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"The Corporate Duty to Contribute to (Sustainable) Development from the Perspective of Investment Arbitration"

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Abstract

International investment law is a law field known for granting a wide array of legal protection to private companies. Traditionally, the latter had no obligations vis-à-vis their host States. The abundant case law, which originates from arbitral tribunals, have thus mostly focused on construing and developing the legal standards and principles of investment protection. Such cases arose in a specific arbitral configuration inherent to international investment law whereby the claimant is normally the investor and the defendant is its host State. This trend is however changing concomitantly with the very landscape of international investment law which has freshly started to include standards of corporate social responsibility and investors' duties within its ambit, namely in investment protection agreements. One of such duties relate to sustainable development and focus, for instance, on environmental and human rights protection or on preventing corruption (mal)practices. Some arbitral tribunals recently upheld these duties. In one case, the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference was the applied law. In other cases, the technique of counterclaims was used. In a counterclaim before an arbitral tribunal, the logic is reversed, and the State becomes the claimant while the investment acts as defendant. Set against this background, this paper will discuss whether there is, in international law, a corporate duty to contribute to sustainable development. It will argue that the duty exists even though its legal regime is still under technical construction, the latter needing doctrinal guidance. This legal conundrum has a transversal nature and is consequently directly relevant to the Islamic world.

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1. Introduction

Prima facie, sustainable development and arbitration may seem worlds apart. The first one — sustainable development — is a whole complex public policy project whose intricacies are yet to be solved by the research work of specialists. The second — arbitration — is an alternative means of dispute settlement. Sustainable development is an ambitious project which aims at the public interest and at the well-being of humanity as a whole; arbitration is a pragmatic mechanism which aims at resolving a dispute between only two parties. Therefore, trying to bring both of these together within the ambit of a scientific study can be intellectually challenging. Working with the issue of sustainable development through legal lenses can be raise two sets of difficulties. The first difficulty is conceptual and the second one is operational. Conceptually, defining sustainable development in technical terms is not an easy task. Operationally speaking, there are also doubts about how to implement sustainable development by using legal instruments and also how to ascertain that the objective of sustainable development has been partially or totally attained in a specific project. There are, in this sense, no clear legal standards of measure and calculations.

This said, sustainable development, as a concept and as an objective, has been incorporated in the legal sphere be it at the national or at the international level. In this vein, sustainable development and arbitration do cross each other's path. This is namely the case in international investment arbitration. It has been argued extensively elsewhere how the concept of development is used in international investment arbitration[1]. To summarize, there is a debate on the validity or not of the contribution to the host State's development as a criterion to identify an investment[2]. This debate establishes a clear articulation point

[1] N.Monebhurrun, "The (mis)use of Development in International Investment Law: Understanding the Jurist's limits to Work with Development Issues", 10 *Law and Development Review* (2017), pp.451-476.

[2] For a sample of cases, see: Patrick Mitchell v. Democratic Republic of Congo, ICSID no. ARB/99/7, Decision on annulment (01/11/2006); Phoenix Action Ltd. v. Czech Republic, ICSDI no. ARB/06/5, Award (15/04/2009); Joy Mining Machinery Limited v. Egypt, ICSID no. ARB/03/11, Decision on Jurisdiction

between arbitration and development. Development, in this case, acts as an indicator in the identification process of an investment with the purpose of defining a given arbitral tribunal's jurisdiction. This connection with arbitration is equally visible when it comes to sustainable development. For example, the bilateral investment agreement between Morocco and the Democratic Republic of Congo states that investment refers to a company which, amongst others, contributes to the sustainable development of its host State[3]. Similarly, the preamble of the Agreement on Cooperation and Facilitation (ACFI) of Investments between Brazil and the United Arab Emirates recognizes "*the essential role of investment in promoting sustainable development*"[4]. In the case of investment agreements having a comparable provision or preamble, a contribution to the sustainable development of the host State might potentially be invoked to define investment before an arbitral tribunal. This is but one example which certifies the existence of a technical and legal link between sustainable development and arbitration.

There are other circumstances in which sustainable development can be connected to arbitration. However, this is tightly related to how sustainable development is defined and made workable. The concept is often abstractly defined as a development process which "meets the needs of the present without compromising the ability of future generations to

(06/08/2004); Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID no. ARB/ 05/10, Decision on Jurisdiction (17/05/2007; Pantechniki S.A. Contractors & Engineers v. Albania, ICSID no. ARB/07/21, Award (30/07/2009); Noble Energy, Inc. and Machalapower CIA. LTDA v. Ecuador and 'Consejo Nacional de Electricidad', ICSID no. ARB/05/12, Decision on Jurisdiction (05/03/2008); Jan de Nul N.C. and Dredging International N.C. v. Egypt, ICSDI no. ARB/04/13, Decision on Jurisdiction (16/06/2006); Mr Saba Fakes v. Turkey, ICSID no. ARB/07/20, Sentence (14/07/2010); Victor Pey Casado and Foundation President Allende v. Chile, ICSID no. ARB/98/2, Award (08/05/08); Electrabel S.A. v. Hungary, ICSID no. ARB/07/19, Decision on Jurisdiction (30/11/2012); Quiborax S.A., Non Metallic Minerals SA & Allan Fosk Kaplún v. Bolivia, ICSID no. ARB/06/2, Decision on Jurisdiction (27/09/2012).

93 Compania de Aguas del Aconquija S.A & Vivendi Universal v. Argentina, ICSID no. ARB/97/3,

[3] Bilateral Investment Agreement between Morocco and the Democratic Republic of Congo (30/04/2018), art.1.1. The Pan African Investment has a similar provision in article 22(3)(3).

[4] ACFI between Brazil and the United Arab Emirates (15/03/2019), preamble.

meet their own needs"[5]. It balances economic development with environmental and social protection[6]: the former must be respectful of the latter. The economy is as such no longer an end in itself and must be combined with these other parameters and values, in line with the evolutive nature of development[7]. This confluence whereby the economic, social and environmental facets of development converge is considered as fertile for a sustainable development. This would be a top-down approach to sustainable development: based on this conceptual framework built on three pillars, general policies or norms can then be adopted to achieve to sustainable development; these norms and policies will drip from a general macro level to a specific micro one or from an international ambit to a more regional, national or local sphere. The Rio 1992 Declaration or the Sustainable Development Goals coined in 2012 would, for instance, fit within this category.

Another approach exists which follows a bottom-up direction. In such a case, the method is to peruse what is being done at a micro level and how this paves the way towards a contribution to sustainable development. The method here is not a holistic but an atomistic one. Hence, sustainable development is addressed, explained and eventually measured from its components, each of which acts as a steppingstone towards the sustainability objective. Studying sustainable development under this approach has potential and limits. On one hand, the potential lies in working with concrete elements of sustainable development which makes it easier to connect these to a legal analysis of sustainable development as this will be explained hereinafter. On the other hand, the limits of this methodological choice imply that it is technically impossible to measure and affirm the existence of a holistic contribution to sustainable development. It is this second method which will here be used,

[5] Report of the World Commission on Environment and Development: Our Common Future (1987), Chapter 2, para.1.
[6] S. Allemand, *Les paradoxes du développement durable* (Paris: Édition le Cavalier bleu, 2007), pp.7-9; R. Ramlogan, *Sustainable Development: Towards a Judicial Interpretation* (Leiden: Martinus Nijhoff Publishers, 2011), pp.12-13.
[7] N. Monebhurrun. *La fonction du développement dans le droit international des investissements* (Paris: L'Harmattan, 2016), p. 24 *et seq.*

especially because it enables to establish a concrete connection between sustainable development and arbitration within the context of international investment law.

Indeed, in the wide array of parameters used to identify potential contributions to sustainable development, the 2012 Sustainable Development Goal (SDGs) and the United Nations 2030 Agenda for Sustainable Development list seventeen (17) goals. These, in turn, include, amongst others, the protection of the environment[8] and of human rights[9], the fight against corruption[10], the respect of decent working conditions[11]. These parameters which act as a measure of sustainable development are equally used as criteria for corporate social responsibility. It can thus be assumed that consolidating corporate social responsibility is a vehicle for sustainable development and that the duties anchored in corporate social responsibility are also those mobilized to achieve (or not to hinder) sustainable development. For this reason, the term sustainable development corporate duties will sometimes be used in the article.

The understanding of what is corporate social responsibility has changed overtime. If part of the liberal doctrine initially considered that the only social responsibility which companies had was to make profits[12], the scope of corporate social responsibility has been widened[13] with the aim of mitigating and preventing the negative social externalities which

[8] For example, the SDGs 13, 14 and 15. See also: 2030 Agenda for Sustainable Development, Goals, 13, 14 and 15.
[9] 2030 Agenda for Sustainable Development, Preamble; para.3, para.7, para.8, para.10, para.19, para.20, para. 29, para. 35; Goal 4, para.4.7.
[10] 2030 Agenda for Sustainable Development, Goal 16, para. 16.5.
[11] 2030 Agenda for Sustainable Development, Goal 8, para. 8.8
[12] T. Lewitt, "The Dangers of Social Responsibility", *Harvard Business Review*, September-October 1958, pp. 41-50; Milton Friedman, "The Social Responsibility of Business is to Increase Its Profits", *The New York Times Magazine*, 16 septembre 1970 [available at: http://www-rohan.sdsu.edu/faculty/dunnweb/rprn-ts.friedman.dunn.pdf].
[13] H. Wells, "The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century", *Kansas Law Riew*, vol.51, 2002, pp. 77-140.

can be related to business conduct[14]. Corporations are, accordingly, not expected to act solely for their own benefits or for those of their shareholders[15]. If they do not always have a legal duty to make their host States and host societies more prosperous[16], they do have a duty — a corporate social responsibility — not to conduct their business to the detriment of the local population. By the means of this duty of care, the business sphere has thus been enlarged to include social, environmental and human rights considerations. The very 2030 Agenda for Sustainable Development highlights that the aim of the participating States is to "foster a dynamic and well-functioning business sector, while protecting labor rights and environmental and health standards in accordance with relevant international standards and agreements and other ongoing initiatives in this regard, such as the Guiding Principles on Business and Human Rights and the labor standards of the International Labor Organization, the Convention on the Rights of the Child and key multilateral environmental agreements, for parties to those agreements"[17]. Other parts of the 2030 Agenda also bring to the fore the efforts that the business world must endeavor to contribute to the common goal of sustainable development[18].

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[14] United Nations Environmental Program, *Corporate Social Responsibility and Regional Trade and Investment* Agreements, UNEP, 2011, p. 13; A. Gill, "Corporate Governance as Social Responsibility: A Research Agenda", *Berkley Journal of International Law*, vol.26, no.2, 2008, pp. 453-454; S.R. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility", *Yale Law Journal*, vol.111., 2001, pp. 443-545; E. Assadourian, "Transforming Corporations", *in*, Linda Starke (org.), *The State of the World 2006. A Worldwatch Institute Report on Progress Toward a Sustainable Society*, London, WW. Norton and Company, 2006, p. 172; Kate Miles, *The Origins of International Investment Law*. *Empire, Environment and the Safeguarding of Capital*, Cambridge, Cambridge University Press, 2013, p. 218; Stephen Tully, *International Corporate Responsibility*, Alphen Aan Den Rijn, Kluwer Law International, 2012, pp. 20-22.

[15] N. Monebhurrun, "Mapping companies' Duties in International Investment Law", 14 *Brazilian Journal of International Law* (2017), p.15.

[16] For a counterexample, see article 10.3 of the investment agreement between Iran and Slovakia (19/01/2016): "Investors and investments should apply national, and internationally accepted, standards of corporate governance for the sector involved, in particular for transparency and accounting practices. Investors and their investments should strive to make the maximum feasible contributions to the sustainable development of the Host State and local community through appropriate levels of socially responsible practices".

[17] 2030 Agenda for Sustainable Development, Chapter on the Means of Implementation and Global Partnership, para. 67 (footnotes omitted).

[18] 2030 Agenda for Sustainable Development, Introduction, para. 28, para. 52; Chapter on the Means of Implementation and Global Partnership, para. 62

Providing for duties of such nature to regulate private corporations' international activities and investments is justified given that they are generously protected by an important arsenal of international investment agreements which traditionally endow them with rights[19] whilst imposing no or very few obligations. If there is a common understanding that the business sector and private investors are important partners to build a sustainable development, it is still unclear how their activities can be technically regulated towards this objective. There is a legal vacuum when it comes to investors' duties in international law even if this issue has arrested the attention of the legal scholarship and of the States themselves. It is in this sense that a binding treaty on business and human rights is under ongoing negotiations before the United Nations Human Rights Council[20] or that the most recent international investment agreements are providing for corporate social responsibility. The latter is presented as mere recommendations in some agreements[21] but they are considered as formal obligations in others[22]. Considering that these corporate social duties are starting to appear and to be addressed directly to investors in investment agreements, one of the next steps is to know how to enforce these duties and how any breach can lead to the recognition of the investors' liability. Of course, in international investment law, the most expected mechanism for such purposes would be arbitration. However, in principle, in the international investment law arbitral practice, the investor is normally the claimant and its host State, the defendant — as it occurs before international human rights courts. This is

[19] On international investment law, see generally: A. de Nanteuil, *Droit international de l'investissement* (Paris: Pédone, 2017), 512p; C.L. Lim, J. Ho, M. Paparinskis, *International Investment law and Arbitration. Commentary, Awards and other Materials* (Cambridge: Cambridge University Press, 2018), 536p; H. Ascensio, *Droit international économique* (Paris: PUF, 2018), chapter III.

[20] Human Rights Council, "Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights", Draft Resolution A/ HRC/26/L.22/Rev.1 [25/06/2014].

[21] This is for example the case in the Brazilian Agreements on Cooperation and Facilitation of Investments. These, as well as all the other agreements referred to in the article, are available at: https://investmentpolicy.unctad.org/international-investment-agreements

[22] For example: Investment Agreement between Morocco and Nigeria (03/12/2016); Southern African Development Community (SADC) Investment Treaty Model (2012).

the case because as per the logic of international investment agreements, investors are those who have protected rights which the signatory States are obliged to uphold. On this basis, the problematic which this article seeks to examine is if investment arbitration is an effective dispute settlement mechanism when it comes to enforce sustainable development corporate duties.

As a response to this, it can be argued that although investment arbitration faces certain limits when it comes to enforcing these duties (Section 2), these can be readily overcome by applying some alternative legal techniques (Section 3).

2. The Limits of Investment Arbitration to Enforce Sustainable Development Corporate Duties

These limits are twofold. They are firstly related to the recommendatory nature of the sustainable development corporate duties in some investment agreements. As such these duties are not binding upon international investors (2.1.). Additionally, the arbitration clauses of other agreements exclude sustainable development corporate duties from the jurisdiction of arbitral tribunals (2.2.).

2.1. The limits related to the recommendatory nature of Sustainable Development Corporate Duties

In general, provisions on corporate social responsibility — which contain sustainable development corporate duties —, are composed of recommendations. These initially followed a top-down approach[23]: the provisions on corporate social responsibility were addressed to the States and could be recommended to the investors. There has been an

[23] See for instance: USMCA (30/11/2018), art.14.17; Canada-Peru Free Trade Agreement (01/08/2009), art. 810; N. Monebhurrun, "Mapping companies' Duties in International Investment Law", 14 *Brazilian Journal of International Law* (2017), 55

inflection in this trend in the recent international investment agreements whereby the addressees of these duties are the investors. To that extent, the Brazilian agreements on cooperation and facilitation of investments generally contain a whole chapter on corporate social responsibility. The agreement signed with the United Arab Emirates states, for instance, that "[i]nvestors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles, and standards set out in the OECD Guidelines for Multinational Enterprises". The second paragraph of the same article then provides a list of acts, behavior and omissions recommended to and expected from the investors. It is, for instance, provided that they must not conduct their activities by welcoming or by encouraging illegal exemptions related to relaxing local regulation on human rights respect and environmental protection, on health or on working standards[24]. A special attention must however be paid to the language used to frame these sustainable development corporate duties. Indeed, the language is not mandatory. The investor must only endeavor their best efforts to comply with the provision which, in itself, states that the duties are voluntary. This is also visible in the bilateral investment agreement signed between Argentina and Qatar whose article 12 affirms that "[i]nvestors operating in the territory of the host Contracting Party should make efforts to voluntarily incorporate internationally recognized standards of corporate social responsibility into their business policies and practices"[25]. A similar article exists in the investment treaty between Belarus and India[26].

These provisions are undoubtedly innovative within the ambit of international investment law in that they are addressed directly to the private investors. They however face intrinsic limits because of their voluntary nature. The effective implementation of sustainable

[24] ACFI between Brazil and the United Arab Emirates (15/03/2019), art.15 para.2. A similar provision can be found in the Brazil-Morocco ACFI (13/06/2019), art.13.
[25] Investment Agreement between Argentina and Qatar (06/11/2016), art.12.
[26] Investment Agreement between Belarus and India (24/09/2018), art.12.

development corporate duties therefore ultimately depends upon the good will of the private investors. Entrenching these patterns of behavior in international investment agreements would thus not be as such (only) a regulatory tool but a learning technique to adhere to the culture of corporate social responsibility. At a time, this is also how the United Nations Global Compact was presented[27]. This innovative category of investment agreements draws on the already existing soft law instruments on corporate social responsibility or on Business and Human Rights ones like the already mentioned Global Compact, the OECD Guidelines for Multinational Enterprises or the United Nations Guiding Principles on Business and Human Rights, that is, instruments which have no binding value.

Consequently, the characteristics of the sustainable development corporate duties, dipped in soft norms, imply that investors which are potentially protected by the investment agreements cannot be held accountable before an arbitral tribunal. The legal provision on corporate social responsibility chiefly participate in tentatively promoting a culture of corporate social responsibility and in encouraging investors to incorporate it in their business practices[28] — maybe considering that "an agreement need not be binding to be recognized as an authoritative guide to behavior"[29]. A minority of investment agreements have been more revolutionary and provide for binding sustainable development corporate duties to the investors. This is the case of the bilateral investment agreement between Morocco and Nigeria. Article 18 of the agreement is entitled "Post-Establishment Obligations" of investors and its language is mandatory in obliging them to uphold human rights[30] or to abide to the international labor standards[31]. The same article states that the

[27] J.G. Ruggie, "The Global Compact as a Learning Network", 7 *Journal of Corporate Citizenship*, (2001) 371-378; N. Bernaz, *Business and Human Rights. History, Law and policy — Bridging the accountability gap* (London: Routeledge, 2017), p.180.
[28] N. Monebhurrun, "Mapping companies' Duties in International Investment Law", 14 *Brazilian Journal of International Law* (2017), 57
[29] S. Coonrod, "The United Nations Code of Conduct for Transnational Corporations", 18 *Harvard Journal of International Law* (1977), 297.
[30] Article 18.2 reads, for instance: "Investors and investments shall uphold human rights in the host state".
[31] Investment Agreement between Morocco and Nigeria (03/12/2016), art.18.3.

investment must be conducted so as to be respectful of international obligations on human rights, on the environment or on labor protection to which the investors' home and/or host States are parties[32]: as such, article 18 acts as a bridge which enables the indirect application of States' obligations to the investors. The same treaty also makes provisions for binding obligations in matters of corruption[33] and of corporate governance[34]. In terms of extraterritoriality, article 20 (entitled "Investor Liability") states that "[i]nvestors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state". This, it can be said, is also very innovative. In 2012, the Southern African Development Community (SADC) drafted an investment treaty model with an article 15 entitled 'Minimum standards for Human Rights, Environment and Labor' which also contains binding obligations for investors in these three fields[35].

However, agreements with such provisions are still rare[36]. Besides, it should be noted that the dispute settlement provisions of some agreements specifically exclude the already non-binding corporate social responsibility clause from the jurisdiction of the arbitral tribunal.

[32] Investment Agreement between Morocco and Nigeria (03/12/2016), art.18.4.
[33] Investment Agreement between Morocco and Nigeria (03/12/2016), art.17.
[34] Investment Agreement between Morocco and Nigeria (03/12/2016), art.19.
[35] Because of its innovative character, the article is worth quoting:
"15.1. Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit in, the violation of the human rights by others in the Host State, including by public authorities or during civil strife.
15.2. Investors and their investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998.
15.3. Investors and their investments shall not [establish,] manage or operate Investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher".
[36] The Intra-Mercosur Investment Facilitation Protocol (07/04/2017) has an article 13 on the obligations of investors in matters of respect due to local laws and more especially those on taxation and corruption. See also article 10.3 of the Iran-Slovakia investment agreement (19/01/2016); article 18 of the Investment agreement between Mali and the United Arab Emirates which mentions that the investment must be centered

2.2. The limits entrenched in the exclusion of sustainable development corporate duties from the arbitration clauses

One peculiarity of some investment agreements is that certain provisions cannot be the object of an arbitration. And these sometimes include the one on corporate social responsibility. This is one of the characteristics of the Brazilian ACFI. The ACFI signed with the United Arab Emirates accordingly specifies the provisions excluded from arbitration, some of which are: "Article 15 - Corporate Social Responsibility; Paragraph 1 of Article 16 - Investment Measures and Combating Corruption and Illegality; and Paragraph 2 of Article 17- Provisions on Investment and Environment, Labor Affairs and Health"[37]. The investment agreement between the United Arab Emirates and Argentina also rules out corporate social responsibility from arbitration[38]. These examples are not isolated ones[39].

By means of this exclusion, the *ratio legis* of the corporate social responsibility clause collapses. It potentially loses its legal purpose and it can legitimately be asked for which technical reason it was negotiated and included in the agreements. The provision seems more cosmetical than technical. To this question, the argument of the learning technique and of culture creation in the sphere of sustainable development corporate duties — explained in the previous section[40] —, could be put forward. Still, it would not be totally

on the protection of the environment and the objective of sustainable development and the technology used must not be detrimental to the environment.

[37] ACFI between Brazil and the United Arab Emirates (15/03/2019), art. 25.3.

[38] Investment Agreement between the United Arab Emirates and Argentina (16/04/2018), art. 21 (1) (b) (i).

[39] See also: Investment Agreement between Belarus and India (24/09/2018), art. 13.1; Agreement Between Canada and Mongolia for the Promotion and Protection of Investments (08/09/2016), art.20 (1); Agreement Between Canada and Guinea for the Promotion and Protection of Investments Guinea (27/05/2015), art.21 (1); Brazil-Chile ACFI (24/11/2015), annex 1, art.1 (2); Brazil-Colombia ACFI (09/10/2015), art. 23 (3); Investment agreement between the Hong Kong Special Administrative Region of the People's Republic of China and Chile (18/11/2016), art. 21[1] (a) (i); Intra-Mercosur Investment Facilitation Protocol (07/04/2017), art. 24 (3); Indian investment agreement model (2015), art. 14.2.

[40] See section 2.1. for more details on the learning technique which characterizes the corporate social responsibility provisions.

convincing given that there already exist other instruments with a similar objective, with a longer history and process of creation and, above all, with a more detailed content whilst having, equally, a recommendatory nature[41]. In the current configuration of investment agreements, corporate social responsibility duties have been incorporated therein in an overlapping way, that is, as redundant soft norms with little or no effectiveness. As all the other provisions found in investment agreements are conspicuously binding, the same legal value could have been legitimately expected regarding the corporate social responsibility clause(s) — as in the Morocco-Nigeria investment treaty. Yet, it curiously seems that they have been rendered void in the treaties. The signatory States have missed a good opportunity to effectively harness investment agreements as a worthy instrument to impose sustainable development corporate duties. If the agreements do refer to sustainable development and the role of investors therein, they have no operative provisions to materialize this objective or, at least, to avoid its deterrence. Any lack of corporate social diligence from investors — which could bear negative externalities for its host population —, cannot in principle be submitted to an arbitral tribunal and cannot be the object of a primary dispute. For this reason, investment arbitration faces technical limits when it comes to enforcing sustainable development corporate duties.

This said, it will here be argued that such provisions are not necessarily stillborn and must not remain a dead letter. Indeed, there are alternative techniques to enforce sustainable development corporate duties through investment arbitration.

3. The Alternative Techniques to Enforce Sustainable Development Corporate Duties Through Investment Arbitration

[41] These were mentioned in the previous section.

It is well-known in international law that any provision, and to some extent, any word included in a treaty has a purpose which, when not crystal clear, must be construed and enlightened by the jurist[42]. Sustainable development corporate duties can resultantly be given a purposeful interpretation. As such, if they cannot be the object of a main claim before an arbitral tribunal, they can be used as a means of interpretation to act as a benchmark of investment protection (3.1.). Incidentally, when the duties are clear and specific enough, they can also be upheld by the means of a counterclaim procedure (3.2.). These two techniques contribute to alternatively enforce sustainable development corporate duties through arbitration.

3.1. Harnessing sustainable development corporate duties as a benchmark of investment protection before arbitral tribunals

Aligning the classical provisions on the protection and the treatment of investors with their sustainable development corporate duties is a recent feature of international investment agreements. It will here be submitted that investors' duties go beyond the corporate social responsibility culture creation factor and that they do have legal effects.

The legal protection which international investment agreements grant to investors is not absolute in that they do not have a systematic right to protection irrespective of their behavior vis-à-vis their host States. The arbitral case law has already shown that corporate misconduct can bar an investor's claims before an arbitral tribunal. In some of these cases the misconduct was materialized by practices of corruption which, as aforesaid, act as a parameter of sustainable development[43]. For example, in the *Hesham Talaat M. Al-Warraq*

[42] This is done as per the rules of interpretation set in articles 31 and 32 of the Vienna Convention on the Law of Treaties (1969).
[43] 2030 Agenda for Sustainable Development, Goal 16, para. 16.5. See generally: T.S. Aidt, "Corruption and Sustainable Development", *in*, S.R. Ackerman, T. Soreide (eds.), *International Handbook on the Economics of Corruption* (Cheltenham: Edward Elgar Publishing, 2012), p.3 *et seq.*

v. Indonesia arbitration, the investor claimed that its host State had violated the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference (OIC). The investor argued, amongst other submissions, that it was not treated fairly and equitably during a criminal procedure which followed the bailout of an Indonesian financial institution in which it has invested and invoked the violation of several articles of the agreement[44]. The same investor was however involved in a case of corruption and money laundering while investing. Article 9 of the applicable investment agreements provides that:

"The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means"[45].

This article can be considered as a rare ancestor[46] of the current corporate social responsibility clauses. It states a minimum level of business practices and conduct expected from an investor below which the latter cannot claim protection from the agreement. For this reason, the arbitral tribunal considered that acts of corruption or of money laundering were, firstly, in contravention of Indonesia's domestic laws but were also hurtful of the public interest which the investor had jeopardized[47]. The arbitral tribunal acknowledged that Indonesia had effectively not granted a fair and equitable treatment[48] to the investor but decided that it could not be protected by the OIC investment agreement because of its

[44] *Hesham Talaat M. Al-Warraq v. Indonesia*, UNCITRAL, Award (15/12/2014), see as from p.151.
[45] Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference (06/06/1981), art. 9.
[46] The OIC Agreement was signed in 1981.
[47] *Hesham Talaat M. Al-Warraq v. Indonesia*, UNCITRAL, Award (15/12/2014), para.645, para.647.
[48] The Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference does not have a specific clause on the fair and equitable treatment. The latter was imported by the means of the most-favored nation clause.

unclean hands[49]. Having unclean hands means that a party to a case cannot plead for equitable justice if it is itself in violation of a principle of equity[50]. This position was also upheld by other arbitral tribunals even absent a specific provision on corporate social responsibility in the applicable investment agreement[51], thereby confirming that investors do have duties vis-à-vis their host States and that they cannot legitimately expect an absolute and open-door protection from investment agreements.

On these premises, when these duties are clearly specified in an investment agreement, even as recommendations, their purpose is namely to act as a benchmark for the legal protection due to the investor. It is in this vein that sustainable development corporate duties originally marked as soft law deploy their *effets utiles*. They are, in other words, the indicators of the investor's clean hands and legitimate expectations of protection. They can be used by arbitral tribunals to construe the provisions on investment protection. This means that protection will be granted depending upon the corporate social diligence of the investor. This, it is argued, is the legal purpose of the provision on corporate social responsibility.

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[49] *Hesham Talaat M. Al-Warraq v. Indonesia*, UNCITRAL, Award (15/12/2014), para.645, para.647, para.648.

[50] *Black's Law* Dictionary, 9th Edition (2009), p.286. See generally: Sir G. Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law", 92 *Recueil des Cours*, vol.92 (1957), p. 119; J. Salmon, "Des mains propres comme conditions de recevabilité des reclamations internationals", 10 *Annuaire français de droit international* (1964), p. 232; R. Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine", *in*, K. Hover, A. Magnusson, M. Ohrstrom (org.), *Between East and West : Essay in the Honour of Elf Franke* (Juris, 2010) pp. 317-318; P. Dumbery, G. Dumas- Aubin, "How to Impose Human Rights Obligations on Corporations Under Investment Treaties?", 4 *Yearbook of International Investment Law and Policy* (2012), pp. 589-591; A. Shapovalov, "Should a Requirement of "Clean Hands" be a Prerequisite to the Exercise of Diplomatic Protection? Human Rights Implications of the International Law Commission's Debate", 20 *American University International Law Review* (2005), pp. 829-866; A.R. Freitas da Silva, *A arguição da ilegalidade articulada a partir do princípio das mãos limpas na arbitragem investidor-Estado* (Rio de Janeiro: Processo, 2019), p.109 *et seq.*

[51] *World Duty Free v. Kenya*, ICSID Case No. ARB/00/7, Award (04/10/2006); *Inceysa Vallisoletaba v. El Salvador*, ICSID Case No. ARB/03/26, Award (02/08/2006); *Gustav F W Hamester GmbH & Co KG v. Ghana*, ICSID Case No. ARB/07/24, Award (18/06/2010); *Metal-Tech Ltd. v. Uzbekistan*, ICSDI No. ARB/10/3, Award (04/10/2013); *Plama Consortium Ltd. v. Bulgaria*, ICSID Case Nº. ARB/03/24, Award (27/08/2008); *David Minnotte and Robert Lewis v. Poland*, ICSID Case Nº. ARB(AF)/10/1, Award (16/05/2014)

Correspondingly, an investor's claim can be denied or alternatively its reparation — if granted — can be reduced if it cannot evidence a minimum level of diligence in respecting the corporate social responsibility clause. Even if the latter is not binding, the diligent investor should necessarily be aware of its existence[52] in the investment agreement and should therefore know that the provision acts as a watchdog of its corporate behavior and diligence to determine whether it qualifies for legal protection or not. In order not to lose the legal protection guaranteed by the investment agreements, investors will be prompted to maximize their corporate social diligence. It is through this indirect means that sustainable development corporate duties might be enforced.

As per this technique of indirect enforcement, the investors' duties appear at a secondary level during the arbitral procedure, the main level being the investor's claims. This order can be inverted, and sustainable development corporate duties can be invoked at a primary level by having recourse to the counterclaim procedure.

3.2. Upholding sustainable development corporate duties through counterclaims

In a counterclaim procedure, the defendant in an original case becomes the claimant and vice-versa. Both the main case and the counterclaim must be interrelated[53], that is, they must be based on the same facts but on different legal questions. A counterclaim is "a separate claim, autonomous with respect to the respondent's statement of defense, although it is usual that materially it is a part of that statement"[54]. The counterclaim procedure is normally provided in a legal text. In international investment arbitration, article 40 of the Washington Convention which instituted the International Centre for the Settlement of

[52] *Fraport AG Frankfurt Airport Services Worldwide v. The Philippines*, ICSID Case no. ARB/03/25, Award (16/08/2007).
[53] H.E. Veenstra-Kjos, "Counterclaims by Host States in Investment Treaty Arbitration", 4 *Transnational Dispute Management* (2007), p.5.
[54] *David Aven v. Costa Rica*, ICSID Case no. UNCT/15/3, Award (18/09/2018), para.745.

Investment Disputes (ICSID) states that "[e]xcept as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre".

A counterclaim procedure could, at first sight, seem to offset the very spirit of investment arbitration whereby the investor is normally the claimant for the simple reason that it is the holder of rights guaranteed by investment agreements without being the bearer of obligations. However, counterclaims have recently been used in cases where the investors' corporate social responsibility — namely in terms of environmental and human rights duties —, was under discussion. It is worth noting that counterclaim procedures have brought some novelties in international investment law and arbitration, with positive impacts on sustainable development corporate duties. In the *Burlington* case for example, the tribunal recognized the private investor's liability and condemned it to pay damages to its host State, Ecuador, for damages caused to the environment by its oil extraction activities[55]. This is a rare happening given that a private company was declared liable and condemned by an international tribunal. For this reason, counterclaim procedures can prove to be a very effective mechanism to encourage and enforce corporate environmental and social duties in international law[56]. The procedure was for example used in another environmental counterclaim in the *David Aven v. Costa Rica* case. The applicable investment agreement was the Dominican Republic-CAFTA one whose article 10.11 confirms the member States' regulatory powers to frame investment activities in a manner that is consistent with environmental concerns. This agreement does not have a specific article on investors' duties, but these were construed by arbitral tribunal as inherent to article 10.11. The tribunal

[55] *Burlington v. Ecuador*, ICSID Case no. ARB/08/5, Counterclaims (07/02/2017).
[56] T. Ishikawa, "Counterclaims and the Rule of Law in Investment Arbitration", 113 *American Journal of International Law* (2019), p.36.

considered that if the host State could adopt regulatory measures to protect the environment, these measures had to be respected by foreign investors. It concluded that the investors had "the obligation, not only under domestic law but also under […] Chapter 10 of DR-CAFTA to abide and comply the environmental domestic laws and regulations, including the measures adopted by the host State to protect human, animal, or plant life or health"[57]. The tribunal considered that if the investor had international obligations, it could consequently be held liable[58]. In the *David Aven* case, the investor's liability was nonetheless not recognized mostly because of procedural reasons: Costa Rica only made general statements on environmental damage but did not bring enough evidence to support its claim[59]. Still, what must be recorded in this case is the principle that investors can be held liable in counterclaim procedures for violation of sustainable development corporate duties. To confirm this position, the tribunal understood that for the application of some provisions — which in this case were those indirectly related to corporate social responsibility —, investors must be considered as subjects of international law obligations[60]. This was a shared understanding with the arbitral tribunal of a previous counterclaim procedure in the *Urbaser v. Argentina* case[61], case in which the host State contended that the investor had not respected the human right to water of its population because of the investment activities' — a water supply concession — poor performance. Once again, the arbitral tribunal validated the possibility of the investor's liability in this sense and acknowledged that it should be considered a subject of international law. It added:

"[Corporate social responsibility] includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation. In light of this more recent development, it can no longer be

[57] *David Aven v. Costa Rica*, ICSID Case no. UNCT/15/3, Award (18/09/2018), para. 734,
[58] *David Aven v. Costa Rica*, ICSID Case no. UNCT/15/3, Award (18/09/2018), para. 735.
[59] *David Aven v. Costa Rica*, ICSID Case no. UNCT/15/3, Award (18/09/2018), para. 745.
[60] *David Aven v. Costa Rica*, ICSID Case no. UNCT/15/3, Award (18/09/2018), para. 737.
[61] *Urbaser v. Argentina*, ICSID Case no. ARB/07/26, Award (08/12/2016).

admitted that companies operating internationally are immune from becoming subjects of international law"[62].

Having validated this premise, the tribunal however decided that the investor had not incurred liability for the simple reason that there are, in international law, no obligations to perform a human right to water incumbent upon investors[63].

Lessons can however be drawn from the *Urbaser* and from the *David Aven* cases. Firstly, they both took an important step forward by recognizing, even in *obiter dicta*, that investors are subjects of international and can for this reason be held liable before an international tribunal — as it happened in the *Burlington* case. Secondly, they were useful in showing that such liability can only exist if the alleged corporate social duty is clearly and specifically provided for in a legal text. The applicable law must be easily identified which was not the case in *Urbaser*. In *Burlington* however, the corporate environmental obligations were clearly set in Ecuador's domestic law, which facilitated the investor's condemnation. The tribunal even mentioned that in case of doubts concerning a given environmental harm, it would apply "the most protective standard in conformity with the principles of precaution and *in dubio pro natura*"[64].

These cases act as food for thought to reflect on the future consolidation of sustainable development corporate duties. They bring positive and negative evidence on how successful counterclaims can be and surely confirm that arbitration can be a useful mechanism to enforce these duties.

[62] *Urbaser v. Argentina*, ICSID Case no. ARB/07/26, Award (08/12/2016), para.1195.
[63] *Urbaser v. Argentina*, ICSID Case no. ARB/07/26, Award (08/12/2016), para. 1210.
[64] *Burlington v. Ecuador*, ICSID Case no. ARB/08/5, Counterclaims (07/02/2017), para. 343 (ix).