Firms, contract law and the fight against climate change[1]

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The Paris Agreement adopted on 12 December 2015 as the outcome of the COP21 (21st Conference of the Parties to the United Nations Framework Convention on Climate Change) has been a diplomatic success. For the first time ever, a universal and binding agreement has been entered into to fight against climatic disturbance.[2] Just how effective it will be remains uncertain, though. The long-term objective for reduced world emissions remains unattainable given the level of effort that will be required.[3] Means of coercion are weak and the voluntary undertakings of states, appended to the Agreement, are not binding. In the absence of any

[1] Author's note (1 March 2017).

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Since this paper was first published, two major reforms have taken place in France with impacts on the questions raised in this paper:

- The reform of French contract law reinforcing the international contractual framework described in this paper (a particularly interesting provision in this respect is new Article 1166 C civ. – see the developments on Art. 1166 of the "draft ordinance" (*projet d'ordonnance*) at the end of this paper). The new provisions of the *Code civil* created by *Ordonnance* n° 2016-131 of 10 February 2016 have now been translated into English (http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf) ;
- The adoption, on 21 February 2017, of the *Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.* *http://www.assemblee-nationale.fr/14/ta/ta0924.asp*. This new law, which has been hotly debated, is currently being contested in the Constitutional Court. If it is enacted, it will markedly impact the issues raised in this paper.

[2] The agreement takes the form of a protocol to the United Nations Framework Convention on Climate Change (UNFCCC) and will become binding when ratified by at least fifty-five countries responsible for at least 55% of estimated greenhouse gas emissions. See P. Thieffry, 'L'accord de Paris sur le changement climatique : quelles contraintes ?' (2016) *Recueil Dalloz*, 304.

[3] The Agreement 'aims' to maintain the increase in average global temperature to 'well below' 2 °C above preindustrial levels and to 'pursue efforts' to limit it to 1.5 °C. The Group of Intergovernmental Experts on Climate Change (GIEC) deems it necessary to lower worldwide emissions by 40 to 70% by 2050 to avert climatic runaway. The contributions made by states, that is their promises to reduce greenhouse gas emissions, will be insufficient to contain heating to a maximum of 2 °C, and a fortiori to 1.5 °C (aggregate contributions would put the planet on the path to heating of about 3 °C rather).

specific organ for imposing sanctions, it remains a matter of conjecture as to how effective the Agreement – which will only come into force in 2020 – will be, including in its most stringent provisions (regular monitoring of countries' commitments, obligations for developed countries to provide funding, reinforced framework with respect to transparency).

For jurists in the habit of measuring the mandatory character of legal instruments by the nature of the agreement, the sanctions it lays down and the courts and tribunals through which it can be enforced, the Agreement raises a degree of scepticism and invites us to reflect on the means of making international law more effective for ensuring the transition to resilient, low-carbon societies and economies.[4]

However, one should not underestimate the scope of such an agreement. Recent events show that national courts, with their heightened awareness of the fight against climate disturbance and the objective of a post-carbon civilisation, are sometimes keen to enforce this sanction and that they too play a part in accelerating the transformation underway.

Six months before the Agreement, the district court of The Hague ordered the Dutch government on 24 June 2015 to reduce greenhouse gas emissions in the country by at least 25 per cent by 2020 compared with 1990. The Court estimated that, on the basis of its current policy, the state would have reduced its emissions by 17 per cent in 2020 compared with 1990 levels and that this was insufficient with regard to the GIEC computations to contain planetary heating. The ruling dismissed the Dutch government's argument that climate change is a global issue that cannot be dealt with on a national scale, affirming instead that countries had a duty to act locally in the name of the 'common but differentiated obligation of states to combat

[4] See the report entitled *Increasing the Effectiveness of International Environmental Law*, Nov. 2015, Club des juristes, Commission environnement, published with the support of the Fondation pour le droit continental, that makes 21 innovative proposals, the last two of which suggest adopting a mandatory universal charter in the form of a legally binding international convention. See also the report of the End Ecocide on Earth organisation for drafting amendments to the statute of the International Criminal Court to make ecocide an international crime. Cf. Proposal 1 in *Increasing the Effectiveness of International Environmental Law*: 'Introduce a global citizens' initiative under the framework of the United Nations or environmental bodies'.

climate change'.[5] The action was brought by Urgenda, together with some nine hundred citizens. The Dutch government appealed, but the decision gained a high media profile and similar suits have already been brought in several countries.[6]

It is true that the mobilisation of the courts is encouraged by an active civil society and many non-governmental organisations (NGOs) engaged on all fronts. In the United States, further to pressure from associations, scientists and members of Congress, inquiries were made into the US petroleum giant Exxon Mobil, which is suspected of having sought to conceal the impact of its activities on climate warming and having failed in its duties by not alerting its shareholders to the risks for its business and its capacity to continue to use fossil fuels (other firms in the sector will probably be involved soon too).[7]

In Germany – and this was a first in Europe[8] – a Peruvian farmer supported by Germanwatch, an environmental association fighting for 'global equity and the preservation of livelihoods', introduced a claim on 24 November 2015 against the energy company RWE (a major polluter in Europe), which they accused of being partly responsible for climatic warming and the melting of ice in the Andes. Mr Lliuya claimed €20 000 from RWE to finance part of

[5] The concept of 'common but differentiated responsibility' was at the heart of climate talks to share the effort between industrialised and developing countries.

[6] www.urgenda.nl/en. A suit was brought in late 2014 in Belgium by asbl Klimaatzaak (*action pour le climat*), with the support of more than 12 000 Belgian citizens. The Brussels court of first instance has jurisdiction (http://klimaatzaak.eu/fr/le-proces).

[7] In November 2015, the New York prosecutor issued a subpoena on the basis of the Martin Act, that enables the State to prosecute financial fraud and any 'deception, misrepresentation, concealment, suppression, false pretense or false promise'. According to the Bloomberg financial information website, this inquiry procedure is 'the most aggressive state action yet on the financial effects of burning fossil fuels'. Other serial actions are already expected. US justice is also interested in Exxon Mobil's financing of research to deny climate change. Another example: in December 2015, 21 young people (one aged just 8 years old), supported by Our Children's Trust, filed a lawsuit against Barack Obama and the US government for inaction on climate warming. Three associations representing almost all the oil companies were authorised by the Federal District Court of Oregon to be joined alongside the government, as defendants.

[8] There are precedents in the USA with in particular the suit brought in California by an Inuit village, Kivalina, against Exxon. The action was dismissed for reasons of US constitutional law and the political question doctrine ('political questions' cannot be brought before the courts of law). In February 2013 the Supreme Court refused to hear the motion filed by the plaintiffs against the court of appeals' decision.

the work needed to protect his house and those of his 55 000 neighbours in the town of Huaraz in northern Peru from flooding because of the melting of ice and the rising level of Lake Palcacocha, which lies some 4500 m above sea level, that is 0.47% of the total €3.5 million needed for the work. This percentage is meant to be proportional to the company's role in causing pollution. Since the beginning of industrialisation (from 1751 to 2010), RWE is supposedly responsible for 0.5% of the world's greenhouse gas emissions.[9]

It is hardly surprising that liability law can provide a basis for legal actions with a high media profile brought against governments or companies that are responsible in part for climate warming. However, it may seem more surprising to emphasise the primary role of contract law in the fight against climate change.[10] This article is designed to show how, borne by a general movement leading major groups to make all sorts of voluntary international commitments with respect to the environment and climate, contract law can be enrolled to give such commitments binding force. It is inspired by reflections about the way in which parties to a contract make it binding by choosing an instrument of soft law to govern their contract (e.g. the Unidroit Principles of International Commercial Contracts).

The commitments to which firms subscribe voluntarily are increasingly numerous and demanding (I). They are giving rise to a new international contractual framework that it is for contract law to uphold, as the privileged instrument for combatting climate change (II).

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[9] http://climatejustice.org.au/peruvian-farmer-demands-compensation-rwe. The German lawyer for the plaintiff explained that it was far more difficult to demonstrate a relationship of cause-and-effect between the emissions of sulphur dioxide in Germany and the damage caused to Swedish forests than to relate greenhouse gas emission and world climate change.

[10] The connection between the environment and contracts is often made but from a different perspective. See especially M. Hautereau-Boutonnet (ed.) *Le contrat et l'envrionnement* (Presses Universitaires d'Aix-Marseille, 2014) (37 contributions); *Le contrat et l'environnement, Etude de droit comparé* (Presses Universitaires d'Aix-Marseille, Brussels, Bruylant, 2015); the book brings together 13 contributions highlighting the advent of 'environmental contracts', the primary purpose of which is to protect the environment. See also M. Boutonnet, 'Le contrat et l'environnement' (2008) *Revue trimestrielle de droit civil*, 1; 'Le contrat, un instrument opportun de l'ordre public environnemental ?' (2013) *Recueil Dalloz*, 2528 and M. Hautereau-Boutonnet (ed.), 'Quel droit face au changement climatique ?' (2015) *Recueil Dalloz*, 2259. See, in a vein more similar to the one that inspired this paper, K. P. Mitkidis, 'Using private contracts for climate change mitigation' (2014) *Groningen Journal of International Law*, vol. 2 (1), 54.

I. The boom in voluntary international commitments by multinational firms

Everyone is aware that business is called on to become a major actor in the fight against climate change (A). What people are less aware of, however, is that their adhesion to soft-law instruments commits them to a far greater extent than is commonly thought (B).[11]

A. The firm as a major actor in the fight against climate change

At the COP20 organised in Peru, the 'Lima-Paris Action Agenda' launched the 'agenda of solutions' the purpose of which was to facilitate the implementation of the agreement reached in Paris by encouraging non-state initiatives (firms, local authorities, international organisations, NGOs, indigenous populations, etc.). Those actors mobilized on a massive scale, especially firms and cities (and notably Paris). Thousands of undertakings were given outside of the Paris agreement as part of the Lima-Paris Action Agenda.[12] The agenda of solutions continues and, when evaluating the Paris Agreement, account will have to be taken of all these actions that contribute to progressively transforming the real economy and inventing a 'post-carbon civilisation'. A global movement has been triggered and these initiatives are a necessary supplement to those taken by governments through national contributions.

The financial sector is particularly affected. The reorientation of finance towards a low-carbon economy has been one of the major challenges of the COP21.[13] 'Socially responsible investing' (SRI) integrates environment, social and corporate governance (ESG) criteria into business management and financial performance. In France, decree no 2016-10 of 8 January

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[11] A. G. Castermans, 'Corporations for human rights' (Oct. 2010) *European Company Law*, 7 (5), 217; P. Herbel, 'La responsabilité sociétale de l'entreprise en tant que vecteur pour faire avancer les droits de l'homme par l'entreprise' (2013) *Recueil Dalloz*, 1570; the author also shows how the firm's societal responsibility is 'a genuine strategic axis for the development of its economic activity'; P. Deumier, 'La responsabilité sociétale de l'entreprise et les droits fondamentaux' (2013) *Recueil Dalloz*, 1564.

[12] http://newsroom.unfccc.int/lpaa-fr/lpaa/mobilisation-massive-des-acteurs-non-etatiques-a-la-cop21.

[13] See especially, Article 2.1(c) of the Paris Agreement on 'finance flows consistent with a pathway towards low greenhouse gas emission and climate-resilient development'.

2016 lays down the requirements for developing, revising and approving the reference framework that determines the criteria certain collective investment bodies must meet to benefit from the 'socially responsible investment' accreditation.[14]

The Equator Principles (EPFI) are an international benchmark in the finance sector for determining, assessing and managing the environmental and social risks associated with operations to finance projects in the industrial sector. The major financial establishments that have adopted them voluntarily and independently are firmly committed: 'We will not provide Project Finance or Project-Related Corporate Loans to Projects where the client will not, or is unable to, comply with the Equator Principles'.[15] They consider it their responsibility to view carbon emissions as a risk and to accompany the world energy transition, even if it means selling off their interests in the firms that are most involved in coal-related activities.

Climate change issues are now taken into account in the risk reporting of subject businesses that must measure and give public account of the impact of their activities on climatic disturbance (See art. 173 L. no. 2015-992, 17 August 2015 on energy transition for green growth).[16] The 'carbon risk' concept, corresponding to the fact that climate change could call into question business models based on the production of fossil energy and entail financial devaluation of the businesses concerned, is taken into account by notation agencies and this notation is an item that structures the way the financial market allocates capital. Financial

[14] The decree also specifies the procedures for accrediting funds and defines the role of the certification bodies and the procedures for monitoring and inspecting funds that apply for the 'socially responsible investment' accreditation.

[15] Eighty-two businesses in January 2016 in 36 different countries: that makes up a major share of project financing business worldwide. Just before the COP21 and in conjunction with it (See the press release of 30 September 2015), the Crédit Agricole, which adopted these principles, undertook 'not to finance any new coal-fired power stations or their extensions in high-income countries as defined by the World Bank' and 'to gradually introduce new assessment criteria relating to climate risks, particularly concerning the cost of CO_2, for the Bank's clients and products'. In May 2015, the Crédit Agricole had already announced it was to discontinue financing coal mining projects.

[16] The *Caisse de dépots* will be called on to play a leading role in energy and ecological transition.

circles, being aware of the financial risks relating to the expected negative impact of climate change for the economy, are mobilising.

The advantages related to being a socially responsible or 'green' business are increasingly well understood and quantified by firms which then showcase their exemplary conduct.[17] New corporate forms are appearing, taking better account of the interests of all the stakeholders: employees, shareholders, suppliers, NGOs, local councils, etc.[18] In the United States, Benefit Corporations or purpose-with-profit businesses propose new models of governance combining positive social and environmental impact with the pursuit of profit. Transparency in the publication of information and data – for example on the true curve of CO_2 emissions – is a major challenge for businesses, especially when they have adhered to soft-law instruments.

B. Soft-law instruments as sources of obligations for businesses

When a firm adheres to a soft-law instrument, it takes on all manner of commitments described by that instrument.

For example, under the United Nations Global Compact,[19] the business undertakes to promote the principles of the Global Compact, to implement them and to communicate about its 'progress action plans'. Communication on Progress (COP) involves a whole series of mandatory documents and requires a detailed description of actions implemented on Global

[17] As a case in point the L'Oréal group unveiled the initial results of its sustainable development programme *Sharing Beauty with All* in April 2015, announcing a 50% cut in the Group's CO_2 output, in absolute value, compared with 2005, www.sharingbeautywithall.fr.

[18] B. Segrestin and S. Vernac, 'Les nouvelles formes de gouvernance et de sociétés', in B. Fauvarque-Cosson (ed.), *Le droit comparé au XXIe siècle. Enjeux et défis* (Paris, Société de législation comparée, 2015), p. 223; B. Segrestin and A. Hatchuel, *Refonder l'entreprise*, (Paris, Seuil, La république des idées, 2012). The authors propose creating a 'socially extended purpose corporation' whose business purpose would include other objectives than creating economic value for shareholders.

[19] The Global Compact is the largest worldwide initiative in terms of sustainable development, bringing together more than 13 000 organisations in 160 countries. In 2015, more than 1100 French businesses and organisations were involved in the UN Global Compact, making France the world number two in terms of the number of participants (www.pactemondial.org).

Compact themes. It has to be submitted within one year of joining, and then annually thereafter. It is put on line on the Global Compact website of the United Nations, which also encourages its inclusion in the company's annual report or the equivalent.[20] Businesses can then no longer take the risk of being struck off the list for want of disclosure under pain of being suspected of eco-whitewashing or greenwashing. The sanctions threatened by the bodies that receive the commitments, in particular the striking-off of the business if it fails to publish the COP, involve a tremendous reputational risk.[21]

In contract law, voluntary commitments are analysed as unilateral promises that many legal systems consider constraining, as reflected by article 2:107 of the Principles of European Contract Law: 'A promise which is intended to be legally binding without acceptance is binding'.[22] In countries where there must in principle be acceptance for a promise to be legally constraining there are exceptions. In France, voluntary commitments may be considered to cover advertising documents of contractual value, provided they are precise, detailed and that they influence the other party.[23] Moreover, Directive No 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices may apply in the event of a misleading advertisement.

It is true that profitability requirements mean firms must first look to their own interests in a highly competitive environment; a business is not a charity. It is true that groups that adhere

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[20] www.pactemondial.org.

[21] Cf. Herbel, 'La responsabilité sociétale de l'entreprise' on the UN guiding principles: 'Loyal to the Common Law instruments from which they are derived, the guiding principles recommend firms to evaluate their impacts and show their stakeholders that they have implemented remediation procedures (know and show) to ward off criticism from civil society (name and shame). The guiding principles therefore impose a standard of behaviour and require it to be transparently applied, which means the stakeholders can know what the company is doing. Stakeholders can therefore exert pressure especially through the publicity they give to the event, with as a consequence reputational damage to the business'.

[22] G. Rouhette, I. de Lamberterie, D. Tallon and C. Witz, *Principes du droit européen du contrat*, coll. Droit privé comparé et européen, vol. 3, (Paris, Société de législation comparée, 2003, republished 2006).

[23] Civ. 1re, 6 mai 2010, n° 08-14.461 (2011) *Recueil Dalloz*, 472, obs. S. Amrani-Mekki; (2010) *Revue trimestrielle de droit civil*, 580, obs. P.-Y. Gautier; (2010) *Juris-Classeur Périodique*, 983, obs. J. Ghestin. See M. Mekki, 'Le contrat et l'environnement', Postface, in Hautereau-Boutonnet, *Le contrat et l'environnement*, p. 533, esp. p. 544.

to these instruments sometimes simultaneously engage in intense lobbying of the national and European institutions so as not to see too many regulatory constraints imposed on them (especially when the states or organisations they are part of wish to show themselves to be exemplary) and relocate some of their activities to countries where national and regional environmental regulations are not stringent. It would be wrong, though, to underestimate the scope, worldwide, of parallel processes to those in treaties, such as sustainable development objectives.[24] In this ambivalent context, the effectiveness of soft law lies both in its ability to direct behaviour other than by constraint[25] and in the fact that firms are bound to pass on their voluntary undertakings to those in their 'sphere of influence'.

A change of viewpoint is progressively coming about: the fight against climate change is perceived worldwide ever less as a constraint imposed by Western countries and increasingly as a global risk for a country. One need only look at the discontent of populations exposed to urban pollution. Climate and economic development are therefore no longer opposed but associated. It is in this new geopolitical context that contract law – which can render mandatory what were initially voluntary undertakings – is a privileged instrument in the fight against climate change.[26]

II – Contract law as a privileged instrument in the fight against climate change

The analysis that follows aims to open up a few avenues of enquiry into the way contract law makes mandatory voluntary undertakings, so bringing about a novation of soft law into hard

[24] At the sustainable development summit on 25 September 2015, UN Member States adopted a new sustainable development programme that comprises a set of 17 world objectives to end poverty, fight against inequalities and injustice, and tackle climate change by 2030.

[25] On the general effectiveness of soft law see *Le droit souple* (Etude CE, 2013). See also among the very abundant literature, the founding article by C. Thibierge, 'Le droit souple – Réflexion sur les textures du droit' (2003) *Revue trimestrielle de droit civil*, 599.

[26] Cf. Deumier, 'La responsabilité sociétale de l'entreprise', who suggests corporate social responsibility (CSR) should no longer be understood 'as a form of soft law that was to be made harder by fitting it into the mould of traditional law' but as 'hard law relinquishing the usual channels of constraint for new incentives and effective mainsprings of action', p. 1564.

law. This novation occurs when firms pass on their commitments to their suppliers and subcontractors through international supply chains (A). It may also occur, even when nothing is contractually provided for, because soft law has laid down the basis for a new international framework for contracts (B).

A - New contractual practices

1 - The contract as an instrument for the circulation and promotion of the fight against climate change

The more powerful a firm is, the greater is its impact on individuals' living conditions through terms of employment and environmental measures. Progressively the contractual framework of supply chains is changing. The private-law contract, the social function of which is seldom enshrined by the legislature,[27] has become an instrument for the circulation and promotion of environmentally-friendly practices and the fight against climate change, especially for the reduction of greenhouse gas emissions.[28]

The firm that has adhered to soft-law instruments or committed itself to an environmental certification procedure will pass its obligations all the way down the supply chain.[29] In the context of the performance of a deal, it will insert a 'sustainable development' clause into its general terms and conditions. It may also have its commercial partners sign a 'sustainable development charter' referring to its own voluntary commitment or certification procedure and require its partners to abide by them. For example, to comply with standard ISO

[27] With the noteworthy exception of art. 421 of the Brazilian Civil Code, title V, art. 1 on contracts, 'freedom of contract shall be exercised within the limits of the contract's social function'.
[28] K.P. Mitkidis, *Sustainability Clauses in International Business Contracts* (The Hague, Eleven International Publishing, 2015).
[29] The working group on international contracts chaired by Dutch professor F. de Ly, composed of many practitioners and academics, studies environmental or sustainable development charters and contractual clauses supplied by the group members. A book is to be published in 2017.

14001,[30] the firm will ask its partner to provide it with all relevant information about protection of the environment and alert it to any circumstances that may have an environmental impact.

In the part of the agreement on 'supplier's commitments', the firm shall be led to provide that the supplier will have to do its utmost to ensure the enforcement, by itself and its subcontractors, of the commitments to which the firm has subscribed. The contract may thus mention the support for the same values, compliance with national conventions and regulations applicable to each activity or require suppliers to draw up similar charters and extend them to their own subcontractors. Certain standard terms and conditions include whole sections that impose heavy requirements on suppliers, including, so that they do not remain inoperative, the requirement to answer CSR questionnaires, receive internal or external auditors to check the charter is enforced over all or part of the supply chain, draw up reports on their actions, and become involved in a common approach on pain of sanctions.

2 – Termination of contract: a sanction to be wielded with care

In contract law, sanctions vary with the seriousness of the failure and may extend to termination of the agreement.

When a termination clause covering the failure to comply with environmental requirements is included in the contract, it is important to ensure that the firm does not take advantage of the least failure to comply with a social or environmental requirement to terminate the agreement abusively. It is better (environmentally) to leave well alone, especially in a context of fierce local competition where contracts are not negotiated.

As some supervision of the validity of termination clauses and the conditions for implementing them may be required, the questions of the choice of competent courts and

[30] This standard is a worldwide reference for putting in place an environmental management system that is part of the three most used management system standards in the world (together with ISO 9001 on quality and OHSAS 18001 on health and safety at work).

governing law, settled in the attribution of jurisdiction and choice of governing law clauses, take on all their importance. It will be for the courts (or arbitration panels) before which cases are brought by application of the governing law to check that the termination clause is both lawful and valid and to oversee its implementation. Like most other systems of law but more still than some, French contract law has all the necessary tools for combating bad faith and abuses.

Initially, anyone who has failed to comply with the environmental clause must be allowed to take any steps to cure that failure, at their own expense and in circumstances that might be as follows: that they indicate without delay the manner in which they plan to do so, that the cure is appropriate in the circumstances, that the claimant has no legitimate interest in refusing the cure, and that it be effected promptly (cf. art. 7.1.4. Unidroit Principles on International Commercial Contracts).

If there is no express termination clause, there remains the possibility of judicial termination in the event of serious failing or a unilateral termination if the governing law so allows (French law now authorizes this and the draft reform of contract law enshrines this advance in jurisprudence).

The persistent refusal of a supplier to implement an environmental measure would count as a serious failing warranting, even in the absence of any clause, that the contract could or should be ended. More than this, in the event of serious breaches of fundamental rights, the right to terminate the contract is transformed into a duty for the firm, which cannot run the risk of being associated with such goings on.

This leaves the hypothesis whereby a firm that has voluntarily signed up to principles or undertaken an environmental certification procedure has not contractually passed on those commitments to its joint contractors (suppliers, subcontractors). Various reasons can explain this: oversight (current agreements that run on), inability to impose such a commitment given

the state of the market, or the fact that, in view of the nature or purpose of the obligation, the parties considered that the obligations 'went without saying' because they were part of a corpus of fundamental rights or quite simply established practice, prescribed by commercial custom.

B – Towards a new international contractual framework

When a multinational firm adopts a CSR strategy that underscores both its commitment to sustainable growth and development and its character as a civic-minded firm, it makes it publicly known and can then legitimately expect that its joint contractors take this into account, especially in the current context, buoyed by the Paris agreement and the growing role of legitimate expectations and confidence in contract law.

1 – Legitimate expectations

In many legal systems, the courts can add 'implied terms' to contracts. Under the Unidroit Principles of International Commercial Contracts, such obligations may stem from the nature and purpose of the contract, practices established between the parties and usages, but also from good faith and fair dealing, and reasonableness (art. 5.1.2). In France, article 1135 of the Civil Code under which 'Agreements bind not only as to what is therein expressed, but also as to all the consequences that equity, usage, or law impose upon the obligation according to its nature' (Legifrance translation) could serve as a basis for the discovery of implied duties in the realm of the environment.

2 – Conformity of goods

In the context of contracts for the supply of goods, compliance with certain environmental and social requirements could still be ensured by the applicable rules to the non-conformance of the

product manufactured in breach of fundamental rights or voluntarily subscribed commitments by the firm and made known to its commercial partners.

Under article 35 of the Vienna Convention on the International Sale of Goods, '(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used; … (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;'

Article 35(3) tempers the seller's obligations: 'The seller is not liable (…) for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity.'

This text prevents abuse whereby a purchaser invokes the non-conformance of the product when it was aware of the conditions in which the goods were produced. More often than not, it can be deemed that the firm knew or should have known about the lack of conformance. The undertakings it signed up to include the undertaking to apprise itself of the conditions in which products are made.

3 – Quality of service provision

Under article 1166 of the draft ordinance for reform of contract law, 'When the quality of the service is not or cannot be determined under the agreement, the party owing the duty must provide a service of a quality consistent with the legitimate expectations of the parties considering its character, usage and the amount of the consideration'. This text enshrines the theory of legitimate expectations (objectively evaluated).

Article 1166 is inspired by article 5.1.6 of the Unidroit Principles entitled 'Determination of Quality of Performance': 'Where the quality of performance is neither fixed by, nor determinable from, the contract a party is bound to render a performance of a quality that is reasonable and not less than average in the circumstances.' In article 5.1.6 circumstances are taken into account and the average is appraised relative to the relevant market in the rendering of the service.[31] Carried along by the development of instruments that can serve as benchmarks,[32] the reference to the quality of the service as 'consistent with legitimate expectations' or 'equal to average' might come into play in the context of supply chains when the service provided entails long-term damage to the environment (discharge of toxic products, water pollution, deforestation, high greenhouse gas emissions, etc.), when cleaner technologies could have been used.

Through contracts, multinational firms pass on their international voluntary commitments to their commercial partners, who in turn pass them on down the entire supply chain, either through contractual clauses, or by appending to them documents such as a business charter. The more multinationals there are that adhere to soft-law instruments, the more those instruments become a reference standard, to which universal agreements also refer. A customary law is being shaped.[33]

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[31] The commentary of the Principles states that citation.

[32] See for example *Supply Chain Sustainability. A Practical Guide for Continuous Improvement* (UN Global Compact and BSR, 2010).

[33] In contract law, usages that are widespread and regularly observed by parties in international commerce are mandatory. This rule, enshrined by many legal systems, is set out by article 1.9 of the Unidroit Principles of International Commercial Contracts: '(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable.'