

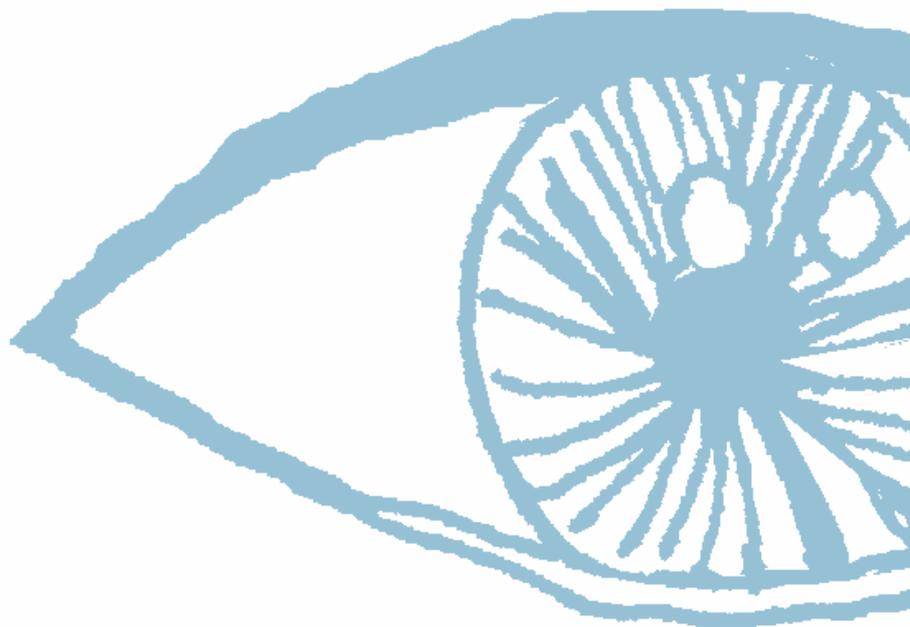
Sustainable Contracts

"All contracts which object and execution terms combine economic, social and environmental aspects, with the purpose of supporting fundamental rights and environmental protection."

Concept's outlines and exploration tracks

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/// Confidential before publication ///



January 2010

The concept of Sustainable Contract

It wouldn't take much observation on the heavy tendencies of private international investments over the past decades to notice the shift in the limits of the public interest of both private and public spheres. The multiplication of « Public Private Partnerships » (PPPs), greatly promoted by the international financial institutions, comes as an illustration of that fact. But the phenomenon goes deeper and we are witnessing today numerous contracts between private partners of which effects on social and environmental fields depend upon the public interest. Wood, for instance, is a resource of which exploitation has an influence on biodiversity and climate change. Contracts organising the production and the providing of manufactured goods, in which employees do not benefit from the ILO - International Labour Organisation - standards, raise evident questions depending upon the public interest. What was so far considered as merchandise and services, as objects of private contracts, now cover other dimensions which cannot be ignored any longer today. In other times, distance and shortage of means of communication could explain an ignorance and a lack of interest for such considerations on behalf of ordering parties. This is no longer the case in a time of global communication campaigns for sustainable development.

Now this shift of public interest within the private contract - which was intrinsically not meant to receive it - has not found a satisfying translation yet in regard to the responsibility of the concerned people. The debates around the idea of corporate social and environmental responsibility (CSR) endeavour to bring the proper answers. The lack of international consensus, on which the recent stage report of Prof. John Ruggie focuses, does not give any sign of hope of adopting international conventional tools on the subject before a long time.

In this context, the Sherpa association considers that a specific and original juridical tool should be developed in that sense. Its objective would focus on translating the new borders of the public interest - induced by the ever-growing intervention of private operators - into international contractual obligations. The concept of the sustainable contract, of which we describe the outline hereinafter, aims at giving answers which could form a relevant synthesis between typical CSR soft and hard-law tools.

The expression of « sustainable contract » naturally results from the concept of sustainable development as defined by the United Nations,¹ which aims at setting viable outlines while combining the three economic, social and environmental human activities. The sustainable contract would that way represent a juridical translation of sustainable development objectives, leading to a contractual synthesis of disparate norms forming the juridical environment of the CSR. The sustainable contract could be defined in a complete way as: *"All contracts which object and execution terms combine economic, social and environmental aspects, with the purpose of supporting fundamental rights and environmental protection."*

Developing such a tool serves a triple interest:

Interpretation tool - Judges and arbitrators in charge of litigations could comprehend the contracts submitted to them with the idea of sustainable contracts. Thus, the use of sustainable contract's criteria could contribute to putting an end to the current situation, in which companies are free to interpret social and environmental responsibility standards in a discretionary manner,

¹ In 1984, the general meeting of the United Nations elected Mrs. Gro Harlem Brundtland, then prime minister of Norway, with the purpose of presiding over the UN World Commission on Environment and Development. In 1987, the commission hands in its report entitled « The Future for all of us ». This report gives a definition to the idea of sustainable development. According to this definition, sustainable development is « a development meeting the needs of current generations without jeopardizing the capacity of future generations to meet theirs ».

which they must justify. It could enlighten the different stages of a contract's life, from the procedure of invitation to tender to its breach, via the quality of the parties' consent and the execution terms of their own obligations.

Decision support tool - The development of the sustainable contract concept would provide companies with standards, representing that way a tool of support in the decision-making process, when they are confronted to situations coming under their social and environmental responsibility. That way, the sustainable contract would represent a performance evaluating tool directly linked to the idea of a « Triple bottom line ».²

Full contractual tool - Such a project obviously includes the establishment of contractual standards to be incorporated on the long term into international law of contractual obligations. A new generation of PPP's and private contracts organising a balance between economic, social and environmental implications should come out of the sustainable contract concept.

The implementation of such a tool requires the emergence of an international juridical doctrine able to draw a coherent synthesis from disparate norms. Within the framework of arbitral disputes, the *Amicus curiae* contributions would be a privileged field of development of such a doctrine. According to us, a powerful synthesis tool lies in fundamental norms from the *Lex Mercatoria* (good faith, legitimate expectations, constructive knowledge, etc.), general principles of law and international customary law, which have the advantage to cover an area adapted to the supranational dimensions of multinational groups.

The sustainable contract will only find its relevance if it manages to assimilate the complex CSR juridical environment. In such circumstances, as the previous developments have shown, this environment is where heterogeneous juridical tools

² This is a tool of corporate performances evaluation in the field of sustainable development according to three factors : People (Social criterion), Planet (Environmental criterion), Profit (Economic criterion). The expression was created in 1994 by John Elkington, cofounder of Sustainability, first british consulting firm of sustainable development strategy.

meet, forming the DNA of the sustainable contract as we understand it. The general framework is to be considered as a combination of the concept of sustainable development and the millenium development goals. Besides, more specific juridical tools will be called. Among others:

- Contractual Law (through, for instance, the PPP contract, the idea of unilateral commitment or « head of household » management)
- Competition Law (especially its uses with the ideas of abuse of rights, economic dependance and corporate groups),
- Investment Law (in particular through a general trend of international arbitration³, certainly still marginal yet, but which begins to take into account considerations of public interest),
- Corporate Law (through reporting obligations over social and environmental impacts, the idea of corporate groups, parent companies, limited responsibility, etc.),
- Tax Law (practice of transfer pricing, management fees affecting the inland revenue of a receiving country),
- Accountancy Law (which, beyond the development of accounting practices such as endowment provision for extra-financial risks, brings as well tools such as consolidation to have a better approach of corporate groups structures).

Every last one of these juridical tools, considered all together with a CSR perspective, contribute to a sustainable development and, according to us, give rise to obligations of prevention and compensation to social and environmental harm for which multinational groups are responsible. Reaching this stage, the concept of a sustainable contract finds its relevance and can fill the legal

³ As an example, the case CIRDI *Aguas Argentinas v Argentina* and the taking into account of private stakes in the water sector. On the 12th of October 2007, arbitrators accepted to receive an *amicus curiae* contribution of 5 NGOs, considering they would have to solve the «complex public and international law questions, including human rights considerations» CIRDI, n°ARB/03/19, Order in response to a petition by five non-governmental organisations for permission to make an *amicus curiae* submission, February 12, 2007, para.18.

vacuum prevailing today, i.e. the gaps between the impacts of a private contract affecting public interest considerations and the correlative responsibility of the parties between them and towards stakeholders. The sustainable contract intends to inject a dose of public interest responsibility in the interstices of contractual relations where it is legitimate to fill a legal vacuum. The DNA of the contract thereby modified, the effects on the contracts' execution would be anticipated in an ever-constant perspective of respect of future generations.

Of course, the area covered by this outline paper does not enable us to develop on this particular subject. The state of our research on the subject being at the embryonic stage, it is somewhat hasty to suggest a complete definition on the concept of sustainable contract. We can however introduce the following fundamental characteristics:

Fundamental aspects of the sustainable contract – The sustainable contract's terms depend on two different factors: 1) The effects of the contract concerned on public interest considerations brought about by the research of a sustainable development and 2) the balance of power between the contract's parties referring in particular to the idea of sphere of influence.

Thus, the working out of a sustainable contract imposes beforehand to diagnose the potential and proven impacts on the environment (resources durability and pollution, biodiversity, etc.) and fundamental rights (including social rights and the rights as defined by the international charter of human rights) of the implementation of the contract planned. This diagnostic will help to identify the obligations of public interest which should appear in the contractual terms. Now, as we can see, this preparatory stage requires the carrying out of social and environmental impact assessment studies, widespread measures central to the CRS debates. Besides, an observation can be made about the prevention requirement which has still not, up until now, reached its contractual maturity. The sustainable contract intends to put forward mechanisms offering the maximum of prevention. Indeed, beyond the technical aspects proper to

each contract and the activity it intends to organise, the main role of the sustainable contract remains to prevent disputes and damages, while equitably sharing out the respective responsibilities of the parties. Besides, within a sustainable contract, « stakeholders » become parties of the principal contract or at least parties of a chain of contracts, and this is one of the fundamental aspects and contractual rule of which the project intends to reveal the interest.

Concerning the sharing out of correlative obligations and responsibilities between the contract's parties, the process imposes specific analysis : on the one hand, an analysis with regard to the parties' balance of power, and on the other hand, a diagnosis regarding their respective influence on public interest considerations. This analysis aims at having the identified obligations respected, bearing weight on the party most able to assume them. Reaching this stage, the concept of a sustainable contract obviously fundamentally shatters the current situation as it gets private operators to submit themselves to obligations so far unknown or limited to a voluntary area. In fact, this involves a restraint of the excessive asymmetries frequently noted between an ordering party and its contracting parties, such as expertise imbalance or economic dependency, which often causes inappropriate contractual conditions compromising the contract's durability. The objective is especially to have contractual terms organising the treatment of the social and environmental impacts while restoring a coherence between the legitimate continuation of private interests and its negative outcomes.

Illustrations – Let us consider, for instance, a contract enforcing a subcontractor to enter into an ethical commitment with its ordering party, but which would not respect the sustainable contract's principle, as the financial terms agreed would prevent the subcontractor's necessary investments.

On another level, regarding States/investors arbitral disputes and more specifically within the framework of public private partnerships, the taking into account of the sustainable contract implies

arbitrators to consider in their decisions not only investors' expectations but also what can be expected from investors involved in activities in relation to fundamental rights. For instance, the water sector. The responsibility of a private operator of supplying drinking water directly includes it in the access to water right process. That way, we can believe that the intransigence of an operator during a tariff renegotiation going towards a contract's cancellation has to be taken into account by the arbitrators, at least in order to evaluate the compensations claimed. Even more so when such a tariff renegotiation occurs after only a few months of contracts' execution, often concluded for a period exceeding 20 years. And especially when the investor's compensation claims consist in getting paid for the years during which the contracts were not executed, in accordance with the loss of luck. In these circumstances, the arbitrators will have to question themselves about the sustainable aspect of the PPP contract which gave rise to the dispute and to understand the consequences about the investor's compensation claims.⁴

The concept of a sustainable contract enables to have a global approach on the field of considerations, evidently very wide. It is the reflection of the stakes lead by corporate social and environmental responsibility. The set of issues - according to a balance between the parties of a

⁴ For instance, through the idea of « *constructive knowledge* » combined with the expertise of multinational companies in water management. According to this principle, « *if one by exercise of reasonable care would have known a fact, he is deemed to have had constructive knowledge of such fact* ». As a consequence, when it is proven for example that the expertise of a company could have anticipated the financial issues of part of the population which lead to the failure of a project and/or the negotiation of new and more favourable contractual terms, the company can be forbidden to be legally awaiting a full compensation.

contract - will of course be the crucial point to consider as much for States/companies relations as the ones between a parent company and its partners, both integrated (companies forming the group) or external (suppliers, subcontractors, distributors).

Just as the relations established by the companies with their stakeholders. For this reason, the development of the sustainable contract as a juridical tool will have to meet the principles of proportionality, cooperation and coherence.

Thus, the field of intervention of the sustainable contract concerns as much the form as the substance. It covers the process starting from the period of negotiation of a contract's terms (technical and economic balance between parties, involvement of stakeholders) through different stages: formalisation (quality of agreement, transparency), execution (reporting), reviewing and breach (resort to arbitration).

The emergence of contractual clauses of international public dimension is the objective of the development of the sustainable contract. Sherpa considers that it is time to restore a loyal competition and redress the balance between operators of which action affects the public interest. The sustainable contract is a tool to rehabilitate trust towards economic actors' action. With the use of a contractual tool and the balance it enables between voluntary measures and mandatory obligations, Sherpa believes it will be easier to obtain the constructive support of private operators to such a project.

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A special thanks to Tristan Bahier for this translation of the original french version
This text will be published in I.Daugareilh (dir.)
Responsabilités de l'entreprise transnationale et globalisation de l'économie
ed. Bruylant-LGDJ, 2010.