The Attractiveness of Contracts: Community Benefit Agreements and Environmental Law's Contractualisation

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Abstract

In Europe, local opposition to mining projects is growing, which has driven scholars in the mineral-rich Nordics to study the governance environment of the extractive industry. This article examines a proposed solution, namely Community Benefit Agreement (CBA), a contract through which a community grants its consent for a planned mining project. The broad aim of this article is to contextualise CBA with respect to the regulatory developments that are emerging in Europe, especially in the field of environmental law. The more specific aim is to lay out why CBA appears to represent an attractive regulatory solution in tackling social acceptance issues.

Based on the observations made through two interconnected developments, contractualisation and proceduralisation, this article concludes that in many respects CBA reflects the developments that are already occurring in Europe. With regard to the attractiveness of contracts, the contractualisation approach highlights that two qualities give rise to their attractiveness, namely their flexibility and their law-like character. The analysis based on the theories of proceduralisation lays out why these qualities are considered beneficial. The reasons can be summarised as follows: the enablement of democratisation, between-system coordination and the development of the contract parties' agency in regulating.

Key words: Community Benefit Agreements, Contractualisation, Proceduralisation, Regulatory Theory

1. Introduction

In Europe, local opposition to mining projects is growing, which has driven scholars in the mineral-rich Nordics to study the governance environment of the extractive industry.[1] A recent empirical study conducted in Finland proposes Community Benefit Agreement (CBA) as a potential complementary instrument to state regulation and companies' own Corporate Social Responsibility (CSR) measures in tackling problems with social acceptance of mining activities.[2] The basic idea of CBA is that an impacted community negotiates a binding agreement with a mining company. In the agreement the community grants its consent for the planned mining project in exchange for certain benefits and the minimisation of adverse cultural and environmental impacts. However, there is a lack of European legal research about CBA.

Perhaps the most beneficial way to begin the European legal discussion of the foreign instrument is to observe it against wider regulatory developments emerging in environmental law.

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[1] Juha M. Kotilainen, Lasse Peltonen, and Kalle Reinikainen, "Community Benefit Agreements in the Nordic Mining Context: Local Opportunities for Collaboration in Sodankyla, Finland," *Resources Policy* 79 (2022): 1–10; Sonja Kivinen, Juha Kotilainen, and Timo Kumpula, "Mining Conflicts in the European Union: Environmental and Political Perspectives," *Fennia – International Journal of Geography* 198, no. 1–2 (August 23, 2020): 163–79.

[2] Kotilainen, et al. (n 1), p. 8.

In other words, we should start the discussion by asking why we would use a *contract* to answer social acceptance problems. The question is essential since comprehensive state regulation, as well as companies' own self-regulation measures, is already in force. Therefore, the question could be rephrased as follows: why would we introduce a novel regulatory instrument, a *contract*, and not simply improve the existing measures? The interest towards contracts can be understood when observing it against the wider regulatory developments emerging in environmental law.

The use of contracts is expanding in environmental law in such a way that there seems to emerge an overlooked regulatory development called 'contractualisation'. Today contracts are becoming a central regulatory tool for environmental policies at domestic, international, and European levels, and their use has spread to new dimensions of environment-related matters.[3] This trend in which the use of contracts has increased in a certain context, or where contracts have been used for new purposes, has been labelled contractualisation[4], but environmental law scholars have rarely paid attention to the phenomenon. The studies have instead focused on individual contract models. However, contractualisation is a useful perspective when investigating why we would introduce CBA in Europe, since it enables us to highlight the qualities that make contracts attractive regulatory tools. Thus, by analysing CBA through contractualisation, we are also able to contextualise CBA with respect to wider developments in environmental law in Europe.

Although contractualisation is a good starting point, the approach does not provide explanations on a wider legal and societal level as to why we would use contracts to answer social acceptance problems. Therefore, we need to look at the phenomenon that explains why we are interested in complementing laws with other regulatory instruments. This phenomenon, or rather a theoretically anchored framework, is called 'proceduralisation'. The term is often used to refer to the shift towards procedures and participation. It can be also understood as an analytical framework that highlights the tension between traditional democratic rule-making and the need for flexibility. The latter understanding of proceduralisation builds on the idea that the goals of the law must be articulated directly by those who are subject to legal procedures.[5] Therefore, proceduralisation is seen to cover the strategies of inducement that aim to develop procedures, e.g. contract negotiations, and institutional structures, e.g. contracts, that will enable the regulatees to become the regulators.[6]

In legal and regulatory literature these types of strategies are most clearly seen in the theories of reflexive law and responsive regulation, which can therefore be called theories of proceduralisation.[7] Reflexive law aims for a certain form of democratisation by emphasising the need for law to focus on the regulation of self-regulation.[8]

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[3] Mathilde Hautereau-Boutonnet, "The Effectiveness of Environmental Law through Contracts," in *The Effectiveness of Environmental Law*, ed. Sandrine Maljean-Dubois, 1st ed., 2017, 67–80, p. 68.

[4] Eckard Rehbinder, "Environmental Agreements a New Instrument of Environmental Policy," *Environmental Policy and Law* 27, no. 4 (1997): 258–69; Cristina Poncibò, "The Contractualisation of Environmental Sustainability," *European Review of Contract Law* 12, no. 4 (2016): 335–55.

[5] See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996), p. 408–410.

[6] Julia Black, "Proceduralizing Regulation: Part I," *Oxford Journal of Legal Studies* 20, no. 4 (2000): 597–614, p. 597–598.

[7] Ibid., p. 598 and 602.

[8] Ralf Rogowski, *Reflexive Labour Law in the World Society* (Edward Elgar Publishing, 2013), p. 38–39. Sanford E. Gaines, "Reflexive Law as a Legal Paradigm for Sustain-

Thus, it provides one explanation for the question of why we are interested in complementing laws with other regulatory instruments. Another explanation for this question is provided by responsive regulation. It emphasises the role of non-governmental actors in governance.[9] In other words, a responsive regulation approach complements reflexive law by focusing on the regulators and the regulatees.

The aims of this article can be summarised as follows. The broader aim is to contextualise CBA with respect to the regulatory developments that are emerging in Europe, especially in the field of environmental law. Proceduralisation and contractualisation developments highlight that CBA does not represent as unorthodox a regulatory solution as it seems at first glance, rather in many respects it can be seen to reflect the developments that are already occurring in Europe. The more specific aim is to lay out why CBA seems to represent an attractive regulatory solution in tackling social acceptance issues. While contractualisation analysis highlights the qualities that make contracts attractive regulatory tools, proceduralisation analysis shows why these qualities are seen to be beneficial.

The article is divided into two parts. The first part considers contractualisation. It starts by outlining the emergence of contractualisation development in environmental law and then moves on to consider the reasons why contractualisation emerges in the given context. The third subchapter covers contractualisation in the mining sector, and this development is compared against the wider contractualisation phenomenon in environmental law. The second part concerns proceduralisation. It starts by outlining my understanding of proceduralisation. The next two subchapters analyse CBA through proceduralisation theories, reflexive law, and responsive regulation, the aim of which is to elaborate on the understanding of CBA's attractiveness. The article ends with concluding observations.

Before moving on to contractualisation, it should be emphasised that the terms 'agreement' and 'contract' are used interchangeably, since both notions have been used in environmental contractualisation. Moreover, governance and regulation are used interchangeably unless stated otherwise.[10] Additionally, the concepts of 'procedure', 'procedural', and consequently proceduralisation are understood extensively, hence they include a variety of structured participation models, not just court proceedings. With relation to the method of this research, it is based on qualitative analysis of the texts of legal and social sciences and their interpretations.

2. Contractualisation

2.1 Interest in environmental contracts (re)awakens

In the first part of the article, I investigate contractualisation. I start this investigation by outlining the emergence of contractualisation in environmental law and what position contracts appear to have in today's environmental regulation. Thus, the analysis in this chapter shows that there emerges a development in the field of environmental law that can be referred to as contractualisation.

Contracts are not so much an innovative or a new initiative. From an overall historical perspective, the contract is probably the oldest con-

able Development," *Buffalo Environmental Law Journal* 10, no. 1–2 (2002): 1–24, p. 8–9.

[9] See Cameron Holley and Clifford Shearing, "A Nodal Perspective of Governance: Advances in Nodal Governance Thinking," in *Regulatory Therory: Foundations and Applications*, ed. Peter Drahos, 1st ed. (ANU Press, 2017), 163–80, p. 166.

[10] F.ex. Kotzé has stated that governance is just a more modern name for regulation. See Louis J. Kotzé, *Global Environmental Governance: Law and Regulation for the 21st Century* (Edward Elgar, 2012).

struction defined by the law and certainly the most used one.[11] Even in the context of environmental regulation, contracts, often referred to as environmental agreements or covenants, have been in use for decades. They were first introduced in France and Germany in the early 1970s, where contracts were made between the business sector and the government to achieve certain environmental objectives that went beyond legal requirements.[12] Later on, in the 1980's environmental agreements emerged in the Dutch-speaking part of Europe where they became relatively popular.[13] Also, other European countries such as Austria, Denmark, Italy, Sweden and Portugal started to experiment with environmental agreements.[14] These developments occurred at the EU level as well. However, environmental contracting has not been limited to Europe; environmental agreements have been experimented with in the United States since the 1980s, and their use has been highly popular in Japan.[15]

The highest point of academic and political interest in environmental agreements was reached at the turn of the millennium.[16] In 1996 the EU formally embraced the use of this regulatory approach when the Commission provided a Communication on Environmental Agreements, in which it stated that agreements can be used as a supplement to legislation or as an implementation tool.[17] Shortly thereafter the Commission issued a Recommendation on environmental agreements for implementing directives of the Community.[18] The Communication and the Recommendation were based on a large-scale empirical investigation of environmental contracts that occurred in the Community.[19] In 2002 the Commission made a new recommendation that concerned environmental agreements at the Community level.[20] Wider-scale research on the topic took place at the end of the 1990s and the beginning of the 2000s.[21]

Since that time the interest surrounding environmental agreements as a whole seems to have faded, but this does not mean that the use of environmental agreements has decreased or stopped altogether. Today, contracts are used to replace, anticipate, supplement or implement the law, and they are becoming an essential regulation tool for environmental policies at the domestic, international, and European levels.[22] Moreover, they are used in various sectors of environmental regulation such as waste regulation, nature conservation regulation, energy regulation, environmental damage regulation, ecologi-

[11] Simona-Maya Teodoroiu, "The Administrative Contract Regulated by the Environmental Law," *Perspectives of Law and Public Administration* 8, no. 1 (2019): 128–35, p. 128.

[12] Eric W. Orts and Kurt Deketelaere, "Introduction: Environmental Contracts and Regulatory Innovation," in *Environmental Contracts: Comparative Approach to Regulatory Innovation in the United States and Europe* (Kluwer Law International Ltd., 2001), 1–35, p. 5–6.

[13] Ibid.

[14] Rehbinder (n 4), p. 260.

[15] Orts and Deketelaere (n 12), p. 11; Rehbinder, "Ecological Contracts: Agreements between Polluters and Local Communities," in *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization*, ed. Gunther Teubner, Lindsay Farmer, and Declan Murphy (Wiley, 1994), 147–65, p. 151.

[16] Eric W. Orts and Kurt Deketelaere, *Environmental Contracts: Comparative Approaches to Regulatory Innovations in the United States and Europe*, 1st ed. (Kluwer Law International Ltd., 2001).

[17] COM(96)561 final: Communication from the Commission to the Council and the European Parliament: On Environmental Agreements, p. 3.

[18] Recommendation 96/733/EC, 1996 O.J. No. L 333/59.

[19] Rehbinder (n 4), p. 260.

[20] COM(2002) 412 final: Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Environmental Agreements at Community Level Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment.

[21] Teubner, Farmer, and Murphy (n 15); Orts and Deketelaere (n 15).

[22] Hautereau-Boutonnet (n 3), p. 68.

cal compensation, etc.[23] In Finland, for example, the use of environmental agreements was fairly marginal at the end of the 1990s.[24] Nowadays, however, the approach seems to have changed. Fixed-period 'green deals' between the business sector and different levels of government are becoming more common[25] and the popularity of voluntary environmental forestry subsidy agreements made between private forest owners and the Finnish Forest Centre has increased[26]. Also, voluntary ecological compensation incorporated into the new Nature Conservation Act (9/2023) is meant to be applied partly through agreements made between a polluter and the entity that produces nature values.[27]

Scholarly interest is, however, mainly directed towards the environmental contracts occupying a specific sector of environmental law, which leaves the wider development of contractualisation off the radar.[28] Moreover, legal research regarding contracts seems to be marginalised in comparison to other disciplines, such as economics, business administration and social sciences. This might be due to legal scholars' reluctance to embrace transactional documents as a component of legal scholarship.[29] Therefore, the work of these scholars paints a rather fragmented and technical picture of environmental contracts. Nevertheless, academic interest in more broadly framed environmental contracts seems to be reawakening in Europe.[30] Whereas political interest, at least at the EU level, is yet to be reawakened.[31]

2.2 The attractiveness of environmental contracts – reasons for their introduction

As the former chapter demonstrates, contracts are in use in diverse areas of environmental law. Their details and explicit objectives may differ significantly, as do their names, parties and legal form. However, the reasons why they have been introduced are in many ways analogous. Thus, in this chapter, I will outline the reasons

[23] Ibid.

[24] See Geert Van Calster and Kurt Deketelaere, "The Use of Voluntary Agreements in the European Community's Environmental Policy," in *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe* (Kluwer Law International Ltd., 2001), 199–246, p. 245; Panagiotis Karamanos, "Voluntary Environmental Agreements: Evolution and Definition of a New Environmental Policy Approach," *Journal of Environmental Planning and Management* 44, no. 1 (2001): 67–84, p. 72.

[25] Ministry of Environment in Finland, "Green Deals". https://ym.fi/en/green-deals (29.4.2023).

[26] The Finnish Government, "Voluntary forest protection popular among forest owners – record funding for fixed-term environmental forestry subsidy agreements". https://valtioneuvosto.fi/-/1410837/vapaaehtoinen-metsien-suojelu-metsanomistajien-suosiossa-maaraaikaisiin-ymparistotukisopimuksiin-ennatysrahoitus?languageId=en_US (29.4.2023).

[27] The Government Bill on Nature Conservation Act (HE 76/2022 vp) p. 230–232.

[28] See f.ex. Hans Bressers et al., "Negotiation-Based Policy Instruments and Performance: Dutch Covenants and Environmental Policy Outcomes," *Journal of Public Policy* 31, no. 2 (2011): 187–208; Steven Van Garsse, Kit Van Gestel, and Nicolas Carette, "Energy Performance Contracts for Governments: The Two Faces of Europe," *European Procurement & Public Private Partnership Law Review* 12, no. 2 (2017): 87–96; Malin Aldenius, Panagiota Tsaxiri, and Helene Lidestam, "The Role of Environmental Requirements in Swedish Public Procurement of Bus Transports," *International Journal of Sustainable Transportation* 16, no. 5 (2022): 391–405; Claudia Sattler et al., "Institutional Analysis of Actors Involved in the Governance of Innovative Contracts for Agri-Environmental and Climate Schemes," *Global Environmental Change* 80 (2023): 1–14.

[29] Natasha A Affolder, "Rethinking Environmental Contracting," *Journal of Environmental Law and Practice* 21 (2010): 155–80, p. 159.

[30] Kateřina Peterková Mitkidis, "Using Private Contracts for Climate Change Mitigation," *Groningen Journal of International Law* 2, no. 1 (2014): 54; Hautereau-Boutonnet (n 3).

[31] However, there are sector-specific recommendations on the use of contracts, for example concerning energy performance contracting. See Van Garsse, Van Gestel, and Carette, "Energy performance contracts for governments: the Two Faces of Europe, European Procurement & Public Private Partnership Law Review, Vol. 12, No. 2 (2017), pp. 87–96.

why contractualisation is emerging in environmental law. The question is deeply connected to the qualities of contracts, and therefore the overarching qualities of different types of environmental agreements are highlighted.

Environmental contracts comprise a category that is highly variable, or some would say flexible. Firstly, it is important to notice that just as the names of environmental contracts differ, there are also different categorisations. Perhaps the most widely used is 'Voluntary Environmental Agreements'(VEAs), but 'negotiated agreements' and 'private agreements' are also typical classifications for environmental contracts.[32] Secondly, parties to the agreements may include any of the three sectors: public, business, and non-profit. However, the extent of the involvement of either party varies across different contracts.[33] Thirdly, the legal character of environmental contacts differs from one contract to the next. Some of them are legally binding and others are more accurately characterised as 'self-commitments' that are not legally enforceable, even though they have a real effect on the practice of environmental law.[34] Similarly, the contracts may be interpreted as private law or public law instruments depending on their content and parties.

The fourth area of variability relates to the declared objectives of environmental contracts. Broadly speaking, their aim is the achievement of *environmental* objectives.[35] Usually, however, environmental contracts seek to answer specific environmental issues or opportunities such as climate change, loss of biodiversity, overconsumption of natural resources, or promotion of a circular economy.[36] Moreover, the relative significance of environmental objectives might differ since the purpose of the contract is not in all cases solely environmental. For example, supply chain contracts may include clauses that concern carbon emissions, but their primary purpose is not to improve the environment; rather the environmental improvements are a by-product of the contract.[37] Thus, a contract can be classified as an environmental contract (as has been done in this article) even though it may only indirectly be environmental in nature.[38]

There are developments that explain why flexibility is a quality that is considered attractive. The interest in environmental contracts stems from the critique directed to command-and-control regulation, i.e. the implementation and enforcement deficit of environmental law.[39] Contracts were one of several regulatory options offered as a solution for the perceived efficiency and effectiveness issues of traditional regulation. This development in environmental policy-making has been related to deregulation tendencies and, especially at the EU level, to the approach called 'political modernisation' which was born from the recognition of ecological crisis.[40] In essence, political modernisation was an efficiency-oriented approach that sought to fix

[32] See f.ex. Rory Sullivan, *Rethinking Voluntary Approaches in Environmental Policy* (Edward Elgar Publishing, 2006); Stephanie Hayes Richards and Kenneth R Richards, "VIII.24 Voluntary Environmental Agreements," in *Elgar Encyclopedia of Environmental Law*, ed. Michael Faure, vol. 8 (Edward Elgar Publishing, 2023), 363–76.

[33] Hayes Richards and Richards (n 32), p. 366.

[34] Orts and Deketelaere (n 12), p. 6.

[35] COM(96) 561 final, p. 5.

[36] See f.ex. Ministry of Environment in Finland, "Green Deals". https://ym.fi/en/green-deals (3.10.2023).

[37] See Mitkidis (n 30).

[38] Hautereau-Boutonnet (n 3), p. 70.

[39] Rehbinder (n 15), p. 148; Affolder (n 29), p. 156; Cameron Holley, Neil Gunningham, and Clifford Shearing, *The New Environmental Governance*, vol. 1 (Taylor & Francis Group, 2013), p. 1–4.

[40] Anne Kumpula, "Ympäristösopimukset – itsesääntelyä vai yhteisohjausta," in *Juhlajulkaisu Leena Kartio 1938-30/8-2008*, Suomalaisen Lakimiesyhdistyksen julkaisuja 39 (Suomalainen Lakimiesyhdistys, 2008), 147–62, p. 150.

degradation through techno-scientific development and technocratic practices.[41]

Therefore, it is not surprising that one of the justifications for environmental contracting is its effectiveness and efficiency, especially in relation to hierarchical command-and-control regulation. Traditionally, contracting is thought to relieve the public sector's regulatory burden by distributing the burden more equally.[42] Moreover, it has been suggested that contracts' inherent flexibility and voluntarism allow the industry or company in question to find the most cost-effective and adaptive solution to a specific situation.[43] Also from a goal achievement perspective, contracts are suggested to represent an effective regulatory tool. This perspective is usually connected to the implementation of the public goals laid in law, i.e. the vertical effectiveness of contracts.[44] The urgent need for rapid and effective solutions can be most clearly seen in relation to climate change. However, there is scepticism among scholars as to whether environmental contracts or other voluntary approaches do lead in reality to overall improvements in the environmental wellbeing.[45]

Even though political modernisation narrowed the range of terms in which the ecological crisis could credibly be discussed by accepting the parameters of the capitalist system, it paved the way for novel kinds of thinking by raising the role of non-state actors in governance.[46] Continuing ecological degradation and the increasing complexity of social and environmental problems shifted governance/regulation thinking towards 'new environmental governance' (NEG) that is believed to improve the effectiveness, efficiency and legitimacy of responses to environmental problems.[47] NEG differs from partnership and "light-handed" approaches in that it demands higher levels of collaboration, participation, integration, flexibility and adaptability.[48] The approach can be described as polycentric governance, since it involves collaboration between a diversity of private, public and non-governmental stakeholders, who act collectively towards commonly agreed (or mutually negotiated) goals.[49] It relies heavily, inter alia, on participatory dialogue, deliberation, and institutionalised consensus-building practices.[50]

NEG thinking raises another perspective from which the attractiveness of environmental contracts can be understood. As reflected earlier, environmental contracts constitute a broad category in which contracts between local communities and the polluters represent one segment. Broadly speaking, the aim of all environmental contracts is environmental improvements. However, one main purpose of community-polluter environmental contracts is to find agreement despite conflicting motivations between a state agency, the originator of the polluting project and local communities.[51] In this context, contracts can be seen to provide a technology for collaboration and participation since they em-

[41] Maarten A. Hajer, "'Verinnerlijking': The Limits of a Positive Managements Approach," in *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization* (Wiley, 1994), 167–84, p. 172.
[42] Rehbinder (n 4), p. 266.
[43] COM(96) 562 final, p. 6.
[44] Hautereau-Boutonnet has separated vertical and horizontal effectiveness of environmental contracts. See more: Hautereau-Boutonnet (n 3).
[45] Hayes Richards and Richards (n 32), p. 375.
[46] Kumpula (n 40), p. 150; Hajer (n 41), p. 172. Cameron Holley, "Environmental Regulation and Governance," in *Regulatory Theory*, ed. Peter Drahos, 1st ed. (ANU Press, 2017), 741–58, p. 746.
[47] Peter P. J. Driessen et al., "Towards a Conceptual Framework for The Study of Shifts in Modes of Environmental Governance – Experiences From The Netherlands: Shifts in Environmental Governance," *Environmental Policy and Governance* 22, no. 3 (2012): 143–60, p. 144–145.
[48] Holley (n 46), p. 744–747.
[49] Holley, Gunningham, and Shearing (n 39), p. 4.
[50] Holley (n 46), p. 747.
[51] Rehbinder (n 4), p. 159.

body a product of institutionalised negotiation between the parties. Thus, they are a reflection of, and a response to, the crisis of traditional participation, such as EIA and environmental licence procedures, that does not sufficiently secure the acceptance of potentially adversely affected parties.[52] From this perspective, contracts are a means of social self-help in situations where a state is (relatively) inactive, i.e. contracts are believed to enable effective public participation to occur.[53]

The discussion above highlights the important aspects of the attractiveness of environmental contracts, but the question of what distinguishes contracts from other 'voluntary' approaches is still ambiguous, even though the notion that contracts are a product of *institutionalised* negotiation might offer some ideas on that front. However, what differentiates contracts is that they can be used to create individual (or, as some would say, situation-specific) norms that are at least partially legally binding.[54] It should be noted that not all environmental contracts are legally enforceable, but if they are, the contractual form horizontally strengthens the legal pressure on compliance.[55] Thus contracts embody law-like rules and they are subject to – and interpreted through – law and legal institutions. Based on this notion, some have even proposed that differences between command-and-control regulation and contracts are differences largely of degree rather than kind.[56]

This type of argumentation, where contracts' ability to create legally binding norms is invoked, is typical when contracts are compared to companies' self-committed, softer obligations. For example, it has been suggested that if CSR-related obligations are incorporated into companies' supply chain contracts, the obligations might obtain a hard law edge and might, therefore, be more successful in fostering ethical behaviour among suppliers.[57] Some have characterised this as 'certainty', although in the context of contracts the level of certainty is always relative.[58] However, it should be kept in mind that large-scale contracts, which environmental contracts usually are, generally include both hard and soft contractual clauses and both types of clauses may direct parties' behaviour. For example, climate change litigations against corporations have shown that corporate social responsibility is evolving into corporate social liability, and thus companies' soft obligations may have real legal effects.[59] Moreover, the value of soft obligations is not restricted to their legal character. Clauses that, for example, provide tolerance zones for unexpected events or outline the decision-making processes direct parties' behaviour into certain direction. These clauses direct parties' behaviour even though their *legal* enforcement might be pointless or even impossible.[60]

All in all, it appears that the attractiveness of environmental contracts is based on their cha-

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[52] Ibid.

[53] Ibid., p. 148.

[54] See Hautereau-Boutonnet (n 3).

[55] Mitkidis (n 30), p. 75.

[56] See f.ex. Geoffrey C. Hazard, Jr. and Eric W. Orts, "Environmental Contracts in the United States," in *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe* (Kluwer Law International, 2001): 71–91, p. 77. Dadush has also suggested that contracts are a hybrid in that they operate at the junction of soft and hard law. Sarah Dadush, "Prosocial Contracts: Making Relational Contracts More Relational," *Law and Contemporary Problems* 85, no. 2 (2022): 153–75, p. 158.

[57] Kateřina Peterková Mitkidis, *Sustainability Clauses in International Business Contracts* (Eleven International Publishing, 2015), p. 6.

[58] Affolder (n 29), p. 175–76.

[59] The most famous case is perhaps a Dutch case called Milieudefensie et al. v. Royal Dutch Shell.

[60] See more about contracts' multifold functions: Donald J. Schepker et al., "The Many Futures of Contracts: Moving Beyond Structure and Safeguarding to Coordination and Adaptation," *Journal of Management* 40, no. 1 (2014): 193–225.

meleon-like character. We can list the different qualities that are invoked when endorsing the use of environmental contracts, as I have done here, but all these qualities are dependent on their context and framing. Approaches such as political modernisation and NEG have proved the statement to be correct, since they paint a fairly different picture of the same instrument by emphasising different characteristics. In a similar manner, there always appear to be a counter argument for the positive qualities of contracts. For example, some may state that contracts are legally enforceable while others can object to such a statement by arguing that in reality the disputes are rarely taken to court. Moreover, critical scholars might perceive contracts as reinforcing the triumph of neoliberalism, while others might see them as enabling the emergence of collectivism, of which collective labour contracts are a good example.

Although versatility can be seen as the overarching quality of contracts that contributes to the instrument's attractiveness, there is also another appealing characteristic that appears in the discussion above; contracts provide the comfort of familiar dullness in a similar manner like law. They are easy to endorse since they are (probably) the oldest tool defined by the law, and certainly the most used. They also follow the same logic as law by providing norms which are protected by the judicial system. Moreover, even their physical appearance and language resemble law. Thus, contracts could be defined as 'the second-best option'. This conclusion concerns above all a 'market failure' of the regulation in force, i.e. situations where legislation and self-commitments have inflicted disappointments.

The next chapter covers Community Benefit Agreement (CBA), which represents one segment of environmental contracts. They can be categorised as community-polluter environmental contracts, but state agencies may also be involved in, or even a party to, such agreements. Next, I will outline what kind of instrument CBA is understood to represent, and why this type of contractualisation emerges in a specific and topical area of environmental law, i.e. in natural resource exploitation. This chapter's general discussion of environmental contracts' attractiveness is mirrored against CBA's development, which is meant to provide context for the instrument within the wider developments emerging in environmental law. Since CBA has not been, to my knowledge, implemented here in Europe, we need to look at developments elsewhere. The focus is on Canadian and Australian CBAs because, firstly, utilisation of CBAs has been the most popular in these countries, and secondly, their societal and legal systems are more comparable to European counterparts.

2.3 Contractualisation in the Mining sector: what and why?

Mining is one of the expanding issue areas where contracts have been used. This is not surprising, since voluntary approaches have been a characteristic practice of the mining industry for a long time.[61] There is no broad consensus about the role of CBAs or their ability to deliver the improvements they promise.[62] Many writings have in fact provided fairly critical reflections on the topic, and empirical findings show that in some cases the agreements have created significant disadvantages for communities.[63] However, scholars seem to be more inclined to see

[61] Karamanos (n 24), p. 71 Sullivan, *Rethinking Voluntary Approaches in Environmental Policy*, p. 132–135.
[62] Cameron Gunton and Sean Markey, "The Role of Community Benefit Agreements in Natural Resource Governance and Community Development: Issues and Prospects," *Resources Policy* 73 (2021): 1–11.
[63] Ibid., p. 3; Ciaran O'Faircheallaigh, "Explaining Outcomes from Negotiated Agreements in Australia and Canada," *Resources Policy* 70 (2021): 1–7, p. 1.

CBA use as a beneficial rather than disadvantageous practice, since even negatively-framed CBA literature focuses on identifying how the instrument can be improved, rather than simply rejecting it as an unsuitable instrument for extractive governance.[64]

During the same period as VEAs emerged on a larger scale in Europe in the early 1990s, mining-related contracts started to generate serious interest in the Canadian North.[65] CBA, also commonly known as Community Development Agreement (CDA) and, especially in Canada, as Impact Benefit Agreement (IBA), is an instrument that has been used in various jurisdictions for various purposes, and its application is expanding.[66] In Australia and Canada CBAs are negotiated in relation to nearly all major mining projects, and their application is increasing in the United States, New Zealand, and developing countries.[67] Although their use has been the most popular in the mining sector, CBAs have also been used in other major natural resource exploitation projects.[68]

CBAs are typically over hundred pages long documents[69] but they do not have a widely accepted definition. This is mostly explicable by the instrument's goal of being situation-specific. *O'Faircheallaigh*'s Canadian-based description, however, succeeds in capturing most of the essential ideas of CBA. According to him, IBAs are "negotiated agreements which seek to shape the occurrence and distribution of costs and benefits arising from major projects – and which embody the support of Indigenous entities (landowners, communities, governments) for the project concerned" and they "[seek] to reduce negative impacts that would otherwise occur, particularly by providing protection beyond that already available under legislation for Indigenous values and cultural heritage and for the bio-physical environment".[70]

As this description shows, CBA is not merely a benefit-sharing mechanism, as its name suggests, although the compensation dimension is an important part of the instrument. CBA embodies the support of the entities that are somehow tied to the land in the vicinity of the planned resource extraction project. From this perspective, CBA does not differ from commu-

[64] Gunton and Markey (n 62), p. 7.

[65] Emilie Cameron and Tyler Levitan, "Impact and Benefit Agreements and the Neoliberalization of Resource Governance and Indigenous-State," *Studies in Political Economy* 93, no. 1 (2014): 25–52, p. 25.

[66] Andy Hira and James Busumtwi-Sam, "Improving Mining Community Benefits through Better Monitoring and Evaluation," *Resources Policy* 73 (2021): 1–11, p. 3.

[67] Ciaran O'Faircheallaigh, "Aboriginal-Mining Company Contractual Agreements in Australia and Canada: Implications for Political Autonomy and Community Development," *Canadian Journal of Development Studies* 30, no. 1–2 (2010): 69–86, p. 69.

[68] Ciaran O'Faircheallaigh, "Social Equity and Large Mining Projects: Voluntary Industry Initiatives, Public Regulation and Community Development Agreements," *Journal of Business Ethics* 132, no. 1 (2015): 91–103. p. 97; Jennifer Loutit, Jacqueline Mandelbaum, and Sam Szoke-Burke, "Emerging Practices in Community Development Agreements," *Journal of Sustainable Development Law and Policy* 7, no. 1 (2016): 64–96, p. 65.

[69] There are articles that *inter alia* business contracts commonly include, such as definitions, interpretations, principles, objectives, project description, implementation, term, termination, mediation and arbitration. However, they may also involve more exceptional articles concerning financial participation, employment, workplace conditions, education and training, wildlife compensation, inuit engagement in project stewardship etc. See. Kivalliq Inuit Association and Agnico Eagle Mines Limited, Whale Tail Project Impact and Benefit Agreement, 2017. http://kivalliqinuit.ca/wp-content/uploads/2019/02/Whale-Tail-IIBA-2017-06-15.pdf (10.5.2024); Qikiqtani Inuit Association and Baffinland Iron Mine Corporation, "The Mary River Project Inuit Impact and Benefit Agreement", 2018. https://www.qia.ca/wp-content/uploads/2018/10/Mary-River-IIBA-Signed.-October-22-2018.pdf (10.5.2024).

[70] Ciaran O'Fairchellaigh, "Impact and Benefit Agreements as Monitoring Instruments in the Minerals and Energy Industries," *The Extractive Industries and Society* 7 (2020): 1338–46, p. 1339.

nity-polluter environmental contracts that have been used in Europe. In other words, their aim is to gain the local community's acceptance for the planned project, i.e. build legitimacy for it. However, unlike its European 'counterparts', CBA is strongly tied to indigenous rights. It has mainly been used in regions that suffer from structural challenges originating from a colonial past, but any "affected community", even non-indigenous ones, can be a party to CBA.[71]

Additionally, *O'Faircheallaigh*'s description highlights that CBA is an instrument that enables the reduction of a project's negative impacts on culture and environment. There can be clauses that provide, for example, higher quality standards for wildlife and aquatic ecosystems.[72] Since CBA may include clauses that aim to limit a mining project's negative impacts on its bio-physical environment, the agreement can be seen to represent an indirect environmental contract, similar to supply chain contracts. However, because CBA's regulatory object is a big natural resource project that is directly connected to its environment, CBA can also be seen as a contract that is directly environmental. It should be noted, however, that CBA's economic (or benefit-sharing) dimension is still given strong emphasis because economic concerns are of significance for all the regulators involved, i.e. public sector, the mining company, and the community.[73]

As is the case for environmental contracts, CBA can be either legally binding, which seems to be more common, or more like 'self-commitment' in its nature. Similarly, it may be interpreted as a private law or public law instrument, but this depends on the CBA's content and parties to it. It has often been perceived as a legal or quasi legal document that could be enforced.[74] In Canada and Australia, CBAs are often categorised as private contracts that rely on private law and can be enforced through courts.[75] Moreover, CBA utilisation can occur either on a voluntary basis, or national or subnational laws may require it, which has affected the legal characterisation of the instrument.[76] However, perceiving CBA merely as a subject of private law is misleading. It can in fact provide for an increased role of the state in environmental management.[77] Moreover, the instrument can be used to implement the law, and a public agency may be heavily involved in agreement-making process, or even be a party to the agreement.[78]

Typically, the incentives for the use of CBA relate to concerns about the inadequacy of existing statutory frameworks and the mistrust that Aboriginal and non-governmental participants feel towards the government.[79] These incentives have the same roots as environmental contracting in the case of community-polluter environmental contracts: issues with acceptance, traditional participation and state's inactiveness.

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[71] The World Bank, "Mining Community Development Agreements Source Book" (The World Bank, 2012), p. 19–20. Kotilainen, Peltonen, and Reinikainen (n 1), p. 1.

[72] Affolder (n 29), p. 156.; see also Chris Hummel, "Impact Benefit Agreement Transparency in Nunavut," *Cahiers de Droit* 60, no. 1 (2019): 367–94.

[73] Juha M Kotilainen et al., "Kaivossopimukset – sisällöt, funktiot ja riskit," *Ympäristöpolitiikan ja -oikeuden vuosikirja* XII (2019): 7–41. p. 20–25. Kristi D. Bruckner, "Community Development Agreements in Mining Projects," *Denver Journal of International Law and Policy* 44, no. 3 (2016): 413–28, p. 426.

[74] Hummel (n 72), "Impact Benefit Agreement Transparency in Nunavut," p. 380; Hira and Busumtwi-Sam (n 66), "Improving Mining Community Benefits through Better Monitoring and Evaluation," p. 3.

[75] O'Fairchellaigh (n 70), p. 1338–1339.

[76] Bruckner (n 73), p. 422.

[77] Affolder (n 29), p. 175.

[78] Loutit, Mandelbaum, and Szoke-Burke (n 68), "Emerging Practices in Community Development Agreements," p. 65.

[79] Affolder (n 29), p. 162; Neil Craik, Holly Gardner, and Daniel McCarthy, "Indigenous – Corporate Private Governance and Legitimacy: Lessons Learned from Impact and Benefit Agreements," *Resources Policy* 52 (2017): 379–88, p. 387.

In other words, minority groups are seeking greater autonomy. However, it seems that in Europe distrust is directed in equal measure towards mining companies and the government and administrative authorities.[80] In the context of CBA, inadequate statutory frameworks and consequent mistrust are usually the result of the differing interests between governmental/public entities and the affected community. For example, a municipality or government might be more interested in positive economic impacts, while stakeholder groups may focus on the mitigation of the negative impacts of mining, commitment to compensation and the improvement of dialogue.[81]

These incentives have affected the development of CBA in a way that can be described as a NEG-like approach, in which higher levels of collaboration, participation, integration, and adaptability are demanded. For example, in Finnish research, CBA is framed as collaborative governance.[82] Collaborative governance is one of NEG's applications that prescribes how NEG operates.[83] It emphasises negotiation-based problem-solving and the objective of finding consensus.[84] These viewpoints underline the importance of public participation simultaneously as they show that there are gaps in participation possibilities and public participation's perceived effectivity. CBA ideally provides a platform for continuous collaboration, from negotiations to monitoring and feedback mechanisms.[85] Moreover, participation of the parties should be effective, since agreement-making requires consensus between all the signatories to be built.

This kind of governance framing is understandable in the societal context of a Nordic welfare state, but the governance categorisation always depends on how CBA is implemented. Some researchers have suggested that while CBA embodies an example of complex interactions between public regulation and private arrangements, it is useful to examine CBAs workings through the lens of private governance.[86] However, this notion concerns mainly those CBAs in which governments play no role.[87] Either way, both governance perspectives highlight that CBA implementation might help in building legitimacy for a planned project because it enables a local community's procedural and substantive expectations to be fulfilled.[88]

Another incentive for contracting in the mining sector is CBA's legally binding and situation-specific nature. This situates CBA at the junction of discretionary industry initiatives and public regulation by providing flexibility and certainty. Again, the attractiveness of CBAs mirrors that of (community-polluter) environmental contracts. Communities' and public interest groups' disappointment with discretionary industry initiatives, such as CSR and different performance standards, stems from the lack of effective enforcement mechanisms, since it has been proven that there exists a substantial gap between companies' rhetoric and delivery.[89] Public regulation, on the other hand, is seen to be inflexible and unresponsive, especially to the specific circumstances of communities, and it can be exposed to industry capture.[90]

[80] Kivinen, Kotilainen, and Kumpula (n 1), p. 175.
[81] Kotilainen, Peltonen, and Reinikainen (n 1), p. 7. Kotilainen (n 73), p. 25.
[82] Kotilainen, Peltonen, and Reinikainen (n 1), p. 8.
[83] Holley (n 46), p. 747–748.
[84] Juha M Kotilainen, Lasse Peltonen, and Rauno Sairinen, "Yhteistoiminnallinen ympäristöhallinta erityispiirteineen ja sovelluksineen," *Ympäristöpolitiikan ja -oikeuden vuosikirja* XIV (2021): 7–47. p. 36.
[85] The World Bank (n 71).
[86] Craik, Gardner, and McCarthy (n 79).
[87] Ibid., p. 386.
[88] Ibid., p. 387; Kotilainen, Peltonen, and Reinikainen (n 1), p. 8.
[89] O'Faircheallaigh (n 68), p. 93–95.
[90] Ibid., p. 92.

As a conclusion to the first part of this article, it can be said that CBA's attractiveness mirrors that of environmental contracts in many respects, even though the societal and legal contexts in which CBA emerges differ. In CBA discussion, situation-specific, collaborative and binding characteristics are emphasised, which has focused the conversation on their acceptability (or legitimacy). These reflections, however, in many ways follow the same argumentation model as community-polluter environmental contracts, which is one segment in the broad category of environmental contracts. Thus, this part of the article has shown that contractualisation that occurs in the mining sector is not an isolated phenomenon occurring in only one area of environmental law. Contracts are rather spreading to new areas of environmental law as the views on what constitutes good governance are developing into more multifold directions.

Another conclusion that can be made in the light of the analysis above is that there are two main reasons for contracts' attractiveness. Firstly, contracts are flexible in many ways. They enable the traditional regulatees to become regulators in addition to being able to adapt to different contexts, whether the context is public or private, conflicted or cooperative, implementation of defined goals or creation of new objectives. The second main reason is that contracts enable the creation of law-like norms. This is perceived to help in integrating the agreed goals and policies into parties' practice. On the other hand, it enables legal enforcement in cases where the agreed rules are not followed.

The next part of this article takes a step back by examining a phenomenon, or rather a theoretically anchored framework, called 'proceduralisation'. Contractualisation can be seen as one of the many forms of proceduralisation. Thus, proceduralisation provides explanations on a broader legal and societal level as to why a contract, or more specifically CBA, is an attractive regulatory instrument. The next part begins with the introductory chapter outlining my understanding of proceduralisation. The two subsequent chapters cover two well-known theories (or strategies), namely reflexive law and responsive regulation, that fall under proceduralisation.

3. Proceduralisation

3.1 Understanding proceduralisation

Here I will develop my understanding of proceduralisation. In some legal texts, where the term proceduralisation is referred to, the scope has been limited to court proceedings.[91] It has been used in a similar manner as contractualisation; it encapsulates the observation that proceedings are increasing in number and assuming a greater part of social and legal life. However, proceduralisation can also be seen as a more diverse, theoretically anchored approach, and this is the understanding this article assumes.

The term proceduralisation or 'procedural approach' has been used to create a bridge to the procedural theories that take the difficulties of regulating pluralistic and complex modern societies as their starting points.[92] Thus, these accounts usually begin with the reference to Habermas who advocated a procedural turn. He argues that due to the increased complexity of the modern welfare state the form and the goals of the law should be retrieved from practices and

[91] See f.ex. Karl-Heinz Ladeur, "Coping with Uncertainty: Ecological Risks and the Proceduralization of Environmental Law," in *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organisation* (Wiley, 1994), 299–336.; Christian Pigache, *Les Évolutions Du Droit : Contractualisation et Procéduralisation* (Université de Rouen, 2004).

[92] Black (n 6); Mark Dawson, *New Governance and the Transformation of European Law : Coordinating EU Social Law and Policy*, Cambridge Studies in European Law and Policy (Cambridge University Press, 2011), p. 103–163.

preferences of citizens.[93] Hence, the goals must be articulated *directly* by those who are subject to legal procedures, i.e. the addressees of the law must be the ones who define the scope and boundaries of the programs being advanced in their name.[94] These views highlight the tension which is occurring between general legal norms and the complex reality of social circumstances. Environmental issues are perhaps the most obvious context in which the tension occurs.

The exact meaning of proceduralisation is ambiguous. Dawson has used proceduralisation as an analytical framework to conceptualise new governance methods in the context of EU social law. In his work proceduralisation highlights a common challenge or tension to which European law has had to respond, namely the functional and territorial complexity of the European polity, and the regulatory environment within which new governance methods must live.[95] Howarth has, in a similar but narrower manner, used the term to encapsulate the development of EU environmental legislation in which mandatory environmental standards are supplemented by regulatory mechanisms that allow greater national and local flexibility and discretion in determining what particular substantive outcomes need to be realised.[96] Black has referred to proceduralisation when observing the shift to procedures and participation. She uses proceduralisation as an umbrella term to indicate the strategies of 'decentring' and inducement which include Habermas's discursive democracy and Teubner's reflexive law.[97]

Based on the earlier applications of proceduralisation I understand the term as an analytical starting point that highlights the tension between traditional democratic rule-making and the need for flexibility while simultaneously underlining the shift to procedures, participation, and inducement. Thus, proceduralisation is a broad umbrella under which exist different theories that provide more detailed diagnosis of the regulatory dilemma and recommendations for how to solve it. One of these theories is reflexive law, which is perhaps the most frequently connected to proceduralisation.[98] Reflexive law aims for a certain form of democratisation by emphasising the need for law to focus on the regulation of self-regulation.[99] Another theory that reflects proceduralisation is responsive regulation that provides a different but complementary viewpoint regarding CBA's attractiveness.[100] It highlights CBA's ability to enable the development of a local community's regulatory agency. The next two chapters will analyse CBA first through reflexive law and thereafter through responsive law.

3.2 CBA as a reflexive law mechanism

The emergence of reflexive law dates back to the time when scholars saw the law as one among several other modes of political regulation.[101] German legal scholar *Gunther Teubner* analysed the evolution of modern law in the 1980's and he called the emerging kind of legal structure 'reflexive law' which is one perspective on the process of social and legal change.[102] In other

[93] Habermas (n 5), p. 408.
[94] Ibid., p. 408–410.
[95] Dawson (n 92).
[96] William Howarth, "Aspirations and Realities under the Water Framework Directive: Proceduralisation, Participation and Practicalities," *Journal of Environmental Law* 21, no. 3 (2009): 391–418, p. 396–398.
[97] Black (n 6).
[98] Black (n 6); Dawson (n 92).
[99] Rogowski (n 8), p. 38–39. Gaines (n 8), p. 8–9.
[100] See Black (n 6), 598.
[101] Peer Zumbansen, "Law after the Welfare State: Formalism, Functionalism, and the Ironic Turn of Reflexive Law," *The American Journal of Comparative Law* 56, no. 3 (2008): 769–808, p. 787.
[102] Gunther Teubner, "Substantive and Reflexive Elements in Modern Law," *Law & Society Review* 17, no. 2 (1983): 239–85.

words, reflexive law is built on the observation that the complexity of society is increasing in terms of differentiation (social change) at the same time as the scope of governmental regulation of the different areas of society is dramatically expanding (legal change[103]). Reflexive law is an attempt to *conceptualise* a new model of law which could be adequate in addressing the challenges of these changes.[104] Moreover, reflexive law emphasises the need for law to focus on regulation of self-regulation.[105] Therefore, *Teubner's* analysis highlights that the perception of law's rationality needed to be diversified and reflexive law was one way of achieving that.

Even though reflexive law has earned plenty of criticism over the years, it has been used in various areas of law. Especially in environmental law, reflexive law has been used to analyse different self-regulatory models, such as reporting and certification systems and CSR, but also to observe environmental law more broadly.[106] Additionally, in other fields of law, such as labour law and human rights, reflexive law has received scholarly attention.[107]

Central for *Teubner's* reflexive law is the attempt to separate the procedural rationality of law from the purposive or 'substantive' rationality that was characteristic for the social welfare state. Thus, reflexive law does not impose the substantive ends to be achieved, but rather induces social subsystems (such as economics, politics, the marketplace and the law itself) towards those ends by using indirect strategies.[108] Since social processes happen in and between semi-autonomous social subsystems[109], law becomes a system for the coordination of these actions.[110] Therefore, in reflexive law *Teubner* melds *Luhmann*'s system theoretical ideas, which emphasise the aspect of coordination between social subsystems, and *Habermas*' arguments about the need for democratisation of social subsystems to institutionalise procedural legitimation.[111] He summarised his theses by stating that:

"(I) Reflexion within social subsystems is possible only insofar as processes of democratization create discursive structures within these subsystems. (2) The primary function of the democratization of subsystems lies neither in increasing individual participation nor in neutral-

[103] Teubner describes this 'welfare-regulatory intervention'. Ibid., p. 240.
[104] Zumbansen (n 101), p. 793.
[105] Rogowski (n 8), p. 38–39.
[106] Eric W. Orts, "Reflexive Environmental Law," *Northwestern University Law Review* 89, no. 4 (1995 1994): 1227–1340; Gaines (n 8); Karin Buhmann, "The Danish CSR Reporting Requirement as Reflexive Law: Employing CSR as a Modality to Promote Public Policy Objectives through Law," *European Business Law Review* 24, no. 2 (2013): 187–216; Ronan Kennedy, "Rethinking Reflexive Law for the Information Age: Hybrid and Flexible Regulation by Disclosure," *George Washington Journal of Energy and Environmental Law* 7, no. 2 (2016): 124–39; Ngaya Munuo and Jan Glazewski, "The Implementation of REDD+: Self-Governance through the Lens of Reflexive Law," *Carbon & Climate Law Review* 2018, no. 2 (2018); Adaeze Okoye, "Reflexive Law and Section 172 Reporting: Evolution of Social Responsibility within Company Law Limits?," *European Business Law Review* 32, no. 3 (2021): 501–20.
[107] Rogowski (n 8),; Karin Buhmann, "Neglecting the Proactive Aspect of Human Rights Due Diligence: A Critical Appraisal of the EU's Non-Financial Reporting Directive as a Pillar One Avenue for Promoting Pillar Two Action," *Business and Human Rights Journal* 3, no. 1 (2018): 23–46; Eliah English, "Section 54 of the Modern Slavery Act 2015 and the Corporation," *SOAS Law Journal* 6, no. 1 (2019): 87–142; Hazel Conley, "Gender Equality in the UK Public Sector: Is Reflexive Legislation the Way Forward?," in *Gender and Diversity Studies: European Perspectives*, ed. Ingrid Jungwirth and Carola Bauschke-Urban (Verlag Barbara Budrich, 2019), 71–87.
[108] Teubner (n 102), p. 254–255.
[109] Teubner's semi-autonomous social subsystems seem to build on the concept of semi-autonomous social fields that was originally developed by Moore. See Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study," *Law & Society Review* 7, no. 4 (1973): 719.
[110] Teubner (n 102), p. 242.
[111] Gaines (n 106), p. 4–5.

izing power structures but in the internal reflexion of social identity".[112]

Unfortunately, in later writings, *Teubner* gives more emphasis on systems theories which has, according to *Gaines*, led to reflexive law missing essential social elements it previously included.[113] In systems theories the concept of autopoiesis, which is a biological concept referring to self-production, is essential.[114] In the autopoietic line of thinking, systems are separated from their environment, and the environment consists of other systems; in other words, the autopoietic concept includes a system-environment dichotomy.[115]

Teubner talks about the law's radical closure and openness which both occur simultaneously because information and interference (or 'coupling') combine operative closure of the law with cognitive openness to the environment. This means that law produces an 'autonomous legal reality' by generating knowledge within the system itself. It orients its operations according to this autonomous reality, without any real contact with the outside world. However, the law is still connected with its social environment, but this is possible through mechanisms of interference which operate between systems. Thus, in autopoiesis the emphasis shifts from design and control to autonomy and sensitivity to the environment; in other words, a shift happens from planning to evolution. However, he notes that the proceduralisation focus does not mean the abandonment of substantive legal norms.[116] Moreover, reflexive law itself has a purposive orientation.[117]

However, to return to *Gaines*'s critique, these developments of reflexive law led to its missing the two essential social elements: within-system democratisation and between-system coordination. These elements must be restored if reflexive law strategies are to work properly in the field of environmental law, especially with regard to sustainable development.[118] He explains this conclusion by saying:

> "So long as system coordination is properly understood to include exchange of information and interaction between and among different social systems, specifically including all levels of government and affected nongovernmental individuals and organizations, reflexive law reinforces democratic participation and the opportunity for environmental policy to incorporate important non-scientific values into the environmental protection side of sustainable development and important noneconomic values into its human development side."[119]

In other words, the multiple initiatives of sustainable development can neither operate reliably nor with legitimacy in the absence of shared information and mechanisms of social response to that information.[120] *Gaines's* attempt to restore reflexive law to its original form is in my opinion well justified, since modern environmental law

[112] Teubner (n 102), p. 273.
[113] Gaines (n 106), p. 9.
[114] Gunther Teubner, *Law as an Autopoietic System*, European University Institute Series (Oxford/Cambridge: Blackwell Publishers, 1993).
[115] See more about the paradoxical nature of the system-environment dichotomy: Andreas Philippopoulos-Mihalopoulos, "Towards a Critical Environmental Law," in *Law and Ecology: New Environmental Foundations*, ed. Andreas Philippopoulos-Mihalopoulos, 2011, 18–38.
[116] Teubner, (n 114), p. 64–67.
[117] Black (n 6), p. 603.
[118] Gaines (n 106).
[119] Ibid., p. 24.
[120] Ibid., p. 9. Black also seems to criticise reflexive law partly on this same basis as Gaines, since she seems to categorise reflexive law as thin rather than thick proceduralisation, the thick proceduralisation reflecting Habermas's ideas of discursive democracy. Black (n 6).

grapples constantly with information and interaction challenges.

So, what does all this have to do with environmental contractualisation and more specifically with CBA? As I have argued before, contractualisation can be seen as a result of proceduralisation, i.e. contractualisation is one form in which proceduralisation appears. Reflexive law as described above, on the other hand, is a certain type of proceduralisation strategy that aims to explain how society has changed and how we should address these changes. Thus, reflexive law can help to understand and conceptualise why CBA is an attractive instrument for the mining sector, which is currently facing major acceptance issues. As the legitimacy of the mining project is the purposive orientation incorporated into CBA, i.e. its aim seems to be to create a structure that *enables* legitimacy to be built, the 'original' reflexive law and *Gaines*' elaborated version of it seem to be the most fruitful analytical bases.

Many writings related to mining regulation highlight the tension between general regulation and local regulatory needs, which is seen to be one of the root causes of the legitimacy issues being faced by mining projects. CBA's 'tailor-made', flexible character emphasises this notion. The local circumstances differ significantly, as do the reasons for the opposition. Moreover, the extractive projects and their effects vary greatly. In reflexive law language, the local communities and their needs are differentiating, which results in increased complexity (societal change). This has been taken into account by legislators, since nowadays local people have an increasing number of participatory possibilities available to them (legal change).

However, the participation possibilities have not resulted in legitimacy since they are not felt to be effective, and the multiplicity of different participation procedures has resulted in confusion among local people about what information is relevant in each procedure.[121] Thus, the relationships between mining companies and local communities are hard to regulate with direct strategies. This conclusion is in line with Teubner's belief that direct regulation may actually present problems of motivation because it engenders resistance by the regulated system.[122] Therefore, it seems more suitable to focus on procedure and communication, as reflexive law does, because they are the essential ingredients of legitimate decisions in democratic societies.[123]

If CBA is approached as a reflexive law mechanism, its democratising and coordinative elements can be traced.[124] By following this approach it can be perceived that CBA formulates a knowledge and norm-generating social subsystem, i.e. it allows societal actors, in this case the mining company and the local community, to interact and formulate norms based on learning.[125] Technically speaking, this means that CBA includes negotiations, monitoring and feedback mechanisms.[126] In more abstract terms, these 'processes of democratisation' ideally enable 'the creation of discursive structures within the subsystem'.

The between-system coordination is a slightly more ambiguous and speculative part of this approach. At the same time as CBA formulates a knowledge and norm-generating social subsystem, it can be seen to constitute a mechanism of social response that responds to the information a local community provides. As has been noted in many cases related to sustainable develop-

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[121] Sonja Vilenius, "Kaivossopimus – vaikuttavampaa osallistumista ja lisää legitimiteettiä?," *Ympäristöjuridiikka* 3–4 (2022): 34–58, p. 42.
[122] Teubner (n 114), p. 91.
[123] See Gaines (n 106), p. 23.
[124] Okoye has regarded CRS semi-autonomous subsystems as a result of the law's limitation. Okoye (n 106).
[125] See Buhmann (n 106), p. 202.
[126] See The World Bank (n 71).

ment, noneconomic values are hard to incorporate into corporations. CBA provides a platform and a mechanism that enables a mining company's representatives to acquire knowledge about local needs, and this information can be responded to by making contractual clauses that result in changes in the company's behaviour. Thus, the 'local' information could be incorporated into the mining company's 'coding' since the main focus of CBA is the company's actions, i.e. what the company can do to satisfy local people so that they sign the agreement. However, it should be kept in mind that "reflexive law will always need to be supplemented with substantive law determined through legislation and regulation by public authorities"[127]

3.3 CBA and agency building

The deregulation debate was not only a starting point for the theory of reflexive law, but also for the theory of responsive regulation that was developed by *Ian Ayers* and *John Braithwaite* in the 1990s in Australia. Responsive regulation, as well as reflexive law, aims at providing a solution to the challenge of how to regulate modern society. However, the scholars approach the issue from different viewpoints. Both theories emphasise the role of self-regulation, but while *Teubner's* main focus is on law and its general development in society, *Ayers* and *Braithwaite* are more interested in the interplay and the mix of public and private regulation concerning corporations and industries.[128] Consequently responsive law builds on the polycentric understanding of governance where important roles in governance are played by non-governmental actors, in this case corporations/industry.[129] In other words, the viewpoint in responsive regulation is the regulators and the regulatees, while in reflexive law it is the systems, not the intra-system actors per se.

Responsive regulation builds on *Braithwaite's* conclusion that companies may sometimes be motivated by making money, and at other times by being socially responsible; responsive regulation argues that this goodwill of actors should not be undermined by the strategy of punishment.[130] Thus, responsive regulation theorises how a plurality of motivations for compliance interact by establishing an escalating enforcement pyramid which generates a synergy between punishment and persuasion.[131] In *Ayer's* and *Braithwaite's* model enforcement pyramid self-regulation is categorised as persuasion and it constitutes the lowest and first part of the pyramid, and enforced self-regulation is the second part of the pyramid.[132] This mirrors responsive regulation's idea that the company has the opportunity to create tailored self-regulation and, in case of enforced regulation, to create self-regulation that holds institutionally-recognised position. If this opportunity is ignored or wasted, however, the government provides harsher standards.[133]

Since different motivations and self-regulation's primacy sit at the core of the theory, the approach highlights how self-regulation *enables* companies to build regulatory agency. Self-regulation's enabling role means that if a company or industry does not make their private regulation work, this very behaviour channels the regulatory strategy to greater degrees of government in-

[127] Gaines (n 106), p. 24.
[128] Ian Ayers and John Braithwaite, *Responsive Regulation: Transcending the Deregualtion Debate*, Oxford Socio-Legal Studies (Oxford University Press, 1992), p. 3.
[129] See Holley and Shearing (n 9), p. 166.
[130] Ayers and Braithwaite (n 128), p. 24.
[131] Buhmann (n 107), p. 26–27; Ayers and Braithwaite (n 128).
[132] Ayers and Braithwaite (n 128), p. 35–39. CBA can be categorised as either self-regulation or enforced self-regulation depending on the legal context.
[133] Ibid., p. 101.

tervention.[134] Thus, not all companies/industries have the same degree of regulatory agency. As responsive regulation argues, regulation should be responsive to those companies/industries that are willing to go through the agency building process, i.e. to create credible and effective self-regulation that should also be responsive to the context in which private regulators are less-motivated.

Before proceeding to the analysis of how CBA enables regulatory agency building, I will add a heuristic framework[135] called 'smart regulation' to the puzzle, since it strengthens responsive regulation by invoking the strategy of surrogate regulator harnessing.[136] *Gunningham's*, *Grabosky's*, and *Sinclair's* smart regulation builds on responsive regulation, but it considers a broader range of regulatory actors, namely quasi-regulators/third parties such as public interest groups and professional bodies.[137] Smart regulation suggests, according to *Gunningham*, that "markets, civil society and other institutions can sometimes act as surrogate regulators and accomplish public policy goals more effectively, with greater social acceptance and at less cost to the state."[138] Thus, smart regulation holds that third parties have an important and potentially beneficial role in rule-making and the 'tripartism' should not be just a strategy for implementing laws and regulations.[139]

The reason for this kind of elaboration was the substantial body of empirical research revealing that there is a plurality of regulatory forms, with numerous actors influencing the behaviour of regulated groups in a variety of ways.[140] Moreover, smart regulation was developed to address in particular the increasingly complex environmental problems during the period in which the dominance of neoliberalism had resulted in the relative weakening of formerly powerful environmental regulators, i.e. the state.[141] Hence, essential for smart regulation is the construction of multi-instrument mixes in which different regulatory instruments complement each other's weaknesses, and the engagement of a variety of first- (government), second- (business), and third-party (commercial and noncommercial) participants in the regulatory process.[142]

However, there are preconditions for the use of a smart regulation approach. Firstly, the circumstances in which second and third parties should be mobilised, and which members of these parties should be involved, should be carefully considered.[143] Additionally, smart regulation's empowerment principle suggests that the government has an important role in creating the necessary preconditions for second or third par-

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134 See Ayers and Braithwaite (n 128), p. 4.

135 Van Gossum et al. have suggested that smart regulation should be understood rather as a heuristic framework than a coherent theory. Peter Van Gossum, Bas Arts, and Kris Verheyen, "'Smart Regulation': Can Policy Instrument Design Solve Forest Policy Aims of Expansion and Sustainability in Flanders and the Netherlands?," *Forest Policy and Economics* 16 (2012): 23–34, p. 24.

136 Neil Gunningham, "Enforcing Environmental Regulation," *Journal of Environmental Law* 23, no. 2 (2011): 169–201, p. 197.

137 Neil Gunningham, Peter Grabosky, and Darren Sinclair, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998); Robert Baldwin, Martin Cave, and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice*, 2nd ed. (Oxford University Press, 2012), p. 265–266.

138 Gunningham (n 136), p. 174.

139 Although, responsive regulation notes the importance of third-party involvement in regulation, the role of tripartism is limited mainly to preventing corruption and capture of authorities by punishing regulatory agencies who fail to punish guilty firms. Ayers and Braithwaite (n 128), p. 54–57.

140 Neil Gunningham and Darren Sinclair, "Smart Regulation," in *Regulatory Theory: Foundations and Applications*, ed. Peter Drahos (ANU Press, 2017), 133–48, p. 133–134.

141 Ibid., p. 134.

142 Neil Gunningham and Darren Sinclair, "Integrative Regulation: A Principle-Based Approach to Environmental Policy," *Law & Social Inquiry* 24, no. 4 (1999a): 853–96, p. 853.

143 Ibid., p. 878.

ties to assume a greater share of the regulatory burden, because their participation in regulatory processes is unlikely to arise spontaneously. In other words, government should act principally as a catalyst or a facilitator.[144]

When reading CBA through the brief review of responsive and smart regulation provided above, another aspect of the instrument appears. While reflexive law highlighted the democratising and coordinating elements of CBA, responsive and smart regulation raises how this type of regulation enables the development of the second party (mining company) and the third party (local community) agency in regulating. The mining company and local community become 'surrogate' regulators who have the power to make decisions when they take part in the agreement-making processes. Their positions differ significantly from those they have in the licensing and EIA processes due to this decision-making power, even if this decision-making happens within the frameworks that the government has provided.

The frameworks and preconditions, however, are essential in order to empower the parties. For example, in Australia the government has 'catalysed' agreement-making between indigenous people and mining companies by enacting the Native Title Amendment Act 1998, which introduces legally binding Indigenous Land Use Agreements (ILUAs), and nowadays they have become frequently used instruments.[145] Meanwhile in Finland, Kotilainen et al. have argued that the key reason why CBA has not been established here yet is the lack of the institutionalised form.[146] CBA's institutionalised position would most likely facilitate the coercion of the company by the local community in the desired direction. Additionally, it should be noted that CBA should not be seen as a disconnected part of the regulatory mix concerning mining projects; rather it should be noted that there occurs a dependence between CBA and other regulatory tools.

4. Conclusions

This article sought to contextualise CBA with respect to the regulatory developments that are emerging in Europe, especially in the field of environmental law. As the discussion above shows, the development of contractualisation is emerging in different European countries. Contracts have been used in various ways in diverse issue areas. However, this development seems to be overlooked as contracts are increasingly used today as one narrowly focused part of the regulatory frameworks that exist in different sectors of environmental law. CBA can be seen as one embodiment of such development. It represents one segment of environmental contracts, namely community-polluter contracts, that have already been used in some European countries.

Contractualisation can be seen as a result of the more widely recognised shift towards procedures. Proceduralisation covers the strategies that aim to develop procedures that enable the regulatees to become the regulators. Contracts can be seen as such, since ideally they include negotiations in which the parties to the contract become the regulators who decide what they can agree on. Therefore, CBA does not represent as unorthodox a regulatory solution as it seems at first glance, rather in many respects it can be seen to reflect the developments that are already occurring in Europe. In other words, the disuse of CBA does not seem to be a result of CBA's unsuitability for European contexts. A more credible conclusion is that this disuse results from the

144 Ibid., p. 876–877.
145 Catherine Howlett and Rebecca Lawrence, "Accumulating Minerals and Dispossessing Indigenous Australians: Native Title Recognition as Settler-Colonialism," *Antipode* 51, no. 3 (2019): 818–37, p. 825–826.
146 Kotilainen, Peltonen, and Reinikainen (n 1), p. 8.

fact that the continent's mining activities have been decreasing over the years.

The second aim of this article was to lay out why CBA appears to represent an attractive regulatory solution in tackling social acceptance issues. Contractualisation analysis outlined the reasons referred to when endorsing the application of environmental contracts. Consequently, it highlighted the two overarching qualities that make environmental contracts, including CBA, promising regulatory tools.

The first quality is flexibility. It illustrates contracts' adaptability in different contexts and for different purposes. The context may be public or private, conflicted or cooperative. The purpose may be to implement defined goals or create new objectives. Flexibility also explains the difficulty of deciding whether the contract is a preferable regulatory instrument, since this aspect of contracts allows them to be used and framed in multiple ways. The second quality is their law-like character. Contracts follow the same logic as law, i.e. providing norms which are protected and recognised by the judicial system. This appears to help in integrating the agreed goals and policies into the parties' practices. When the two qualities are combined, we begin to understand why environmental contracting has expanded in use. Contracts provide a familiar solution for the diverse 'market failures' of the regulation in force. Ideally, they combine the advantages of legislation and self-commitments.

The discussion of proceduralisation deepened the analysis. It provided a more in-depth examination of why the above-mentioned qualities are seen to be beneficial by analysing CBA through the theories of reflexive law and responsive regulation. The reflexive law approach highlights CBA's democratising and coordinating elements. The former can be traced to CBA's ability to formulate a knowledge and norm-generating social subsystem, i.e. it allows societal actors, in this case the mining company and the local community, to interact and formulate norms based on learning. Negotiations, monitoring and feedback mechanisms enable interaction and learning by creating discursive structures within CBA. The coordinating element of CBA enables local information to be incorporated into a mining company's 'coding' since the company has agreed on the norms and is (legally) bound by them. Therefore, CBA's flexibility allows (but does not guarantee) democratisation in a similar way as its law-like character allows (but does not guarantee) coordination.

Responsive and smart regulation, on the other hand, raised CBA's ability to strengthen the development of a mining company's and a local community's agency in regulating. The mining company and local community become surrogate regulators who have the power to make decisions when they take part in the agreement-making processes. This position differs significantly from licensing processes where especially the local community is a participator rather than a regulator. CBA's flexibility and law-like character emphasise the parties' agency in regulating since they allow the parties to create binding norms.

This article has portrayed CBA as a possibility and therefore it does not provide critical reflections on the instrument. The purpose is not to deny the risks that this type of instrument presents. Rather the purpose is to provide a general contextualisation that also allows for critical and more detailed accounts in Europe-based legal writings in the future.