

## The use of private law instruments as a new trend of international environmental law: the case of biofuel promotion

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### Abstract

The purpose of this work is to demonstrate how private law instruments, such as contracts and certification schemes used in the context of biofuel promotion may contribute to more effective compliance to International Environmental Law. In order to understand the role of private law instruments in the protection of the environment some traditional regulatory instruments used in International Environmental Law are analysed as to point out their weak effectiveness and in order to explain the need for new regulatory instruments. Afterwards, some examples in which private law instruments are being used to guarantee environmental protection and how they may be able to “overtake” these traditional regulatory difficulties is also analysed.

Traditionally, regulatory instruments used by International Environmental Law were based on command and control measures, economic incentive systems and information-based systems. These regulatory instruments are frequently seen as not effective for many different reasons. Basically, because their goals aren't always implemented worldwide, for instance the United States of America opted in not following the Kyoto protocol. The lack of effectiveness can also be explained because they can not be directly applied to private parties. Therefore, it is possible to see an increasing use of regulatory instruments that motivate environmentally favourable behaviour rather than just instruments that regulate or sanctionate them.

As market based instruments, private law instruments such as contracts and certification schemes have already been to some extent used before as an instrument for International Environmental Law compliance. For example, in the domain of biodiversity conservation, biodiversity prospecting contracts are used in order to establish rules for researches and commercial use of natural resources. These biodiversity contracts are signed normally between a host country rich in biodiversity and

in general a pharmaceutical company and they have been considered as an effective way of assuring equitable benefit sharing among all parties directly involved in the contract and even parties indirectly involved such as traditional communities that share their traditional knowledge for these researches. These contracts enforce compliance towards the obligations set out by the Convention on Biological Diversity as they guarantee that private companies which explore natural resources are more directly “regulated”.

As well, we can see Contract law being used in the Climate Regime, these contracts are known as carbon contracts or Emission Reduction Purchase Agreement. They are agreed among private companies with the main objective of assisting companies in buying or selling carbon offsets in the Carbon Market. So, these contracts assure private companies more legal certainty and stimulate more investment in emission reduction projects.

In the Biofuel promotion context, the production of biomass for biofuels may have both negative and positive effects to the environment. Since there isn't yet an internationally recognized and harmonized regulatory system for their production, what we see is the increasing number of international private contracts and private voluntary certification schemes being designed with the promise of guaranteeing environmental protection as well as social and economical development. These contracts establish the sustainable use of the environment as a mandatory condition to continue their economic activities. The nature of these contracts vary considerably but normally they consist in investment agreements, such as joint ventures and concessions.

However, these contractual relations should be carefully analysed in order to see if these private contracts may be considered as “an instrument for international cooperation” in the sense that the partnership between the companies result gains for all parties involved, from the local biomass producer until to the

multinational company that invested in the development of biofuel. So if well agreed, private investment contracts can also be used to insert rules that obligate environmental protection and other sustainability goals. The surveillance of these “promised” sustainable commitments turns out to be complex and quite difficult since these contracts have many privacy principles that can not be easily trusspased.

Considering the humankind interets involved it is important to also establish effective tools capable of ensuring more transparency in order to maximize the contribution of an investment contract towards environmental friendly actions. Therefore, considering the necessity of contract and commitment surveillance, certification schemes appear to have an increasing importance to assure environmental protection. There are many different kinds of certification iniciatives being negotiated at national, international, and European Community level. These certifications schemes establish sustainable critereas that must be considered in order to prove that a certain biofuel is environmentally safe. However, these iniciatives are quite descoordinated and not at all harmonized, specially in what concerns developed and developing countries point of view.

Just to illustrate this scenario, the European Union Directive on Renewable Energy promotion was adopted in 23 april 2009, and sets out in article 17 some sustainable critereas that must be fullfield so that only biofuels can count for European Members national targets. These critereas are applied for all biofuels, whether they are produced within European Union or imported from outside the EU.

The European commission encourages industry, governments and NGOs to set up

voluntary certification schemes. So, these certificates must guarantee that all the biofuels sold under the label are sustainable. All schemes have to have an independent auditors which will inspect and report the whole production chain, from the farmer to the trader and the fuel supplier. Briefly, there are two kinds of criteras set out by the directive, one concerning the biofuel capacity of GHG savings and another criteria is realted to land use, so it explains which types of land can not be used to produce biofuels.

However, even if this sustainable critereas seem to be a good solution to the surveillance problem earlier mentioned, it must be pointed out that the proliferation of different technical criterias of sustainability are creating more difficulties especially with regard to the legitimacy of their elaboration and to the possibility of creating commercial trade discrimination barriers. These certification schemes will be more effective if they are internationally harmonized and recognized, but in order to achieve that harmonisation it is necessary to have a broad participation of diferent stakeholders in the elaboration of these critereas.

In conclusion, what we see is that the use of contracts can contribute to the construction of a hybrid regulatory system, formulated by both public and private regulatory instruments and that this hybrid system may ensure a more effective protection of the environnement since its norms are directly applied by private sectors. Therefore, even if the use of hybrid public-private regulation in International Environmental Law is still in an early stage it is already possible to conclude that private law will have an important role to prevent future environmental damages.