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RESEARCH HANDBOOK ON
**Transnational
Labour Law**

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RESEARCH HANDBOOKS IN INTERNATIONAL LAW

4. A 'dialogic' approach in perspective

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1. INTRODUCTION

An approach characterized by the involvement of various non-State actors in decision-making processes is becoming increasingly evident in different areas of international law. International law requires, through procedural devices and substantial norms, that a variety of non-State actors may have a say in matters governed by international law. This is what I call a dialogic approach. Thus, State authorities are asked to provide non-State actors with adequate information in order to allow them to express their views in one way or another before a decision is taken. Their involvement is seen as a factor reinforcing legitimacy.¹ As a matter of fact, access to public goods and services has increasingly been associated with the guarantee of safeguards that deal with the provision of information and effective public participation.² They allow for interactions and exchanges between actors with differing legal status.

International environmental law and human rights law favour this approach. With its emphasis on social dialogue, transnational labour law presents similarities with the dialogic approach that has emerged in other fields of international law. An important antecedent of the 'dialogic' approach can be seen with the system of tripartism in the International Labour Organization, whereby representatives of governments, employers and workers have elaborated and adopted international labour conventions and recommendations since 1919.³ Over the years, the ILO has promoted 'social dialogue' at various levels within and among countries, in what it describes as 'both a means to achieve social and economic progress and an objective in itself, as it gives people a voice and stake in their societies and workplaces.'⁴ This constitutes one facet of the dialogic approach. In other areas it may be broader, involving more actors and an alternative range of issues. As will be seen, international environmental law has, over time, made this approach central to its functioning.

¹ Laurence Boisson de Chazournes, *Changing Roles of International Organizations: Global Administrative Law and the Interplay of Legitimacies*, 6(2) *INTERNATIONAL ORGANIZATIONS LAW REVIEW* 655 (2009).

² See UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 15: The Right to Water, para 12(c)(iv), January 20, 2003, E/C.12/2002/11.

³ See ILO CONST, art. 3(1).

⁴ ILO, *SOCIAL DIALOGUE*, International Labour Conference, 102nd session, Report VI, 5 (2013).

2. PUBLIC PARTICIPATION GUARANTEES IN INTERNATIONAL ENVIRONMENTAL LAW AS VEHICLES FOR A DIALOGIC APPROACH

Interestingly, an early example of public participation guarantees is found in the Indigenous and Tribal Peoples Convention 1989 (No 169) of the ILO, which states that: 'Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity' (Art. 2(2)). This includes protection of their environment (see Arts 4(2), 7(3) and 4, 13(2) and 15) and these peoples should be permitted to freely participate at all levels of decision-making in bodies responsible for policies and programmes that concern them (Art. 6(1)(b)).⁵ The non-binding UN Declaration on the Rights of Indigenous Peoples (2007) echoes and expands upon these participation rights.

The Rio Declaration on Environment and Development of 1992,⁶ in its Principle 10, has systematized this approach with its reference to three necessary pillars, ie access to information, participation in decision-making, and access to justice. More pointedly, the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('Aarhus Convention') is entirely devoted to this very subject,⁷ and its objective is 'to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.' Other treaties make similar provision for public participation, such as the African Convention on the Conservation of Nature and Natural Resources adopted under the aegis of the African Union, which provides that:

The Parties shall take the measures necessary to enable active participation by the local communities in the process of planning and management of natural resources upon which such communities depend with a view to creating local incentives for the conservation and sustainable use of such resources.⁸

At the Rio+20 Conference on Sustainable Development of 2012, States reiterated the importance attached to the implementation of these principles for the promotion of sustainable development.⁹

⁵ See also ILO, APPLICATION OF CONVENTION NO. 169 BY DOMESTIC AND INTERNATIONAL COURTS IN LATIN AMERICA: A CASE BOOK 192 (2009), http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-normes/documents/publication/wcms_123946.pdf.

⁶ United Nations Declaration on Environment and Development, August 12, 1992, UN Doc A/CONF.151/5/Rev.1(1992),/CONF.151/ on Environment and Development').

⁷ Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, art. 1, June 25, 1998, UNTS 2161 ('Aarhus Convention').

⁸ African Convention on the Conservation of Nature and Natural Resources, Revised, art. XVII(3), July 11, 2003, 1001 UNTS 3.

⁹ Outcome of the United Nations Conference on Sustainable Development (Rio+20), 'The future we want,' para. 13, July 27, 2012, UN Doc A/RES/66/288.

Access to information is a fundamental element of a democratic society.¹⁰ In the context of the Aarhus Convention, the right of access to information, which finds its expression in Article 4, presents a formulation that offers a rather broad margin of appreciation. Notably, environmental information may be requested from public authorities without necessarily demonstrating the existence of an 'interest.'¹¹ What renders the Aarhus Convention particularly interesting is that the definitions of both 'environmental information' and 'public authority' under the Convention are broader than most national standards.¹² The Convention, however, also provides for a number of exceptions from the access to information regime. In particular, Member States have the discretionary power to refuse to disclose requested information, whenever the disclosure 'would adversely affect,' in the State's view, interests covered by the exemptions. Even though the Convention provides that these grounds for refusal should be interpreted restrictively, the grounds are worded in a broad way and are numerous. In particular, the affected interests may include international relations, intellectual property rights, and the confidentiality of industrial and commercial interests.¹³

The right of the public to participate in governmental decision-making processes concerning the issuance of permits for activities likely to have an impact on the environment (Art. 6) is also worth noting. Article 6 imposes upon the Parties the obligation to inform their citizens early in the decision-making process of any initiative falling under the list of activities contained in Annex I of the Convention. Furthermore, the public has the right, in accordance with Article 6, paragraph 7, to submit comments, information, analysis, or opinions considered as relevant for the concerned decision-making process.¹⁴

3. OTHER AVENUES FOR A DIALOGIC APPROACH

International human rights law has also shed light on the understanding of these procedural safeguards. Indeed, it is particularly interesting to note that a number of international human rights bodies have begun to require that indigenous populations be consulted when they are affected by works related to natural resources. For example, in the *Belo Monte Dam* case, the Inter-American Commission on Human Rights granted precautionary measures in favour of indigenous communities in the Xingu River basin, stipulating that construction of the dam should be halted until the concerns of the

¹⁰ See Peter H Sand, Information Disclosure as an Instrument of Environmental Governance, 63(2) HEIDELBERG JOURNAL OF INTERNATIONAL LAW 487 (2003).

¹¹ Aarhus Convention, art. 4(1)(a).

¹² Id., art 2(3) and (2) respectively. See, in particular, UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE 5, 32, 35 (2000) <http://www.unece.org/fileadmin/DAM/env/pp/acig.pdf>.

¹³ Aarhus Convention, art 4(4). See also Maria Lee and Carolyn Abbott, The Usual Suspects? Public Participation under the Aarhus Convention, 66(1) THE MODERN LAW REVIEW 80, 90 (2003).

¹⁴ Sean T McAllister, The Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters, 9 COLORADO JOURNAL OF INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 187, 189 *et seq* (1998).

indigenous people in the area had been addressed. These concerns were related to population displacement and the flooding of lands.¹⁵ Similarly, in the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* case, the African Commission found in favour of the indigenous Endorois community, and in its judgment stressed that the Kenyan government must consult with the Endorois in clarifying the nature and content of their rights over Lake Bogoria.¹⁶ The African Commission considered that the right to be adequately consulted was a component of the right to development. It even challenged the decision of the UNESCO World Heritage Committee, which inscribed Lake Bogoria on the World Heritage List without involving the Endorois in the decision-making process and without obtaining their 'free, prior and informed consent.'¹⁷

Another instrument for promoting a dialogue is the impact assessment procedure.¹⁸ It allows for access to information and public participation to be implemented, notably through public consultation initiatives. Indeed, the importance of such mechanisms comes into sharp focus when one considers the potentially vast impact that investment projects can have. Through an impact assessment procedure, those potentially affected are given the opportunity to express their views, have access to the necessary information on the planned activity and to be consulted.¹⁹

¹⁵ *Belo Monte Dam*, Case MC-382-10 (Inter-American Commission on Human Rights, April 1, 2011).

¹⁶ *Centre for Minority Rights Development (Kenya) and Minority Group International on Behalf of Endorois Welfare Council v Kenya*, Case 276/03 (African Commission on Human and Peoples' Rights, November 25, 2009).

¹⁷ RESOLUTION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, THE PROTECTION OF INDIGENOUS PEOPLES' RIGHTS IN THE CONTEXT OF THE WORLD HERITAGE CONVENTION AND THE DESIGNATION OF LAKE BOGORIA AS A WORLD HERITAGE SITE No 197, para. 9 (October 24–November 5, 2011).

¹⁸ On the subject of impact assessment, the International Court of Justice has remarked:

that it is up to each State to determine, under its domestic legislation or the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the project involved and its likely adverse impact on the environment as well as the need to exercise due diligence in conducting such an assessment. The Court also considers that an environmental impact assessment must also be conducted prior to the implementation of the project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.

Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay), 2010 ICJ 14, para. 205.

¹⁹ In this regard, see also Convention Concerning Indigenous and Tribal Peoples in Independent Countries, September 5, 1991, ILO Convention No. 169 and observations of the Committee of Experts on the Application of Conventions and Recommendations for Member States having ratified it. In 2012, the International Organization of Employers made a comment in relation to the consultation requirements of the Convention, noting, inter alia, the 'difficulties, costs and negative impact that the failure by [a number of] States to comply with the obligation of consultation can have on the projects undertaken by both public and private enterprises.' See for example, observations relating to Guatemala, in ILO COMMITTEE OF EXPERTS ON THE

In the case of *Tătar v Romania*, the European Court of Human Rights emphasized the need to respect the principle of impact assessment to protect the rights of the complainants, namely their right to family life where there has been damage to the environment.²⁰ In the same decision, the Court stressed the importance of public participation. It considered that the complainants should have been informed of the risks and dangers posed to them following an environmental accident that had occurred at a nearby gold mining plant.²¹

In the assessment of the provision of benefits of a given planned activity, the status of the beneficiaries and their specific demand for access to public goods and services should also be evaluated. The latter aspect has not yet been sufficiently analysed. Non-discrimination and equality have their part to play in terms of the rights and responsibilities involved. Procedural safeguards regarding information and participation can help to address these issues and lead to corrective action.

Dispute resolution procedures can also allow intervention by the public. Participation may occur through the submission of *amicus curiae* briefs, where persons not party to a dispute can submit information on points of law or facts during the legal proceedings. The increasing influence of international human rights law as regards access to water has helped to justify intervention in this way. Thus, whereas water management raises issues of public interest in civil society, tribunals have allowed the intervention of *amicus curiae*.²² These tribunals have equally emphasized in their awards the public interest attached to the object of disputes over concession contracts, noting that several international law issues, including questions relating to human rights, were at stake.²³

Procedural safeguards provide conduits for those affected people to identify and prevent infringements to these commitments. In addition, the satisfaction of these human needs cannot be isolated from health and environmental concerns, and indeed a

APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, 831–832, International Labour Conference, 102nd Session, Report III(1A) (2013).

²⁰ *Tătar v Romania*, ECHR Judgment of January 27, 2009, paras 110–112.

²¹ *Id.*, para. 113.

²² See for example, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v Argentina*, ICSID Case No ARB/03/19, Order in response to a petition for transparency and participation as *amicus curiae* (19 May 2005); *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v Argentina*, ICSID Case No ARB/03/17, Order in response to a petition for participation as *amicus curiae* (17 March 2006); *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No ARB/05/22, Procedural Order No 5 (26 March 2007).

²³ For example, one tribunal has noted:

The factor that gives this case particular public interest is that the investment dispute centers around the water distribution and sewage systems of urban areas in the province of Santa Fe. Those systems provide basic public services to hundreds of thousands of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favor of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve.

Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v Argentina, *id.*, para. 18.

comprehensive approach that links these concerns together is required.²⁴ Public participation further underlines the need for coherence.

4. SOCIAL RESPONSIBILITY AND TRANSPARENCY AS MEANS FOR PROMOTING A DIALOGIC APPROACH

A heterogeneous ensemble of public, private and hybrid actors is increasingly involved in the provision of global public goods and services. The membership of the concerned structures is varied: they may be public, semi-public or private actors. It is important to recognize that denomination as an 'organization' or 'body' is inappropriate for these structures that operate within a minimal legal and organizational framework. Rather, it would be more appropriate to speak of a 'network' since these structures do not resemble a formal legal order from which they would draw the legitimacy of their existence or their standards. Another characteristic concerns the delegation of regulatory powers by governments to national agencies (in the field of banking supervision for example), which form components of these networks.²⁵

Although non-obligatory, standards and norms formed by such groups are for the most part implemented, often by the national authorities of a given country. To this end, political or economic pressure may be exerted. Thus, certain international organizations can encourage their members to adopt these standards, and this is evident with the International Monetary Fund (IMF), which has a strong influence in the field of financial regulation. Moreover, the Financial Stability Forum (now called the Financial Stability Board)²⁶ drew up an exclusive list of standards required for an 'efficient and predictable financial system.' Quite often the impact of these standards transcends the framework of those entities that have authored them. These regulatory tools are used as vehicles for promoting new values at the international level.²⁷

The Global Compact²⁸ is a prominent example in this regard. Launched in July 2000 by then UN Secretary-General Kofi Annan, the Global Compact asks companies to 'embrace, support and enact' a set of core values relating to human rights, labour standards, anti-corruption and the environment. In this context, the Global Compact brings together companies, UN agencies, the International Labour Organization, NGOs and others to form partnerships and build a fairer global economy, which is more amenable to the integration of human, social and environmental values. The ten

²⁴ A call for 'policy coherence' across fields was made by the World Commission on the Social Dimension of Globalization; see WORLD COMMISSION ON THE SOCIAL DIMENSION OF GLOBALIZATION, *A FAIR GLOBALIZATION: CREATING OPPORTUNITIES FOR ALL*, 168 (2004).

²⁵ See also Diller, Ch 23 in this volume.

²⁶ See Financial Stability Forum Press Release, 'Financial Stability Forum re-established as the Financial Stability Board,' (April 2, 2009), http://www.fsforum.org/press/pr_090402b.pdf.

²⁷ See also Ebert, Ch 8 in this volume.

²⁸ UN Global Compact, July 26, 2000, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>. See also Laurence Boisson de Chazournes and Emmanuelle Mazuyer eds, *Le Pacte mondial des Nations Unies 10 ans après/The Global Compact of the United Nations 10 Years After*, (2011).

principles of the Global Compact are inspired by documents around which there exists a universal consensus in the international community: the Universal Declaration on Human Rights (1948), the International Labour Organization's (ILO) Declaration on Fundamental Principles and Rights at Work (1998) and the Rio Declaration on Environment and Development (1992). Accordingly, some companies have decided to adopt a set of principles.²⁹ Drawing inspiration from the Global Compact principles, codes of conduct have been drawn up by a number of multinational enterprises.³⁰

The Global Compact rests on the principles of transparency and accountability of business enterprises. The obligation to provide information and to be accountable to the different actors involved in the Global Compact must allow for a dialogue on the promotion of the values and principles as contained in the Compact.

This dialogue is regarded as a driving force for inciting the enterprises to be loyal to these values and principles. The importance given to the mechanism of the said promotion as a means of fulfilling the Global Compact has been criticized, mostly because of the absence of consequences when the adherents do not respect their commitments. In order to respond to these critiques, an additional condition has been attached to the commitment signed by the business enterprises, namely the necessity to submit reports on a regular basis.³¹ However, will the obligation to submit reports be sufficient? This question touches the very spirit of the Global Compact and affects the strategies designed to fulfil it. Is promotion possible? Is control possible simply by challenging business enterprises and their reputation? Should not the legal responsibility of the enterprises be at stake and should it not also play a role? Such were and are the challenges of the Global Compact. This trend towards corporate social responsibility has been fortified by the UN Human Rights Council's 2011 endorsement of the UN Guiding Principles on Business and Human Rights, the second of which entails the obligation of States to 'set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.'³²

²⁹ See for example, The Nestlé Corporate Business Principles (June 2010) <http://www.research.nestle.com/asset-library/documents/corporate-business-principles-en.pdf> and Total Ethics Charter (April 2011), http://www.total.com/static/en/medias/topic1607/CSR_2006_principles_commitments.pdf.

³⁰ See the Code of Conduct of the Total Group (2007), <http://www.ng.total.com/media/publications/code-of-conduct.pdf> and the Code of Business Conduct of the Nestlé/Group (2008), http://www.nestle.com/asset-library/Documents/Library/Documents/Corporate_Governance/Code_of_Business_Conduct_EN.pdf. For an earlier critical overview of codes of conduct, see Janelle Diller, A Social Conscience in the Global Marketplace? Labour Dimension of Codes of Conduct, Social Labeling and Investor Initiatives, 138(2) INTERNATIONAL LABOUR REVIEW 99–129 (1999).

³¹ New participants are obliged to submit their Communication on Progress (COP) within one year of joining the initiative and subsequent reports in annual intervals thereafter. See UN Global Compact Policy on Communicating Progress (Updated March 1, 2013), http://www.unglobalcompact.org/COP/cop_deadlines.html.

³² UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2011), Resolution 17/4 of the Human Rights Council (16 June 2011). See Trebilcock, Ch 6 in this volume.

As for the Global Compact, four principles speak directly to labour standards. In particular, these concern the obligation to ensure freedom of association and the right to collective bargaining, the elimination of forced labour, the abolition of child labour and the elimination of discrimination in employment and occupation. It is important to note that these principles are rooted in the ILO's Declaration on Fundamental Principles and Rights at Work, which in turn is linked to the core ILO Conventions and has been itself adopted by States, businesses and employees around the world. The Declaration on Fundamental Principles and Rights at Work is considered to contain rights and principles having a universal character, regardless of whether a given State has ratified any of the ILO Conventions.³³ In addition to the reporting obligation described above, in the context of labour standards under the Global Compact, a number of other mechanisms have been established to encourage the realization of these standards. One such conduit for the propagation of the labour principles is the UN Global Compact Labour Working Group, which was set up in 2008 and merged with the Human Rights Working Group in 2013 to reflect the fact that labour rights are human rights.³⁴ Moreover, the ILO Helpdesk for Business is a resource designed to assist businesses in aligning their activities with international labour standards, including those elaborated under the Global Compact. It has an advisory capacity and is not intended to adjudge compliance.³⁵

One can also point to the Voluntary Principles on Security and Human Rights.³⁶ In response to calls from the US, UK, businesses in the extractives sector, as well as from non-governmental organizations, these principles are intended to guide companies in the extractive sector to maintain safety and security in their operations whilst preserving respect for human rights and fundamental freedoms. They have been divided

³³ ILO AND INTERNATIONAL TRAINING CENTRE, *INTERNATIONAL INSTRUMENTS AND CORPORATE SOCIAL RESPONSIBILITY: A BOOKLET TO ACCOMPANY TRAINING ON PROMOTING LABOUR STANDARDS THROUGH CORPORATE SOCIAL RESPONSIBILITY*, 4 (2007). The core ILO Conventions include: (i) Freedom of Association and Protection of the Right to Organize Convention (No. 87) 1948; (ii) Right to Organize and Collective Bargaining Convention (No. 98) 1949; (iii) Forced Labour Convention (No. 29) 1930; (iv) Abolition of Forced Labour Convention (No. 105) 1957; (v) Minimum Age Convention (No. 138) 1973; (vi) Worst Forms of Child Labour Convention (No. 182) 1999; (vii) Equal Remuneration Convention (No. 100) 1951; (viii) Discrimination (Employment and Occupation) Convention (No. 111) 1958. There is an evident link between the four major themes of these eight core conventions and the four principles on labour of the Global Compact.

³⁴ UN Global Compact website, <http://www.unglobalcompact.org>. The UN Global Compact Labour Working Group aims to:

- (i) raise the profile, relevance of, and respect for the four labour principles among UN Global Compact companies and networks;
- (ii) help ensure a consistent approach is taken to the application and understanding of the four principles, drawing on ILO, ITUC, and IOE information and experience;
- (iii) develop tools, information exchange, and forums for UN Global Compact companies' engagement on the four labour principles.

see ILO, *THE LABOUR PRINCIPLES OF THE UNITED NATIONS GLOBAL COMPACT: A GUIDE FOR BUSINESS*, 8 (2008).

³⁵ *Id.*

³⁶ Voluntary Principles on Security and Human Rights (2000) <http://www.voluntaryprinciples.org>.

into three categories: risk assessment, interactions with public security and interactions with private security. In practice, these principles have been adopted in a Memorandum of Understanding concluded between five firms doing business in Indonesia, the regulatory body BPMIGAS, which is the entity in charge of regulating gas and petroleum in Indonesia, and local police forces. The Colombian Ministry of Defence has included the obligation to comply with these principles in an agreement between the company Ecopetrol and the Colombian armed forces. A working group (Information Working Group on the Voluntary Principles) is responsible for collecting information on the application of the principles.³⁷

Furthermore, we may also highlight the Equator Principles and the Extractive Industries Transparency Initiative. These relate to the increasing importance given to environmental protection and socio-economic questions in projects funded by international financial institutions. They aim to encourage certain private actors to respect, in particular, certain standards in the private banking or extractive industries in the mining sector. The Equator Principles were adopted in 2003 by ten private banks, notably ABN AMRO Bank and Rabobank (Netherlands), Barclays and the Royal Bank of Scotland (UK), Citigroup (US), Crédit Lyonnais (France), Crédit Suisse (Switzerland), HVB Group and WestLB AG (Germany), and Westpac Banking Corporation (Australia).³⁸ The International Finance Corporation (IFC), a member of the World Bank, was present during negotiations and supported their adoption. These principles incorporate the operational policies of this institution. The IFC does not have direct control over compliance with these principles. However, according to Principle 1,³⁹ when funding is sought for a project, a bank which has signed the Equator Principles must apply criteria established by the IFC.⁴⁰ Depending on the circumstances, the

³⁷ See Information Working Group of the Voluntary Principles on Security and Human Rights (IWG) (2006), *Overview of Company Efforts to Implement the Voluntary Principles*, http://voluntaryprinciples.org/files/vp_company_efforts.pdf.

³⁸ Agence France Presse, *Ten Global Banks Endorse Socially Responsible Equator Principles* (June, 5 2003), <http://www.equator-principles.com/afp1.shtml>. Today, there are about 60 signatories to these principles. The banks which have adopted the Equator Principles must declare that their internal policies conform to the Principles and publish a report on the implementation of these principles (see Principle 10). The Principles are available at: http://www.equator-principles.com/documents/Equator_Principles.pdf.

³⁹ Principle 1 reads as follows:

When a project is proposed for financing, the EPFI will, as part of its internal social and environmental review and due diligence, categorize such project based on the magnitude of its potential impacts and risks in accordance with the environmental and social screening criteria of the International Finance Corporation (IFC) (Exhibit I).

⁴⁰ According to the IFC, *Policy and Performance Standards in Social and Environmental Sustainability*, 18 (January 1, 2012): As part of its review of a project's expected social and environmental impacts, IFC uses a system of social and environmental categorization to: (i) reflect the magnitude of impacts understood as a result of the client's Social and Environmental Assessment; and (ii) specify IFC's institutional requirements to disclose to the public project specific information prior to presenting projects to its Board of Directors for approval in accordance with Section 12 of the Disclosure Policy. These categories are: Category A Projects: Projects with potential significant adverse social or environmental impacts that are diverse, irreversible or unprecedented; Category B Projects: Projects with potential limited adverse social

borrower must make an assessment of the social and environmental consequences of a particular project.

The Extractive Industries Transparency Initiative is based on the adoption of transparency measures by State authorities.⁴¹ The signatory States undertake to make public information relating to payments made by companies involved in the mining sector. To date, more than 20 countries have signed the Initiative.⁴² The objective of these measures is to improve transparency in the public administration of certain countries. It is worth mentioning that the Initiative has made the observation that countries rich in natural resources are those most affected by conflict. Indeed, mineral resources in particular can trigger a conflict. The Initiative is based on the idea that transparency in public spending can help to prevent and resolve such conflicts.⁴³

These various endeavours involving the private sector and State authorities to commit to transparency and public participation facilitate a dialogic approach with other actors. The above exploration also reveals some of the facets of this approach.

5. A DIALOGIC APPROACH AND LEGITIMACY: A FEW REMARKS

These new modes of procedural and substantial regulation are illustrative of the evolution in legislative techniques for adapting law to the new challenges of international society. In fact, traditional channels in the production of rules in international law often fail to accommodate the needs of the diverse range of actors in the international community.⁴⁴ In this context, social responsibility and transparency mechanisms should not be perceived as convenient means of averting traditional obligations. They build on existing positive law, filling in gaps or voids where needed. They are not a panacea and must be rooted firmly within norms of positive law, both at the national and international level.⁴⁵

or environmental impacts that are few in number, generally site-specific, largely reversible and readily addressed through mitigation measures; Category C Projects: Projects with minimal or no adverse social or environmental impacts, including certain financial intermediary (FI) projects with minimal or no adverse risks; Category FI Projects: All FI projects excluding those that are Category C projects.

⁴¹ Extractive Industries Transparency Initiative (June 2003) <http://eiti.org/eiti>.

⁴² For example: Cameroon, Congo, Azerbaijan, Kazakhstan, Kyrgyzstan, Iraq and Nigeria.

⁴³ The UK Government played an important role in the promotion of the Initiative. The idea was launched by Tony Blair at the 2002 Global Sustainable Development Summit in Johannesburg. The G8 meeting at Sea Island in 2004 also supported this Initiative. However, transparency does not always mean better accountability and criticism has been levelled at this Initiative. See, for example, the interview of Arvind Ganesan of Human Rights Watch, *Mining For Disclosure* (May 20, 2009), <http://www.cchange.net/2009/05/20/mining-for-disclosure>.

⁴⁴ Laurence Boisson de Chazournes, *Standards et normes techniques dans l'ordre juridique contemporain: quelques réflexions*, in *INTERNATIONAL LAW AND THE QUEST FOR ITS IMPLEMENTATION – LE DROIT INTERNATIONAL ET LA QUÊTE DE SA MISE EN ŒUVRE: LIBER AMICORUM VERA GOWLLAND-DEBBAS*, 351–76 (Laurence Boisson de Chazournes and Marcelo Kohen eds, 2010).

⁴⁵ See also La Hovary, Ch 22 on soft law in this volume.

In simply combining incentives, research and more inclusive strategies, they are not sufficient to fulfil all of the required functions and needs of the rule of law. Control mechanisms and sanctions that accompany them play a corrective role but they still may not be enough and should be supplemented by other mechanisms drawn from international law.

The viability of this 'regulatory' phenomenon is linked to the major challenge of legitimacy. The decision-making processes of governments, international organizations and regional associations, intergovernmental officials and experts, private regulatory agencies, multinational companies or other actors must reflect this requirement. An effort should also be made to address the concerns of legitimacy.⁴⁶ One of these is the way in which a standard or a norm is developed. The problem of legitimacy and the legal effect of a standard or a norm lies not only in the question of whether States or other actors have adhered to it or not, or expressed consent to be bound to those standards. Rather, it consists in knowing how the standard or a norm was developed, that is to say who was involved in the decision-making process and who was excluded, and what expertise was taken into account. The principles of inclusiveness, transparency, public participation and access to information are indicators of more legitimate regulation.⁴⁷ The establishment of appropriate fora in which the interests of all actors are taken into account should be considered. In this way, a common solution or consensus that satisfies most concerned actors may be found. Reflections on legitimacy must also accompany the growing trend to resort to new forms of international regulation and decision-making processes. The dialogic approach needs to be rooted in these concerns for legitimacy.

⁴⁶ Jean D'Aspremont and Eric de Brabanère, *Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise*, 34(2) *FORDHAM INTERNATIONAL LAW JOURNAL* 190 (2011).

⁴⁷ On these principles, see Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 20(1) *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 23 (2009) and Benedict Kingsbury, Nico Krisch and Richard Stewart, *The Emergence of Global Administrative Law*, 68 *LAW AND CONTEMPORARY PROBLEMS* 15 (2005).