Standards and Guidelines: Some Interfaces with Private Investments

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7 Standards and Guidelines
Some Interfaces with Private Investments*

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7.1 Standards, Guidelines, Soft Law and Beyond

The concept of the standard is protean. It is understood as a means for driving up social conduct, yet some terminological confusion surrounds the notion. To illustrate this, it is sufficient to make reference to the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) of the World Trade Organization (WTO), which uses a panoply of terms to refer to international standards; for example, that they are concerned with 'norms', 'directives', or 'recommendations'. Other definitions either supplement or supplant the aforementioned. It is sometimes asserted that a particular category of actors has the power to lay down certain standards. This was the case when the Codex Alimentarius Commission was created by the World Health Organization (WHO) and Food and Agriculture Organization (FAO). One aspect of this Commission's mandate is to 'promote the coordination of all work on food standards undertaken by international governmental and non-governmental organisations [and] to determine priorities and initiate and guide the preparation of draft standards through and with the aid of appropriate organisations'.

Many standards are contained in negotiated instruments that have been adopted by states, be they treaties or resolutions of international

* This chapter is based on a contribution to L. Boisson de Chazournes and M. Kohen (eds), International Law and the Quest for its Implementation - Liber Amicorum for Vera Gowlland-Debbas, Leiden/Boston: Martinus Nijhoff, 2010.


2 See for example, Art. 3.2 of the SPS Agreement.


4 For an example of a standard included in an international treaty, see Annex III 'Risk Assessment' to the Cartagena Protocol on Biosafety to the Convention on Biological Diversity. For a discussion on the nature of the international standard in Annex III, see L. Boisson de Chazournes and M.M. Mbenga, 'A propos du principe du soutien mutuel. Les relations
organizations. Others are laid down by categories of instruments whose legal profile is far from easy to establish. Because of the difficulty in determining the exact legal profile of those instruments, in practice standards are often referred to as guidelines and vice-versa. Groups of states, international organizations and non-state actors are all involved in their elaboration and in the shaping of their content.

The temptation is often to group these standards and guidelines under the generic umbrella of the concept of soft law. Non-traditional methods by which international law is developed are often referred to under this notion because it is both flexible and malleable. The notion of soft law has a range of doctrinal meanings, particularly in respect of its criteria for formation of a norm or relativity to its content.

The notion of soft law can make it possible to include some but not all standards and procedures, unless one recognizes that all norms are capable of becoming soft law and that all actors in the international society contribute to the formation of soft law. If certain international standards display these characteristics, one is forced to conclude that soft law is not, mutatis mutandis, a process of international standardization. Soft law is not primarily technical in character. Yet, technicality is one of the characteristics of international standards.

5 The term ‘resolution’ encompasses here a wide range of instruments. It can include, for example, technical rules adopted by certain international organizations, which contain standards or may qualify as standards. See, for example, the International Health Regulations (2005) from the WHO adopted by the World Health Assembly in accordance with Article 21 of the Constitution of the WHO. On the particular nature of this instrument, see L. Boisson de Chazournes, ‘Le pouvoir réglementaire de l'Organisation mondiale de la santé à l'aune de la santé mondiale: Réflexions sur la nature et la portée du Règlement sanitaire international de 2005’, in Droit du pouvoir, pouvoir du droit: mélanges offerts à Jean Salmon, Bruxelles: Bruylant, 2007, pp. 1157–81.
8 The Preamble to the revised text of the International Plant Protection Convention highlights this. It stipulates that ‘... phytosanitary measures should be technically justified...’. The text of the Convention is available: https://www.ippc.int/index.php?id=convention&no_cache=1&L=0 (accessed 3 February 2012).
Furthermore, soft law is not in itself utilitarian. In order to fulfil a utilitarian function, instruments of soft law generally need to be supplemented by instruments of positive law. International standards have as their primary purpose to fix norms of ordinary social conduct. The Appellate Body of the WTO has strongly emphasized the utilitarian dimension of international standards in the context of international trade and, in particular, the Technical Barriers to Trade Agreement (TBT):

In several of its provisions, the TBT Agreement recognizes the important role that international standards play in promoting harmonization and facilitating trade. For example, Article 2.5 of the TBT Agreement establishes a rebuttable presumption that technical regulations that are in accordance with relevant international standards do not create unnecessary obstacles to trade ... The significant role of international standards is also underscored in the Preamble to the TBT Agreement. The third recital of the Preamble recognizes the important contribution that international standards can make by improving the efficiency of production and facilitating the conduct of international trade. The eighth recital recognizes the role that international standardization can have in the transfer of technology to developing countries.

If standards overlap in some cases with soft law, they have their autonomy as to their legal effects.

The structure of the international legal order in part explains the recourse to international standards. Even though international treaties and custom play a fundamental role, they still cannot cover the vast sphere of international activity. It is the same for instruments of national law, even if we take into account their possible extra-territorial effect. In those areas where little or no cover is provided by these instruments, one can observe the prevalence of documents such as guidelines, codes of conduct, directives or others which purport to play a role in the control of international activities. The need to adapt norms, the necessity to allow actors operating within different frameworks to formulate standards that meet common objectives and the increasing technicality of a number of subjects to be regulated all count among the requirements having their origin in the formulation of standards and guidelines.

11 For an example, see in this volume the chapter by S. Trevisanut.
These standards and guidelines have impacts on investments. Their interfaces with public investments have been a focus of attention since the end of the 1980s. As to their interfaces with private investments, the topic has not yet received much attention, although its importance is increasing on a daily basis. Standards and guidelines are resorted to as vehicles of socialization for promoting values. They also contribute to strengthening the accountability of the actors involved in investment activities.

7.2 Standards and Guidelines as Vehicles of Socialization

By socialization, what is targeted is the emergence, if not the rise to prominence, of values at the international level, especially through the negotiation of treaties, through customary law and through resolutions and decisions of international organizations. To this end, they must be respected and complied with. Standards and guidelines count among the vehicles used for ensuring their consideration and implementation.

The Global Compact is a prominent example in this regard.12 Launched in July 2000 by then United Nations (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.13 In this context, the Global Compact brings together companies, UN agencies, the International Labour Organization (ILO), nongovernmental organizations (NGOs) and others to form partnerships and build an economy that is more amenable to the integration of human, social and environmental values. The ten principles of the Global Compact are inspired by instruments and documents around which there exists a universal consensus in the international community: the Universal Declaration on Human Rights (1948), the ILO’s Declaration on Fundamental Principles and Rights at Work (1998), and the Rio Declaration on Environment and Development (1992). The recent influence of the Global Compact in extending the reach of human rights can be seen in the Human Rights Council’s (HRC) 2011 adoption of its Guiding Principles, the second of which entails the corporate responsibility to respect human rights.14 More directly, some

12 On the Global Compact, see L. Boisson de Chazournes and E. Mazuyer (eds), Le Pacte mondial des Nations Unies 10 ans après / The Global Compact of the United Nations 10 Years After, Travaux du CERIC, Bruxelles: Bruylant, 2011. See also in this volume the chapter by A. Bonfanti.

13 For further analysis, see S.W. Schill and M. Jacob, ‘Soft Law Instruments in International Investment Law’ (on file with author).

companies have decided to adopt their own sets of principles. Drawing inspiration from the Global Compact principles, codes of conduct have been drafted and published by a number of multinational companies.

Equally, one can point to the Voluntary Principles on Security and Human Rights. In response to calls from the US, the UK, businesses in the extractive sector and NGOs, these principles are intended to guide companies in the extractive sector to maintain safety and security in their operations while preserving respect for human rights and fundamental freedoms. They have been divided into three categories: risk assessment, interactions with public security, and interactions with private security. Additionally, the Implementation Guidance Tools (IGT) entails a preliminary module concerning stakeholder engagement, which provides steps to establish the foundation for the successful implementation of the three categories of principles. As examples, these principles have been adopted in a Memorandum of Understanding concluded between several firms doing business in Indonesia, the regulatory body BPMIGAS (the entity in charge of regulating gas and petroleum in Indonesia) and local police forces. A working group is responsible for collecting information on the application of the principles. In 2011, Ecopetrol agreed with the working group’s recommendation to support the Colombian Ministry of Defence’s Comprehensive Policy on Human Rights and International Humanitarian Law. Beyond representatives of the Colombian government, the working group’s current membership


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includes twelve companies, representatives of four foreign states and two civil society organizations.21

Furthermore, it is possible to 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 private banking or extractive industries in the mining sector.

The Equator Principles were adopted in 2003 by ten private banks, namely ABN AMRO Bank and Rabobank (Netherlands), Barclays and Royal Bank of Scotland (UK), Citigroup (US), Crédit Lyonnais (France), Crédit Suisse (Switzerland), HVB Group and WestLB AG (Germany) and Westpac Banking Corporation (Australia).22 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 1,23 when funding is sought for a project, a bank that has signed the Equator Principles must apply criteria established by the IFC.24 Depending on the


22 World Business Council for Sustainable Development, ‘10 Global Banks Endorse Socially Responsible Equator Principles’, 6 June 2003. Online. Available: http://www.enviroreporting.com/detail_press.phtml?act_id=460&username=guest@enviroreporting.com&password=9999&publish=Y&username=guest@enviroreporting.com&password=9999&groups=ENVREP (accessed 3 February 2013). 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).

23 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, categorise 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)’.

24 According to the IFC (30 April 2006) Policy and Performance Standards in Social and Environmental Sustainability: ‘18. 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 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’. 
circumstances, the borrower must make an assessment of the social and environmental consequences of a particular project. Following the 2006 adoption of the IFC's Performance Standards within its Sustainability Framework for investments undergoing credit review (revised in 2012),25 the NGOs, industry associations, clients and credit agencies that comprise the Equator Principles Financial Institutions (EPFIs) substantially revised these Principles to reflect the IFC's Performance Standards, resulting in Equator Principles II (EPII).26 Among EPII's more notable amendments is Equator Principle 10, which requires annual performance and progress reports.27

The Extractive Industries Transparency Initiative is based on the adoption of transparency measures by state authorities.28 The signatory states undertake to publish information relating to payments made by companies involved in the mining sector. To date, 16 countries are fully compliant with the Initiative, while another 21 countries are implementing the Initiative and working toward full compliance.29 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.30 One can view the ripple effect of this tide toward transparency in


30 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. Yet 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. Online. Available: http://www.change.net/2009/05/20/mining-for-disclosure (accessed 3 February 2013). To date, although the US has joined Norway as the second G8 country to sign EITI (it is currently classified by EITI as an ‘other’ country, as its participation has been limited to producing reports that disclose revenues from natural resource extraction), the
the mining sector in the US Security and Exchange Commission’s August 2012 decision to require publicly traded companies to disclose not only sums paid to local governments for resource access, but also proof that extracted resources did not emerge from conflict zones.31

7.3 Standards and Guidelines as Vehicles of Accountability

Standards also play a role in the accountability of actors who are expected to respect them in the course of their activities. Moreover, their adoption has been accompanied by control mechanisms to ensure that desired accountability is achieved. These are intended to make compliance standards more visible and transparent, while at the same time giving recourse to non-compliance sanctions. Some examples will help to illustrate the diversity of mechanisms used.

7.3.1 The Operational Guidelines of the World Bank and of the International Finance Corporation

The Operational Guidelines of the World Bank and of the IFC are a set of documents, prepared and adopted by the institutions’ management, which purport to direct the behaviour of employees in the preparation and implementation of projects financed by them. They include various social impact topics, such as conducting environmental impact studies, assessing the interests of indigenous peoples and evaluating the compensation to be awarded to people displaced due to a project. It also requires that local people are informed and consulted, being given a chance to express their views on a proposal. Compliance with operational guidelines is the hallmark that the institutions seek to achieve in their financing of projects.

The operational policies are of an internal nature within the Bank and are, for the most part, obligatory for its personnel in their dealings with countries seeking funding.32 This does not mean that operational policies have no

UK has refused to sign the Initiative. Encouragement from the EITI for the UK to reverse this decision is online. Available: http://www.energydigital.com/oil_gas/uk-refuses-extractive-industries-transparency (accessed 3 February 2013).


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external effect; on the contrary, in forging the behaviour of the Bank, the IFC and its partners in their relations during the design phases of a project, its evaluation and its implementation, have a positive external by-product. They are also increasingly used as benchmarks by civil society in their evaluation of international actors. This is especially important if one keeps in mind that the World Bank acts as a facilitator of projects involving public and private financial actors. Its operational policies can therefore influence the behaviour of other creditors who are involved in these projects. For their part, the IFC Performance Standards directly influence the private actors involved in a project. This marks a deliberate outgrowth of the IFC's transition from its former Safeguard Policies to its current Performance Standards, which shifted assessment from pre-appraisal toward a stage-by-stage approach that works with clients for the duration of the loan.33

The creation of the Inspection Panel of the World Bank in 1993 has helped to strengthen the scope and implementation of these policies, since they are, to some extent, applied as 'law' by the Panel. The policies and procedures also determine the competence of the Panel in that they define the conditions of admissibility. The Inspection Panel of the Bank is a unique institution in several respects.34

The Inspection Panel procedure allows groups of people (stakeholders) affected by a project financed by the Bank to request that the Panel evaluate and even make changes to the project. As part of the inspection, the Bank may be required to implement an action plan to address contentious issues. This procedure permits representatives of those affected by these projects to ask international policymakers to account for their decisions.35 The standards


34 The Inspection Panel was created in September 1993, through resolutions from the Board of Directors of the International Bank for Reconstruction and Development (IBRD No. 93-10) and the International Development Association (IDA No. 93-6), which provide the framework of its functions. The Panel was also provided with a procedure for operation in order to implement these resolutions. For the text of these instruments (in French), see L. Boisson de Chazournes, R. Desgagné, M.M. Mbengue, C. Romano (eds), Protection internationale de l'environnement: recueil d'instruments juridiques, Paris: Pedone, 2005, pp. 753-7. The Board of Directors also clarified the operational procedures in 1996 and again in 1999; for the text of these instruments (in English), see I.F.I. Shihata, The World Bank Inspection Panel: In Practice, 2nd ed., Oxford: OUP, 2000, pp. 320-8.

35 See L. Boisson de Chazournes, 'The World Bank Inspection Panel: About Public Participation and Dispute Settlement', in T. Treves, M. Frigessi di Rattalma, A. Tanzi,
of reference are the operational policies of the World Bank, whereby the behaviour of this financial institution is assessed and controlled through the abovementioned procedure to ensure compliance.

For its part, the IFC saw the need for a similar mechanism as the World Bank's Inspection Panel, and so in 1999 established its Compliance/Advisor Ombudsman to monitor its work as well as the work of the World Bank's Multilateral Investment Guarantee Agency. Once an individual or community affected by such projects files a complaint raising social or environmental issues, the Ombudsman has 120 working days to assess options for resolving the conflict. Partnering with neutral facilitators independent of the project-sponsoring agencies, the Ombudsman will conclude its assessment by either working with local stakeholders to devise a collaborative strategy for addressing underlying project issues, or else determine that such solutions are impossible. In the latter scenario, the case is transferred to the office's compliance division, which may conduct an audit through independent experts, followed by continued project monitoring.

7.3.2 The Fight Against Corruption and the Procedure for the Administration of Sanctions

Before 1996, corruption was perceived at the World Bank as a political problem not related to issues of economic development. One of the arguments for international economic organizations' reluctance to act stemmed from unwillingness to interfere in the domestic affairs of their members. By comparing corruption with cancer, which was reducing the effectiveness of development assistance, the President of the Bank at the time, James Wolfensohn, in 1996 made a decisive step toward putting the fight against fraud and corruption on the Bank's agenda. Corruption was perceived as a 'cost', reducing growth and development through the diminution of investments made at the domestic and international levels.

The World Bank then initiated a series of reforms that led to the establishment of directives for its borrowers for the prevention and fight against fraud and corruption in the projects that it finances. The Directives for the Fight Against

36 See Meyerstein, op. cit., pp. 22-3.
Corruption were adopted in 1999 with broad definitions of ‘corruption’ and ‘fraud’. In 2004, the Bank added ‘coercive practices’, ‘collusion’ and ‘obstructive practices’. These directives are referred to in a series of documents such as policies on procurement and the recruitment of consultants for investment projects financed by the Bank. They are incorporated by reference in the legal agreements drawn up for each project. They set out the fundamental obligations that borrowers and other recipients of loan funds must follow, in the hope that this will help to prevent acts of fraud and corruption as well as to eliminate such acts within the framework of projects financed by the Bank.

If a company or individual contests the allegations of the World Bank Integrity Vice Presidency or the sanction recommended by the Evaluation and Suspension Officer, the case is referred to the Sanctions Board of the World Bank (hereinafter ‘the Board’), which represents the second-level procedure for administering sanctions. The Board, which consists of three members of the World Bank and four people from outside the institution, examine the evidence against the company or individual, as well as the


41 Defined as ‘a misrepresentation or omission of facts in order to influence a procurement process or the execution of a contract’: ibid.

42 "[C]oercive practice" means harming or threatening to harm, directly or indirectly, persons, or their property to influence their participation in a procurement process, or affect the execution of a contract’: Guidelines: Procurement under IBRD Loans and IDA Credits, May 2004, at para. 1.14 and Guidelines: Selection and Employment of Consultants by World Bank Borrowers, May 2004, at para. 1.22.

43 ‘[A] scheme or arrangement between two or more bidders, with or without the knowledge of the Borrower, designed to establish bid prices at artificial, non-competitive levels’: ibid.

44 (i) ‘Deliberately destroying, falsifying, altering or concealing of evidence material to the investigation or making false statements to investigators in order to materially impede a Bank investigation into allegations of a corrupt, fraudulent, coercive, or collusive practice; and/or threatening, harassing, or intimidating any party to prevent it from disclosing its knowledge of matters relevant to the investigation or from pursuing the investigation, or (ii) acts intended to materially impede the exercise of the Bank’s inspection and audit rights’: Guidelines: Procurement under IBRD Loans and IDA Credits, October 2006, at para. 1.14 and Guidelines: Selection and Employment of Consultants by World Bank Borrowers, October 2006, at para. 1.22.

company’s or individual’s response, before making a final decision. The World Bank may then resort to sanctions that include a public letter of reprimand, debarment, conditional non-debarment, debarment with conditional release and restitution. The constitution of the Board, development of specific standards and establishment of a special procedure were designed to ensure compliance with the rules of this international organization. The sanction for non-compliance is a missed market opportunity due to failure to participate in the activities financed by the organization. Such sanctions for non-compliance with standards and guidelines might also have a collateral effect on proceedings taking place outside of the Bank’s framework; notably, they may be used as elements of evidence.

7.4 The Evolution of Normative Techniques and Investment Regulation

Regulation, notably through the use of international standards, guidelines and soft law instruments, is illustrative of the evolution of the normative techniques for adapting to new challenges of international society. In fact, traditional channels for the production of rules in international law often fail to accommodate the needs of the diverse range of actors in the international community. In the international order, standards and guidelines contribute an expected level of social conduct, adaptable to the particularities of a given case. Standards and guidelines possess flexibility and adaptability. These are useful characteristics when faced with the need for adaptation and evolution.

These standards and guidelines have a growing influence on the legal profile of private investments. They help to internalize international values in a said investment and create new paths of accountability for the various actors involved in investment operations. As such, they belong to the overall investment regime. For example, the OECD has published a statement on the basis of varied roundtable feedback that addresses such topics as the taking into account of environmental requirements within investment law. This suggests the important role that standards and guidelines can play in developing a complementary relationship between investment law and other legal regimes. Such instruments can also play a role as interpretative tools and clarify the meaning and content of a *lex lata* provision, and as such orientate the implementation of the latter.

46 Ibid.
47 See L. Boisson de Chazournes, ‘Normes, standards et règles en droit international’, in Brosset and Truilhé (eds), op cit., p. 44.
More broadly speaking, and as previously noted, soft law, standards and guidelines perform a role complementary to the application of general principles of public law in international investment law. In this context, they promote good governance standards through the consideration of all stakeholders' expectations in the investment process. However, they possess a life of their own in contributing to the shaping of new requirements, such as transparency, accountability and legitimacy. In this light, when examining the revision of arbitral rules governing investment disputes, one can view one of the paths through which soft law initiatives, standards and guidelines may be absorbed into binding rules of international law.

Commentators have correctly noted that the utility of soft law, standards and guidelines is not solely measured by the extent to which they seep into 'hard' law. Such instruments may influence decision-makers without any public acknowledgement of this fact. Non-binding principles may create 'normative standards and expectations of appropriate behaviour' without incorporation into formal law. In this sense, such principles cast some shadow on both the development of international law and the less visible decision-making processes of international actors involved in investment activities. It is a pattern that is not specific to this regulatory area and which concerns the evolution of the very structure of the international legal order. There is a need for new regulatory tools to promote commonly agreed-upon values and a culture of accountability. Organizational tools in international economic law have been developed to encourage close collaboration with non-state actors in the advancement of such values. For example, one can look to the WTO Aid for Trade Initiative, which embraces informational transparency and promotes accountability by allowing public scrutiny of decisions and relevant documents.

In the sense that an institution's legitimacy can be gauged via its conformity to commonly agreed-upon values such as transparency, these values may imbue the decision-making rules of international organizations with legal

51 See Schill and Jacob, op. cit, pp. 19–26 (analysing the criteria of modification to the arbitral rules of ICSID, SCC, ICC and UNCITRAL).
effect. This is not to say that a norm established by an organization through transparent procedures is rendered ‘more legal’, but rather that the organization’s embrace of transparency vests the resulting rule – and thus those actors that adhere to it – with greater legitimacy. Transparency thus functions as an important component in the accountability of the various concerned actors in the area of investment.

The demand for accountability can lead international organizations and sui generis mechanisms such as public-private partnerships to establish objective standards and rules to which their staff must adhere in the form of operational standards and procedures, or through mechanisms that serve to assess their conduct (such as the World Bank Inspection Panel). Once soft law, standards and guidelines have diffused into the normative behaviour of some non-state actors such as those being part of the ‘investment community’, others become increasingly more likely to adopt such behaviour through the power of socialization, which reduces variety among acceptable forms of private conduct.

Inclusiveness, transparency, public participation and access to information are at the forefront in grounding such developments. Without the

58 See e.g. L. Boisson de Chazournes, ‘The World Bank Inspection Panel: About Public Participation and Dispute Settlement’, in T. Treves et al. (eds), op. cit.
59 ‘[The Tribunal] deems that, subject to the specifics of the Treaty and of the circumstances of the actual case, it has a duty to contribute to the harmonious development of investment law, with a view to meeting the legitimate expectations of the community of states and investors towards the certainty of the rule of law.’ Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia (ICSID Case No. ARB/06/2), Decision on Jurisdiction, 27 September 2012, para. 46. See also Burlington Resources, Inc. v. Republic of Ecuador (ICSID Case No. ARB/08/5), Decision on Jurisdiction, 2 June 2010, para. 100.
61 For a legal commentary on the role these principles play in global administrative law, see B. Kingsbury, ‘The Concept of “Law” in Global Administrative Law’, 1 EJIL, 2009.
stamp of procedural legitimacy through these means, the legal effect of standards and guidelines is reduced to the adherence levels they attract. By contrast, when the international legal order is fully aware of the manner in which these norms were developed – who was involved, and what expertise was considered – then both the effectiveness of these regulatory tools and the viability of the standards and guidelines are improved.