

Chicago Journal of International Law

Volume 14 | Number 1

Article 3

1-6-2013

Ersatz Normativity or Public Law in Global Governance: The Hard Case of International Prescriptions for National Infrastructure Regulation

Megan Donaldson

Benedict Kingsbury

Recommended Citation

Donaldson, Megan and Kingsbury, Benedict (2013) "Ersatz Normativity or Public Law in Global Governance: The Hard Case of International Prescriptions for National Infrastructure Regulation," *Chicago Journal of International Law*: Vol. 14: No. 1, Article 3. Available at: <http://chicagounbound.uchicago.edu/cjil/vol14/iss1/3>

This Article is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in Chicago Journal of International Law by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

Ersatz Normativity or Public Law in Global Governance: The Hard Case of International Prescriptions for National Infrastructure Regulation

Megan Donaldson* and Benedict Kingsbury†

Abstract

Taking global prescriptions for national infrastructure regulation as a case study, this Article examines the nature and implications of the mingling of law, governance, and economics that is increasingly prevalent in global regulatory governance. It focuses on three sets of formally non-binding but influential instruments issued in the 2000s by the World Bank, the OECD, and UNCITRAL, each of which promotes far-reaching reforms to existing national public law and institutions. The Article excavates these instruments' unarticulated theories of the state and its roles, and their visions of the nature and preferred features of law. It explores the use by these instruments of law-like hierarchies of norms and their deployment of legal concepts within a hybrid vocabulary of law, economics, and policy disciplines. This may amount merely to ersatz normativity. But this Article posits that, by bringing discourses of public law and regulatory governance into relation, instruments of this kind could open possibilities for renovation of traditional public law within the state through the opening to an incipient global public law. The production and use of these instruments largely escapes the reach of orthodox public and private international law, and of national constitutional or administrative law. Conceivably, global public law could transform the ways in which such prescriptions are developed, and their invocation in particular cases, and might eventually contribute to the reimagination or reinvigoration of public law as a distinct mode of ordering. To assess whether these are possibilities, we take the infrastructure provisions as a "hard case" against which to analyze two approaches to global public law: "international public authority" and "global administrative law." The infrastructure case illustrates significant limits in the current

* Megan Donaldson is a doctoral candidate at New York University School of Law.

† Benedict Kingsbury is Murry and Ida Becker Professor of Law and Director of the Institute for International Law and Justice, New York University School of Law. The authors are grateful to Matthias Goldmann, Arie Rosen, Guy Fiti Sinclair, Moran Yahav, and the participants at the workshop "After Public Law" (Edinburgh, June 2011), at which a part of this material was presented, for comments and criticism.

doctrinal framings and institutional specificities of these approaches, and indicates the importance of future struggles among multiple different political and legal projects concerning the roles of law in global regulatory governance.

Table of Contents

I. Introduction	3
II. Global Engagement with National Infrastructure Policy and Regulation	8
A. The World Bank's <i>Handbook for Evaluating Infrastructure Regulatory Systems</i>	9
B. UNCITRAL's <i>Legislative Guide and Model Legislative Provisions on Privately Financed Infrastructure Projects</i>	12
C. OECD Advisory Material on Investment, Regulatory Policy, and Infrastructure.....	14
D. The Role of Transnational Instruments in National Policymaking.....	17
III. Infrastructure, the State, and Public Law.....	21
A. Theories of the State and Its Role.....	22
B. Interventions in, and Visions of, Law	28
IV. Forms and Vocabularies of Law.....	33
A. Hierarchical Structures	33
B. Vocabularies of Law, Governance, Economy	36
V. Global Public Law as an Avenue for the Renewal of Public Law.....	39
A. Transnational Governance and Global Public Law.....	40
1. International Public Authority.....	41
2. Global Administrative Law.....	44
B. Public Law as Mindset and Method	48

I. INTRODUCTION

Global prescriptions for the reform of national law and institutions increasingly blend managerial governance, often inspired by economics, with the language and techniques of law. This blending is denounced by many public international lawyers and scholars of transnational constitutional and administrative law as amounting merely to an “ersatz normativity”¹ or as corrosive of orthodox commitments to legality and values immanent in public law.² This Article begins by examining global prescriptions for national infrastructure regulation as an example of this blending or hybridization of law, governance, and economics. We trace the theories of the state and the attitudes to law that these instruments encode, and the way in which they interweave terms familiar from public law with languages and ideas rooted in economics and policy disciplines. Insofar as these prescriptive instruments come to be considered by scholars of public law, many are likely to reject the perceived manipulation of a public law vocabulary, and its grafting on to a very specific institutional and political project shaped primarily by economics. We frame an alternative possibility, that instruments of the type examined, by bringing discourses of public law and regulatory governance into relation, could prove instead to open a path toward a more robust regime of legality. We posit that an incipient global public law may advance this evolution, by transforming the way in which such prescriptions are developed or invoked in particular cases, or more broadly by contributing to the reimagination or reinvigoration of public law as a distinct mode of ordering. This in turn may help renew the potential of public law within states and resist the collapse of public law into, or its wholesale instrumentalization in the service of, more diffuse notions of governance.

To explore the possibilities of such a global public law, we take global prescriptions for national infrastructure regulation as a “hard case” against which to analyze two approaches: “international public authority” and “global administrative law.” The infrastructure case illustrates the importance of a global public law, but also the challenges of adapting existing framings of international public authority and global administrative law to engage effectively with

¹ See Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization*, 8 Theoret Inq L 9, 14 (2007).

² Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 Eur J Int'l L 187 (2006); Alexander Somek, *Administration without Sovereignty*, in Petra Dobner and Martin Loughlin, eds, *The Twilight of Constitutionalism?* 267 (Oxford 2010). See also David Dyzenhaus, *The Rule of (Administrative) Law in International Law*, 68 L & Contemp Probs 127 (2005); Ming-Sung Kuo, *Inter-Public Legality or Post-Public Legitimacy? Global Governance and the Curious Case of Global Administrative Law as a New Paradigm of Law*, 10 Intl J Const L 1050 (2012).

governance that is formally non-binding and works through persuasion and expertise.

Section II outlines the genesis, coverage, and form of the three sets of instruments on which we focus our analysis, and sketches some of the ways in which the instruments are used or invoked. The first instrument—and the one that forms the primary subject of analysis here because of its unusual detail and comprehensiveness—is the World Bank’s *Handbook for Evaluating Infrastructure Regulatory Systems*.³ The other instruments discussed are a set of prescriptive materials on concession agreements relating to infrastructure produced in 2000 to 2003 under the auspices of the United Nations Commission on International Trade Law (UNCITRAL), and materials bearing on infrastructure policy and regulation promulgated in 2006 and 2007 by the Organisation for Economic Co-operation and Development (OECD).⁴ All continue to be in effect despite the turbulent reconsiderations prompted by the financial crisis that began in 2008, the rising importance of China and other non-OECD states in foreign infrastructure construction and financing, and the resurgence of government’s role in several significant developing economies. These instruments draw on academic and professional knowledge of various kinds, but digest it in a form suitable for lay audiences. They promote the sense of a general field of infrastructure governance, while recognizing differences between sectors and national systems. They offer models that (to varying extents) may be immediately incorporated and applied in national systems; but none of the instruments are—by themselves—comprehensive or determinative as to the course of action to be taken by governments. Rather, they are part of structures of influence exerted by specialist corps of consultants, experts from foreign governments and international organizations, lobbyists, internationally connected business interests and civil society groups, conferences and online fora, and flows of public and

³ Ashley C. Brown, Jon Stern, and Bernard Tenenbaum, with Defne Gencer, *Handbook for Evaluating Infrastructure Regulatory Systems* (World Bank 2006) (*Handbook*).

⁴ Other instruments, not examined here, include United Nations Industrial Development Organization, *Guidelines for Infrastructure Development through Build-Operate-Transfer (BOT) Projects* (UNIDO 1996) (an earlier instrument superseded in some ways by later innovations); as well as briefer instruments, such as the European Bank for Reconstruction and Development (EBRD), *Core Principles for a Modern Concession Law* (2005) (a two-page document). Infrastructure projects in Europe may be governed by binding EU Directives on public procurement, including a proposed directive on concessions (under discussion in the European Parliament as of February 2013). Other advisory prescriptive materials relate to particular sectors or project types. Large volumes of other normative materials and assessments of infrastructure and infrastructure regulation, not considered here, are produced by specialist bodies concerned with human rights, environmental protection, security, energy policy, and governance, etc.

private funds.⁵ In this regard, they reflect the complex and multifaceted nature of global influences on national policymaking.

Substantively, the instruments reflect an evolution in dominant understandings of the relative roles of state and market in infrastructure provision and essential services. The instruments are informed by the assumption that, in light of the enormous need for investment in infrastructure, and perceived limits on the possibility or desirability of public borrowing, private capital will, at least in most countries, have to play a major role in future infrastructure expansion.⁶ They also, however, manifest a tempering of the enthusiasm for rapid privatization that prevailed in many states, and in the international financial institutions (IFIs), in the 1980s and 1990s. Shifts to greater reliance on private sector provision have not always yielded the benefits anticipated and are often controversial. Opposition by state politicians and local communities has led to renationalization or tighter regulation in some countries. Protests have also targeted international organizations such as IFIs for their roles in construction and private provision of infrastructure, and the transnational law that underpins infrastructure projects, including foreign investment treaties.⁷

⁵ There is growing scholarly interest in the role that such structures play in the “diffusion” of particular policies and institutional configurations. Examples in English include Gregory C. Shaffer, *Transnational Legal Ordering and State Change* (Cambridge 2013); Terence C. Halliday and Bruce G. Carruthers, *The Recursivity of Law: Global Norm-Making and National Law-Making in the Globalization of Corporate Insolvency Regimes*, 112 Am J Sociol 1135 (2007); Terence C. Halliday and Bruce G. Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford 2009); Yves Dezelay and Bryant G. Garth, eds, *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (Michigan 2002); Yves Dezelay and Bryant G. Garth, eds, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (Chicago 2002); Beth A. Simmons, Frank Dobbin, and Geoffrey Garrett, eds, *The Global Diffusion of Markets and Democracy* (Cambridge 2008); Alasdair Roberts, *The Logic of Discipline: Global Capitalism and the Architecture of Government* 9 (Oxford 2010); César Rodríguez-Garavito, *Toward a Sociology of the Global Rule of Law Field: Neoliberalism, Neoconstitutionalism, and the Contest over Judicial Reform in Latin America*, in Yves Dezelay and Bryant G. Garth, eds, *Lawyers and the Rule of Law in an Era of Globalization* 156 (Routledge 2011).

⁶ See, for example, OECD, 2 *Infrastructure to 2030* 25 (OECD 2007) (explaining that, in light of the growing burdens of spending on health and aging populations, and projected diminishing tax receipts, “public budgets . . . will not suffice to bridge the infrastructure gap. What is required is greater recourse to private sector finance, together with greater diversification of public sector revenue sources.”).

⁷ For a discussion of this contestation in the water sector, see Bronwen Morgan, *Water on Tap: Rights and Regulation in the Transnational Governance of Urban Water Services* (Cambridge 2011). For activist accounts of some of the major conflicts, see, for example, Benjamin Dangl, *The Price of Fire: Resource Wars and Social Movements in Bolivia* 55–73 (AK Press 2007) (on the “water war” in Cochabamba); David Hall, *Struggles against Privatization of Electricity Worldwide*, in Kolya Abramsky, ed, *Sparking a Worldwide Energy Revolution: Social Struggles in the Transition to a Post-Petrol World* 188–96 (AK Press 2010) (cataloging and analyzing successful campaigns against electricity privatization). Controversies over privatization initiatives are not confined to the developing world. There has

High-profile failures and opposition encountered in some early privatization initiatives, and the growing wariness of some of the major investors most active in the waves of concession activity in the 1990s and early 2000s,⁸ prompted the refinement and further development of recommendations for national regulatory reform, some of which are embodied in the instruments examined here. In particular, the instruments reflect the rebalanced orthodoxy of the period: that reliance on the private sector requires the creation and maintenance of a considerable regulatory apparatus, the construction of which can be highly challenging, particularly in the developing world.⁹

Section III discusses in greater detail the nature of the prescriptions set out in the instruments, the (often extensive and specific) legal reforms they promote, the theory of the role of the state implicit in their recommendations, and the general attitude to national legal systems that they encode. If followed, these international prescriptions would have major implications for the substance of national law in the infrastructure area, and potentially for the nature and role of the state in infrastructure provision. These international prescriptions, necessarily shorn of specific national context and framed for portability, typically lack the deep foundations and institutional superstructure that long-established national public law provides in many countries. Some of those involved in the drafting of the instruments undoubtedly intend that infrastructure regulation escape from some existing public law controls, and from what they regard as the excessive and costly reach of public lawyers and legal institutions. Others may simply be specialists in the technical elements of infrastructure and its economics and

been significant opposition to privatization conditions attached to bailout funds provided to members of the EU, and reforms in 2012 to the UK approach to public-private partnerships for the provision of public infrastructure. For example:

[T]he Government . . . recognises the concerns with [the Private Finance Initiative] and the need for reform. There has been widespread concern that the public sector has not been getting value for money and taxpayers have not been getting a fair deal now and over the longer-term. There has been a lack of transparency of the financial performance of projects and the returns made by investors and . . . the future liabilities to the taxpayer created by [Private Finance Initiative] projects. This has led to an increasing tension in the relationship between [Private Finance Initiative] providers, the public sector and the wider public.

HM Treasury, *A New Approach to Public Private Partnerships* 5 (Dec 2012), online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/205112/pf2_infrastructure_new_approach_to_public_private_partnerships_051212.pdf (visited June 13, 2013).

⁸ For examples in the water sector, see David Hall and Emanuele Lobina, *The Birth, Growth and Decline of Multinational Water Companies*, in Tapio S. Katko, Petri S. Juuti, and Klaas Schwartz, eds, *Water Services Management and Governance: Lessons for a Sustainable Future* 123, 128 (International Water Association 2013).

⁹ See Navroz K. Dubash and Bronwen Morgan, eds, *The Rise of the Regulatory State of the South: Infrastructure and Development in Emerging Economies* (forthcoming, Oxford 2013).

policy, and not attuned to fundamental legal issues implicated in their prescriptions. Assessed from a public law standpoint, the prescriptions are highly instrumental in their orientation, and their vision of law is (in some cases at least) a rather hollow one. They attach little weight to the specificities of existing law and legal institutions (other than property rights), and are not attentive to the systemic or political dimensions of law.

Section IV sets out the way in which these instruments draw on both the vocabulary and forms of law. We argue that the instruments mingle newer vocabularies of governance with readily recognizable terms of public law and legality—primarily those concerned with procedural norms rather than rights or self-government—in the service of what may be contestable legal or economic reforms. This mingling or hybridization of vocabularies, for several decades a feature of national practices of “new governance” in many OECD countries, is thus carried over into transnational efforts to set out universal models for developing countries. Hierarchies of prescriptions, from abstract to concrete, play some role in managing the diversity of national legal systems,¹⁰ but they also work to give content to hybrid terms such as “legitimacy” and “transparency,” and to transfer the connotations of these terms to particular projects of reform. Together, these features enable processes of comparison, aggregation, and abstraction by which certain locally specific practices and rules are translated into universally applicable ideas, recommendations, or standards.

The hybridization we trace may have radically different effects. Over time it may further erode the sense of any distinctive quality in law beyond its merely instrumental usefulness in constructing particular regimes and incentives. On the other hand, it may create a conduit for greater attention to legal structures and dynamics. A modest form of global public law, now barely evident but already under rudimentary construction, could over time be brought in through this hybrid language, stiffening the current malleability of transnational managerialist regulation, and perhaps even coming to shore up the tenuous legal framing of “new governance” within states as well. Whether this actually occurs will depend on a struggle between several competing political projects concerning the role of law in global regulatory governance.

Section V explores the potential contribution of newly emerging conceptions of global public law. Ultimately, we suggest that a future global public law might aspire not only to order and check global influences on national

¹⁰ Insofar as the splitting of general, higher-order norms from more specific recommendations allows for the development of global consensus while still accommodating polities for which the specific recommendations are unsuitable. This argument is developed in Susan Block-Lieb and Terence Halliday, *Harmonization and Modernization in UNCITRAL’s Legislative Guide on Insolvency Law*, 42 Tex Intl L J 475, 477–80 (2007).

policy, but to generate more robust legality in approaches to national, hybrid, and private regulation, fostering a more nuanced and holistic approach not only to law and legality in prescriptions for reform, but also in the mindset and work of the consultants, experts, and national officials shaping future regulatory structures. Against the backdrop of these aspirations, we use the infrastructure case to assess the possible contributions of international public authority and global administrative law. Work under these banners seeks, in somewhat different ways, to identify in practice, or to craft, new visions of global public law adequate to capture governance of the kind reflected in the infrastructure instruments. Consideration of the infrastructure case brings to light some limits inherent in the current doctrinal framings and institutional specificities of these approaches. In relation to global administrative law, the infrastructure case points to critical questions regarding the persons or entities whose practice shapes the development of a global administrative law, the hybrid vocabulary in which global administrative law itself is framed, and the methodologies of comparison or translation, abstraction and specification, by which broad principles are translated into specific institutional requirements.

II. GLOBAL ENGAGEMENT WITH NATIONAL INFRASTRUCTURE POLICY AND REGULATION

Infrastructure transactions with regulatory implications are typically entered into by national or sub-national governments, but government contractual arrangements and national constitutional and legal provisions concerning infrastructure operate within an increasingly dense web of transnational legal norms. These range from, for example, obligations undertaken pursuant to the WTO agreements to liberalize services trade in particular sectors, to bilateral investment treaties and the customary law concerning treatment of foreign investors, to obligations in loan agreements with multilateral development banks (MDBs). International organizations may be involved as lenders,¹¹ political risk insurers,¹² or fora for dispute settlement,¹³ as well as sources of “technical

¹¹ For example, the MDBs or, in more limited ways, the International Monetary Fund (IMF). Typically, lending by the MDBs conditional on elements of privatization has been applicable primarily to developing countries, but in Europe the “troika” of the European Commission, IMF and European Central Bank are pressing for privatization of water companies in Greece and Portugal as a condition of bailout funds: see the exchange of correspondence between civil society groups and the European Commission (May–October 2013), online at <http://www.tni.org/article/ec-stop-imposing-privatisation-water> (visited May 18, 2013).

¹² For example, the Multilateral Investment Guarantee Agency (MIGA), part of the World Bank Group.

¹³ For example, the International Centre for Settlement of Investment Disputes (ICSID)—also part of the World Bank Group—and arbitral panels operating under its auspices.

assistance” and expert advice on creating a domestic legal and institutional environment conducive to foreign investment—the facet of their activity emphasized here.¹⁴

In what follows, we give a brief overview of three sets of prescriptive material produced by or under the auspices of international organizations, concerning various aspects of infrastructure provision and governance of the infrastructure sector. The World Bank’s *Handbook for Evaluating Infrastructure Regulatory Systems* focuses on the design and function of regulatory agencies. UNCITRAL’s materials focus on the legal framework for, and process of entering into, concession agreements. The OECD instruments, insofar as they deal specifically with infrastructure, address policymaking at a more general level.

For each set of instruments, we give basic indications of the forms of the instruments, their institutional background, their mode of creation, and instances in which they have been invoked. The forms of the instruments are important for understanding the nature of their engagement with national public law and their use of a vocabulary affiliated with public law (further explored in Sections III and IV). The way in which these instruments were created, and have been invoked, becomes relevant when we turn in Section V to the question of whether their generation, promulgation, and application are subject to any body of public law.

A. The World Bank’s *Handbook for Evaluating Infrastructure Regulatory Systems*

From the 1990s the World Bank shifted from predominantly “bricks and mortar” projects to a greater emphasis on developing the national regulatory environment necessary to attract foreign investment to infrastructure sectors.¹⁵ However, some regulators did not develop the capacities and independence the World Bank thought they needed; consumers and citizens were, in some cases, violently opposed to commercialization and privatization projects; and total

¹⁴ Among other institutional engagements discussed further below, see UNCTAD, *Services, Development and Trade: The Regulatory and Institutional Dimension of Infrastructure Services* (UN 2012); UNCTAD Secretariat, *Promoting Investment for Development: Best Practices in Strengthening Investment in Basic Infrastructure in Developing Countries: A Summary of UNCTAD’s Research on FDI in Infrastructure*, TD/B/C.II/12 (Feb 10, 2011), online at http://unctad.org/en/Docs/ciid12_en.pdf (visited May 18, 2013). Global influences may also be brought to bear on particular transactions by the corporate entities or groups involved in infrastructure projects. These entities are often large, multinational enterprises, and transactions may be supported by lawyers, advisers, consultants, or insurers themselves operating globally and drawing on experience gleaned from analogous transactions in different jurisdictions.

¹⁵ See World Bank, *Infrastructure Action Plan 2* (2003), online at <http://siteresources.worldbank.org/INTTRM/Resources/InfrastructureActionPlan.pdf> (visited May 18, 2013).

investment in infrastructure fell.¹⁶ Although the World Bank increasingly faces competition from other lenders in the area of infrastructure,¹⁷ it remains an important source of expertise concerning regulatory and institutional design.¹⁸ The *Handbook* had its origins in one element of the bank's 2003 Infrastructure Action Plan: the development of standardized "diagnostic assessments" of investment, institutional and policy frameworks in the infrastructure sectors of different countries.¹⁹

The *Handbook* was authored by four regulatory specialists, two holding primarily academic positions but with long experience as consultants or advisers on regulatory matters to various countries and agencies, including the World Bank, and two individuals then holding posts within the bank. It is a highly sophisticated book-length "road map" for evaluation of both governance in, and performance of, existing regulatory systems.²⁰ It sets out a comprehensive vision, sometimes explicit and sometimes implicit, of the nature, purpose, and design of national regulation itself, and of the proper arrangement of the polity and economy, in sectors such as electricity, water, and telecommunications, endorsing a model of independent regulatory agencies overseeing privatized, or at least commercialized, service provision.

The *Handbook*'s vision of regulation is highly systematized. At the peak are three "meta-principles" which must be satisfied by any regulatory system if it is to be sustainable. These are connected to a list of "principles," and to more concrete "standards," that implement the "meta-principles" in the context of an independent regulator. Taken together, the standards provide a detailed and far-reaching scheme, full compliance with which may necessitate significant changes to applicable laws and institutional arrangements in many developing—and

¹⁶ *Handbook* at 13–14 (cited in note 3). See also Jon Stern, *The Evaluation of Regulatory Agencies*, in Robert Baldwin, Martin Cave, and Martin Lodge, eds, *The Oxford Handbook of Regulation* 223 (Oxford 2010).

¹⁷ Chinese banks are providing significant funds for infrastructure projects, particularly in Africa, and there are ongoing discussions about the formation of a new development bank, controlled by the emerging "BRICS" powers, with a focus on addressing infrastructure needs.

¹⁸ On the bank as a repository of knowledge and a research institution in general, see, for example, Nicolas Stern with Francisco Ferreira, *The World Bank as "Intellectual Actor,"* in Devesh Kapur, John P. Lewis, and Richard Webb, eds, 2 *The World Bank: Its First Half-Century* 523 (Brookings 1997); Elisa van Waeyenberge and Ben Fine, *A Knowledge Bank?*, in Kate Bayliss, Ben Fine, and Elisa van Waeyenberge, eds, *The Political Economy of Development: The World Bank, Neoliberalism and Development Research* 26 (Pluto 2011); Jonathan Morduch, *The Knowledge Bank*, in William Easterly, ed, *Reinventing Foreign Aid* 377 (MIT 2008).

¹⁹ *Handbook* at 14 n 5 (cited in note 3). Although examples and analysis in the *Handbook* are drawn primarily from the electricity sector, the authors suggest that most of the *Handbook* is applicable to the regulation of other infrastructure as well. *Id* at 23.

²⁰ *Id* at xii.

indeed developed—countries. In this hierarchy of “meta-principles,” “principles,” and “standards,” the *Handbook* deftly invokes abstract concepts such as “transparency” and “accountability” that draw on languages of legality, rule of law, and public law, as well as discourses of “good governance.”

Outlining techniques by which experts can increase the influence of their recommendations within states, the *Handbook* is also explicitly designed as a tool for diffusion of the regulatory policy it embraces. It sets out detailed methodologies for three kinds of evaluation (short, mid-level, and in-depth), involving different degrees of inquiry into actual practices of regulation, and the merits or otherwise of substantive decisions made. Evaluations are likely to be a condition of, or part of the process of project design for, a loan from an MDB or aid agency, and evaluators are typically World Bank staff, counterparts in other similar institutions, consultants, or experts from policy research institutes.²¹ The *Handbook* embraces the central role played by experts in certain fields as vectors of policy and as ongoing advisers.²² Evaluators are encouraged to be persuasive advocates of the approved regulatory model, presenting “stepping-stones that can move a country from a starting point of no formal regulatory system to a best-practice regulatory system,”²³ and drawing on techniques of benchmarking and comparison. Quantitative rankings or “indicators” are used in the *Handbook* to simplify information about complex social phenomena,²⁴ manage the diversity of regulatory contexts across jurisdictions, and spur competitive inclinations that promote reform. Once an evaluation is complete, for example, the *Handbook* suggests that evaluators “present, at least initially, the ‘big picture’ in a single overall governance ranking,” as “[a] policymaker is much more likely to pay attention if he sees a single number that shows that his country’s electricity regulatory commission ranks five out of six in his region rather than numerous tables filled with raw data that are hard to grasp.”²⁵

²¹ Id at 168–69. For “in-depth” investigations, the *Handbook* recommends a team of three, including an international expert “experienced in both regulatory and sectoral matters in both his or her own country, as well as in other countries and cultures [and ideally having] advanced academic credentials in relevant disciplines (for example, law, economics, engineering, and/or accounting),” a local expert that has similar credentials and is well connected and respected in the domestic regulatory system, and a local lawyer. Id at 304–05.

²² See, for example, id at 106–08, 217, 228–29.

²³ *Handbook* at 79 (cited in note 3).

²⁴ See, for example, *Handbook* at 83–88 (cited in note 3). See also Kevin E. Davis, Benedict Kingsbury, and Sally Engle Merry, *Indicators as a Technology of Global Governance*, 46 *L & Socy Rev* 71, 71–72 (2012).

²⁵ *Handbook* at 32 (cited in note 3).

B. UNCITRAL's *Legislative Guide* and *Model Legislative Provisions* on Privately Financed Infrastructure Projects

UNCITRAL, a UN commission with a membership of 60 states,²⁶ was established in 1966 with a mandate to further the progressive harmonization and unification of the law of international trade. It has historically relied primarily on conventions and model laws as instruments, but has broadened its repertoire into new “legal technologies” such as “legislative guides,” the greater flexibility of which have arguably allowed it to be more ambitious in its law reform proposals, to accommodate dissent and national particularity, and to include more detailed background material for the guidance of national legislators.²⁷

Following work by the Secretariat in 1994 to 1996 on “build–operate–transfer” projects,²⁸ UNCITRAL decided to proceed with the drafting of a legislative guide on privately financed infrastructure. Discussions in the UN Sixth Committee indicate widespread support for this work from states, and particularly from developing countries.²⁹ The guide was developed by the Secretariat with the assistance of experts, rather than, as had been the case with other UNCITRAL projects, by a working group reflecting the Commission’s membership.³⁰

²⁶ These states represent different geographical regions, and they reflect the principal economic and legal systems of the world from both developed and developing countries. Members are elected to six-year terms by the General Assembly. General Assembly Res No 2205 (XXI), UN Doc A/RES/2205(XXI) (1966); General Assembly Res No 57/20, UN Doc A/RES/57/20 (2002).

²⁷ UNCITRAL, *A Guide to UNCITRAL: Basic Facts about the United Nations Commission on International Trade Law* 13–18 (UN 2013), online at <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf> (visited May 18, 2013). On the possible tensions between unification, harmonization, and modernization in UNCITRAL’s work, see Block-Lieb and Halliday, 42 Tex Intl L J at 477–80 (cited in note 10). On the relationship between incrementalism and legitimacy in the work of UNCITRAL, see Susan Block-Lieb and Terence C. Halliday, *Incrementalisms in Global Law-Making*, 32 Brook J Intl L 851 (2007); Terence C. Halliday, Susan Block-Lieb, and Bruce G. Carruthers, *Rhetorical Legitimation: Global Scripts as Strategic Devices of International Organizations*, 8 Socio-Econ Rev 77 (2010).

²⁸ See *Build-Operate-Transfer Projects: Note by the Secretariat*, 27 YB UNCITRAL 207, UN Doc A/CN.9/424, UN Sales No E.98.V.7 (1996).

²⁹ See UN GAOR 6th Comm, 51st Sess, 3d mtg, UN Doc A/C.6/51/SR.3 (1996); UN GAOR 6th Comm, 51st Sess, 4th mtg, UN Doc A/C.6/51/SR.4 (1996); UN GAOR 6th Comm, 52d Sess, 3d mtg, UN Doc A/C.6/52/SR.3 (1997); UN GAOR 6th Comm, 52d Sess, 4th mtg, UN Doc A/C.6/52/SR.4 (1997).

³⁰ Some were critical of the reliance on expert advisers. See, for example, Don Wallace Jr., *UNCITRAL Draft Legislative Guide on Privately Financed Infrastructure: Achievement and Prospects*, 8 Tul J Intl & Comp L 283, 286 (2000) (observing that this meant that there was not “as rich an exchange among representatives of different legal systems and traditions as there could have been”). Others, including representatives of the UK, welcomed the decision not to establish a formal working group. See UN GAOR 6th Comm, 52d Sess, 3d mtg, UN Doc A/C.6/52/SR.3 at 6 (1997). Malaysia proposed establishing a working group to complete work on the *Legislative Guide*; Kenya

In 2000, UNCITRAL adopted the resulting *Legislative Guide on Privately Financed Infrastructure Projects*.³¹ The *Legislative Guide* comprises a series of relatively high-level “legislative recommendations,”³² covering everything from the general legislative and institutional framework for privately financed infrastructure to selection of concessionaires, the contents of the project agreement, the duration, extension, and termination of the agreement, and dispute settlement, followed by some 200 pages of “notes” described as providing an “analytical introduction” and “background information to enhance understanding of the legislative recommendations.”³³

Some states had proposed the development of actual model legislative provisions dealing with the matters covered in the *Legislative Guide*. Although there was some controversy over the desirability of such an undertaking,³⁴ a working group of UNCITRAL member states proceeded and, in 2003, UNCITRAL adopted a set of *Model Legislative Provisions on Privately Financed*

took the opposite view, arguing that “the level of interest in the topic and the limited expertise available from developing countries were such that the discussions should not be entrusted to a working group.” Id at 6; UN GAOR 6th Comm, 52d Sess, 4th mtg, UN Doc A/C.6/53/SR.4 at 7 (1998).

³¹ UNCITRAL, *Legislative Guide on Privately Financed Infrastructure Projects*, UN Doc A.CN.9/SER.B/4 (2001) (*Legislative Guide*).

³² Id at xii.

³³ Id at xi.

³⁴ The “Rio Group” called for model legislative provisions in 1998, and Belarus supported this: UN GAOR 6th Comm, 53d Sess, 4th mtg, UN Doc A/C.6/53/SR.4 at 2, 8 (1998). Austria supported the discussion of preparation of a model law, if a large number of states, particularly developing states, would benefit from it: UN GAOR 6th Comm, 55th Sess, 3d mtg, UN Doc A/C.6/55/SR.3 at 6 (2000). India and Japan suggested waiting to see how the *Legislative Guide* performed before attempting a model law, while Indonesia and Kenya favored the holding of a colloquium to discuss the possibility: UN GAOR 6th Comm, 55th Sess, 3d mtg, UN Doc A/C.6/55/SR.3 at 8, 10–11 (2000); 4th mtg, UN Doc A/C.6/55/SR.4 at 2 (2000). The UK expressed skepticism about the desirability or feasibility of a model law “without proof of substantial support from potential user countries”: UN GAOR 6th Comm, 55th Sess, 4th mtg, UN Doc A/C.6/55/SR.4 at 2 (2000). Germany, Czechoslovakia, and the Ukraine all expressed a preference for remaining with the flexible mode of the model law, rather than drafting model legislative provisions: UN GAOR 6th Comm, 53d Sess, 3d mtg, UN Doc A/C.6/53/SR.3 at 7 (1998); UNGAOR 6th Comm, 54th Sess, 3d mtg, UN Doc A/C.6/54/SR.3 at 10 (1999); UNGAOR 6th Comm, 53d Sess, 4th mtg, UN Doc A/C.6/53/SR.4 at 7–8 (1998). To assist UNCITRAL to reach an informed view on whether or not to proceed with the drafting of model provisions, the Secretariat, together with the Public-Private Infrastructure Advisory Facility, a multi-donor facility under the aegis of the World Bank, organized a colloquium attended by some 70 government officials, bankers, lawyers, representatives of international organizations and in particular international financial institutions, as well as business-oriented NGOs. At that event, too, views were divided on the desirability or feasibility of development of model provisions: *Possible Future Work on Privately Financed Infrastructure Projects, Note by the Secretariat*, UN Doc A/CN.9/488 at 4–5 (July 5, 2001).

*Infrastructure Projects.*³⁵ The *Model Provisions* translate recommendations on the more specific aspects of the *Legislative Guide* (from selection of concessionaires to dispute settlement) into template legislative provisions, many of which simply set out matters to be stipulated in the concession contract. While the *Model Provisions* do not entirely overlap with the *Legislative Guide*, they are “to be understood and applied in the light and with the assistance of the explanatory notes contained in the Guide.”³⁶

UNCITRAL is contemplating an expansion of its work on privately financed infrastructure. A 2012 note from the Secretariat suggested that this work might encompass: harmonization of the *Legislative Guide* with work on procurement; identification of other topics that should be addressed in a modern text on privately financed infrastructure projects, such as promotion of domestic rather than international dispute resolution mechanisms; and broadening the scope of the *Legislative Guide* and *Model Provisions* to cover public-private partnerships (PPPs) beyond the infrastructure sector, in areas such as natural resources and private provision of services.³⁷ UNCITRAL agreed to the first of these areas of work, and opted to explore the possibility of pursuing the latter two. A colloquium was held in May 2013 to examine the issue and the resulting report will be considered by UNCITRAL in July 2013.³⁸

C. OECD Advisory Material on Investment, Regulatory Policy, and Infrastructure

The OECD’s economic and social policy work spans its (now) 34 member countries and varying constellations of non-members. The OECD produces some conventions and binding “decisions,”³⁹ but many more formally non-binding “declarations,” “recommendations,” or “guidelines.”⁴⁰ Much of the

³⁵ UNCITRAL, *Model Legislative Provisions on Privately Financed Infrastructure Projects*, UN Sales No E.04.V.11 (2004) (*Model Provisions*).

³⁶ *Report of the Working Group on Privately Financed Infrastructure Projects on the Work of its Fifth Session*, UN Doc A/CN.9/521 at 5 (Sept 26, 2002).

³⁷ *Procurement and Infrastructure Development: Possible Future Work, Note by the Secretariat*, UN Doc A/CN.9/755 (June 11, 2012).

³⁸ *Report of the United Nations Commission on International Trade Law*, UN GAOR, 67th Sess, UN Doc A/67/17 at 28–29 (2012). For identification of various factors to be considered in relation to whether to pursue further work on PPPs, see UNCITRAL, *International Colloquium on Public-Private Partnerships: Discussion Paper*, UN Doc A/CN.9/782 (Apr 22, 2013).

³⁹ “Decisions” are, unless otherwise provided, binding on all OECD members. Convention on the Organisation for Economic Co-operation and Development (1960), Art 5(a), 8888 UN Treaty Ser 179 (1960).

⁴⁰ “Recommendations” are submitted to members in order that the members may implement them, if they consider it opportune. Id at Art 5(b). There is no provision in the OECD Convention for

OECD's influence works through structures of peer review, surveillance, and policy dialogue informed by these non-binding instruments.⁴¹

The OECD's engagement with infrastructure and infrastructure regulation lies at the intersection of a number of different initiatives on investment, concessions, and regulatory policy, as well as infrastructure more specifically. We here consider primarily those instruments dealing most directly with infrastructure and infrastructure regulation: the 2006 *Policy Framework for Investment (PFI)* and associated materials,⁴² and the 2007 *Principles for Private Sector Participation in Infrastructure*.⁴³

The *PFI* is the most recent iteration of the OECD's investment policy agenda and has been described as the OECD's "most serious surveillance effort [on liberalization] to date."⁴⁴ It covers areas from investment to trade, competition, tax, human resource development, public governance, and infrastructure, including the "investment climate" for private investment in infrastructure provision. It is structured as a series of questions about whether the government in question has taken particular steps intended to improve the climate for investment, together with "annotations" that explain the importance of each of the steps mooted in the questions, and specify options and additional

"declarations" or "guidelines," but at least the former, while not legally binding, are noted by the OECD Council, and their application is monitored by relevant bodies within the OECD. See OECD Legal Instruments, <http://www.oecd.org/legal/oecdlegalinstruments-theacts.htm> (visited May 18, 2013).

⁴¹ On the OECD's mode of work, see Tony Porter and Michael Webb, *Role of the OECD in the Orchestration of Global Knowledge Networks*, in Rianne McBride and Stephen Mahon, eds, *The OECD and Transnational Governance* 43 (UBC 2008); Richard Woodward, *The OECD and Economic Governance: Invisibility and Impotence*, in Kerstin Martens and Anja P. Jakobi, eds, *Mechanisms of OECD Governance: International Incentives for National Policy-Making?* 54, 70 (Oxford 2010).

⁴² OECD, *Policy Framework for Investment* (OECD 2006) (*PFI*). On the OECD's work on investment (among other things), see Robert T. Kudrle, *Governing Economic Globalization: The Pioneering Experience of the OECD*, 46 J World Trade 695 (2012); Russell Alan Williams, *The OECD and Foreign Investment Rules: The Global Promotion of Liberalization*, in McBride and Mahon, eds, *OECD and Transnational Governance* 117, 118 (cited in note 41) (arguing that while the OECD is supposedly member-driven, the OECD's work on investment has been oriented to the promotion of particular perspectives—those of "economists committed to an organizational discourse of (neo)liberal economics").

⁴³ OECD *Principles for Private Sector Participation in Infrastructure* (OECD 2007) (*Private Sector Participation Principles*). These Principles have the status of a "recommendation" (see note 40). Other OECD material dealing less directly with infrastructure includes the *General Principles for Regulatory Quality* (2005) and *Recommendation on Regulatory Policy and Governance* (2012), online at <http://www.oecd.org/gov/regulatory-policy/49990817.pdf> (visited May 18, 2013). More specifically on the concessions point, the OECD has prepared *Basic Elements of a Law on Concession Agreements* (1999–2000), although this document is no longer featured prominently on the OECD website, and may have been superseded to some extent by subsequent work in UNCITRAL.

⁴⁴ Williams, *The OECD and Foreign Investment Rules* at 129 (cited in note 42).

resources. The *PFI* is accompanied by a book of “good practices”⁴⁵ and by a “PFI Toolkit” providing further explanation and references.⁴⁶ The OECD asserts that the *PFI* was developed by a task force of national representatives from some 60 countries, together with representatives of various business, labor, and civil society organizations, and major international organizations including the World Bank and the United Nations Conference on Trade and Development (UNCTAD)⁴⁷ (although a joint letter to the OECD signed by some 53 NGOs rejected any suggestion that the consultation period meant that the *PFI* had been developed “in cooperation with civil society,” as the OECD had reportedly claimed).⁴⁸ The *PFI* is now used in OECD reviews of the investment policy of states,⁴⁹ although more as a checklist to ground the survey of state performance than as a rigid framework against which states are assessed.⁵⁰ It has been taken up as a basis for work on business-climate development strategies under the auspices of the MENA-OECD investment program, and for the conduct of investment policy reviews under the NEPAD-OECD Africa and ASEAN-OECD investment initiatives.⁵¹

The *Private Sector Participation Principles* emerged from a large-scale study on “Infrastructure to 2030,” conducted in 2005 to 2007.⁵² The *Principles* are worded

⁴⁵ OECD, *Policy Framework for Investment: A Review of Good Practices* (OECD 2006) (*PFI Review of Good Practices*).

⁴⁶ OECD, *PFI Toolkit*, online at <http://www.oecd.org/investment/toolkit/> (visited May 18, 2013).

⁴⁷ For further details on consultations and contributing organizations, see *PFI* at 4 (cited in note 42).

⁴⁸ *OECD Watch Co-ordinated NGO Submission*, in OECD, *A Policy Framework for Investment: Responses Received in Public Consultation* 61 (Feb 22, 2006), online at <http://www.oecd.org/daf/inv/investmentfordevelopment/36199688.pdf> (visited May 18, 2013) (*PFI Public Responses Compilation*).

⁴⁹ These reviews are published by the OECD Investment Committee, following consultation with country officials. The OECD indicates that “[p]riority countries for review are those showing potential for adherence to the OECD investment instruments,” being the OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations [in other words, services] [originally promulgated in 1961 and 1960 respectively, but periodically updated]; the Declaration on International Investment and Multinational Enterprises and its four components (on Guidelines for MNEs, National Treatment, conflicting requirements for MNEs, and international investment incentives and disincentives); and the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions. See *OECD Investment Policy Reviews*, online at <http://www.oecd.org/daf/inv/mne/countryreviews.htm> (visited May 18, 2013).

⁵⁰ For examples, see OECD Investment Policy Reviews Indonesia (OECD 2010); OECD Investment Policy Reviews Colombia (OECD 2012); OECD Investment Policy Reviews Tunisia (OECD 2012).

⁵¹ OECD, *The Policy Framework for Investment* (PFI), <http://www.oecd.org/investment/pfi.htm> (visited May 18, 2013).

⁵² See, for example, OECD, *Infrastructure to 2030: Telecom, Land Transport, Water and Electricity* (OECD 2006).

in very general terms, and each is accompanied by some further discussion. Thus, Principle 5 (“A sound enabling environment for infrastructure investment, which implies high standards of public and corporate governance, transparency and the rule of law, including protection of property and contractual rights, is essential to attract the participation of the private sector”) is elaborated with, *inter alia*, a cross reference to the *PFI*, and the comment that “[s]uccess depends on a wide range of legislation and administrative practices bearing on private companies, their employees and other stakeholders, and the ability of local suppliers and subcontractors to partner with infrastructure providers.”⁵³ The *Private Sector Participation Principles* are stated to have been developed “under the aegis of the Investment Committee . . . in co-operation with other OECD bodies and through a process of consultations with a broad group of public and private sector experts from OECD and non-OECD countries, as well as from non-governmental organisations,” and are intended “to be used for government assessment, action plans and reporting, international co-operation and public-private dialogue,” in conjunction with the *PFI* and other OECD instruments.⁵⁴

D. The Role of Transnational Instruments in National Policymaking

It is difficult to gauge the actual effects of instruments such as those examined here in the wider landscape of transnational governance and of national decisionmaking. Although some of the prescriptions overlap with what might be binding obligations under, for example, international investment law, none of the instruments considered here are binding and, given their form and the mode of their drafting, it seems difficult to locate them even within a netherworld of “soft law.”⁵⁵ They work primarily through rhetorical persuasion and appeals to expertise, and even under the best conditions it is difficult accurately to assess the individual impact of such interventions.⁵⁶ It is entirely

⁵³ *Private Sector Participation Principles* at 15 (cited in note 43).

⁵⁴ Id at 3, 11. See also *OECD Principles for the Public Governance of Public-Private Partnerships* (OECD 2012).

⁵⁵ The *Legislative Guide and Model Provisions* are the subject of a UN General Assembly resolution, but the resolution merely recommends that all states “give due consideration to” these instruments “when revising or adopting legislation related to private participation in the development and operation of public infrastructure.” General Assembly Res No 58/76, UN Doc A/RES/58/76 at 2 (2003).

⁵⁶ For example, Kudrle concludes that policy diffusion within OECD membership is difficult to ascribe to actions of the OECD alone, such as the OECD’s support of liberalization efforts, facilitation of peer review (albeit primarily of new members or outside states adhering to the OECD’s 1976 *Declaration on International Investment and Multinational Enterprises*) and production of high-quality research and data. Kudrle, *Governing Economic Globalization* at 710–11 (cited in note 42).

possible that the instruments surveyed here do not, by themselves, have any discernible effect distinct from the effects of other institutions' material, international legal norms, conditionalities imposed by one of the MDBs, or broader influences of global capital flows. However, given that the institutions involved in adopting or promoting these instruments (or the national delegates involved in decisionmaking) have an interest in infrastructure, and a range of means by which they might further this agenda, it seems reasonable to assume that the institutions and/or national delegates at least expect the instruments which they have chosen to use to have *some* impact.

These instruments can bear on national policymakers in different ways. Where the drafting is collaborative, the process of drafting itself might play a role in educating officials or shifting them toward a particular view. Officials might simply read and consider the instruments in the process of national policymaking, or cite them in national debates. The extent of the comments by NGOs and the OECD Business and Infrastructure Advisory Committee on specific textual features of the *PFI*, for example, indicates that at least some groups thought the detail of the whole text mattered.⁵⁷

The instruments may also be adopted as part of an agenda for specific evaluation and reform projects. The *Handbook* is described by experts as the “gold standard” for assessing the effectiveness of infrastructure regulatory systems,⁵⁸ and now features in the World Bank’s “PPP in Infrastructure Resource Center,”⁵⁹ and in the “Body of Knowledge” on infrastructure regulation.⁶⁰ It is specifically designed to provide a benchmark for evaluations that might themselves have a great influence, especially if conducted as part of preparation of a loan, or provision of technical assistance. It has been used to

Williams agrees that it is difficult to measure the impact of the OECD's work on liberalization, Williams, *OECD and Foreign Investment Rules* at 132 (cited in note 42). For a skeptical view of the OECD's impact overall, see Woodward, *OECD and Economic Governance* (cited in note 41) (arguing that “the OECD's greatest contribution to economic governance is not shaping national economic policies but, through constructing communities of influence, the less tangible altering of the *mindset* of those involved in economic management and the *ideas* underpinning it.”).

⁵⁷ See note 71 below.

⁵⁸ Sanford Berg, *Characterizing the Efficiency and Effectiveness of Regulatory Institutions*, in UNCTAD, *Services, Development and Trade: The Regulatory and Institutional Dimension of Infrastructure Services* 112, 114 (UN 2012).

⁵⁹ See World Bank, *PPP in Infrastructure Resource Center, Energy Law and Regulation*, online at <http://ppp.worldbank.org/public-private-partnership/sector/energy/laws-regulations> (visited May 18, 2013).

⁶⁰ Developed by the Public Utility Research Center at the University of Florida, in collaboration with institutions including the World Bank. See *Body of Knowledge on Infrastructure Regulation, Annotated Reading List for Regulatory Process*, online at <http://regulationbodyofknowledge.org/regulatory-process/references/> (visited May 18, 2013).

carry out evaluations leading to regulatory reform in Jamaica,⁶¹ and is cited in the policy and academic literature on regulatory design and evaluation.⁶²

Although there is no definitive survey of the influence of the *Legislative Guide* and *Model Provisions*,⁶³ they are referred to by various international organizations and are, in particular, taken as one of the principal international standards against which country legislation is assessed in the European Bank for Reconstruction and Development's (EBRD) "Concessions Assessments"⁶⁴ and "Country Law Assessments."⁶⁵ Assessments undertaken in 2011 indicate that Albania and Lithuania, in particular, have concessions laws very close to the contents of the *Legislative Guide*.⁶⁶

⁶¹ Stern, *Evaluation of Regulatory Agencies* (cited in note 16).

⁶² See, for example, Darryl S.L. Jarvis and Benjamin K. Sovacool, *Conceptualizing and Evaluating Best Practices in Electricity and Water Regulatory Governance*, 36 Ener 4340, 4351 n 14 (2011).

⁶³ UNCITRAL monitors the status of its conventions and the adoption by states of legislation based on its model laws, but this monitoring does not extend to other texts, including legislative guides, "whose impact this method cannot easily assess." *Status of Conventions and Model Laws, Note by the Secretariat*, UN Doc A/CN.9/751 at 1 (May 2, 2012).

⁶⁴ See EBRD, *Concessions Assessments*, online at <http://www.ebrd.com/pages/sector/legal/concessions/assessments.shtml> (visited May 18, 2013). For a compilation of methodology and country-by-country results, see EBRD, *Concession / PPP Laws Assessment 2011: Final Report* (May 2012), online at <http://www.ebrd.com/downloads/legal/concessions/ppreport.pdf> (visited May 18, 2013).

⁶⁵ These assessments are defined by the EBRD as a "means of judging the progress made by a single country in making its commercial law *internationally acceptable*." EBRD, *Country Law Assessments*, online at <http://www.ebrd.com/pages/sector/legal/cla.shtml> (visited May 18, 2013) (emphasis added). These country law assessments in turn draw on earlier "concessions sector assessments." See, for example, EBRD, Office of the General Counsel, *Commercial Laws of Poland (July 2010): An Assessment by the EBRD* *6, online at <http://www.ebrd.com/downloads/sector/legal/poland.pdf> (visited May 18, 2013). The EBRD was an active participant in development and implementation of the *Legislative Guide* and *Model Provisions*. José Angelo Estrella Faria, *The Relationship between Formulating Agencies in International Legal Harmonization: Competition, Cooperation, or Peaceful Coexistence? A Few Remarks on the Experience of UNCITRAL*, 51 Loy L Rev 253, 276–77 (2005).

⁶⁶ EBRD, *Concession/PPP Laws Assessment 2011* at *18, 36 (cited in note 64). It seems that the *Legislative Guide* was used as one source of guidance for the drafting of the Lithuanian law: see Christopher Clement-Davies, Gledrius Stasevicius, and Alexei Zverev, *Laying the Foundation Stone: Lithuania's New Concessions Law and Its Lessons for PPPs*, 32 Intl Bus Law 267, 270 (2004) (describing a process whereby the Lithuanian Ministry of Economy approached the EBRD with a request to review its existing concessions law; the EBRD put the assignment of reviewing the existing law and drafting a new one out to tender, and awarded the tender to a team comprising an international law firm and a Lithuanian law firm; and this team drafted an initial version of the new law, drawing on the *Legislative Guide* (along with EU requirements and recommendations, the draft OECD "Basic Elements of a Law on Concession Agreements," and local procurement, construction, investment protection, contract and other laws)). However, there are indications that the reforms pursued in Lithuania are not yet widespread. A 2012 review of the EBRD's Legal Transition Programme, which had been involved in the drafting of the UNCITRAL *Legislative Guide* and *Model Provisions*, found that the legal environment in emerging and transition economies in Europe had scope for improvement, and that this improvement may be a slow process.

The *Private Sector Participation Principles* are referred to by several of the MDBs. They have also been used by the OECD as the basis for a further *OECD Checklist for Public Action on Private Sector Participation in Water Infrastructure*, intended as more practical guidance for states, and used as the basis for assessments of framework conditions for private sector participation in various countries.⁶⁷

It may be the existence of an *ensemble* of similarly oriented instruments that exercises influence, whether because the instruments validate each other,⁶⁸ or because the multiplicity of such instruments reinforces the sense of an independent field of infrastructure policy which must be considered from the starting point of encouraging private investment, rather than from some alternative imperative (such as social justice, human rights, or national sovereignty over resources). Transnational governance of infrastructure of the kind reflected in the instruments works alongside other global legal regimes which assume, or seek to realize, particular features of domestic public law: interventions in the areas of democratization and rule of law also aim at fundamental reorganizations of domestic political and legal systems, while international and regional human rights law has its own vision of domestic public law as a system for the recognition and vindication of rights.⁶⁹ Although there are, in the instruments, muffled echoes of these potentially divergent programs, the instruments as a whole manage to seal themselves off from this broader universe. The *PFI*, for example, was drafted in the wake of backlash against attempts to negotiate a binding Multilateral Agreement on Investment (MAI), and the attempt to involve civil society in the *PFI* may have stemmed in part from the MAI experience,⁷⁰ but there is little reflection of this controversy

T. Bartos, et al, *Special Study: Legal Transition Programme Review**7, 13, Annex 3 (University of Hong Kong Faculty of Law Research Paper No 2012/040, Nov 2012), online at <http://ssrn.com/abstract=2181251> (visited May 18, 2013).

⁶⁷ For the *Checklist* and reports of national assessments to date, see OECD, *Private Sector Participation in the Water and Sanitation Sector*, online at <http://www.oecd.org/daf/inv/investment-policy/water.htm> (visited May 18, 2013).

⁶⁸ In some cases the instruments refer directly to each other. The *PFI*, for example, mentions as “additional resources,” under the treatment of infrastructure-related questions, the website of the Public-Private Infrastructure Advisory Facility (PPIAF) (featuring the *Handbook*) and the UNCITRAL *Model Provisions*. *PFI* at 65 (cited in note 42). See also *Private Sector Participation Principles* at 30 (cited in note 43). Interestingly, the more specific *Handbook* does not refer to either OECD or UNCITRAL materials. The invocation of a similar vocabulary across the instruments, albeit with minor differences in definition or specification, may itself generate a sense of consensus even in the absence of specific cross-references.

⁶⁹ A human rights approach may have specific implications for the regulation of infrastructure, for example, in demands that privatization or regulatory reform be structured to protect particularly vulnerable populations. On the interplay between human rights and the ways in which these rights translate to particular demands for regulation, see Morgan, *Water on Tap* at 24–27 (cited in note 7).

⁷⁰ Kudrle, *Governing Economic Globalization* at 707–10 (cited in note 42).

in the text itself. The *PFI* is drafted at one remove from positive law. Although it makes frequent reference to investment agreements and the international law concerning expropriation, for example, it does not delve into international investment jurisprudence, and this distancing allows the *PFI* to selectively incorporate references to human rights law, for example, without making clear possible tensions between states' obligations to protect human rights and investor rights.⁷¹ The very familiarity of the normative prescriptions contained in these texts is indicative of the effects of the governance of which they are a part: the generalization, naturalization, and diffusion of a "common sense" of the way to handle this aspect of public policy, and of the role of law in this domain.

III. INFRASTRUCTURE, THE STATE, AND PUBLIC LAW

We turn now to examine the various prescriptions for national public law contained in the instruments. We look first at their general characterization of the appropriate role of the state in infrastructure provision (Section III.A). We then try to give some sense of the particular, sometimes far-reaching, reforms to systems of national law contained in these instruments, and the attitude to law in general encoded by them (Section III.B). On our reading, the treatment of the state is connected to the detailed recommendations for legal reforms. It is self-evident that the greater involvement of private actors requires major institutional and legal change. However, we also argue that the instruments' approach to the state as an actor, and their emphasis on "balancing" the various interests involved in infrastructure, influences the orientation of the instruments more generally and the way they approach the definition of abstract terms such as "legitimacy" and "transparency." The connection of these terms with particular prescriptions for reform is taken up in Section IV below.

⁷¹ On the conflict between neoliberal and rights-based framings of water service provision, and their interactions, see Morgan, *Water on Tap* (cited in note 7); René Urueña, *The Rise of the Constitutional Regulatory State in Colombia: The Case of Water Governance*, in Dubash and Morgan, eds, *Rise of the Regulatory State of the South* 27 (cited in note 9). In the public consultation process, some NGOs called for more systematic attention to human rights in the *PFI*; see, for example, the Amnesty International submission in the *PFI Public Responses Compilation* at 8 (cited in note 48). But the Business and Industry Advisory Committee to the OECD (BIAC) (officially representing business views at the OECD), in its comments, suggested that "the issue of human rights is part of the broader OECD principles and commitments to 'democratic government and the market economy' that serve as the foundation of the Organization. . . . [T]he PFI should include a reference to the principles of democratic governance and free markets as foundation [sic] of sustainable development directly in the preamble" *PFI Public Responses Compilation* at 12. The final version of the preamble states that the *PFI* "builds on universally shared values of democratic society and respect for human rights, including property rights." *PFI* at 7 (cited in note 42). The term "human rights" thus finds a place in the text, but the substance is inflected to be compatible with the investment agenda, and much of the detailed critique in other NGO submissions was not incorporated or acknowledged.

A. Theories of the State and Its Role

The instruments acknowledge, in various ways, the controversy regarding public versus private sector provision of particular types of infrastructure,⁷² but for the most part do not confront the question head-on. The World Bank *Handbook* indirectly argues for private sector provision. Its self-declared focus is on economic regulation. As commercialized entities are much more responsive to regulation of this kind than are public entities shielded from market pressures, it assumes some degree of commercialization, and commercialization, in turn, is said to require a significant degree of private sector involvement, particularly in the developing world.⁷³ The UNCITRAL and OECD instruments are more ambivalent. Early sections of the UNCITRAL *Legislative Guide* disavow any attempt to prescribe private ownership or involvement,⁷⁴ and as discussed below, the *Model Provisions* do not take any position on which sectors should be open to concession contracts (although the whole thrust of UNCITRAL's work on privately financed infrastructure is to foster the environment thought to be required in order to attract private finance). The Preamble to the OECD *Private Sector Participation Principles* similarly states that the principles "shall not be construed as advocating the privatisation or private management of publicly owned infrastructure," and calls instead for the choice of public or private provision to be "guided by an objective assessment of what best serves the public interest."⁷⁵

⁷² For acknowledgments of the failures of some earlier privatization initiatives, see, for example, *Handbook* at xii, 13–14 (cited in note 3); *PFI Review of Good Practices* at 209, 211, 220 (cited in note 45).

⁷³ *Handbook* at 21–22, 90 (cited in note 3).

⁷⁴ *Legislative Guide* at 4 (cited in note 31) ("The line between publicly and privately owned infrastructure must be drawn by each country as a matter of public policy.... No view is expressed in the *Guide* as to where the line should be drawn in a particular country."). See also *id* at 9.

⁷⁵ However on the preceding page there is a statement that "encouraging private sector participation is an option that governments cannot afford to ignore." *Private Sector Participation Principles* at 9–10 (cited in note 43). The "objective assessment of what best serves the public interest" becomes, in the words of Principle 1, "cost-benefit analysis taking into account all alternative modes of delivery, the full system of infrastructure provision, and the projected financial and non-financial costs and benefits over the project lifecycle." *Id* at 12. The *PFI* asks directly "Has the government evaluated the investment needs in water required to support its development goals? To what extent is the private sector involved in water management, supply and infrastructure financing?" *PFI* at 21 (cited in note 42). However, the "annotations" accompanying these questions do not directly advocate for greater private sector involvement (and indeed are quite inconclusive, suggesting perhaps some contestation over the text in the drafting process). *Id* at 62–63. For a complaint that a draft of the *PFI* referred too "half-heartedly" to the importance of private sector participation in infrastructure, see the comments of BIAC in *PFI Public Responses Compilation* at 22 (cited in note 48). The draft *PFI* was in fact changed to slightly amplify the extent to which the

Although they vary in the extent to which they explicitly endorse greater private sector involvement, the instruments examined here generally support a shift to a neoliberal model in which the state draws back from any direct role in managing or providing access to certain infrastructure previously controlled by the public sector. Typically, the reliance on private sector actors is thought to require the creation of an “independent” regulatory agency, at one remove from the government and the relevant ministry.⁷⁶ A preference for commercialized or wholly privatized provision is thus associated with the turn to a “regulatory” state in which the state acts not through direct control of infrastructure but rather through the development and maintenance of a regulatory structure overseeing market-based provision.⁷⁷

The instruments envisage relations between actors in terms of a contract or balance. Sometimes the state and public authorities are explicitly named as actors, as “partners,” whose interests must be considered alongside those of investors. In other instances, the state is not seen as an actor or partner to the transaction so much as the guarantor of the background conditions required for

private sector can not only finance but also more fully participate in the provision of infrastructure, though not with the exact language suggested by BIAC. (Compare *PFI* at 60, final paragraph under 9.1); OECD, *PFI: Draft Text for Public Consultation* *47 (Jan 2006), online at <http://www.oecd.org/investment/investmentfordevelopment/35815912.pdf> (visited May 18, 2013) (“Private investors can ease the call on public funds to finance a country’s infrastructure maintenance and development.”). The *PFI Review of Good Practices* cautions that, while “[p]rivate participation is often advocated because it provides an alternative source of financing to governments that have limited resources,” this reasoning is “flawed” because the infrastructure still has to be paid for by someone. Instead the *Review* suggests that “[t]he real advantage of well-designed private participation is different and deeper: it lies in changing the political economy of infrastructure provision . . . [t]o more easily allow genuine competition.” *PFI Review of Good Practices* at 211, 220 (cited in note 45).

⁷⁶ For example, the *PFI* asks “Are the regulatory agencies that oversee infrastructure investment and the operations of enterprises with infrastructure investments independent from undue political interference?” *PFI* at 21 (cited in note 42). The importance attached by the World Bank and investors to the creation of an independent regulatory agency is apparent in certain evidence cited by the arbitral decision in *Binvater Ganuff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, (Award of July 24, 2008), ¶¶ 535–44, 571–77, 608–21, online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1589_En&caseId=C67 (visited May 18, 2013). In this case, the tribunal found that Tanzania’s failure to establish an independent regulator constituted a breach of Tanzania’s obligation to provide fair and equitable treatment insofar as it represented a departure from the investor’s expectation, based on several undertakings, that such a regulator would be created, the failure to establish an independent regulator did not, in the particular circumstances of the case, have any negative impact on the investor.

⁷⁷ On this notion of the “regulatory state” and its relevance to privatization, see Giandomenico Majone, *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, 17 J Pub Pol 139, 144 (1997).

the proper balancing of interests between investors and their counterparts, whether conceived of as citizens or consumers.

Of the *Handbook*'s three "meta-principles," "credibility" refers to investors' confidence that the regulator will honor commitments, "legitimacy" is defined as consumers' confidence that the regulator will protect them from monopoly power, and "transparency" is "implied" from the other two: "the regulatory system must operate transparently so that investors and consumers 'know the terms of the deal.'"⁷⁸ The *Handbook* states that together, these meta-principles confer "legitimacy" on a regulatory system, helping foster a "demand" for sustainable regulation and thus allowing the regulatory system to take root.⁷⁹ The meta-principles are structured in the form of a bargain: something for both sides (investors and consumers, rather than the government or citizens as a whole), together with the conditions required for both parties to have confidence they are getting what is due. While recognizing the need for the regulatory system to be embedded in the society as a whole, the *Handbook* places the government in the background, as providing the institutions to support the bargain.

The *PFI Review of Good Practices* similarly sees in the recommended institutional structure of independent regulatory agencies "an attempt to reconcile the partly competing demands for investor protection and public legitimacy."⁸⁰ Principle 10 of the *Private Sector Participation Principles* recommends that "[a]uthorities responsible for privately-operated infrastructure projects should have the capacity to manage the commercial processes involved and to partner on an equal basis with their private sector counterparts."⁸¹ The authorities' role in this partnership is, however, confined to the careful custody of the terms of the bargain, and does not extend to any direct opposition to the private sector:

Public officials and administrative staff should not go to the extreme of perceiving businesses' profit maximising behaviour as somehow "illegitimate" or convey this impression to the public. Their duty to act in

⁷⁸ *Handbook* at 55 (cited in note 3).

⁷⁹ Id at 56 (cited in note 3). The *PFI Review of Good Practices* at 210 (cited in note 45) takes a very similar approach: "To be credible to firms, the [infrastructure regulation] arrangement must be sustainable, which means it must be perceived as reasonably fair and legitimate by consumers."

⁸⁰ *PFI Review of Good Practices* at 211 (cited in note 45):

If legitimacy could be ignored, investors' property rights would be most secure if contractual tariff adjustment rules were interpreted by independent international experts and serious disputes resolved by international arbitration. Using national regulatory agencies, courts, or arbitration increases one type of risk for investors, because the national institutions are more susceptible to political pressures to keep prices below costs—but decisions made by national institutions may be viewed as more legitimate, enhancing the sustainability of the arrangements.

⁸¹ *Private Sector Participation Principles* at 19 (cited in note 43).

the public interest is best expressed in the form of a competent, equitable and diligent attention to contracts, regulation and legal frameworks.⁸²

The state is thus called upon to undertake a wide range of functions to create or preserve the conditions necessary for other actors—both corporations and, where applicable, “independent” regulators—to operate. The *Handbook* stipulates that, particularly where there is a need for major adjustments in pricing, the government must support the regulator in pursuing often controversial measures.⁸³ More generally, “[t]he police power of the state will be needed to enforce laws against theft of service.”⁸⁴ The state must also furnish a range of other “pre-requisites,” including legislative bodies capable of enacting adequate laws, a functioning dispute resolution process, and a “reasonable overall quality of country governance.”⁸⁵ The *Legislative Guide* calls for state provision of “adequate administrative structures and practices, organizational capability, technical expertise, appropriate human and financial resources and economic stability,”⁸⁶ and Principle 5 of the OECD *Private Sector Participation Principles* emphasizes the importance of a similar list of characteristics.⁸⁷ The very breadth of the *PFI* and the *PFI Review of Good Practices* indicates the complexity of the work to be done by the state in cultivating an environment in which investors will be content to operate.⁸⁸

This approach of situating the state as the provider and guarantor of the overall system of governance within which investment occurs, rather than as an advocate for a public interest counter to the interests of investors, is consistent with the general preference for market-based approaches to delivery of public services. It may also reflect a principled position that the state is required to take this background role precisely because it is a party to a bargain (the relevant concession contract, asset lease, or other arrangements), and thus cannot at the same time be the deciding judge of performance under these contracts or

⁸² Id.

⁸³ *Handbook* at 89–90 (cited in note 3).

⁸⁴ Id at 90.

⁸⁵ Id at 92–93.

⁸⁶ *Legislative Guide* at 2 (cited in note 31).

⁸⁷ See text accompanying note 53.

⁸⁸ This sensibility is broadly consistent with the “second wave” of law and development. This “second wave” is characterized by greater regard for the social dimensions of development, such as human welfare, rights and freedoms, even democracy (albeit often only insofar as these are correlated with growth), rather than purely economic indicia; and it takes law and institutions as central objects of concern (albeit with a range of different agendas, some most attentive to the correlation between “rule of law” and economic development, others more open to normative demands for rights and justice). See, for example, Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, 26 Mich J Int'l L 199 (2004).

arrangements.⁸⁹ This instantiation of the liberal principle that no party can be a judge in its own cause (*nemo iudex in causa sua*) would be consistent with the relegation of the state to the status of any other (interest-driven) actor. This characterization is, however, at odds with the general expectation that the state take on a wide range of obligations in order for the transactions to succeed. The tension is characteristic of the state after neoliberalism: the state is both suspect, as a self-interested or captured actor (or conglomeration of self-interested bureaucracies), and the bearer of unique responsibilities for the public welfare.

The general emphasis on “balancing” and the uncertain role of the state as a party to, or guarantor of, the “balance,” establishes a particular dynamic for compromise and negotiation between the various interests at stake. The UNCITRAL *Legislative Guide* is telling in this respect. It identifies “transparency,” “fairness,” and “long-term sustainability” as “[g]eneral guiding principles for a favorable constitutional and legislative framework.”⁹⁰ The specification of what each of these principles entail turns crucially on the way in which the relation between the various actors is imagined. “Fairness,” for example, is defined in terms of a “fair legal framework,” namely one that

takes into account the various (and sometimes possibly conflicting) interests of the Government, the public service providers and their customers *and seeks to achieve an equitable balance between them*. The private sector’s business considerations, the users’ right to adequate services, both in terms of quality and price, the Government’s responsibility for ensuring the continuous provision of essential services and its role in promoting national infrastructure development are but a few of the interests that deserve appropriate recognition in law.⁹¹

As exemplified by this discussion of what a “fair legal framework” demands, the sheer ubiquity of the emphasis on balance and trade-offs can work to suggest that investor interests and the public interest are on the same plane, rather than the former being a necessary element of calculations regarding how to achieve the latter. To be clear, all of the instruments are animated by a conviction that, in at least some cases, greater private sector provision is in the

⁸⁹ See, for example, *Private Sector Participation Principles* at 24 (cited in note 43) (“Principle 17: Regulation of infrastructure services needs to be entrusted to specialised public authorities that are competent, well-resourced and shielded from undue influence by the parties to infrastructure contracts.”).

⁹⁰ *Legislative Guide* at 23–24 (cited in note 31).

⁹¹ Id at 24 (emphasis added). See also id at 2 (“The advice provided in the *Guide* aims at achieving a balance between the desire to facilitate and encourage private participation in infrastructure projects, on the one hand, and various public interest concerns of the host country, on the other.”).

public interest.⁹² Provision of an environment conducive to private sector investment is presented as a means to achieve that public interest. However, the instruments repeatedly either omit any reference to a public interest in favor of seemingly narrower categories such as “government” or “consumer” interests, or juxtapose the public interest and private sector interests, mingling the first order objective with the second-order trade-offs required to attain it.

One motivation for structuring discussions of the positions of the different actors in terms of “balance” may be a desire to push back against a reform agenda perceived as excessively favorable to investors.⁹³ On the other hand, this structure might reflect the pull of the contractarian mindset or, more narrowly, the perspective of private sector actors and advisers heavily engaged in law reform and policy in the infrastructure field, for whom concessions *would* primarily be perceived as transactions or partnerships in this sense. Regardless of the intention, the prevalence of the references to “balancing” tends to reinforce a view that the interests of investors on one hand and users, the state, or the public, on the other, are of the same order. Insofar as these competing interests are suggested to be determinative of what constitutes such things as a “fair legal framework,” the emphasis on “balance” opens the way for a renegotiation of the terms of governance in which the perspectives of the private sector play a very significant role. This becomes crucial in Section IV below, where we trace the ways in which general, open-textured terms such as “fairness” and “transparency” are attached to very specific institutional forms and legal provisions.

⁹² Whether because private financing is the only viable source of funds, or, for example, because competition between private actors holds them to higher standards, or because the private sector has some specific expertise that the public sector does not, or has better incentives to forecast accurately expected revenues and long-term costs of maintenance.

⁹³ For example, while early discussion of UNCITRAL’s work on privately financed infrastructure was generally positive about the role of private finance, the Secretariat referred to the fact that it had “borne in mind the need to *keep the appropriate balance* between the objective of attracting private investment for infrastructure projects and the protection of the interests of the host Government and the users of the infrastructure facility.” *Privately-Financed Infrastructure Projects: Draft chapters of a legislative guide on privately-financed infrastructure projects, Report of the Secretary-General*, UN Doc A/CN.9/438 at 3 (Dec 18, 1996) (emphasis added). In subsequent discussions, many delegates in the Sixth Committee reiterated this need for “balance.” See, for example, summary record of comments by Mr. Rao (India), in UN GAOR 6th Comm, 52d Sess, 3d mtg, UN Doc A/C.6/52/SR.3 at 4 (1997). See also comments of delegates of Malaysia, Iran, and Italy in UN GAOR 6th Comm, 54th Sess, 3d mtg, UN Doc A/C.6/54/SR.3 at 8–10 (1999); 4th mtg, UN Doc A/C.6/54/SR.4 at 2 (1999).

B. Interventions in, and Visions of, Law

The instruments all envisage potentially extensive reforms to national legal systems, from the constitution down. The most specific recommendations for legal reform are made in the *Handbook* and the UNCITRAL materials (and the UNCITRAL *Model Provisions* actually take the form of text intended to be incorporated into national statutes). Given that the instruments are intended to help foster a legal and institutional framework that supports a single dominant model of infrastructure delivery, it is unsurprising that the instruments actively promote changes to existing laws, in a relatively targeted and disaggregated way, and reflect a largely instrumental view of law as something to be recast in order to serve as a tool for the achievement of policy ends.⁹⁴ However, the extent of this instrumentalization is striking.

As one would expect from the interstate nature of UNCITRAL and its general focus on legal harmonization, UNCITRAL materials go further than the *Handbook* in acknowledging and accommodating existing features of national legal regimes, and adverting to the complexities arising from connections between infrastructure and other areas of law.⁹⁵ The *Handbook*, for example, goes so far as to specify a standard for judicial review of decisions of the independent regulatory agency (without any indication of how this standard is intended to relate—if at all—to the standard of review used in other contexts, or even by regulators in non-infrastructure sectors). The *Legislative Guide*, by contrast, simply provides that “[t]he law should establish transparent procedures whereby the concessionaire may request a review of regulatory decisions by an independent and impartial body, which may include court review, and should set forth the

⁹⁴ For discussion and critique of a similar pattern in the World Bank’s “Doing Business” indicators, see Ralf Michaels, *The Functionalism of Legal Origins*, in Michael Faure and Jan Smits, eds, *Does Law Matter? On Law and Economic Growth* 21 (Intersentia 2011); Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 57 Am J Comp L 765; Bénédicte Fauvarque-Cosson and Anne-Julie Kerhuel, *Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and the Economic Analysis of Law*, 56 Am J Comp L 811.

⁹⁵ *Legislative Guide* at 6, 189 (cited in note 31) (identifying a range of areas of law, beyond the framework for concessions contracts, which may affect investment (from intellectual property to administrative law, contract law, company law, and environmental protection), and discussing in some detail the international treaties and standards operative in these areas). The *Handbook*, on the other hand, gives little sense of how the legal regime recommended for infrastructure regulation relates to different areas of public and private law implicated in the recommendations (which might encompass some or all of administrative law, laws of evidence, civil procedure, corporate law, employment law, and so forth). The overall picture is one of a legal enclave applicable to a subset of regulators and only tenuously related to the surrounding fabric of norms and institutions.

grounds on which such a review may be based.”⁹⁶ In presenting this recommendation, the *Legislative Guide* notes the wide variety of bodies exercising powers of review in different countries, and adds that “in many cases there are limits, in particular as to the right of the appellate body to substitute its own discretionary assessment of facts for the assessment of the body whose decision is being reviewed.”⁹⁷

Even the UNCITRAL process, however, reflects an impetus towards sweeping reform of national systems. In debates about whether it was even possible to determine model legislative provisions for privately funded infrastructure, rather than the more open-ended *Legislative Guide*, some states and experts were opposed to any attempt to develop model provisions on the basis that “many of the crucial issues of private investment in infrastructure did not lend themselves to be properly addressed within the context of a model law, being of a political rather than of a legal nature.”⁹⁸ However, the counter-position—which appears to have prevailed—was that a more deliberate effort to facilitate the surmounting of legal differences was essential. The early decision to release only a legislative guide was criticized by the US delegate (in his personal capacity), who observed:

Whereas in the past such work [of harmonization] may have been driven by an attempt to reconcile doctrine—civil, common, socialist, and other—increasingly we see the effort to reach functional results, to respond to market demands, and to embody best practices, which may be quite detached from any doctrinal roots. In my view, this was not done sufficiently in this project. Here the market demand is clear: investors and lenders require an infrastructure project and package of contracts that is “bankable.” This will not be the case if a host country lacks the framework to “negotiate” deals, or if the governing law allows the host government to alter matters too freely.⁹⁹

⁹⁶ *Legislative Guide* at xiii (cited in note 31).

⁹⁷ Id at 36. The *Model Provisions* do not include any provisions concerning the nature of the review body, although other aspects of dispute settlement are addressed briefly. For example, model provision 49 reads “Any disputes between the contracting authority and the concessionaire shall be settled through the dispute settlement mechanisms agreed by the parties in the concession contract.” *Model Provisions* at 31 (cited in note 35).

⁹⁸ From the UNCITRAL Secretariat’s record of views at the colloquium held to gather perspectives on whether or not model legislative provisions were feasible. *Possible Future Work on Privately Financed Infrastructure Projects, Note by the Secretariat*, UN Doc A/CN.9/488 at 5 (July 5, 2001). See also above note 34.

⁹⁹ He went on to suggest that it was the perceived incompatibility of the civil law system with the kinds of framework that, in his view, the market required, and the inability of the Commission to face this, which partly explained reliance on the legislative guide form. Wallace, 8 *Tul J Intl & Comp L* at 287 (cited in note 30). But see note 34 above for the views expressed in the UN 6th Committee concerning the desirability of proceeding to draft model legislative provisions: although the states most opposed to this were civil law states, the Rio Group and Belarus, which

The subsequent development of the *Model Provisions* and contemplation of a complete model law suggests an increasing orientation towards the surmounting of political differences, expressed at the level of systems of law and doctrine, in favor of a more or less uniform set of “best practices” commensurate with inevitability or desirability of private sector involvement, and thus the expectations of global investors. Of course, whether or not this can be attempted or achieved in the more elaborate form of a complete model law remains to be seen.¹⁰⁰

Other than in relation to property rights, the materials, and particularly the *Handbook*, views existing legal norms as subject to reconfiguration in light of functional demands.¹⁰¹ The *Handbook* frequently mingles recommendations concerning the content of law with recommendations concerning institutional or bureaucratic factors. Principle 9, for example, which stipulates that the regulator must have “appropriate institutional characteristics” to carry out its mandate, encompasses “Commissioners who are appropriately insulated from short-term political repercussions,” bureaucratic requirements (concerning compensation,

also have civil law systems, favored the development of model legislative provisions. On the importance of UNCITRAL “tak[ing] careful note of international financial and capital markets and foster[sing] a willingness to modify existing national laws,” see summary of comments of Ms. Wilson, US delegate, in UN GAOR 6th Comm, 54th Sess, 4th mtg, UN Doc A/C.6/54/SR.4 at 3 (1999).

¹⁰⁰ It is telling that the UNCITRAL working group responsible for drafting the *Model Provisions* was unable to agree on a definition of “concession.” It rejected a definition adopted by the European Commission and ultimately opted for a definition of “concession contract” constrained by a list of the authorities with which, and sectors in which, such concessions can be concluded. This approach continued the trend in the *Legislative Guide* of steering clear of a body of concepts and doctrine particular to certain (civil law) countries. *Legislative Guide* at 3–4 (cited in note 31). On the other hand, the failure to provide a more substantive definition of “concession” still seemed to some experts to pose a danger to the coherence of national legal systems, leaving open the possibility of opportunistic labeling of particular arrangements to avoid, or benefit from, local laws based on the *Model Provisions*. See Bruno de Cazalet and John Grothers, *Présentation des dispositions législatives types sur les projets d’infrastructures à financement privé: Additif du guide législatif de la CNUDCI [Presentation of the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects: Addendum to the UNCITRAL Legislative Guide]*, *Revue de Droit des Affaires Internationales* 33, 36–39 (2004).

¹⁰¹ The *Handbook* and the UNCITRAL materials sometimes suggest that property rights have some natural or essential quality, as well as being an important means to the end of securing investment. See, for example, *Handbook* at 197–200 (cited in note 3) (property rights “should be protected, respected, and in no way treated arbitrarily, or unfairly abridged or violated by the regulatory system. . . . [P]roperty itself should be treated with respect”). In this regard the documents manifest a tension between the willingness to reconfigure other aspects of the law in sweeping ways, and the respect for property rights—a parallel to what has been diagnosed as an “amalgam of functionalism and formalism” in law and development discourse. Kerry Rittich, *Functionalism and Formalism: Their Latest Incarnations in Contemporary Development and Governance Debates*, 55 U Toronto LJ 853, 863 (2005).

education, training, adequate budgets, and the ability to retain outside consultants and so forth)—but also a very specific system of judicial review:

All regulatory decisions should be subject to final appeal to a single, impartial or independent, legally designated court or tribunal with the following requirements. The specified appeal forum should possess regulatory expertise. The regulatory decision should, with very limited exception, remain in force while the appeal is pending. And the appeal body should affirm regulatory decisions unless the following is true:

- The regulators acted beyond their legal authority.
- The regulators failed to follow appropriate procedural requirements.
- The regulators acted arbitrarily or unreasonably.
- The regulators acted against the plain weight of the evidence before the court.¹⁰²

The amalgamation of the parameters of judicial review with more mundane recommendations directed to efficient administration tends to suggest that matters like the standard of review applicable to regulatory decisions, and the funding arrangements enjoyed by the regulator, are of the same order.

Legal institutions and norms are assessed in the *Handbook* solely in terms of their contribution to fostering a regime attractive to investors (although appeal to public sentiment is an element of this calculus). As regards dispute settlement, for example, the *Handbook* notes that where domestic courts are slow or corrupt, thoroughgoing judicial reform will be necessary in the long run, but a short-term solution is also required to get the regulatory system functioning. It acknowledges that options such as alternative dispute resolution and private arbitration, which could be provided for in the contract, are not appropriate for regulatory disputes involving, as they do, the interests of “nonparties” such as consumers, and issues of public policy.¹⁰³ Aside from these “theoretical constraints on bypassing judicial or legally created appellate tribunals,” there are “practical, realpolitik reasons” not to do so: enforcing arbitral decisions is difficult; resort to these alternative dispute resolution mechanisms can cause “public resentment that ‘outsiders’ are deciding critical infrastructure matters in a country other than their own”; and there are “basic legal and constitutional questions about using private means to enforce or overrule the otherwise lawful decisions of duly constituted agencies of the state.”¹⁰⁴ The proposed approach is to allow disputes to be adjudicated by the courts but, where possible, to create specialized tribunals to handle these disputes, or at least allow for optional or mandatory recourse to a panel of experts that could provide non-binding advice.

¹⁰² *Handbook* at 62–63 (cited in note 3).

¹⁰³ Id at 105.

¹⁰⁴ Id at 105–06.

Using specialized tribunals and, to a lesser extent, expert advisers, would “increas[e] the probability that decisions would be made in a consistent manner with a coherent and discernible pattern.”¹⁰⁵ The emphasis is on outcomes and particularly their role in stabilizing and rendering predictable the regulatory regime.

The *Handbook* recognizes differences in the relative status of legal instruments, and favors promulgation of statutes (rather than executive decrees) as the means of establishing regulators and governing regulatory processes. However, the fact that legislation is “more representative of political will,” more transparent, and more likely to be the subject of public debate is important because these features make changes to the regime, once it is established, more difficult.¹⁰⁶ There is no suggestion that it matters, other than perhaps for practical reasons relating to likelihood of passage, whether a statute was drafted in a consultative manner, rather than formulated by the executive on the advice of global consultants. Indeed, the *Handbook* recommends including a local lawyer on the project team, so that, if the government accepts particular recommendations, the consultants can provide advice on specific language required to implement the recommendations, thus avoiding “the delay of a second and separate legal analysis.”¹⁰⁷ The focus is on the capacity of law to organize processes and structure incentives, rather than on deeper and more political dimensions of law—its connection to self-government and political representation, its role in expressing particular values, its connection to particular modes of discourse (legislative debate or judicial reason-giving), or even its dynamic and systemic qualities.¹⁰⁸ Little consideration is shown for the intrinsic importance of political dimensions of law. This creates something of a paradox: in the longer term, it is likely that law can only work in the instrumental way intended—as a guarantee of stability, or more broadly as a mark of the acceptability of the new arrangements in the eyes of the population—if it is understood by the public as something more than merely instrumental.

¹⁰⁵ Id at 106.

¹⁰⁶ *Handbook* at 186 (cited in note 3).

¹⁰⁷ Id at 34.

¹⁰⁸ On the other hand, the ends perceived to be served by law reform are not necessarily limited to satisfying investor expectations. Legal reform is sometimes seen by those involved as part of a larger effort of education and persuasion: “To require countries, their elites, governments, and legislatures and hopefully their people to face up to the dilemmas and ‘tragic’ choices: development and improvement vs aversions and hesitations as to capitalism, nationalism vs globalism, past prejudices vs future hopes.” Don Wallace Jr., *Private Capital and Infrastructure: Tragic? Useful and Pleasant? Inevitable*, in Michael Likosky, ed, *Privatising Development: Transnational Law, Infrastructure and Human Rights* 131, 138 (Brill 2005).

IV. FORMS AND VOCABULARIES OF LAW

Thus far we have suggested that, although there are variations between the instruments surveyed, their intervention in national public law tends to be shaped by a largely instrumental vision of law, in which law is used to bring about a model regulatory system informed principally by economics. Despite this thin view of national legal systems, however, the instruments draw heavily on a vocabulary that has important connections to traditions of public law. The instruments are framed hierarchically, such that the higher order principles articulated in this vocabulary come to be associated with very specific institutional structures and legal reforms.

A. Hierarchical Structures

Each of the instruments involves some more or less explicit hierarchization between general statements or recommendations and more detailed notes or explanations (the precise relation varies). The *Handbook* is somewhat unusual, even among comparable texts, in the extent of the connections it makes between general principles and specific institutional reforms. The *Handbook* sets out its best practice model in a three-tiered structure. At the peak of the whole edifice are the three “meta-principles” (“credibility,” “legitimacy,” and “transparency”) which, according to the *Handbook*, any regulatory regime, transitional or otherwise, must satisfy if it is to function.¹⁰⁹ The *Handbook* identifies ten “principles” necessary to implement the meta-principles in the context of an independent regulator model: independence, accountability, transparency and public participation, predictability, clarity of roles, completeness and clarity in rules, proportionality,¹¹⁰ provision to the regulator of the powers required to carry out its mandate, appropriate institutional characteristics,¹¹¹ and integrity. The “principles” are in turn accompanied by numerous “standards,” constituting “a checklist of specific actions that would be needed to implement the 3 meta-principles and 10 general principles . . . provid[ing] the bridge to go . . . from the ‘theoretical’ to the ‘practical.’ ”¹¹² The standards are organized under headings which correspond to the “principles” in some instances (e.g. proportionality), but do not correspond with them in others. For example, the first three standards, titled “legal framework,” “legal powers,” and “property and contract rights,” transcend the confines of any one principle.

¹⁰⁹ *Handbook* at 59 (cited in note 3).

¹¹⁰ That is, recourse to the minimum regulatory intervention necessary to attain particular goals for the sector.

¹¹¹ For example, appropriate education and training opportunities for commissioners and staff.

¹¹² *Handbook* at 185 (cited in note 3).

In texts negotiated among groups with somewhat divergent national views, such as the UNCITRAL materials or the OECD *PFI*, the juxtaposition of abstract principles with more specific material might leave some flexibility for local choices, and it enables global institutions to set out a relatively ambitious program of reform while accommodating dissent on particular points.¹¹³ On the other hand, the lower-order detailed discussion is likely in some cases simply to reinforce the higher-order recommendation.¹¹⁴ Some tailoring to local circumstances is accommodated in the *Handbook*; for example, the standards provide different mechanisms to ensure transparency, depending on whether the multimember regulatory commission makes decisions by voting or by negotiation and consensus.¹¹⁵ The *Handbook* also refers to “transitional regulatory systems,” which are not expected to meet all the standards set out as best practice. However, the meta-principles, principles, and standards still serve as a

¹¹³ See, for example, Block-Lieb and Halliday, 42 Tex Intl L J at 479–81, 507–12 (cited in note 10). A structure of agreed ends (in the form of framework goals), but relative flexibility as to means, coupled with uniform approaches to assessing the degree to which the agreed ends have been attained, and ongoing deliberation and learning among elites and experts about the efficacy of different means, has been characterized in the EU context as a distinctive form of “experimentalist” governance. See, for example, Charles F. Sabel and Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, in Charles F. Sabel and Jonathan Zeitlin, eds, *Experimentalist Governance in the European Union: Towards a New Architecture* 1 (Oxford 2010).

¹¹⁴ Block-Lieb and Halliday, 42 Tex Intl L J 1 at 501 (cited in note 10). Something of this kind is evident in the *Legislative Guide*’s discussion of regulatory design. Recommendation 8 provides that “[r]egulatory competence should be entrusted to functionally independent bodies with a level of autonomy sufficient to ensure that their decisions are taken without political interference or inappropriate pressures from infrastructure operators and public service providers.” *Legislative Guide* at xii (cited in note 31). The discussion of this recommendation adds that there are “different options that have been used in domestic legislative measures to set up a regulatory framework for privately financed infrastructure projects” and that “the *Guide* does not thereby advocate the establishment of any particular model or administrative structure.” Id at 31. Different options are introduced: “While there are countries that entrust regulatory functions to organs of the Government (for example, the concerned ministries or departments), other countries have preferred to establish autonomous regulatory agencies, separate from the Government.” Id at 32. But the longer “notes” lead almost inexorably to the conclusion that an independent regulatory agency is preferable:

The efficiency of the regulatory regime is in most cases a function of the objectiveness with which regulatory decisions are taken. This, in turn, requires that regulatory agencies should be able to take decisions without interference or inappropriate pressures from infrastructure operators and public service providers.... In order to achieve the desired level of independence it is advisable to separate the regulatory functions from operational ones by removing any regulatory functions that may still be vested with the public service providers and entrust them to a legally and functionally independent entity.

Id at 32–33.

¹¹⁵ *Handbook* at 233–34 (cited in note 3).

benchmark for assessing progress in transitional regulatory systems,¹¹⁶ and even transitional regimes are expected to evolve to the best practice model over time. Moreover, the *Handbook* does not suggest that the “standards” proposed may be replaced by divergent local approaches capable of fulfilling the same “principles.” The main force of the hierarchical organization of the *Handbook*’s benchmarks thus lies not in the openings it provides for local variation but in the way it works to enforce the coherence and persuasiveness of the recommendations overall.

The hierarchical form of the *Handbook*—the pattern of precise directions in the service of more general “principles”—has some affinity to the structure of bodies of law and of legal systems. Both the systemic quality, and the oscillation between the general and the particular, are common to positive law and modes of legal reasoning, although they may also be a feature of bureaucratic ordering more generally.¹¹⁷ The use of a structure associated with law may itself be a part of the rhetorical appeal of the *Handbook*. Whether or not this is the case, the edifice of “meta-principles,” “principles,” and “standards” gives comprehensive and systematic content to abstractions such as “legitimacy.” Conversely, these

¹¹⁶ Id at 92.

¹¹⁷ The formal resemblance between the recommendations and a hierarchy of legal norms, however, is somewhat belied by the content. Higher order “principles” in law tend to both retain some residual meaning not exhausted by more specific provisions, and to have some autonomous normative or purposive content that renders them susceptible to reinterpretation over time. While the “meta-principles” have the abstraction common to “principles” as higher order legal norms, the wider context of the *Handbook* makes clear that these are not analogous to constitutional provisions, capable of re-interpretation through normative argument about what “legitimacy” as such demands, or about how to blend deontological and utilitarian considerations. Rather, the meta-principles reflect almost purely functionalist assumptions about what is required to attract private investment and maintain support for this arrangement, or at least its toleration, by the public (id at 1, 13) which is in turn connected to a theory that only this investment can provide the infrastructure vitally necessary for development. The “principles” are then interpreted in light of this pre-ordained structure. Of course, it may not be the case that investors are most reassured by exactly the measures set out in the *Handbook*; confidence in the security of investments might also flow from close relationships with senior officials, for example, or close relationships between the host state and the investors’ home state governments, or possibilities for issue linkage in other areas (the latter two may be particularly relevant, at least once disputes have arisen, where investors are themselves state-owned). For one example of findings running counter to the consensus presented in the *Handbook*, see Sheoli Pargal, *Regulation and Private Sector Participation in Infrastructure*, in William Easterly and Luis Servén, eds, *The Limits of Stabilization: Infrastructure, Public Deficits, and Growth in Latin America* 171, 185 (World Bank 2003) (noting that, for a set of Latin American countries, private investment volumes are significantly positively related to the infrastructure regulatory body being housed *within* a ministry, rather than as an independent agency—a result that the author suggests may be connected to the historically strong position of executives in Latin America, and thus reflective of the general importance of credibility and predictability of the regulatory framework, albeit under the specific conditions prevailing in those polities).

abstractions, posited as universal and framed in a language that itself carries a normative charge—a matter to which we turn next—validate the specific prescriptions by connecting them up to a broader vision of the political economy of infrastructure.

B. Vocabularies of Law, Governance, Economy

A passage from the detailed “notes” on “Regulatory process and procedures” in the UNCITRAL *Legislative Guide* provides:

The regulatory framework typically includes procedural rules governing the way the institutions in charge of the various regulatory functions have to exercise their powers. The *credibility* of the regulatory process requires *transparency* and *objectivity*, irrespective of whether regulatory authority is exercised by a government department or minister or by an autonomous regulatory agency. Rules and procedures should be objective and *clear* so as to ensure *fairness*, *impartiality* and timely action by the regulatory agency. For purposes of transparency, the law should require that they be made public. Regulatory decisions should *state the reasons* on which they are based and should be made *accessible to interested parties*, through publication or other appropriate means.¹¹⁸

Read in isolation, parts of this passage could plausibly be taken from a text on (Anglo-American) administrative law or even legal philosophy—or from a work on institutional economics. Similarly, setting the *Handbook*'s “principles”¹¹⁹ alongside articulations of the values or characteristics of public law, or the properties of law as a whole, is revealing. In some cases, the principles mentioned in the *Handbook* find more or less direct counterparts in these other discourses. “Accountability” and “public participation,” for example, also appear in administrative law scholar Michael Taggart’s list of public law values, and the “principle” of “transparency” bears a relation to the value of “openness.”¹²⁰ In other cases, the “principles” have counterparts at the level of concept, if not vocabulary. “Predictability,” for example, corresponds to a number of Fuller’s attributes of a legal system: that rules be published, intelligible, possible to comply with, prospective, not subject to constant change, and followed by the officials enforcing them. Principles of clarity of roles, and completeness and clarity in rules, also correspond to some of Lon Fuller’s attributes (published

¹¹⁸ *Legislative Guide* at 35 (cited in note 31) (emphasis added). See also id at 26. Compare this passage to the *Handbook*'s meta-principles of credibility, legitimacy, and transparency.

¹¹⁹ Independence, accountability, transparency and public participation, predictability, clarity of roles, completeness and clarity in rules, proportionality, provision to the regulator of the powers required to carry out its mandate, appropriate institutional characteristics, and integrity.

¹²⁰ Taggart’s distillation of “public law values” includes: openness, fairness, participation, impartiality, accountability, honesty, and rationality. Michael Taggart, *The Province of Administrative Law Determined*, in Taggart, ed, *The Province of Administrative Law* 1, 3 (Hart 1997).

rules, free from contradiction) and perhaps to a public law value of “rationality.”¹²¹

The instruments are representative of a genre of “good governance” literature which is shaped in part by public law traditions, but informed also by criteria of bureaucratic and economic efficiency.¹²² The fact that many of the terms that recur across the instruments, particularly in the *Handbook*’s principles and in the higher-order content of the UNCITRAL and OECD materials, have affinities with vocabularies of public law within the state, and by association with ideals of democracy and self-government with which public law has historically been connected, no doubt gives the terms some normative appeal. Accordingly, one analysis of the instruments might be that they co-opt normatively charged terms to lend an aura of legitimacy and consensus to much narrower, and politically contestable, prescriptions for institutional and legal reform. “Transparency,” “fairness,” “predictability,” and “impartiality” seem unobjectionable, but in the international instruments on infrastructure studied here, this hybrid vocabulary takes its meaning primarily from the functional demands of attracting private sector investment, in accordance with the “balancing” between public and private, and the terms are thus defined, whether explicitly or implicitly, in a way that does not do justice to their roots in political ideals. Such a reading would echo concerns that the vocabulary and values of public law are being deployed to further an economic agenda, or that the vocabulary of law itself is being deployed to legitimize a managerial discourse.¹²³

Of course, some degree of hybridization is already nascent in each of the strands that are drawn together: public law principles and values are to some

¹²¹ Fuller’s desiderata for a legal system include the existence of general rules and their publication, prospectivity, clarity, compatibility, possibility of compliance, constancy, and congruence with officials’ actions. Lon L. Fuller, *The Morality of Law* (Yale rev ed 1969).

¹²² For example, those responsible for producing the bank’s “Worldwide Governance Indicators” have acknowledged the multiplicity and diversity of definitions of “governance,” and in particular a divergence regarding the importance of democratic accountability to citizens, but have nevertheless concluded that there is some degree of consensus on “the importance of a capable state operating under the rule of law.” The functionalist, neoliberal orientation of the “governance” measured by bank indicators is relatively clear, but many aspects of this agenda, particularly those concerning rule of law, the functioning of regulatory institutions, and the control and oversight of public officials, have also been central to public law. See Daniel Kaufmann and Aart Kraay, *Governance Indicators: Where Are We, Where Should We Be Going?* *6 (World Bank Policy Research Working Paper No 4370, 2007), online at <http://elibrary.worldbank.org/content/workingpaper/10.1596/1813-9450-4370> (visited May 19, 2013). For further iterations of the indicator’s composition, see Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi, *The Worldwide Governance Indicators: Methodology and Analytical Issues* *3 (World Bank Policy Research Working Paper No 5430, 2010), online at <http://info.worldbank.org/governance/wgi/pdf/WGI.pdf> (visited May 19, 2013).

¹²³ See, for example, Somek, *Administration without Sovereignty* (cited in note 2).

extent shaped by considerations of political economy and the efficient management of the state, as well as by ideals of democracy and self-government. Conversely, as is evident from the focus of the instruments on property rights, economic models of regulation are heavily reliant on a certain class of property rights, if not on any broader range of civil or political rights. We suggest that the invocation in the instruments of a hybrid vocabulary, reaching into each of these traditions, does not simply pass one thing (instrumental features of governance) off as another (public law), but rather brings the two into relation. The vocabulary in which the *Handbook*'s "principles," for example, are expressed is a new *lingua franca*, incorporating terms taken from different discourses.¹²⁴ The instruments arguably deploy this vocabulary—rather than, say, a more purely technical economic vocabulary—precisely because, while normatively charged, it is not reducible to a single established set of substantive commitments. Government officials, experts, non-government organizations, and corporations may all find the language familiar; although they might understand its contents in radically different ways, they can deploy it to speak intelligibly to one another, and it may both appeal to, and be taken up by, similarly socialized elites in countries or organizations with otherwise inimical values or political structures.

The very indeterminacy of the language may both make possible the persistence of very different understandings of its content, by concealing the magnitude of differences in substantive understanding, and provide a platform for diffusion and cross-fertilization of ideas about this content between actors who appear to have committed to similar programs. For example, the *Handbook* accepts the likely pluralism of views on concepts such as "fairness," and envisages patterns of borrowing and transposition as the various actors deal with each other:

To be acceptable, the process by which [regulatory] decisions are made must be consistent with local notions of fairness and justice. The other perspective that needs to be satisfied is that of the investors, many of whom are likely to be foreign, in the case of developing countries. Just as residents of the country need to be satisfied that the process is fair, so too do international investors who may have different views of fairness than local residents.¹²⁵

The political consequences of this process of diffusion remain open to some extent. Given the relative positions of investors and groups within host states that may be able to influence the process of regulatory decisionmaking,

¹²⁴ On the deliberate adoption of universal vocabularies as a strategy for building consensus and avoiding the impression that particular national approaches dominate global deliberations, see Block-Lieb and Halliday, 42 Tex Int'l L J at 498–500 (cited in note 10).

¹²⁵ *Handbook* at 230 (cited in note 3). See also the strikingly similar passage on "fairness" and a "fair legal framework" in the UNCITRAL *Legislative Guide*, in text accompanying note 91 above.

there is room for skepticism about the likely shape of the consensus on “fairness” that might emerge from the process envisaged above. On the other hand, rhetorical and conceptual limits to this language, and to terms such as “fairness,” rule out some artifices of reconstruction. Precisely because of their abstract and normative dimensions, the invocation of these terms may open avenues for contestation that could develop into some more democratic and emancipatory system. Conversely, the invocation and deployment of this language may drain its normative significance and political potential. As prescriptions for national legal systems are articulated in greater detail, architectural projects of global public law, discussed in the following Section, may prove to be important interventions in struggles over the direction of transnational influence and national developments.

V. GLOBAL PUBLIC LAW AS AN AVENUE FOR THE RENEWAL OF PUBLIC LAW

Despite the significant influence which global prescriptions may have on national public law, and despite the fact that these prescriptions are framed in a vocabulary that bears a relation to traditions of public law, much of the activity involved in the preparation of the instruments considered here, and their use, seems to fall beyond at least traditional conceptions of national public law, private international law, and public international law.¹²⁶ In this Section, we explore the extent to which two accounts of an emergent global public law, namely international public authority and global administrative law, offer any greater purchase on these instruments—and what challenges the instruments pose for these new visions of global public law.

A global public law applied to the prescriptive but non-binding international instruments studied in this Article might have at least two purposes: first, rendering this governance activity intelligible in legal terms, so as to foster (*inter alia*) some structure in which policymakers or communities might engage with the transnational pressures being brought to bear; and second, vindicating some sense of the specificity and complexity of law as both a set of existing norms and a distinct intellectual and political practice.

In this Section, we focus on the “hardest” case of transnational influence of those considered here: preparation of an instrument like the *Handbook* (highly detailed in its prescriptions, but developed without any formal involvement of state representatives), and the conduct of evaluations pursuant to it. The fact that

¹²⁶ It is not that governance falls “beyond” the domain of these bodies of law; rather, the law permits the activity, without regulating it in any detailed way. On private international law and global governance, see Horatia Muir Watt, *Private International Law Beyond the Schism*, 2 Transnatl Legal Theory 347 (2011).

work in particular international organizations has been endorsed by state representatives (members of the executive often acting in pursuit of policies and agendas which have not received any particular sanction from the legislature or the populace as a whole), does not of course exhaust concerns about the legitimacy of this transnational normative production, but it does ensure at least a notional path by which individuals or groups within states might challenge, or seek to influence, this activity through public law channels. The picture is somewhat different in the case of the *Handbook*, insofar as this instrument is developed by experts exercising their own knowledge and professional judgment and without any formal relation of representation of a particular national community.

A. Transnational Governance and Global Public Law

Orthodox public international law offers few resources for the analysis and contestation of activity reflected in works such as the *Handbook*. International organizations exist within and subject to public international law, and may be responsible for internationally wrongful acts,¹²⁷ but the legal norms applicable to international organizations, and particularly the question of whether they are directly bound by international human rights law, are contested.¹²⁸ It would be difficult in practice to establish that non-negligent provision of good faith policy advice, without domination and without any control over its use, constitutes an internationally wrongful act in public international law.

There is increasing interest in arguments that processes of governance transcending the political and legal apparatus of individual states either actually *are* (properly understood), or *should be*, subject to some more comprehensive structure of public law beyond those just surveyed, whether conceived as global “constitutionalism,” “inter-public law,” “global administrative law,” or notions of “international public authority.” These accounts are animated by a variety of normative commitments, and they differ as regards both their conception of existing institutions, and their doctrinal aspirations (for example, the extent to which they understand themselves as articulating *lex lata* or *lex ferendi*, or the extent to which they claim a connection with international law rather than domestic public law). However, they share a commitment to the notion that

¹²⁷ International Law Commission, *Draft Articles on the Responsibility of International Organizations* (2011) Art 6–9 online at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf (visited May 19, 2013).

¹²⁸ For a detailed examination of the relationship between international law and the operations of the MDBs, see the essays collected in Daniel D. Bradlow and David B. Hunter, eds, *International Financial Institutions and International Law* (Kluwer 2010).

there is some distinct characteristic in law which may be isolated from its functional role in governance.

We here briefly sketch two of these approaches—international public authority and global administrative law—and assess the extent to which they might respond to an exercise of governance power such as that manifest in the preparation and invocation of the *Handbook*.

1. International Public Authority.

Animated by a concern to assert a distinctive legal perspective on the phenomenon of governance, and to provide some means of reducing contestation of “legitimacy” to more tractable arguments about legality, legal scholarship on “international public authority” has pursued an *ex ante* categorization of instances in which global governance institutions exercise international public authority. Once so categorized, these exercises of international public authority are subject to a corpus of public law, including human rights law.¹²⁹

Von Bogdandy, Dann, and Goldmann argue for a framework in which “authority” is held to be exercised not only when an institution issues binding legal commands, but whenever an institution has the capacity to condition a legal subject (“conditioning” including, for example, situations in which an act “builds up pressure for another legal subject to follow its impetus,” or an institution “carves out the cognitive environment of the issue in a manner that marginalizes alternative perspectives,” as long as the communicative power involved reaches a certain threshold).¹³⁰ The subject of this conditioning may be an individual, a private association, an enterprise, or a state or public institution, although the ultimate normative concern is one of individual freedom and political self-determination.¹³¹ The “international public” character of authority, in relation to particular persons, derives from its legal basis: the fact that it is exercised on the basis of an (even informal, or “soft law”) act of public authorities like states and intergovernmental institutions—“an act of self-determination of a community to

¹²⁹ On this approach, see Armin von Bogdandy, Philipp Dann, and Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 German L J 1375 (2008); Armin von Bogdandy and Matthias Goldmann, *Taming and Framing Indicators: A Legal Reconstruction of the OECD’s Programme for International Student Assessment*, in Kevin Davis, et al, eds, *Governance by Indicators: Global Power Through Quantification and Rankings* 52 (Oxford 2012).

¹³⁰ Von Bogdandy, Dann, and Goldmann, 9 German L J at 1376, 1382 (cited in note 129); von Bogdandy and Goldmann, *Taming and Framing Indicators* at 66 (cited in note 129).

¹³¹ Von Bogdandy, Dann, and Goldmann, 9 German L J at 1376, 1383 (cited in note 129).

which the person affected belongs.”¹³² At least for intergovernmental institutions, this act will typically be the founding treaty or articles.

In the case of something like reform of domestic infrastructure law and policy, the effect on the behavior of *individuals* as such is highly attenuated—the actual effects on individuals’ access to infrastructure or their ability to participate in regulatory reform processes is mediated by the choices of evaluators regarding what to recommend, and by the decisions of the government about what recommendations to act upon and how to implement them. These governmental decisions may also diverge from what evaluators would advise, although the decisions will often be taken under pressure where the evaluation is a condition of funding or aid, given that the whole thrust of the evaluation process is to deliver ready-made reforms, including even constitutional and statutory changes. The “authority” at stake in the issuing of the *Handbook* and in preparation of evaluations in accordance with it is thus more akin to “conditioning” than outright determination. (The judgment of when epistemic influence can be said to have occurred at a sufficient threshold to “condition” behavior is, however, a fine one.¹³³)

Preparation of a text such as the *Handbook* is one of a myriad of acts undertaken by and under the auspices of intergovernmental institutions which, although guided by internal procedures regarding the preparation of research products, is unlikely to have any specific authorization from state representatives. The ultimate legal basis of the preparation and publication of the *Handbook*, as understood in the scholarship on international public authority, presumably lies in the Articles of Agreement of the International Bank for Reconstruction and Development. The Articles, which establish and govern the operation of the World Bank, are, of course, remote from the actual activity that led to the *Handbook*. From the standpoint of this scholarship, the *use* of the *Handbook* in particular circumstances and the conduct of evaluations by teams of specialists (at least insofar as the use occurs at the behest of particular donor or recipient states) may actually be more plausible instances of “international public” authority than the drafting of the *Handbook* in the first place. The difficulty of determining whether the drafting of the *Handbook*, in particular, constitutes an exercise of international public authority presents interesting questions and

¹³² This last formulation is given in Matthias Goldmann, *A Matter of Perspective: Global Governance and the Distinction between Public and Private Authority (and Not Law)* (April 2013) (draft paper on file with authors).

¹³³ Moreover, in the realm of epistemic authority, it is perhaps unusual that one actor alone “carves out the cognitive landscape” within which policies come to be conceived and debated. The picture is more often one of gradual shifts in a discourse involving multiple entities or individuals, and often influenced by a whole range of historic, economic, and social dimensions.

illustrates the challenges of applying an essentially hierarchical and formal classification to the messy circumstances of governance.

If defined as an exercise of international public authority, the preparation of a prescriptive manual like the *Handbook* and the conduct of evaluations would be subject to a public law framework, including both procedural dimensions similar to those emphasized in global administrative law, and some substantive component of fundamental rights.¹³⁴ Von Bogdandy and Goldmann have suggested that different “instruments” of governance may be subject to tailored, public-law-inspired frameworks.¹³⁵ The preparation of evaluations drawing on the *Handbook* may be analogous in some respects to instruments that they classify as “national performance assessments.”¹³⁶ In their view, the terms of such assessments should be laid out in advance (to ensure that political questions do not become subject to purely bureaucratic and technocratic resolution), and should involve debate and consultation with all groups concerned. Results of assessments should accord with scientific principles, be justified, and be open to criticism, perhaps in some institutionalized forum. Criteria of the kind articulated for “national performance assessments” cannot necessarily be applied directly to a program such as that set out in the *Handbook*, which (like probably the majority of advisory tools) was generated within a global institution, partially nested within a broader community of peer experts, rather than through any deliberate prior decision by states’ representatives or through a general consultative process. However, if these criteria were applied, the modes of governance and intervention exemplified by the *Handbook*, which prioritize targeted, expert

¹³⁴ See, for example, Armin von Bogdandy and Matthias Goldmann, *Sovereign Debt Restructurings as Exercises of International Public Authority: Towards a Decentralized Sovereign Insolvency Law*, in Carlos Esposito, Yuefen Li and Juan Pablo Bohoslavsky, eds, *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing* 39 (Oxford 2013). The rights dimension might be articulated in various ways. At a minimum, global institutions and processes undertaken under their auspices might be required to accommodate, rather than undermine, existing rights and obligations of parties affected by the evaluation, including constitutional and international law obligations of the states whose regulatory systems are under evaluation. In some cases this may be a significant constraint on the approach taken by evaluators of both access to infrastructure (in light of rights to health, food, water) and the process of regulatory reform (in light of rights to, for example, political participation and equality).

¹³⁵ Matthias Goldmann, *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, 9 German LJ 1865 (2008).

¹³⁶ These are defined as involving “the revelation of empirical information with a claim to objectivity by international institutions that evaluate the outcomes of domestic policy, produced for the purposes of the latter and coupled with a light enforcement mechanism for future domestic policy that relies on the incentives created by iterative evaluations, public disclosure, country rankings, and/or specific policy recommendations.” Von Bogdandy and Goldmann, *Taming and Framing Indicators* at 75 (cited in note 129). However, *Handbook* evaluations, though recommended for general, periodic use, are most likely to be conducted on states seeking funding for infrastructure support on a one-off basis rather than in regular assessments applicable to a number of states.

intervention and cooperation with national executives to develop ready-made reforms which are later presented to the legislature for enactment, would have to change significantly before they attained the “legitimacy” for which the international public authority account provides.

2. Global Administrative Law.

Global administrative law has been less concerned with sharp delineations of authority into “public” and “private,” and more concerned with procedural constraints applicable to governance processes across different institutional sites, in particular greater transparency, participation, reasoned decisionmaking, and formal review.¹³⁷ Some elements of these procedural checks already exist within specific individual institutions or regimes (albeit typically as institutional practice or policy, the legally binding quality of which would depend on a practice account of law that extends beyond conventional understandings of custom and even “general principles” as sources of international law).¹³⁸

The World Bank—the institution to which the *Handbook* is most closely connected—has adopted a range of what might be identified as global administrative law mechanisms, including a revised “access to information” policy, an Inspection Panel inquiring into compliance with internal policies, and “safeguards” policies requiring public consultation on certain projects. These institutional developments provide some possibilities for the contestation of broad approaches evident in, for example, the *Handbook*, and their translation into specific programs and projects. Interested groups may be able to track evolving thinking on regulatory issues, or follow reports on how similar projects have fared elsewhere, through documents released automatically, or by invoking the access to information policy to request further documents. Where evaluations and associated policy recommendations are used to underpin projects in particular countries, the Inspection Panel may be invoked where the level and nature of public consultation has fallen short of what is required by the bank’s internal policies.

However, there are limits to the potential of mechanisms such as these to ensure that expert institutions and evaluators are accountable for the technical

¹³⁷ See Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L & Contemp Probs 15 (2005).

¹³⁸ See, for discussion, Benedict Kingsbury, *The Concept of “Law” in Global Administrative Law*, 20 Eur J Intl L 23 (2009); Kuo, 10 Intl J Const L 1050 (cited in note 2). Further systematization will depend on the ways in which existing mechanisms can be disseminated through other institutions and integrated with more basic and generally applicable legal principles, and on the development of judicial or other fora in which they may be enforced. See, for example, Sabino Cassese, *A Global Due Process of Law?*, in Gordon Anthony, et al, eds, *Values in Global Administrative Law* 17, 52–53 (Hart 2011).

quality and consequences of the reforms they promote, and that these reforms in fact reflect the wishes, needs, and priorities of citizens, and larger communities of persons affected, rather than the agenda of ruling elites. In the context of the *Handbook*, we identify three main limitations, some of which would also seem applicable to the international public authority approach sketched above.

First, global administrative law is dependent on institutions and may have relatively little purchase on epistemic authority. Some degree of formalization of the exercise of power is required in order to subject this exercise to procedural constraints, but much of the power exercised in and through documents such as the *Handbook*, and the evaluations for which it provides, works through expertise and the dominance of particular visions of the economy and polity. These are crystallized through formal practices such as evaluation, preparation of reports, decisions on project lending, and drafting of legislation. Global administrative law (or, in the international public authority approach, norms extrapolated from public law) might be applied at these points, perhaps by insisting, for example, that the evaluation include consultation with particular marginalized communities, or that the process by which the bank or other funders persuade the government of necessary reforms be more transparent, or at least involve the legislature or community groups in some meaningful way, rather than remaining largely within the executive. However, insofar as the activity is understood to be premised on particular knowledge or expertise and oriented toward a particular end, such as efficient infrastructure provision, rights to access or participate in these formal and institutional practices may not effect any real opening up of the epistemic landscape or visions of the relevant ends. Where existing global governance structures valorize expertise as a basis for authority, global administrative law may merely serve to ensure wider access to, and participation in, the wielding of this expertise, rather than challenging the privileging of economic, legal, or accounting expertise in the first place. This was illustrated in the public consultation phase of the OECD PFI: many of the submissions from NGOs were fundamentally at odds with the approach taken in the OECD draft, but these divergent perspectives could not be incorporated in any wholesale way, and were largely left aside in the preparation of the final document.

Second, global administrative law focuses on the processes through which decisions should be made, rather than on the “constitutional” question of which bodies should be making the decisions, and on what basis they claim the authority to do so (matters which, as noted above in the discussion of “international public authority,” may be extremely difficult to trace and determine in the circumstance of global governance). Of course, the procedural and “constitutional” are not easily separated. Even procedural norms such as participation and accountability may indirectly orient thinking on foundational questions of authority (for example, applying such procedural norms to processes like evaluation in the *Handbook* might foster a more deferential or

deliberative engagement with existing local law and practice). As global administrative law evolves, it will increasingly confront questions of institutional authority, constituency and representation.¹³⁹ For the moment, however, global administrative law as it applies to global institutions and actors remains rather insulated from these matters and, insofar as the global administrative law approach suggests that decisions taken by a whole range of bodies might be legitimated by procedural means, tends to be in some tension with substantive demands that decisions be made in some institutions rather than others. While institutional features such as access to information policies may assist critics in gathering the information they need to build a campaign, the main thrust of advocacy is likely to lie beyond, and in fact in opposition to, existing governance structures.

If exercises such as the preparation of the *Handbook* and the conduct of evaluations escape any ready analysis, let alone institutional scrutiny or recourse, in public law terms, this is not necessarily attributable only to their extra-national character. The decentralized, epistemic power in evidence in publications such as the *Handbook*, together with the involvement of private actors (in the form of individual experts and evaluators) may not be markedly different from purely nationally driven reform scenarios, in which governments, even those not seeking funding from the MDBs, are influenced to some extent by policy advice, modeling, projections, and research from consulting firms, academics, think-tanks and the like (and, less salubriously, from lobbyists and interested parties themselves) in addition to the views of their own bureaucrats. Only a limited basis exists even in the developed public law of advanced democracies (implicitly taken as a model by much of the advisory literature) for challenging the political or social assumptions underlying expert advice or holding consultants or advisers responsible if they later turn out to have been wrong.¹⁴⁰ In theory, citizens in a state in which the government has adopted reforms based on the expert advice of a consulting firm may not be in that different a position from citizens in a state in which the government has adopted reforms based on the intervention of an international institution, MDB, or team of international experts. This does not mean that national public law provides no resources for situations of this kind—but simply that the role of expertise in governance presents a dilemma for

¹³⁹ As foreshadowed in Nico Krisch, *Global Administrative Law and the Constitutional Ambition*, in Dobner and Loughlin, eds, *Twilight of Constitutionalism?* 245 (cited in note 2).

¹⁴⁰ Although there may be contractual provisions providing recourse in formal advisory relationships, or criminal law or professional misconduct provisions that could be invoked in cases of corruption or gross incompetence.

broader participation and deliberation which is felt in many different sites, global and local.¹⁴¹

Third, the capacity of global administrative law to respond to the challenges posed by instruments such as the *Handbook* may be limited by characteristics of global administrative law which in fact have a deep kinship with some features of the instruments themselves. We have argued that the instruments under consideration here are structured in terms of a balance which sets off the interests of investors against those of the state, or the “public,” or users, with a concomitant tendency to suggest that they are on the same plane. The lack of any prescribed “constitutional” allocation of powers in global administrative law may be a virtue insofar as it addresses the public implications of even “private” governance activity, and is open to a “public” transcending national borders. On the other hand, though, like the “balance” in the instruments themselves, global administrative law as currently conceived may incline towards some open-ended definition of “stakeholders” or constituencies in which corporate and civil society interests or positions are traded off against each other, without any formal hierarchization of a public interest, and with corporate or developed country interests exercising greater influence in practice. This is the challenge of reimagining a “public” in conditions in which national citizenship may no longer provide a realistic or normatively defensible delimitation of the people for and in whose name authority is exercised—but in which the lack of alternative conceptions leaves few resources for principled arguments about the allocation of voice and influence.¹⁴²

We have suggested above that the *Handbook* and other instruments manifest, and make use of, a confluence of the vocabularies of public law and governance. The central principles of global administrative law are framed in a similar hybrid vocabulary in part because global administrative law too must be at least intelligible within different traditions of public law, and capable of being invoked in a wide range of different institutional contexts, public and private. However, as with the vocabulary of the *Handbook*, the very malleability of some of the central “principles” or “mechanisms” traced in global administrative law leaves them open to redefinition and gradual evolution that will inevitably be shaped by distributions of power. Given the current constellation of governance institutions, and the structures of power within states, there is likely to be considerable pressure for substantive understandings of international public law

¹⁴¹ See Susan Rose-Ackerman, *Regulation and Public Law in Comparative Perspective*, 60 U Toronto LJ 519, 528 (2010).

¹⁴² See, for discussion of the complexities of this “public,” Benedict Kingsbury, *International Law as Inter-Public Law*, in Henry R. Richardson and Melissa S. Williams, eds, *NOMOS XLIX: Moral Universalism and Pluralism* 167 (NYU 2009); Kuo, 10 Intl J Const L 1050 (cited in note 2).

or global administrative law principles that favor dominant interests,¹⁴³ or those able to advocate on their terms, and the convergence in overarching vocabulary might make it difficult to challenge this.

B. Public Law as Mindset and Method

We have argued here that transnational governance activity, pursued within international organizations but drawing on expertise that may not be anchored either within that organization or within any state bureaucracy, might be understood as subject to some body of global public law. As suggested earlier, these public law perspectives on the prescriptive but non-binding international instruments studied in this Article could aspire to fulfill at least two purposes: laying the legal foundations for some structure in which policymakers or communities might engage with transnational influences for national reform of law and policy; and vindicating the specificity and complexity of law, both as a set of existing norms and as a distinct intellectual and political practice.¹⁴⁴

As regards the first purpose, framings in terms of international public authority or global administrative law could provide some basis for challenging the exercise of power reflected in, and fostered by, the sorts of instruments examined here, but the current reach of such framings is limited. International public authority relies, for its analytical force and normative impetus, on the identification of certain acts of international public authority, and this identification requires both difficult (and possibly circular) assessments of the effects of particular acts, and tracing the act to a founding legal basis which may be quite removed from the realities of institutional life in which the act took place. Global administrative law, for its part, manifests some of the problematic features of the infrastructure instruments themselves, including a certain indeterminacy regarding the interests or constituencies to be addressed, and the mutability of the hybrid vocabulary of public law and governance.

The attempt to articulate a global public law may still be intellectually productive, even if particular framings of global public law cannot at present meet the challenges posed by transnational governance. The commitment to recovering law as a distinct mode of ordering, and an intellectual practice, may—if nothing else—clarify the normative and rhetorical terrain and enable more principled argument about policy recommendations and the grounds on which they are based. Over the longer term, this has some potential to shore up the specifically legal dimension of global prescriptions, and to preserve a space for

¹⁴³ See, for example, B. S. Chimni, *Co-Option and Resistance: Two Faces of Global Administrative Law*, 37 NYU J Intl L & Pol 799 (2005).

¹⁴⁴ See Koskenniemi, 8 Theoret Inq L at 14 (cited in note 1) (urging a focus on the constitutional “mindset”).

state systems to develop their own public (and other) law in a manner that, while addressing social needs and priorities effectively, is not entirely shaped by functionally oriented governance imperatives. Work in this vein will require careful attention to the distinct intellectual and historical lineages of the vocabularies in circulation, and the different political visions and values on which these vocabularies draw, as well as reflection about modes of comparativism and generalization.

One response to the hybridization of vocabularies of law and governance has been to insist on distinguishing public law from other discourses. Carol Harlow's work, for example, seeks to disentangle what she sees as classic "principles of administrative law" (fairness, legality, consistency, rationality, impartiality) from both a thin account of rule of law, promoted by economic liberals, and from "values" (such as participation, openness, accountability) that are formulated largely beyond legal doctrine, and which she understands as deriving mainly from the "good governance" agenda, or from the due process rights set out in human rights instruments and jurisprudence.¹⁴⁵ Koskenniemi's denunciation of "ersatz normativity" in advocacy of "governance," "managerialism," or "legitimacy" is premised on an even stronger view that law is something irreconcilably different from managerialism and governance.¹⁴⁶ We acknowledge the force of these positions, but argue that the hybrid governance-law form is by now an established feature of extra-national regulation and indeed of national regulation, and it is essential to engage with that reality. Whether this hybridized form and vocabulary become a conduit for genuine public law, or conversely escape from all public law values and control through the subliminal allusions to a legality that has no constitutive presence, remains open for future struggles. However, the inclusion of a legal dimension in the governance-law hybrid provides some scope, in our view, for fine-grained application of an effective future global public law.

The construction of such a global public law may draw both on greater comparative study of national public law, and greater attention to the practices of comparison and abstraction in general. The instruments examined here pose questions about the methodology of comparison between different polities, and the relation of general or universal norms, or recommendations, to particular institutional and legal characteristics. The *Handbook*, for example, stands for a particular style of this work: a sophisticated tool, informed by a generation of experience with regulators in a range of developing countries, drawing on

¹⁴⁵ Harlow, 17 Eur J Intl L 187 (cited in note 2). See also Harlow, *Accountability as a Value in Global Governance and for Global Administrative Law*, in Anthony, et al, eds, *Values in Global Administrative Law* at 173–92 (cited in note 138).

¹⁴⁶ Koskenniemi, 8 Theoret Inq L at 14 (cited in note 1).

vocabularies of economics, governance, and law together, and designed both to promote one model of regulation and to generate recommendations tailored to the circumstances of particular countries regarding how to move towards this model. Approaches to a public law of global governance, whether the global administrative law that emerges in institutions through processes of borrowing and refinement, or the more doctrinally inspired international public authority, or the immensely ambitious enterprises of “global constitutionalism,” similarly involve comparative work, whether explicit or not.¹⁴⁷ The comparative impulse is a longstanding feature of conceptions of international law writ large, and structurally inherent in at least one source of international law, the (only episodically invoked) “general principles of law recognized by civilized nations.” The relation of general norms to particular facts is as central to international law as it is, *mutatis mutandis*, to any national legal system.

Comparative law plays a salutary role in directing attention back to specificities and variations between national systems and modes of rule which can be lost in a single vocabulary.¹⁴⁸ Concrete experience in particular situations can thereby be abstracted into more general propositions, which in turn are given content and context through their local applications and inflections. This produces an approach to balance the dominant comparativism that has spurred the diffusion of technologies and ideologies of “new public management.” As infrastructure regulatory reform programs are diffused pursuant to international prescriptions, local institutions such as courts and legislatures may provide fora, and specific local laws may provide substantive arguments, for challenging the framing of these programs. Moreover, specific understandings of such terms as “participation” and “transparency,” grounded in national public law, may

¹⁴⁷ On the lack, to date, of systematic comparativism in global administrative law scholarship, see Peer Zumbansen, *Transnational Comparisons: Theory and Practice of Comparative Law as a Critique of Global Governance* *16–17 (Osgoode Hall Comparative Research in Law & Political Economy Research Paper No 1/2012), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2000803 (visited May 19, 2013).

¹⁴⁸ See, for example, Susan Rose-Ackerman and Peter Lindseth, eds, *Comparative Administrative Law* (Edward Elgar 2010). For comparativism as a source of examples for domestic public law, see Rose-Ackerman, 60 U Toronto L J 519 (cited in note 141). Comparative work may also yield insights in drawing out relations between apparently distinct bodies of law. In the area of international investment law, for example, Stephan W. Schill starts from the premise that this body of law is concerned with more than “backing up private ordering between foreign investors and host states,” and “has a broader function in providing a legal framework for a public international economic order within which investment relations take place by establishing principles of investment protection under international law that endorse rule of law standards for the treatment of foreign investors,” such that investment treaty arbitration has a character “akin to administrative or constitutional judicial review.” Stephan W. Schill, *International Investment Law and Comparative Public Law—An Introduction*, in Stephan W. Schill, ed, *International Investment Law and Comparative Public Law* 3, 3 (Oxford 2010).

provide an important counterpoint to the delocalized and thus more malleable vocabulary used in the instruments studied here.

Juxtaposing the intellectual processes of comparison, and of abstraction and specification, as manifest in the instruments studied here, in the field of global administrative law, and in international law more broadly, also suggests the need for more scrutiny of these processes. On what grounds, by what assumptions or analogies or processes of reasoning, are specific features entailed by, or enough to satisfy, a norm of “accountability” or “transparency”?¹⁴⁹ What are equivalents, in the drafting of governance instruments, or the elaboration of a global administrative law, to the processes of interpretation and reasoning with which we are familiar from doctrinal or adjudicative contexts? The most fruitful engagement with a putative global public law may be one that recognizes its current fluidity, seeing it not only as a source of a particular guarantee of legitimacy or checklist of requirements, but also as a fragmented enterprise in which these requirements and their foundations are being articulated and contested. Engagement in the public law dimensions of hard cases, such as international prescriptions for national infrastructure regulation, is thus a form of construction; but without clarity or consensus at present on the architecture of what is being built.

¹⁴⁹ On questions of this kind as “ghosts in the architecture” of a “de-nationalized . . . administrative governance framework”, see Zumbansen, *Transnational Comparisons* at *19 (cited in note 147).

