

The ISO 26000 International Guidance Standard on Social Responsibility: Implications for Public Policy and Transnational Democracy

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In September 2010, the International Organization for Standardization adopted a new International Guidance Standard on Organizational Social Responsibility — ISO 26000. This Article, written by a participant in the process of developing the standard over a five-year period, considers the points of intersection between ISO 26000 and

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public policy, international law, democracy, and the role of the state. The Article is grounded in an analysis of the standard's negotiating history. The concluding Part reflects on the implications of these observed facts for the development of appropriate descriptive and normative theoretical frameworks and proposes three innovations that could underpin a less problematic relationship between ISO, public policy and the role of the state.

INTRODUCTION

In September 2010 the International Organization for Standardization (ISO) adopted an ambitious International Guidance Standard on Organizational Social Responsibility, ISO 26000.¹ The five-year process of developing ISO 26000 has offered a touchstone for multi-stakeholder processes that define expectations for ethical behavior. The standard might even be understood as a signpost along the way to an emergent transnational democracy. In May 2010, Danish Minister for Economic and Business Affairs Mr Brian Mikkelsen described ISO 26000 as a "milestone in the history of global cooperation."²

For its enthusiasts, the standard represents a groundbreaking experiment in multi-stakeholder governance and norm-setting. For critics, ISO 26000 is a watershed in ISO's trespasses into areas of broad public policy concern, beginning in the mid-1990s, marked by the ISO 14000 series of environmental management standards.³ Today, ISO works on a wide range of issues that have a direct nexus with (government) public policy, including carbon emissions, health and safety, nanotechnology and biofuels.⁴

ISO's brand recognition gives it real potential to make a positive contribution to social responsibility. ISO standards frequently become benchmarks for good practice among businesses; they are often referenced in supply chain requirements; and many are absorbed into national government

1 INTERNATIONAL ORGANIZATION FOR STANDARDIZATION (ISO), ISO 26000 (2010).

2 Brian Mikkelsen, Minister for Econ. & Bus. Aff., Speech at the Opening Session of the 8th Meeting of the ISO Working Group on Social Responsibility, Copenhagen, Den. (May 17, 2010).

3 See INTERNATIONAL ORGANIZATION FOR STANDARDIZATION (ISO), ISO 14000: ENVIRONMENTAL MANAGEMENT (2009), available at http://www.iso.org/iso/theiso14000family_2009.pdf.

4 See generally *List of ISO Technical Committees*, ISO, http://www.iso.org/iso/standards_development/technical_committees/list_of_iso_technical_committees.htm (last visited Oct. 22, 2010).

regulations and standards. An ISO social responsibility standard could potentially matter a great deal to the uptake of social responsibility. But if organizations consider it irrelevant, inapplicable or obtuse, it might turn out not to matter at all. Worse, there are fears that it could inadvertently further the global squeeze on small producers if they are unable to meet the aspirations of its guidance.

This Article does not assess the likely take-up or market impact of ISO 26000. Rather, it focuses on its public policy dimensions, and the standard's wider implications for democracy and the role of the state. The Article briefly outlines the process through which ISO 26000 has evolved, and key features of its provisions. It goes on to highlight some of the multiple ways in which the standard interfaces with public policy. Finally, the Article goes a step further to consider in outline possible implications of ISO 26000 for an emergent transnational democracy, and calls for the development of an appropriate theoretical framework to account for those implications.

What, then, is the relationship between ISO 26000 and state actors within or drawn towards the process through which it was negotiated; and between ISO 26000 and public policy (understood here to mean government or state policy)? What are the implications of ISO 26000 for global governance; for democracy? And what theoretical framework could encompass the various interactions identified in a way that is not only descriptively useful, but also potentially valuable for the future? These are the key questions considered in this Article.

Perhaps it is inevitable, in a descriptive account of these interactions written by someone involved directly in the ISO 26000 process, that to undertake this exercise is loosely to take a systems perspective. The components of the system described in this Article⁵ are formed of the policies (and in part the politics) and values of international organizations and state actors engaged with the ISO 26000 process; the international working group at the heart of the ISO 26000 negotiating process; the constitutive

⁵ A more complete analysis (including a justification for these suggested system boundaries) must await a different study. For example, this Article does not consider in any detail the internal dynamics, governance structures or values of the organizations from which the experts in the international working group on social responsibility (referred to as the WGSR in this Article) were drawn; or the dynamics, governance structures and values of the so-called "mirror processes" formed within the various national standards bodies associated with the process; or the variety of other "corporate social responsibility" standards that have been developed both by national standards bodies within the ISO family and other stakeholder groupings, many of them referred to in this Article.

rules, procedures and dynamics of ISO overall and, in part, those of the World Trade Organization (WTO); other intergovernmental agreements (with varying kinds of normative force); and the idea of the rule of law.⁶

The remainder of this Article has the following structure. Part I briefly outlines the overall role of international standards in global governance and national policy. Part II describes the history and negotiating process leading to the adoption of ISO 26000 and outlines its overall content. Part III describes in further detail some of the key points of intersection between ISO 26000 and national law, public policy, the role of the state, and intergovernmental or United Nations-backed processes. Parts IV and V focus on the two points of intersection between ISO 26000 and global governance and policy which are most starkly indicative of the currently incomplete integration of ISO within existing intergovernmental governance processes, namely its relationships with the rules of the WTO and with customary international law. Finally, Part VI contains recommendations for effective systems design in light of the earlier analysis, criticizes the adequacy of existing theoretical frameworks to describe the relationships highlighted in that analysis, and concludes with suggestions for the development of an adequate theoretical framework, described in terms of the implications of ISO 26000 for transnational democracy.

I. THE ROLE OF INTERNATIONAL STANDARDS IN GLOBAL GOVERNANCE AND NATIONAL POLICY

A. ISO and the International Standards Community

In a globalized world, trade across borders is greatly facilitated by international standards. Standards help to ensure the technical compatibility of internationally traded goods. They can also convey information to consumers about product characteristics, quality and performance — and, sometimes, about the production processes behind those products.

ISO was established in 1947 — the same year in which the General Agreement on Tariffs and Trade (GATT) was adopted to provide an

⁶ See Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOC. 479 (1997) (describing the role of law in creating the "constitutive environment" of organizations); see also Richard Swedberg, *The Case for an Economic Sociology of Law*, 32 THEORY & SOC. 1, 4 (2003) (arguing that "[l]aw, in modern society, is constitutive for most economic phenomena, meaning by this that it is an indispensable as well as an organic part of them").

overall framework for the liberalization of trade among its contracting parties. ISO's work was to complement that undertaken within the GATT: Its mandate was to promote standards in international trade, communications and manufacturing. ISO is a nongovernmental, international private body with a secretariat in Geneva. As of June 2008, its activities had generated a total of 17,300 currently valid standards.⁷ ISO is just one among a number of non-treaty-based international standards bodies. Others include the International Electrotechnical Commission (IEC) and the International Telecommunications Union (ITU). There are also other international standards bodies which are based on treaties or agreements between governments, including *Codex Alimentarius*, which sets standards for animal and plant health.

ISO functions as a federation of national standards bodies. Its members from 161 countries are largely, but not exclusively, themselves also private nongovernmental bodies. ISO's rules of procedure are set out in the ISO Directives.⁸ These provide that most stages aside from the final voting procedures of any ISO standards-development process are based on decision-making by consensus. The consensus principle has a major impact on the conduct and feel of ISO's standards-setting procedures. Consensus is defined specifically as "[g]eneral agreement, characterized by the absence of sustained opposition to substantial issues by any important part of the concerned interest. and by a process that involves seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments NOTE Consensus need not imply unanimity."⁹

ISO's business model makes it dependent on revenues from the sale of standards. Standards development processes are far from unsubsidized, however. On the contrary, both public and private sector funders often offer sponsorship to cover the cost of hosting ISO committee or working group meetings, or to secure balanced participation. In the ISO 26000 process, many stakeholders felt that the ISO 26000 guidance standard should be made available free of charge in order to advance the wider cause and implementation of social responsibility. However, the ISO hierarchy has refused to deviate from its basic business model, which it enforces

7 Alan Bryden, Sec'y Gen., Report to ISO Gen. Assemb. (Oct. 2008), available at <http://www.iso.org/iso/livelinkgetfile?l1NodeId=188625&l1VolId=-2000>.

8 See *ISO/IEC Directives and ISO Supplement*, ISO, http://www.iso.org/iso/standards_development/processes_and_procedures/iso_iec_directives_and_iso_supplement.htm (last visited Oct. 22, 2010).

9 INTERNATIONAL ORGANIZATION FOR STANDARDIZATION (ISO), *ISO/IEC GUIDE*, pt. 2 (2004).

aggressively.¹⁰ The texts of the Final Draft International Standard (FDIS) and the adopted ISO 26000 standard were made available without charge only to individuals directly involved in its negotiation and adoption.

ISO's business model sits uncomfortably with its rapidly evolving interventions in new thematic areas. For critics, ISO's expansionism is simply a market-driven imperative to ensure the preeminence of the ISO brand in the world of standards, no matter what the subject. To borrow from a different system, ISO "*both organizes itself and manipulates its environment to increase the possibility of its self-perpetuation.*"¹¹ For enthusiasts, however, ISO's Directives and its highly evolved rules of procedure and established capacity to convene participants and therefore expertise from around the world, make it a hugely valuable forum for consensus-based norm-setting activities in complex areas of human and market endeavor. Certainly, the adoption of ISO 26000 will reinforce ISO's value-added within the overall global regulatory web.

B. International Standards in National Law and Policy

International standards developed in the private sector are helpful to public policymakers in some respects. By privatizing the process of developing highly technical standards with potentially significant implications for international trade, but few public policy implications beyond that general goal, governments and civil servants (as well as taxpayers) are spared the burden of regulation.

In the European Union context, the EU's so-called "New Approach" and the subsequently adopted "Global Approach" and "New Legislative Approach" provide for the European standards bodies (CEN, CENELEC and ETSI) to carry out the work of developing technical product standards necessary for the effective implementation of European legislation. Under

10 Council Resolution 32/2009 (Free availability of ISO 26000), *quoted in* Letter from Kristina Sandberg, Secretariat of ISO/TMB/WG SR, to Nominated Experts and Observers of ISO/TMB/WG SR (Sept. 25, 2009), *available at* http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/3974906/4034859/8680335/2009-09-25_Cover_letter%2C_ISO_Council_Resolution_-_No_free_availability_of_ISO_26000.pdf?nodeid=8419078&vernum=-2. (agreeing, in what seemed to most participants a minor concession, that the Draft International Standard (DIS) rather than the final version would be made freely available).

11 Anthony Damato, *International Law as an Autopoietic System*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 335 (2005).

these approaches, with some slight variation, European legislation sets out general legal frameworks which establish the essential requirements that products addressed must meet prior to being marketed in the EU. The development of less politically contentious technical standards setting specifications for products to meet those requirements is then delegated to the European standards bodies.¹²

There has been relatively little research on the relationship between the normative content of voluntary environmental and social standards and public policy and legislation.¹³ One exception is research carried out in 2008 by the ISEAL Alliance, a membership-based organization whose full members are all initiatives or organizations setting voluntary social and environmental standards.¹⁴ ISEAL's review focused on how governments use voluntary standards.¹⁵ This is different from a broader consideration of the public policy implications of voluntary standards (since public policy implications may arise passively, without a government *choosing* to use a standard). However, the ISEAL work offers a major contribution to what is rather a scant field. ISEAL notes that "[g]overnments are increasingly choosing to participate in the development of standards systems, or otherwise support, use and facilitate voluntary standard-setting and certification . . . The relationship has been described as 'the next big thing' or even already now part of 'a new reality . . .'"¹⁶ The study considers case-study examples of government uses of voluntary standards, including the incorporation of Forest Stewardship Council (FSC) certification into Bolivia's forestry law, or the Tunisian government's national organic agriculture policy, based in part on a voluntary standard — the so-called IFOAM Basic Standard.

12 See EUROPEAN COMMISSION, GUIDE TO THE IMPLEMENTATION OF DIRECTIVES BASED ON THE NEW APPROACH AND THE GLOBAL APPROACH (2000), available at http://ec.europa.eu/enterprise/policies/single-market-goods/files/blue-guide/guidepublic_en.pdf.

13 See Tim Bartley, *Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards*, 12 THEORETICAL INQUIRIES L. 517 (2011); see also Kevin Kolben, *Transnational Labor Regulation and the Limits of Governance*, 12 THEORETICAL INQUIRIES L. 403 (2011).

14 See *About Us*, ISEAL ALLIANCE WEBSITE, <http://www.isealalliance.org/content/about-us> (last visited Nov. 21, 2010).

15 ISEAL ALLIANCE, GOVERNMENTAL USE OF VOLUNTARY STANDARDS: INNOVATION IN SUSTAINABILITY GOVERNANCE (2008), available at <http://www.isealalliance.org/resources/r079-governmental-use-of-voluntary-standards-innovation-in-sustainability-governance>.

16 *Id.*

C. The Impact of International Standards on Customary International Law

Governments, then, make use of standards in a variety of ways. And standards — including ISO standards — can also connect with government public policy via the positions taken by government participants in the process of standards development.

In international law, "international custom" may provide evidence of a general practice accepted as law by states. In turn, state practice provides one of the material sources underpinning the evolution of both this and "the general principles of law recognized by civilized nations." State practice and evidence of custom may be found in, among other sources, "diplomatic correspondence, policy statements, press releases, [and] the opinions of official legal advisers" ¹⁷ Government participants in the WGSR therefore have a far wider set of nonnegotiable positions, potentially, than their nongovernmental counterparts, because how they behave and the positions that they take as they express their opinions have the potential to shape the international legal obligations of their countries.

D. International Standards and the World Trade Organization

International standards, and international standardization, are deeply embedded in the rules of the multilateral trading system overseen by the WTO. In general terms, the various rules of the WTO regulate the international trade impacts of various kinds of direct import and export restrictions, such as import and export bans, as well as the international trade impacts of product-related technical regulations and standards (in practice those with some link to public policy or the state). Of the range of agreements with bearing on the interface between ISO 26000 and the rules of the WTO, it was provisions in the WTO's Agreement on Technical Barriers to Trade (the TBT Agreement¹⁸) which most often informed the negotiating positions of government experts in the WGSR.¹⁹

Two key provisions of the TBT Agreement illustrate the significance of

17 IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 6 (6th ed. 2003).

18 Technical Barriers to Trade (TBT) Agreement (1994).

19 *See id.* Annex 1 (defining "technical regulation" and "standard").

international standards in the international trade law of the WTO.²⁰ The TBT Agreement requires Members of the WTO to use "relevant international standards" as the basis for their so-called "technical regulations" where relevant international standards exist or their completion is imminent, unless circumstances spelled out in the Article exist.²¹ Second, it also says that when a technical regulation is in accordance with "relevant" international standards it shall be "rebuttably" presumed not to create an unnecessary obstacle to international trade.²²

In these two ways, the existence of an international standard has a very direct impact on public policy decisions made by WTO Members across the broad field of product policy. When the scope of work undertaken within the international standards community extends into new areas of public policy concern, therefore, it potentially impacts on the policy space of WTO Members. That is because an extension in the subject matter addressed by the standards community means an extension in the reach of the standards to which WTO Members must have regard pursuant to their obligations under the TBT Agreement.

II. ISO 26000: HISTORY, PROCESS, AND CONTENT

A. History and Negotiating Process

In 2002, ISO's Consumer Policy Committee (COPOLCO) published a report on the value of corporate social responsibility (CSR) standards.²³ Subsequently, at the 2002 ISO General Assembly, ISO decided that the time had come to consider whether to develop "management standards" on CSR. In 2003, ISO's Technical Management Board (TMB) appointed a multi-stakeholder Strategic Advisory Group (SAG) on CSR to advise ISO's Council on whether ISO should proceed with the development of ISO deliverables in

20 In addition to the TBT Agreement, there are additional concerns relating to conformity assessment, to the Agreement on Sanitary and Phytosanitary Measures (1994), and a range of other WTO rules, which are not considered in any detail in this Article.

21 TBT Agreement, *supra* note 18, art. 2.4.

22 *Id.* art. 2.5.

23 Consumer Protection in the Global Market Working Group of the ISO Consumer Policy Committee (COPOLCO), *The Desirability and Feasibility of ISO Corporate Social Responsibility Standards, Report to ISO COPOLCO (2002)*, available at <http://www.basisboekmvo.nl/files/The%20desirability%20and%20feasibility%20of%20ISO%20corpor%20ate%20social%20responsibility%20standards.pdf>.

the field of corporate social responsibility; and if so, to determine the scope of the work and the type of deliverable.²⁴ The SAG was convened with twenty-four members, together with two representatives of the ISO Secretariat.²⁵ Members included standards bodies, industry and academics, as well as representatives of the international trade union movement, of the United Nations Global Compact, and one of the most significant international CSR initiatives, the Global Reporting Initiative (GRI). The grouping also included two nongovernmental organization (NGO) participants, from the International Institute for Sustainable Development and from WWF International.

The SAG reported in 2004²⁶ and made a series of (non-consensus-based) recommendations to ISO's TMB.²⁷ The Group recommended that ISO proceed with the development of a "guidance document," rather than a so-called "specification document," against which conformity could be assessed. Many industry commentators feared that a new CSR standard would effectively create a new corporate accountability tool that NGOs might use against them. In response, the SAG recommended a standard on "social responsibility" rather than a CSR standard as originally envisaged by ISO. This "social responsibility" scope of work was later confirmed by the standards development mandate from ISO's TMB.²⁸ ISO therefore found itself in uncharted territory, as what subsequently became "organizational" social responsibility came with no established boundaries on the respective roles of public policymakers and market actors. Organizational social responsibility was potentially applicable to all kinds of organizations. Corporate social responsibility was implicitly for companies, or at least businesses.

24 For further information, see *Corporate Social Responsibility: INNI Articles*, INTERNATIONAL NGO NETWORK ON ISO, <http://inni.pacinst.org/inni/CSR.htm> (last visited Oct. 22, 2010).

25 See *Membership of the ISO Strategic Advisory Group on Social Responsibility as of Sep. 16 2003*, IISD, http://www.iisd.org/standards/csr_members.asp (last visited Nov. 21, 2010).

26 ISO ADVISORY GROUP ON SOCIAL RESPONSIBILITY, WORKING REPORT ON SOCIAL RESPONSIBILITY (2004), available at http://inni.pacinst.org/inni/corporate_social_responsibility/WorkingReportonSR.pdf.

27 ISO/TMB AG CSR N 32, RECOMMENDATIONS TO THE ISO TECHNICAL MANAGEMENT BOARD (2004), available at http://inni.pacinst.org/inni/corporate_social_responsibility/AG-Recs-to-TMB.pdf.

28 *ISO Technical Management Board resolution 35/2004*, ISO, http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/02_news/resolution35.html (last visited Mar. 20, 2011); ISO CENTRAL SECRETARIAT, NEW WORK ITEM PROPOSAL — SOCIAL RESPONSIBILITY (ISO/TMB N 26000) (2004), available at http://inni.pacinst.org/inni/corporate_social_responsibility/SR_NWIP.pdf.

The core focus on "social responsibility," which ISO accepted, also placed the central accounting unit of an analysis of the implications of the standard for public policy in a different place from that which might have resulted from a standard on CSR. Participants in the international working group that was subsequently established to negotiate the new ISO standard often (though not always) built on a derivative idea of "social responsibility" as an amplification of CSR. But there was no solid basis for an assumption that "social responsibility" would simply be a linear extension of corporate social responsibility applied to organizations that were not principally (or only incidentally) market actors. Consequently the role of government and the state in the substantive guidance offered by the standard was a repeated source of disagreement and discussion.

In theoretical terms, the ISO 26000 focus on "organizational social responsibility" rather than "corporate social responsibility" makes less relevant those theoretical frameworks that would analyze ISO 26000 through new governance, legal pluralism, or policy communities approaches that focus on the hierarchical (or heterarchical) relationship between state and market, or the idea of "regulatory capitalism."²⁹ Some of these theoretical approaches do indeed extend beyond state and market to society,³⁰ but even those that appear not to be subject to this bias (for example, because they focus on the relationship between law and self-regulation) turn on analysis of self-regulation within, or of, markets.

The SAG suggested seven conditions for the development of a guidance standard.³¹ Five of these (one to five below) speak directly to the potential public policy implications of the process, including its relationship with political processes at (national or subnational) government and intergovernmental levels and respect for the distinctive role of international organizations. The SAG recommended that ISO should only proceed if: (1) ISO recognizes that social responsibility involves a number of subjects and issues that are qualitatively different from the subjects and issues that have

29 See, e.g., David Levi-Faur, *Regulatory Capitalism: The Dynamics of Change Beyond Telecoms and Electricity*, 19 GOVERNANCE 497, 520 (2006) (arguing that "[r]egulatory capitalism may best be seen as one of the most important hybrids of controls in a governance system that is a patchwork of hundreds and thousands of meso- and microregulatory regimes that govern different aspects of our lives").

30 See, e.g., Greta R. Krippner, *The Elusive Market: Embeddedness and the Paradigm of Economic Sociology*, 30 THEORY & SOC. 775 (2001) (arguing that "markets are treated in [the governance] literature as the other of the social economy, rather than constitutive of it").

31 ISO/TMB AG CSR N32, *supra* note 27.

been already dealt with by ISO; (2) ISO recognizes that it does not have the authority or legitimacy to set social obligations or expectations which are properly defined by governments and intergovernmental organizations; (3) ISO recognizes the difference between, on the one hand, instruments adopted by authoritative global intergovernmental organizations and, on the other hand, private voluntary initiatives that may or may not reflect the universal principles contained in the above instruments; (4) ISO narrows the scope of the subject so as to avoid addressing issues that can only be resolved through political processes; (5) ISO recognizes through a formal communication the International Labour Organisation's (ILO) unique mandate as the organization that defines, on a tripartite basis, international norms with respect to a broad range of social issues; (6) ISO recognizes that, due to the complexity and fast-evolving nature of the subject, it is not feasible to harmonize substantive social responsibility commitments; and (7) ISO reviews its processes and where necessary makes adjustments to ensure meaningful participation by a fuller range of interested parties.

The SAG stressed additionally that the guidance ought to be capable of being applied in a variety of social, environmental and cultural settings, that it should be written in clear and understandable language, and that "ISO should make every effort to ensure that developing countries can meaningfully participate in this work."³²

WWF's representative on the SAG, Gordon Shepherd, submitted a minority view in which he highlighted five areas of particular concern with respect to the majority SAG document. Among these were two which would have reined in the agenda-setting dimension of the ISO 26000 endeavor. Shepherd's view was that "the recommendations should expressly state that as a pre-requisite the ISO deliverable should add value to existing CSR instruments, tools and initiatives," and that the SAG document "needs to state more clearly that the deliverable should be a guidance document to be used *primarily by business*."³³

With the SAG's work concluded, the ISO Secretariat convened a major international conference on social responsibility in June 2004. A statement of support for the endeavor from some of the developing country delegates present appears to have been a critical element in framing the general consensus in favor of a standards development process.³⁴ That same week the

³² *Id.* at 2.

³³ *Id.* at 3-4 (emphasis added).

³⁴ Telephone interview with Tom Rotherham, IISD's Representative on the Strategic Advisory Group (May 2010).

TMB met and resolved that ISO begin work on a standard.³⁵ The work would be carried out through a Working Group process. A specially established ISO TMB Task Force began drafting a New Work Item Proposal (NWIP) which, together with the June 2004 TMB resolution, would set the overall scope of the work.

From the start, the TMB Resolution established important parameters for the relationship between ISO 26000, public policy and the state. In its Resolution, the TMB

recognizes the role of governments and inter-governmental organizations to set social obligations or expectations, recognizes the instruments adopted by global inter-governmental organizations (such as the United Nations Universal Declaration of Human Rights, international labor conventions and other instruments adopted by ILO and relevant UN conventions), but also that there is scope for private voluntary initiatives in the field of SR, and concurs that the scope of any ISO activity on social responsibility needs to be narrowed so as to avoid addressing issues that can only be resolved through political processes.³⁶

The NWIP was approved in January 2005.³⁷ Three constraining factors are relevant. First, the NWIP stated that the standard should "be consistent with and not in conflict with existing documents, international treaties and conventions" (as well as existing ISO standards), and that it "not be intended to reduce government's authority to address the social responsibility of organizations." Second, it stated that "[t]he document shall be an ISO standard providing guidance and shall not be intended for third-party certification." Third, it stated that the standard "will be a tool for the sustainable development of organizations while respecting varying conditions related to laws and regulations, customs and culture, physical environment, and economic development." The NWIP further required (in line with the standard's status as a guidance standard) that the verb form "should" (rather than "shall") should

³⁵ ISO/TMB Resolution 35/2004, *supra* note 28.

³⁶ *Id.*

³⁷ See ISO/TMB N 26000, *supra* note 29; *Online Update, Issue #8, INTERNATIONAL NGO NETWORK ON ISO* (Mar. 2005), http://inni.pacinst.org/inni/inni_online_update_8.htm (last visited Nov. 21, 2010). Two additional documents issued by the TMB set out the basic operating procedures for the working group established to manage the process, ISO/TMB N 26000, *supra*, at 18-22.

be used throughout the standard, and stipulated that only one standard should be developed.³⁸

The NWIP also identified a number of issues that "may affect the feasibility of this activity that require additional consideration by the ISO Working Group."³⁹ These included the applicability of the standard to all types and sizes of organizations; and regional differences relating to legal requirements, customs or cultural differences, physical environmental conditions and economic development.

The NWIP charged a working group of experts, accountable to the TMB, with the task of developing a draft standard that "represents a consensus of the views of the experts participating in the working group."⁴⁰ This became the International Working Group on Social Responsibility (WGSR). The Secretariat for the new WGSR was allocated to two standards bodies, those of Brazil (ABNT) and Sweden (SIS), in what was for ISO an unusual north-south twinning arrangement designed to demonstrate recognition of the imperative for geographically diverse engagement in the process. The Secretariat was made up of a mix of standards body staffers and experts. Chair Jorge Cazeira and Vice-Chair Staffan Söderberg⁴¹ were both employed by businesses.⁴²

The NWIP specified that participants in the WGSR, referred to as "experts," should be organized within six stakeholder categories: consumers, government, industry, labor, nongovernmental organizations, and "other" (later renamed "service, support, research and others"; in practice, a mix of academics, consultants and standards bodies).⁴³ WGSR participants were either nominated via national mirror committees within participating national standards bodies or could enter the process as Liaison D organizations (in practice a variety of organizations with international reach approved as such by ISO and with up to two experts each).⁴⁴ National delegations to the

38 ISO/TMB N 26000, *supra* note 29 (as distinct from a series of guidance standards covering different aspects of social responsibility).

39 *Id.*

40 *Id.*

41 From the second WGSR meeting onwards after the initial Vice-Chair Catarina Munck af Rosenschöld resigned. She was due to take maternity leave.

42 Staffan later joined WWF-Sweden.

43 See ISO/TMB N 26000, *supra* note 29; ISO TECHNICAL MANAGEMENT BOARD, GUIDANCE ON STAKEHOLDER CATEGORIES IN THE ISO/TMB/WG SR (2005), available at http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/04_organization/N048_rev1.pdf.

44 In the ISO 26000 process, some forty Liaison organizations nominated experts to take part.

WGSR were to number no more than six people, and standards bodies were strongly encouraged to ensure balance across the six stakeholder groups. National standards bodies could also simply indicate an interest in the process without establishing mirror committees or participating directly in the WGSR. Provision was also made for participation by observers.

Participants in the WGSR were considered by ISO to be individual experts, but a major part of caucusing within the WGSR took place largely on the basis of stakeholder groups. These groups, together with the basic idea of a north-south balance, provided a basic organizing framework for subsequent nomination and selection of representatives on various subgroups, including most importantly an Integrated Drafting Task Force. This latter body, accountable to the WGSR, was created when it became abundantly clear that the work could not be conducted in its entirety in a plenary of more than three hundred participants (470 in total counting observers by the time of the eighth and final WGSR meeting in Copenhagen in 2010) and that some continuity was needed in the small groups that were set up to take forward particular topics.

The first WGSR meeting in Salvador de Bahia, in March 2005, was chaotic. Much of the discussion was devoted to procedure, and the Secretariat struggled to find ways to achieve consensus on the most basic issues in a group of more than two hundred people. Nonetheless, some progress was made in defining detailed operating procedures and Task Groups for the process.⁴⁵ One Task Group (TG1) was established to find ways of ensuring balanced participation across regions and stakeholder groups, in particular through fundraising efforts. A second Task Group (TG2) was created and charged with developing external communication and dissemination tools, and a third Task Group (TG3) was established to devise internal guidance on special procedures for the WGSR to complement those laid down by the ISO/TMB. A Chairman's Advisory Group was also established to provide strategic advice to the Chair and Vice Chair. Three additional Task Groups (TG4, TG5, and TG6) were established to take forward the drafting of various parts of the standard. Only at the second WGSR meeting in September 2005 were participants able to agree on a design specification for the standard (effectively an agreed outline table of contents).⁴⁶

The WGSR structures evolved further during the course of the process. The

45 ISO TECHNICAL MANAGEMENT BOARD, RESOLUTIONS FROM THE FIRST MEETING OF ISO/TMB/WG SR, SALVADOR, BRAZIL (N 15) (Mar. 17, 2005), available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=3973639&objAction=browse&viewType=1>.

46 ISO TECHNICAL MANAGEMENT BOARD, ISO GUIDANCE STANDARD ON SOCIAL

initial substantive drafting groups, TG4, TG5, and TG6, were disbanded and their leadership absorbed within a twenty-four-member Integrated Drafting Task Force (IDTF) established at the fifth WGSR meeting in Vienna in November 2007.⁴⁷ This IDTF, accountable to the WGSR as a whole, was to review and revise the evolving text of the ISO 26000 drafts as a whole.⁴⁸ The IDTF mandate was subsequently extended at the conclusion of the sixth WGSR meeting of 2008.⁴⁹ The IDTF, under the chairmanship of South African consultant and academic Jonathon Hanks, became centrally important to the drafting process. An editing committee and five language task forces (working to translate key documents into languages other than English) were also established.

A pattern began to emerge during WGSR meetings, with the plenary or Secretariat charging smaller groups of participants to work on collectively identified issues, reporting back to the plenary for further discussion, and to test for, and ultimately arrive at, consensus. The power of the consensus principle began to be felt. Participants who had worked hard in smaller *ad hoc* groups often began to defend small group consensuses when they were presented for discussion within the plenary.⁵⁰

Internally, the ISO 26000 process was relatively democratic, albeit more accessible to fluent English speakers (since the only working language was English) and ultimately driven by a small group of committed individuals from a variety of stakeholder backgrounds. As relationships based on trust grew during the course of the process, WGSR participants by and large became more comfortable with the idea that representative rather than direct engagement should play a significant role. Representatives showed considerable commitment to ensuring that difficult or more controversial issues were open to deliberation by the working group as a whole. And

RESPONSIBILITY — ISO 26000: DESIGN SPECIFICATION (N 49) (Sep. 30, 2005), available at http://inni.pacinst.org/inni/corporate_social_responsibility/ISO26000DesignSpecificationN49.pdf.

47 See ISO/TMB/WG, RESOLUTIONS FROM THE 5TH MEETING OF ISO/TMB/WG SR, VIENNA, AUSTRIA, resolution 2 (Nov. 9, 2007), available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=6936335&objAction=Open>.

48 See *id.* for details on the composition and mandate of the IDTF.

49 ISO/TMB/WG SR, RESOLUTIONS FROM THE 6TH MEETING OF ISO/TMB/WG SR, SANTIAGO, CHILE, resolution 5, (Sept. 5, 2008), available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=7571477&objAction=Open>.

50 This was particularly evident in discussion of the international norms principle, and in the presentation of the draft design specification to some two hundred participants in the Bangkok plenary by a small and diverse working group which had worked until after 2am to agree on a proposal to put forward.

the ISO principle of decision-making based on consensus, coupled with the reality that organizations might in future potentially experience impacts from ISO 26000 whether their governments supported it or not, created powerful incentives to resolve genuine differences. What did not work in terms of advancing consensus was rejected; what did work, once introduced, was retained.

Initially, consensus within the WGSR was the key aim as the text developed through a series of working drafts. But gradually, decision-making input was extended beyond WGSR experts to the mirror committees of the participating standards bodies, and thereafter to both participating and non-participating standards bodies within the ISO membership. In effect, ISO's procedures provide for an initial democracy of balanced experts which gradually broadens to encompass other enfranchised members of the process. Representatives of Liaison D organizations with international reach also played a full part in the WGSR, but did not have a formal vote. Their views were nonetheless actively sought in the quest for consensus.

The so-called "committee draft" (CD) of an ISO standard is the first stage at which the process for seeking consensus allows for written comments to be submitted directly from mirror committees of standards bodies participating in a working group rather than individual working group experts. Thereafter, the standard moves to the next, "draft international standard" (DIS) stage if there is considered (in this case by the WGSR leadership) to be sufficient consensus on the committee draft. A minimum threshold is a two-thirds majority of the P-members (participating standards bodies) in the working group concerned. Following further amendments within the working group to address comments and thereby build consensus, a revised (DIS) text is itself circulated for a five-month voting period during which standards bodies are invited to determine whether they consider the text sufficient to move on to the publication of a "final draft international standard" (FDIS).

Going into the eighth WGSR meeting at Copenhagen in May 2010, the essential votes in favor of moving on to an FDIS had already been cast.⁵¹ The outcome had only been narrowly in favor of a move to an FDIS, however, with seventy-seven percent of P-members in favor and eighteen negative votes out of the total seventy-eight votes (twenty-three percent). Just two more negative votes would have meant a second DIS rather than progress to an FDIS. The task in Copenhagen was therefore to make sufficient progress

⁵¹ ISO/TMB/WG SR N 175, <http://isotc.iso.org/livelink/livelink?func=ll&objId=8718817&objAction=Open> (last visited Mar. 27, 2011).

in addressing outstanding comments and issues to ensure that an FDIS would pass immediately, on a final vote, to an adopted standard.

The FDIS was circulated for a two-month voting period on July 12, 2010. The voting threshold for approval was a two-thirds majority of the votes cast by standards bodies within the WGSR (so-called "P-members") in favor, and not more than one-quarter negative of the total votes cast (from all ISO member bodies, including those that had not participated directly in the process).⁵² Abstentions were not counted in the vote. On September 13, 2010 the ISO Secretariat announced that the standard had been approved, with ninety-three percent of those seventy-seven votes eligible to be counted in favor.⁵³ Eleven ISO members abstained, and those votes were not counted. Of the seventy-one P-members voting, sixty-three were in favor of adoption, with just five P-members submitting negative votes: the United States, Cuba, India, Turkey and Luxembourg. China, which had raised serious concerns about a number of aspects of earlier drafts of the standard, voted "yes," as did a number of Gulf states which had previously voted "no."

B. ISO 26000 in Outline

ISO 26000 is a 106 page document with seven principal clauses, two Annexes and a bibliography.⁵⁴

The Introduction makes a short case for social responsibility and contains a key statement that all core subjects within the standard are considered relevant to all organizations.⁵⁵

The broad scope of the standard is outlined in clause 1. This includes a statement on the standard's implications under the rules of the WTO (discussed further below),⁵⁶ and sets out a number of other framing issues,

52 See WG SR Leadership Statement, in Letter from Kristina Sandberg, Secretariat of ISO/TMB/WG SR, to Nominated Experts and Observers of ISO/TMB/WG SR (Dec. 17, 2009), available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=8605221&objAction=Open&nexturl=%2Flivelink%2Flivelink%3Ffunc%3D11%26objId%3D8680335%26objAction%3Dbrowse%26viewType%3D1>. In the event, only eleven non-P-members voted, six of them positively. See ISO TECHNICAL MANAGEMENT BOARD, RESULT OF VOTING (N 196) (Closed by ISO/CS on 2010-09-13 11:59:50), http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/N196_Result_of_ballot_ISOFDIS_26000.pdf?nodeid=9779426&vernum=-2 (last visited Mar. 27, 2011).

53 ISO/TMB/WG SR N 196, *supra* note 52.

54 ISO 26000, *supra* note 1.

55 *Id.*

56 See *infra* Part IV.

including a statement that "[t]his International Standard is not a management system standard. It is not intended or appropriate for certification purposes or regulatory or contractual use. Any offer to certify, or claims to be certified, to ISO 26000 would be a misrepresentation of the intent and purpose of the International Standard."⁵⁷

Clause 2 includes definitions of key terms, including "social responsibility," "sustainable development," "organization," "international norms of behavior," and "sphere of influence" (each referred to later in this Article).

Clause 3, "Understanding social responsibility," is a general narrative introduction to social responsibility, its characteristics, and recent trends. It distinguishes between social responsibility and sustainable development, and concludes with a section on the state and social responsibility (considered further later in this Article).

Clause 4 outlines seven principles of social responsibility. These begin with a general statement of principle which makes sustainable development the overarching goal of social responsibility: "When approaching and practising social responsibility, the overarching objective for an organization is to maximise its contribution to sustainable development."⁵⁸ The seven substantive principles set out in clause 4 address (respectively): accountability, transparency, ethical behavior, respect for stakeholder interests, respect for the rule of law, respect for international norms of behavior, and respect for human rights.

Clause 5 contains guidance on an organization's "recognition of its social responsibility" and "identification of and engagement with its stakeholders."⁵⁹

Clause 6 is the longest part of the standard. It contains substantive guidance on seven so-called core subjects: organizational governance, human rights, labor practices, the environment, fair operating practices, consumer issues, and community involvement and development. The approach to each is broadly similar. In each core subject area, the text begins with a description of the theme, outlines principles and considerations where needed, and then sets out a series of related actions and expectations.

Clause 7 addresses implementation and communication of social responsibility under the title "Guidance on integrating social responsibility throughout an organization." The final section of clause 7 addresses the

⁵⁷ ISO 26000, *supra* note 1, cl. 1.

⁵⁸ *Id.* cl. 4.1.

⁵⁹ *Id.* cl. 5.1.

role of "voluntary initiatives for social responsibility" and sets out some of the factors that an organization should consider "in determining whether to participate in or use an initiative for social responsibility."

Finally, *Annex A* contains "examples of voluntary initiatives and tools for social responsibility."⁶⁰ *Annex A* proved extremely controversial. A competition between social responsibility norms and their place in an overall marketplace of norms⁶¹ could be seen clearly in discussions over the content of *Annex A* of ISO 26000.

Some WGSR experts sought to limit the risk that an ISO 26000 mention of another standard or initiative could somehow amount to some kind of *imprimatur* of that standard or initiative. In contrast, others sought to maximize the visibility or significance of "their" standards. For example, in June 2009, Georg Kell, Executive Director of the Global Compact Office, wrote to Robert Steele, Secretary-General of ISO, requesting that "with respect to the Annex . . . the reference to the United Nations Global Compact be removed."⁶² Mr Kell complained that "neither in the body of the standard nor in the annex is there any recognition of the world's foremost social responsibility initiative."⁶³ His letter continues: "[T]he current reference to the UN Global Compact does not provide the UNGC with the prominence it deserves."⁶⁴

A further set of concerns was raised by experts who were worried that the listing of certifiable initiatives within the Annex might inadvertently give rise to the implication that ISO 26000 *itself* somehow endorsed certification as a means of verifying adoption of ISO 26000. This latter concern was addressed through explanatory text within Box 16 in the main body of the standard.⁶⁵ Additional explanatory text in the main body of the standard explains that inclusion in the Annex does not "constitute a judgment by ISO on the value or

⁶⁰ *Id.* Annex A.

⁶¹ *Cf.* Martin Marcussen & Lars Bo Kaspersen, *Globalisation and Institutional Competitiveness*, 1 REG. & GOVERNANCE 1, 2 (2007) (describing the concept of institutional competitiveness, as concerning "the intentional and unintentional outcomes of the attempts of people to optimize their institutions in innovative ways with a view to performing in the wake of globalization").

⁶² Letter from George Kell, Exec. Dir., UN Global Compact Off., to Robert Steele, Sec'y Gen., ISO (June 19, 2009), available at <http://www.scribd.com/doc/16741502/20090619-Letter-from-Global-Compact-to-ISO>.

⁶³ *Id.* A self-evaluation all the more extraordinary since the notion of "social responsibility" (as distinct from "corporate social responsibility") had not clearly existed until ISO 26000 invented it.

⁶⁴ *Id.*

⁶⁵ ISO 26000, *supra* note 1, cl. 7.8.4, box 16.

effectiveness of any of the initiatives or tools for social responsibility listed in Annex A," nor "any form of endorsement by ISO of that initiative or tool."⁶⁶

Efforts to create a wider field of competition between norms, thereby minimizing the impact of ISO 26000, were also in evidence in Chinese experts' calls for respect for "the principle of difference." Indeed the Annex was among the key triggers for the Chinese delegation's opposition at the DIS stage.⁶⁷ By contrast, some WGSR experts argued that the standard would fail to offer practical guidance to readers unless it helped users to find their way through the maze of existing initiatives related to social responsibility.

III. ISO 26000 AND DEFERENCE TO STATES, THE RULE OF LAW, INTERNATIONAL INSTITUTIONS AND NORMS OF INTERNATIONAL LAW

A. Deference to the Distinct Role of States

ISO 26000's adoption of the concept of "organizational social responsibility" rather than "corporate social responsibility" shone light on a difficult issue: how should the guidance apply to public sector actors, or to governments, as organizations? Whilst governments, ministries, local authorities and public agencies of all kinds are clearly organizations, the idea that ISO and its member bodies might proactively offer guidance to public organizations *on their public policy functions* was intuitively deeply unpalatable to many. At the second WGSR meeting in 2005, a handful of experts sought to circumscribe the reach of ISO 26000 in relation to public actors. But for some experts from less democratic countries, it was potentially useful that ISO 26000 might add weight to efforts to put pressure on governments for progressive, democratic change and better public policies.

⁶⁶ *Id.* cl. 7.8.4.

⁶⁷ Fears over the Annex's wider significance ran so deep that even after agreement on the text of the FDIS in May 2010, India (presumably in fact the Indian delegation) lodged a formal process of complaint to the ISO TMB on the refusal of the "Chairman/Co-Chairman" to allow discussion of the Indian delegation's proposal to delete Annex A in Copenhagen. See *Appeal Against the Decision of the Co-Chairman/Chairman, ISO/TMB/WG SR to Disallow India's Request for Discussions for Deletion /Modifications of Annex A of ISO/DIS 26000 at the 8th Meeting of WG SR at Copenhagen, Denmark (17.05.10-21.05.10)*, SCRIBD (July 23, 2010), <http://www.scribd.com/doc/36059833/2010-07-23-Appeal-from-India-against-decision-on-Annex-A-of-ISO-26000> (last visited Mar. 27, 2011). ISO/TMB had not made any pronouncement on the complaint by the time ISO 26000 was declared adopted, on September 13, 2010.

The issue was periodically put to rest through circumscribing text. But under the surface, debate rumbled on. Most surprisingly, large parts of the government stakeholder group itself appeared at one point informally to favor the removal of text designed to circumscribe the reach of ISO 26000 to government or state entities as organizations. Bizarrely, at the sixth WGSR meeting in Santiago in September 2008, the government stakeholder group presented in plenary the results of an informal poll of the industry and labor stakeholder groups on the question of how the standard should apply to governments. The result of this exercise in consultation was in essence an agreement that the standard should under no circumstances be a substitute for proper political process or public policy. Only at this point did the government stakeholder group agree to reinsert text to this effect.

The eventual compromise reflected in clause 3.4 of the standard, titled "the state and social responsibility," reflects a balance between market and public policy-oriented perspectives on the role of government and of the public sector in the development and implementation of social responsibility practices:

This International Standard cannot replace, alter or in any way change the duty of the state to act in the public interest. This International Standard does not provide guidance on what should be subject to legally binding obligations; neither is it intended to address questions that can only properly be resolved through political institutions. Because the state has the unique power to create and enforce the law, it is different from organizations

The proper functioning of the state is indispensable for sustainable development. The role of the state is essential in ensuring the effective application of laws and regulations so as to foster a culture of compliance with the law. Governmental organizations, like any other organizations, may wish to use this International Standard to inform their policies, decisions and activities related to aspects of social responsibility However, promoting the social responsibility of organizations is not and cannot be a substitute for the effective exercise of state duties and responsibilities.⁶⁸

The Standard's definition of "organization" as eventually adopted also explicitly excludes "government acting in its sovereign role to create and

⁶⁸ ISO 26000, *supra* note 1, cl. 3.4.

enforce law, exercise judicial authority, carry out its duty to establish policy in the public interest and honour the international obligations of the state."⁶⁹

These provisions need to be read alongside the standard's "WTO clause" in clause 1 (Scope), which begins: "This International Standard is intended to provide organizations with guidance concerning social responsibility and can be used as part of public policy activities"⁷⁰ The reference to the use of the standard as "part of public policy activities" reflects a concern among some government experts that no text must imply any restriction on their freedom to draw inspiration from the standard as they see fit. The real difference was between government experts who felt comfortable with a strong public policy role for ISO because they worked in the market-oriented field of CSR or in the public procurement realm (where standards offer a particularly useful source of inspiration), and those whose functions were more directly related to public policymaking on issues addressed by the standard.

B. Deference to National Law

ISO 26000 defers to the overall public policy role of governments. And it also defers to national law. The standard's definition of social responsibility incorporates a reference to "transparent and ethical behaviour that . . . is in compliance with applicable law and consistent with international norms of behaviour."⁷¹

The principle of respect for the rule of law is also among the seven principles of social responsibility. Clause 4.6 specifies that "an organization should accept that respect for the rule of law is mandatory." Explanatory text explains that "[t]he rule of law refers to the supremacy of law and, in particular, to the idea that no individual or organization stands above the law and that government is also subject to the law." The standard goes on to state that an organization should "comply with legal requirements in all jurisdictions in which the organization operates . . . ensure that its relationships and activities fall within the intended and relevant legal framework; keep itself informed of all legal obligations; and periodically review its compliance"⁷² The principle of respect for the rule of law is also clearly reflected in guidance on labor issues, including for example a provision

⁶⁹ *Id.* cl. 2.12, Note 1.

⁷⁰ *Id.* cl. 1.

⁷¹ *Id.* cl. 2.18.

⁷² *Id.* cl. 4.6.

in clause 6.4.2.2 that states: "Where the law is adequate, an organization should abide by the law, even if government enforcement is inadequate"

There is, however, on occasion a tension between national law and emerging good practice in (corporate) social responsibility. From an international development perspective, for example, it is widely considered that partnerships and collaboration between large and small enterprises, including informal enterprises operating at the community level, can build social capital and enhance the community development contributions of enterprises. But many enterprises or associations operating informally do not pay taxes, and may also fail to comply with national or local laws and regulations in a variety of other areas, including, for example, those relating to accounting or formal registration of otherwise informal structures. This potential dichotomy was resolved, within the ISO 26000 text, in favor of respect for the rule of law, with guidance on community development allowing only very limited exceptions to an overall idea that organizations should not engage in economic activities with other organizations that have difficulty in meeting legal requirements.⁷³

This tension between respect for national law and good international practice had also emerged in a different way at the DIS stage. ISO 26000 DIS contained references to nondiscrimination on grounds of sexual orientation within the human rights and equal opportunities and nondiscrimination parts of the standard.⁷⁴ Many comments from national delegations argued, in identical format, that "[t]he inclusion of 'sexual orientation' conflicts with religion, national laws and local culture."⁷⁵ The concern generated appears to have been so great as to prove decisive to a number of countries in their decisions to vote "no" at the DIS stage. The eighteen "no" votes at that stage included Bahrain, Iran, Kuwait, Libya, Oman, Qatar, Saudi Arabia, and the UAE (though not all commented on the issue of sexual discrimination).⁷⁶

Nondiscrimination on grounds of sexual orientation might reasonably be

⁷³ *Id.* cl. 6.8.7.2.

⁷⁴ ISO/DIS 26000, cls. 6.3.7.1 & 6.3.10.2; ISO/TMB/WG SR N 172 (2009), <http://isotc.iso.org/livelink/livelink?func=ll&objId=8385467&objAction=Open> (last visited Mar. 27, 2011).

⁷⁵ ISO/TMB/WG SR N 176, NSB CONSENSUS COMMENTS AND COMMENTS FROM D-LIAISON ORGANIZATIONS RECEIVED ON ISO/DIS 26000 GUIDANCE ON SOCIAL RESPONSIBILITY (2010), available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=8748415&objAction=Open>.

⁷⁶ *Id.* Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and UAE all eventually voted to adopt ISO 26000. See ISO/TMB/WG SR N 196, *supra* note 52. Libya did not vote, and Iran abstained.

held to be an emergent norm of responsible organizational behavior. But the reality is that same-gender sexual relations remain outlawed, in a variety of ways, in more than seventy countries. Encouraging tolerance for something that is in reality outlawed might therefore be taken to undermine the overarching principle of respect for the rule of law in clause 4.6. Agreement was eventually reached in Copenhagen on a compromise in which the term "sexual orientation" was replaced with the term "personal relationships."

C. Deference to International Institutions in ISO 26000

Within the ISO 26000 process, several intergovernmental organizations, led by the ILO, were successful in creating special negotiating, review and preemption rights for themselves. This effectively generated a new layer of rules of engagement with ISO's directives, which had to be accommodated within the WGSR.⁷⁷

Both the June 2004 ISO/TMB resolution, which set in chain the ISO 26000 process,⁷⁸ and the NWIP contain statements addressing the standard's relationship with international law. The TMB resolution is bullish, saying that it "recognizes the instruments adopted by global inter-governmental organizations (such as the United Nations Universal Declaration of Human Rights, international labor conventions and other instruments adopted by ILO and relevant UN conventions), but also that there is scope for private voluntary initiatives in the field of SR."⁷⁹ The NWIP is more circumspect, stating that the standard should "be consistent with and not in conflict with existing documents, international treaties and conventions"⁸⁰ (as well as existing ISO standards). Both documents, as we have seen, also contained deferential references to the distinctive and unique roles of the state as distinct from other kinds of organizations.

The ILO was acutely aware from the start of the potential for difficulties to arise out of a private standard negotiating process that would inevitably have recourse to intergovernmental instruments for, at the very least, inspiration.

⁷⁷ However, the consent of ISO to a final Memorandum of Understanding between ISO and the Global Reporting Initiative (UNEP-affiliated but effectively a nongovernmental, multi-stakeholder initiative) might be understood as confirmation that at least one conceptual underpinning for those Memoranda was the existence of "potentially globally competing norm-setting authority" rather than deference to the legitimacy of intergovernmental processes.

⁷⁸ ISO/TMB Resolution 35/2004, *supra* note 28.

⁷⁹ *Id.*

⁸⁰ ISO/TMB ISO/TMB N 26000, *supra* note 29.

By the time of the first meeting of the WGSR in 2005, the ILO had already negotiated a Memorandum of Understanding (MoU) on Social Responsibility with ISO, without reference to the WGSR.⁸¹ This followed naturally from the SAG recommendation that ISO should recognize "through a formal communication the ILO's unique mandate . . ."⁸²

The ISO-ILO MoU sets out terms for cooperation between ISO and the ILO "with a view to ensuring that any ISO International Standard in the field of SR, and any ISO activities relating thereto, are consistent with and complement the application of international labour standards worldwide, including fundamental rights at work."⁸³ In effect, the MoU placed the ILO's representatives on a different footing from other experts within the WGSR. Subsequently, ILO representatives (often aligned with representatives of the international trade union movement) frequently aggressively (and quite properly) pursued their interpretations of international labor provisions in relation to the draft standard.

Other international organizations followed suit. By October 2006, the UN Global Compact (with which the ILO is itself affiliated) had also signed an MoU⁸⁴ in which ISO and the Compact agree that "the future ISO International Standard needs to be consistent with the United Nations Global Compact and its ten universal principles."⁸⁵ The MoU also gives the Global Compact a preemptive right to participate in the Chairman's Advisory Group.⁸⁶ In May 2008, a final intergovernmental organization MoU was signed between the Organization for Economic Cooperation and Development (OECD) and ISO.⁸⁷

Both the ILO and the Global Compact MoUs preempt consensus-based

81 Memorandum of Understanding Between Int'l Labor Org. and Int'l Org. for Standardization in The Field of Soc. Resp. (2005) [hereinafter ISO-ILO MoU], available at http://inni.pacinst.org/inni/corporate_social_responsibility/MoU%20ILO%20&%20ISO.pdf.

82 ISO/TMB AG CSR N 32, *supra* note 27, at 1.

83 ISO-ILO MoU, *supra* note 81.

84 Memorandum of Understanding between UN Global Compact Off. & Int'l Org. for Standardization (N 82) (2006), available at http://inni.pacinst.org/inni/corporate_social_responsibility/N082%20MoU%20ISO%20UN%20Global%20Compact.pdf.

85 *Id.* art. 2.

86 *Id.* art. 4.

87 Memorandum of Understanding Between Org. for Co-operation and Dev. (OECD) and Int'l Org. for Standardization (N 114) (May 2008) [hereinafter ISO-OECD MoU], available at http://inni.pacinst.org/inni/corporate_social_responsibility/N144,%20ISO%20OECD%20Agreement%20on%20SR.pdf.

WGSR decision-making on the place of those organizations at the table on relevant WGSR subcommittees. Indeed, the ISO-ILO MoU provides for full participation by not only the ILO but also "its tri-partite constituency" at the ILO's request.⁸⁸ The provision extends beyond even the WGSR and its subgroups to "all other ISO bodies concerned with any ISO International Standard in the field of SR."⁸⁹ The ISO-OECD MoU is less demanding, with the parties agreeing simply on "the full participation of the OECD in the relevant Working Group activities and related bodies, whether formal or informal, relating to the development of the International Standard on social responsibility based on the rules established by the Working Group."⁹⁰

The ISO-ILO MoU is also significantly more strongly worded on substantive links between ISO 26000 and international labor standards. It specifies that guidance "will be [rather than 'needs to be'] fully" consistent with the object and purpose of ILO international labor standards and their interpretation by the competent bodies of the ILO and "in no way detract from the provisions of those standards."⁹¹ It also addresses activities linked to the promotion and implementation of the standard (not only its terms), specifying for example that such activities (and/or publications) will "complement the role of government in ensuring compliance with international labour standards."⁹²

Initially, a range of UN organizations, including WHO, UNIDO, UNEP and UNCTAD,⁹³ were all represented within the WGSR. Gradually, however, as policy or funding priorities shifted, a number of these organizations dropped out. Ultimately the UN Global Compact came to be an umbrella for UN agencies aside from the ILO, which was separately represented throughout.

The participation of intergovernmental experts in the WGSR occasionally made for difficult discussions. In the early stages, it sometimes seemed as if some experts were mandated only to lobby to ensure that "their" intergovernmental instruments received special mentions. Conversely, some experts from intergovernmental organizations took positions within the process which were derived from their individual expertise and experience. For example, one of the UN Global Compact's two experts was Professor

⁸⁸ ISO-ILO MoU, *supra* note 82, art. 5.

⁸⁹ *Id.*

⁹⁰ ISO-OECD MoU, *supra* note 87, art. 4.1.

⁹¹ *See* ISO-ILO MoU, *supra* note 82, art. 2.1.

⁹² *See id.* art. 2.

⁹³ Respectively the World Health Organization, United Nations Industrial Development Organization, United Nations Environment Programme, and United Nations Conference on Trade and Development.

Kernaghan Webb, who had been lead author of the 2002 ISO Consumer Policy Committee (COPOLCO) report on corporate social responsibility.⁹⁴

From one perspective, this reflects no more than the fact that, whilst organizations might nominate experts to participate in the WGSR, ISO views those experts as individuals. From another perspective, it speaks to the risk that agreed intergovernmental policy agendas sit uncomfortably within a multi-stakeholder consensus-building process since they present "non-negotiables" in a range of policy areas so broad that they may stifle the possibility for creative, multi-stakeholder innovation.

D. Respect for International Norms

We have seen already that ISO 26000 shows considerable deference to the authority of state action as the source of a preeminent set of normative expectations for organizational behavior. In this respect, the standard is far from collapsing the distinction between public and private, as some theorists might have it,⁹⁵ seeking instead, rather explicitly, to delineate it. Examples within the text of ISO 26000 include the principle of respect for the rule of law, and efforts to tackle the opposition of delegations from Gulf states and predominantly Muslim countries to references to "sexual orientation."

It is hardly surprising, then, that perhaps the single most controversial provision in the entire text of ISO 26000 is a principle of "respect for international norms of behaviour."⁹⁶ In essence, this principle is designed to provide guidance to organizations that find themselves operating in areas or circumstances where national law is inadequate or conflicts with fundamental international norms. There was widespread agreement across stakeholder groups that the standard would be incomplete if it failed to address these circumstances, but little agreement on how best to frame the guidance, or its content. A number of NGO experts felt strongly that one could already identify certain overarching norms — the minimum globally applicable baseline of responsible behavior — and that these were derived from international law.

As discussions evolved, major differences emerged between, in particular, more and less conservative industry experts, some government experts, and

⁹⁴ See Press Release, ISO, Consumer Call for The Development of International Standards for Corporate Social Responsibility (June 19, 2002), available at <http://www.iso.org/iso/pressrelease.htm?refid=Ref826>.

⁹⁵ Julia Black, *Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World*, 54 WORLD CURRENT LEGAL PROBS. 103 (2001).

⁹⁶ ISO 26000, *supra* note 1, cl.4.7.

experts from NGOs. One suggestion was that the guidance ought simply to offer the unhelpful injunction to "follow best practice." Another was that the guidance should seek to identify and explicitly enumerate some of the most significant norms contained in existing corporate social responsibility instruments and voluntary initiatives, an approach that might both have substantially undermined the legitimacy of the principle and generated greater tensions for governments.

Government experts from the United States and Canada were particularly concerned about efforts to ground the principle of respect for international norms in international law. And the Chinese delegation was adamant that national law must prevail no matter what the national or local circumstances. However, as the negotiations wore on during the fifth, sixth and seventh WGSR meetings, it became apparent that there was no way out of referring explicitly in the principles to customary international law as well as treaties and intergovernmental agreements as the basis for a principle of respect for international norms. The inevitable result was to reduce the accessibility of the standard to ordinary readers. At the sixth WGSR meeting in Santiago in 2008 a fragile consensus emerged.

International norms of behavior in the standard were finally defined as "expectations of socially responsible organizational behavior derived from customary international law, generally accepted principles of international law, or intergovernmental agreements that are universally or nearly universally recognized."⁹⁷ The principle of respect for international norms of behavior is stated as follows: "[A]n organization should respect international norms of behaviour, while adhering to the principle of respect for the rule of law."⁹⁸

The substantive guidance offered by the principle has five distinct components:

In situations where the law or its implementation does not provide for adequate environmental or social safeguards, an organization should strive to respect, as a minimum, international norms of behaviour.

In countries where the law or its implementation conflicts with international norms of behaviour, an organization should strive to respect such norms to the greatest extent possible.

In situations where the law or its implementation is in conflict with international norms of behaviour, and where not following these norms would have significant consequences, an organization should,

⁹⁷ *Id.* cl. 2.11.

⁹⁸ *Id.* cl. 4.7.

as feasible and appropriate, review the nature of its relationships and activities within that jurisdiction.

An organization should consider legitimate opportunities and channels to seek to influence relevant organizations and authorities to remedy any such conflict.

An organization should avoid being complicit in the activities of another organization that are not consistent with international norms of behaviour.⁹⁹

The five elements of the substantive guidance are followed by a text box on "understanding complicity" which distinguishes between legal and non-legal meanings of the word "complicity".¹⁰⁰

The balance reflected in the principle of respect for international norms avoids advocating disregard for the law (which would conflict with the principle of respect for the rule of law within the standard¹⁰¹). Rather, textual restrictions to its reach ensure respect for the principle of respect for the rule of law. The principle of respect for international norms suggests that international norms of behavior are the appropriate reference point only *in the absence of* adequate legally binding social or environmental safeguards at national level. And the guidance reaches into an area of rapidly evolving social responsibility "good practice," which seeks to encourage organizations to use their good offices ("legitimate opportunities and channels") to influence relevant organizations and authorities to remedy any such conflict.

The disadvantage of the language put forward is that it is impossible for someone without a legal background to work out the precise content of the norms to which the international norms principle refers (and even lawyers would no doubt find much to debate). Even so, the principle addresses a very significant and controversial area of social responsibility.

At the final WGSR meeting in Copenhagen and in correspondence and comments beforehand, the Chinese delegation called for respect for "common but differentiated responsibilities" and the inclusion of a principle of "respect for difference," which they proposed should take precedence over the principle of respect for international norms of behavior.

At the Copenhagen WGSR, a proposal from the IDTF to include an apparently redundant explanatory box on the principle of common but differentiated responsibilities between states was debated. It became clear in the process that one effect could be to draw attention to the possible role of the

⁹⁹ *Id.*

¹⁰⁰ *Id.* box 4.

¹⁰¹ *Id.* cl. 4.6.

principle as a means of undermining the principle of respect for international norms of behavior. The text box proposal was dropped, and China again raised its proposal for a principle of respect for difference. That proposal in turn could have very substantially undermined the value of guidance in a number of areas, including, for example, on stakeholder engagement, since the cultural norm in many settings is not to engage with all interested stakeholders, but rather for state organs to encourage organizations only to engage with individuals or entities with power or authority. In the final text, language from the standard's Scope Clause (clause 1) is repeated in the preamble to the principles in clause 4. In a compromise that may have proved critical to the eventual Chinese "yes" vote, WGSR experts agreed to insert the following words: "In applying this International Standard it is advisable that an organization take into consideration societal, environmental, legal, cultural, political and organizational diversity, as well as differences in economic conditions, while being consistent with international norms of behaviour."¹⁰²

E. The Ruggie Process

The negotiation of ISO 26000 took place in the shadow of another ongoing social responsibility-related process within the United Nations; that led by Professor John Ruggie as Special Representative of the Secretary General on Business and Human Rights to operationalize the so-called "protect, respect and remedy" framework for business and human rights.¹⁰³

There were a number of informal contacts between WGSR experts and members of Professor Ruggie's team as the ISO 26000 process evolved. More formally, Professor Ruggie wrote a Note in November 2009 in which he appealed to WGSR experts to resolve differences between his process and that of ISO 26000 in favor of his own process.¹⁰⁴ He began by underscoring the authority of his process, referring to the "United Nations 'protect, respect

¹⁰² *Id.* cl. 4.1.

¹⁰³ Professor Ruggie was appointed to this role in 2005, reporting to the United Nations in 2008 and proposing the adoption of a policy framework for business and human rights based on three pillars: protect (the state duty to protect human rights), respect (the corporate responsibility to respect human rights), and remedy (the access of victims to remedies). His mandate was extended for a further three years in 2008, to provide, in effect, recommendations on how best to operationalize the framework.

¹⁰⁴ John Ruggie, *Note on ISO 26,000 Guidance Draft Document* (2009), available at <http://www.scribd.com/doc/23098499/Nota-de-John-Ruggie-sobre-la-ISO-26000-Nov-2009>.

and remedy' framework for business and human rights which the UN Human Rights Council welcomed unanimously in 2008, and which it has asked me to further 'operationalize,'" and noted that "for [ISO 26000] to support the UN framework it would need to reflect the framework's core provisions where the two overlap."

Professor Ruggie went on to point to discrepancies between the evolving conception of "sphere of influence" within his own process, and that adopted within parts of the ISO 26000 text that did not specifically address human rights (where NGOs had succeeded in achieving a broader conceptualization of the term than that of his own process). In essence, the idea that organizations have not only direct impacts but also a sphere of influence can potentially form the basis of an additional set of normative expectations in relation both to social responsibility and human rights. Professor Ruggie urged the WGSR to "review all references to sphere of influence in the document to ensure that they are consistent with the UN framework not only in the human rights section but throughout." The IDTF accepted the force of Professor Ruggie's criticism, and WGSR experts endeavored to respond positively to Professor Ruggie's input during the Copenhagen WGSR meeting of May 2010.¹⁰⁵

Professor Ruggie's Note underscores the complexities of any comparison of the relative legitimacy or intrinsic democratic properties of his own work and that of ISO 26000. Professor Ruggie had been appointed by the United Nations Secretary General to operationalize a framework that had been adopted by the United Nations following an earlier process of analysis and enquiry led by him. But whatever its authority and legitimacy, derived both from Professor Ruggie's expertise and from the position of his initiative within the United Nations, the so-called "Ruggie process," with its international consultation meetings and documents, was arguably less inclusive or broad-based than that of ISO 26000. The Ruggie process arguably had neither the geographical breadth nor the depth of engagement reflected in ISO's WGSR. And it had no mandate to address issues beyond its remit in relation to "business and human rights."

Professor Ruggie's intervention from outside the WGSR process was taken seriously by WGSR experts, in part because of perceptions of his authority at least as much as a desire to head off the possibility of conflicts between normative frameworks addressing business and human rights. Yet

¹⁰⁵ See ISO/TMB WG SR N 186, *Copenhagen Discussion Document: Copenhagen Key Topics*, 11-14 (May 4, 2010), available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=9180193&objAction=Open>.

ISO's institutional and procedural framework for recognizing the authority of such initiatives is only partly formed. In the case of a process, such as that headed by Professor Ruggie, that carries the authority of the United Nations but is not in itself intergovernmental, one might properly ask whether the formal *imprimatur* of the United Nations ought to take precedence over the procedural legitimacy of a (relatively) highly inclusive ISO process.

IV. ISO 26000, TRADE BARRIERS AND THE WORLD TRADE ORGANIZATION

A number of WGSR experts from developing countries saw risks in ISO 26000 becoming a protectionist tool that could be interpreted so as to limit market access for products from developing countries by raising the bar on social responsibility practices. The fear of protectionist abuse of the standard ran particularly deep for Indian government experts. An article in an Indian newspaper reported that "[t]he commerce department has asked the department of consumer affairs (the nodal ministry for the purpose) to ask the ISO to ensure that the draft that will be put up for voting at Copenhagen should include the proposed caveat of delinking the standard from international trade."¹⁰⁶ Given ISO 26000's extensive provisions addressing social responsibility in the supply chain, an effort systematically to delink the standard from international trade seems futile. Nonetheless, the sentiment encapsulates concerns among a number of developing country experts in the process.

ISO 26000 also addresses the related concern that the implementation of ISO 26000 could *de facto* limit market access for products from developing countries in its advice that

[a]n organization should consider the potential impacts or unintended consequences of its procurement and purchasing decisions on other organizations, and take due care to avoid or minimize any negative impacts

Subject to the above, an organization should . . . promote fair and practical treatment of the costs and benefits of implementing socially responsible practices throughout the value chain¹⁰⁷

¹⁰⁶ *India Opposes Move to Link CSR, Trade*, THE ECONOMIC TIMES, May 5, 2010, available at <http://economictimes.indiatimes.com/news/economy/foreign-trade/india-opposes-move-to-link-csr-trade/articleshow/5891434.cms>.

¹⁰⁷ ISO 26000, *supra* note 1, cls. 6.6.6.1 & 6.6.6.2.

The interface between ISO 26000 and the rules of the WTO were an additional source of concern for some WGSR experts. The description that follows is by no means an exhaustive analysis,¹⁰⁸ but serves simply to explain how some key provisions of one WTO agreement (the TBT Agreement¹⁰⁹) generated controversy within the WGSR.

This Article has already shown, with reference to the TBT Agreement, how the rules of the WTO incorporate a preference for state product regulation (so-called technical regulations) to be based on relevant international standards where they exist or their completion is imminent. In the context of the WGSR, these provisions and the substantive WTO obligations that they placed on WTO Members raised two sets of concerns. First, that ISO 26000 might be cited in support of unnecessarily trade-restrictive technical regulations. Some government participants in ISO 26000 were concerned that even technical regulations that are unnecessarily trade-restrictive (for example, certain kinds of measures on trade in, for example, energy-intensive or genetically modified products that might be justified using the precautionary approach) could be shielded from scrutiny within the WTO by countries citing ISO 26000 as a relevant international standard on which they had based the offending (*sic*) technical regulations.

A second, related set of concerns was that WTO rules could hamper policy innovation in some of the areas addressed by ISO 26000. This is because a WTO Member wishing to depart from the guidance of ISO 26000 when adopting a technical regulation might find itself forced to justify the technical regulation, and to do so in terms of the exceptions set out to the general principle of article 2.4 of the TBT Agreement that technical regulations should generally be based on relevant international standards.

A further important distinction for purposes of the WTO discussion within the WGSR lies between so-called non-product-related production or process methods and those production and process methods which are product-related. Non-product-related methods are those which have no bearing on the physical characteristics or performance of the goods and services that they address. There are different legal views, however, on whether non-product-related production and processing methods fall — or fail — under WTO rules in different circumstances.

108 For a detailed analysis written in 2007, see Alice Palmer, *The Relationship Between the ISO Social Responsibility Standard and the WTO Agreement on Technical Barriers to Trade* (Paper prepared for the Int'l Inst. for Sustainable Dev., Apr. 2007), available at http://inni.pacinst.org/inni/General/IISD_ISO26000WTOpaper.doc.

109 TBT Agreement, *supra* note 18.

ISO 26000 contains a number of references to non-product-related production and processing methods. For example:

In its purchasing decisions, an organization should take into account the environmental, social and ethical performance of the products or services being procured, over their entire life cycles. Where possible, it should give preference to products or services with minimized impacts, making use of reliable and effective, independently verified labelling schemes or other verification schemes, such as eco-labelling; or auditing activities.¹¹⁰

To the extent that these (and other) references within ISO 26000 may be said to amount to guidelines on "products or related process and production methods," the relevant clauses of ISO 26000 could fall within the definition of a standard under the TBT Agreement and, consequently, may *potentially* be relevant for the purposes of article 2.4 of the TBT Agreement.

Discussion within the WGSR was hampered throughout by the fact that ISO could not comment on the likelihood that various WTO dispute scenarios might arise. Neither was there (nor is there) any mechanism for seeking an opinion from the WTO Secretariat to help experts to resolve the issues.¹¹¹

Most of the individual experts within the ISO 26000 drafting process were not expert in the finer points of WTO law. Many therefore formed a view of the substance based on their view of the motives of individual negotiating parties. For example, initial efforts within the WGSR on the part of the U.S. government expert (at that time under the Bush administration) to press for text to address the WTO issues at the Santiago WGSR meeting were met with deep suspicion from many other participants.

In the WGSR meeting in Quebec in May 2009, U.S. and Canadian government experts led the pressure for WTO text in the standard to prevent the presumption of least trade-restrictiveness attaching to regulations based on relevant international standards, a presumption which could disable these countries in certain kinds of trade disputes (for example, potentially with EU members over trade restrictions on genetically modified products). Chinese and Indian government experts shared U.S. and Canadian concerns, and

¹¹⁰ ISO 26000, *supra* note 1, cls. 6.5.2.2 & 6.7.5.2.

¹¹¹ Such a step was considered and rejected by the ISO Central Secretariat in the case of ISO 26000, on the basis that it would not elicit any response from the WTO Secretariat. The problem is on both sides.

were additionally worried that ISO 26000 could lead to a wider range of countries raising barriers to market access on social responsibility grounds.

Austrian and Swedish government experts in the WGSR, among others, were initially opposed to any WTO text. Not only did they take the view that such text could water down the standard, but they also had no objection in principle to the idea that the standard might become a basis for public policy, particularly decision-making related to public procurement criteria. Moreover, they took the position that any WTO issue related to ISO 26000 was properly for the WTO, not ISO, to resolve. Denmark's government expert too appeared to follow this position in Quebec.

Ultimately, most WGSR experts could accept the general idea that ISO 26000 should not *necessarily* become a baseline for public policy in areas addressed by social responsibility. But the highly theoretical possibility that it could *de facto* become just that was for many of little interest. For others, it was important to do whatever could be done within ISO 26000 to limit its potential to become a mandated baseline for technical regulations or other kinds of public product policy, or a shield for trade-restrictive policy measures.

Uncertainty over the WTO law implications of ISO 26000 caused significant controversy within ISO 26000, due both to resentment that an issue that few could understand was taking up valuable discussion time, and also because many people felt that if the precise nature of the issue could not be clarified, it ought to be dealt with within the WTO, not ISO.

No WTO-proofing text could achieve guaranteed read-across into the WTO. ISO 26000 might conceivably have undesirable impacts on states by reducing their policy space in certain circumstances or by providing a shield for policy action that offended certain states. But the legal obligations associated with those impacts would arise out of the obligations that WTO Members had taken upon themselves, not as a result of obligations placed by ISO on WTO Members. ISO clearly has no mandate to tell the WTO or its Members (*qua* members) how to behave. But ISO 26000 could signal the intentions of its drafters, and thereby hope to influence future interpretations of relevant WTO obligations in areas where there is room for doubt, and hence discretion.

By the conclusion of the 2009 WGSR meeting in Quebec, it had become clear that no consensus would be possible in the WGSR without some sort of WTO text, and the text of ISO 26000 that was eventually adopted includes text specifically designed to ensure, to the greatest extent possible, a decoupling of ISO and the WTO. The Scope Clause of ISO 26000 includes the following passage:

This International Standard is intended to provide organizations with guidance concerning social responsibility and can be used as part of public policy activities. However, for purposes of the Marrakech Agreement Establishing the World Trade Organization (WTO) it is not intended to be interpreted as an "international standard," "guideline" or "recommendation," nor is it intended to provide a basis for any presumption or finding that a measure is consistent with WTO obligations. Further, it is not intended to provide a basis for legal actions, complaints, defences or other claims in any international, domestic or other proceeding, nor is it intended to be cited as evidence of the evolution of customary international law.¹¹²

ISO 26000 demonstrates a clear need for further reform in the relationship between ISO and the WTO beyond what could be achieved within the WGSR. For if there are circumstances in which WTO Members do not accept the consequences of their current obligations, given an expansionist ISO, they must necessarily seek to reform those obligations.

ISO and the WTO are interconnected. The interaction between the norms of the two organizations fundamentally affects the content of the global governance system in ways that each without the other would not.¹¹³ If ISO and the WTO exist not only as a system, but as parts of an autopoietic system, we might predict that in a next step those governments concerned about the WTO implications of ISO 26000 might begin to take reflexive steps to adjust their obligations under the WTO to secure an adjustment in the optimal overall balance between the two.¹¹⁴ The WTO and ISO need to acquire a connected reflexive capacity if it turns out that they do not already have it.

112 ISO 26000, *supra* note 1, cl. 1 *ll.* 157-63.

113 *See* Damato, *supra* note 11 (arguing that a system, after all, is more than the sum of its parts).

114 *Cf.* Sanford E. Gaines & Cliona Kimber, *Redirecting Self-Regulation*, 13 J. ENVTL. L. 157 (2001); Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239 (1983).

V. ISO 26000, CUSTOMARY INTERNATIONAL LAW AND THE PRECAUTIONARY APPROACH¹¹⁵

A. Background

This Article has already highlighted the potential for government participation in international standards processes to shape the commitments of states under customary international law. In the negotiation process for ISO 26000, ISO's procedures viewed each WGSR participant as an individual expert, whose view must be considered and, as necessary, negotiated, in the search for an overall consensus. A government stakeholder group had no special status within the WGSR. But the positions taken by government experts carried implications that were unique to governments because those positions could shape customary international law.

A handful of government experts in the WGSR recognized these implications for the evolution of customary international law. Concerns to limit them lie behind the statement, in the scope section of ISO 26000, that the International Standard is not "intended to be cited as evidence of the evolution of customary international law."¹¹⁶ An article published in August 2008, shortly before the sixth WGSR meeting in Santiago, quotes a representative of the U.S. Trade Representative's office, explaining that "we do object to the use of the ISO process as a means to reinterpret, mischaracterize, or misstate treaty text within the context of a draft international standard. These international agreements should simply be referenced by the ISO effort on social responsibility, without attempts to recast or reinterpret."¹¹⁷

Subsequently, in a letter to Sweden's Trade Minister following that WGSR meeting, the then-U.S. Trade Representative highlights concern that "the current draft [at that point a Committee Draft] of ISO 26000 contains many mischaracterizations of international law and presents novel or controversial interpretations of international instruments as settled matters It

115 This Part draws in part on the author's blog post, Halina Ward, *Governments, Democracy and Public Policy in International Standardisation: The Curious Case of ISO 26000 and the Precautionary Approach*, ENG. L. BLOG (May 22, 2010), <http://www.fdsd.org/2010/05/iso2600-governments-and-precaution>.

116 ISO 26000, *supra* note 1, cl. 1.

117 *U.S. Proposes Major Surgery on ISO 26000*, CROSSLANDS BULLETIN (Aug. 22, 2008) (on file with author), www.crosslands.com (by subscription).

likewise asserts a number of 'principles' on which there is no international consensus."¹¹⁸

China was also concerned about the way in which WGSR experts were taking inspiration from international agreements. The inclusion of a principle of respect for international norms within the standard (discussed earlier) was a particularly deep concern. China's government experts advocated instead a principle of respect for difference.¹¹⁹ But government concern for the implications of ISO 26000 negotiations on emerging international law emerged perhaps most clearly in discussion on the role of the precautionary approach within the standard.

B. ISO 26000 and the Precautionary Approach

The principle of precaution posits that lack of full scientific certainty in the face of serious risks of environmental damage should not be an excuse for postponing preventive measures. The approach offers a guide for action by states. Not only is it a key principle of environmental policy and law at national level, but it also appears, with some variations, in a wide range of international environmental agreements adopted since the early 1990s.¹²⁰ International lawyers have on occasion even argued that the precautionary approach has reached such a degree of acceptance that it has become a principle of international environmental law.¹²¹ The precautionary approach has also been incorporated within the United Nations Global Compact as one of its ten principles, where it is addressed to businesses.¹²²

One of the most commonly cited formulations of the precautionary approach appears in the principles of the 1992 Rio Declaration on

118 Letter from Susan C. Schwab, Trade Representative, U.S., to Ewa Björling, Trade Minister, Swed. (Oct. 27, 2008) (on file with author).

119 This was particularly the case during the eighth WGSR meeting in Copenhagen, May 2010, in which the author participated.

120 *See, e.g.*, Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1, princ. 15 (1992); Simon Marr, *The Southern Bluefin Tuna Cases: The Precautionary Approach and Conservation and Management of Fish Resources*, 11 EUR. J. INT'L L. 815 (2000).

121 *See, e.g.*, Owen McIntyre & Thomas Mosedale, *The Precautionary Principle as a Norm of Customary International Law*, 9 J. ENVTL. L. 221 (1997).

122 *See* UNITED NATIONS, THE GLOBAL COMPACT, princ. 7 (1999), available at <http://www.unglobalcompact.org/aboutthegc/thetenprinciples/principle7.html> ("Businesses should support a precautionary approach to environmental challenges").

Environment and Development, an agreed intergovernmental "soft law" output of the 1992 UN Conference on Environment and Development: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."¹²³

The idea of precaution is also centrally important in intergovernmental negotiations to tackle the global issue of climate change. There, it is controversial in part because of lack of agreement over the global distribution of the costs and benefits of tackling climate change in line with precaution. Not all states, at all times, agree on the circumstances in which, or the ways in which, precautionary action is justified. Furthermore, the idea of precaution has also on occasion been used to justify trade-restrictive actions taking effect between states which take different views of risk or of available scientific evidence. One example was a trade dispute between the European Union and the United States concerning EU restrictions on trade in genetically modified grains.¹²⁴

The precautionary approach was a source of tension throughout the WGSR process. Many experts argued strongly for the inclusion of the precautionary approach within the standard because it reflects the reality of good social responsibility practice in many organizations. One repeated argument was that the precautionary approach is only applicable to states (contradicted by the evidence of its inclusion as a principle of the UN Global Compact). In addition, a handful of governments argued against the Rio Declaration formulation, or for the inclusion of language on "sound science" or "scientific evidence" (which others felt would have overturned the precautionary approach).

Some government experts were particularly concerned that WGSR experts were inappropriately rendering reinterpretations of established approaches within both soft and hard international legal instruments. These concerns reflected worries over the trade-related implications of the standard under

¹²³ Rio Declaration, *supra* note 120, princ. 15.

¹²⁴ Dispute Settlement, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291 (Nov. 21, 2006). For a summary of the dispute, which began with a U.S. request for consultations in 2003, and links to key documents, see *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm (last visited Nov. 21, 2010).

the rules of the WTO, specifically a concern that any ISO 26000 reference to the precautionary approach could be used by a WTO Member to defend itself against trade-restrictive measures based on the idea of precaution. An additional underlying concern (implicitly rather than explicitly) was the potential implications of positions taken by government experts within the WGSR process as a matter of state practice for purposes of the progressive development of international law. Those government experts whose capitals were uncomfortable with principle 15 of the Rio Declaration and who saw themselves as government representatives, not simply experts, were duty bound to argue against the inclusion either of the principle's language, or of language derived from it which might imply a reinterpretation of international law.

At the beginning of the Copenhagen WGSR meeting in May 2010, the DIS continued to contain two separate references to the precautionary approach, both as a principle within guidance on the environment, and as a principle within guidance on consumer issues. Problematically, the text in each of the two sections differed. The reference to the principle in the environment section of the standard read:

An organization should respect and promote the following environmental principles

[T]he precautionary approach This is drawn from the Rio Declaration on Environment and Development and subsequent declarations and agreements, which advance the concepts that where there are threats of serious or irreversible damage to the environment or human health, lack of full scientific certainty or the lack of full certainty as to the severity of the threat to the environment should not be used as a reason for postponing cost-effective measures to prevent environmental degradation or damage to human health.¹²⁵

This reference clearly drew on the text of the Rio Declaration, but embellished on it, through the addition of the words "or the lack of full certainty as to the severity of the threat to the environment." In addition, the reference to the precautionary approach in the consumer section of ISO 26000 *omitted* the words "cost-effective" and stated simply (in line with the Rio Declaration) that "lack of full scientific certainty should not be used." This lack of consistency undermined the internal coherence of the standard as a whole, and so the IDTF invited the WGSR to revise the text.

One issue concerned the insertion of additional (non-Rio Declaration) text

¹²⁵ ISO/DIS 26000, *supra* note 74, cl. 6.5.2.1 ll. 1825-30 (emphasis added).

within the environmental statement of the precautionary approach, which was a particular concern for experts (for example, the U.S. government expert) who were concerned that the WGSR should not be interpreting or embellishing statements of international law. This discrepancy was resolved in favor of the precise language of the Rio Declaration. A second discrepancy between the references to the precautionary approach required a compromise from experts in the consumer stakeholder group, who had successfully managed to secure the omission of the limiting words "cost-effective" in the consumer reference to the precautionary approach.

Text was drafted in a so-called clause-specific meeting of several dozen experts, and the new proposal which resulted was that both the consumer and the environmental references to the precautionary approach would contain the words: "When considering the cost effectiveness of a measure an organization should consider the long-term costs and benefits of that measure, not only the short term costs to that organization." This language was strongly opposed by the U.S. government expert, as (ultimately) was a further compromise option developed by a smaller group. The fallback was to return to the text initially deemed to have reached consensus-minus-one.

The U.S. government expert's sustained opposition to the qualification to the term cost-effectiveness was duly made clear during the final plenary session of the Copenhagen WGSR meeting. Canadian and Indian government experts also expressed their disagreement with the precautionary approach text, but chose not to express their interventions as sustained opposition. The precautionary approach text was deemed by the WGSR leadership to have attained sufficient consensus. In effect, it was not considered necessary for purposes of attaining (sufficient) consensus under ISO's definition of the word to compromise or further refine the language in view of the U.S. government expert's sustained opposition and the reservations of the Canadian and Indian government experts.

The positions of the Indian, U.S. and Canadian government experts on the precautionary approach can be seen as an inevitable consequence of the currently disjointed link between ISO and public policy. The three experts brought the political positions of their governments to a private multi-stakeholder standard-setting process where, in contrast to intergovernmental or national policy processes, they were less likely to be negotiable. In reality, the concept of state practice and its role in the evolution of customary international law may have given them no alternative.

VI. TOWARDS EFFECTIVE SYSTEMS DESIGN AND ADEQUATE THEORETICAL FRAMEWORKS

A. Three Design Steps

Three much needed system design steps flow from the foregoing analysis. For as ISO's involvement with key issues of public policy action such as human rights, environment and labor gets deeper and broader, the tensions between government policy and multi-stakeholder negotiation of good organizational practice will only get worse unless governments themselves find a way to create clearer systems boundaries and relationships.

One part of the way forward should be for both ISO and governments to clarify how governments might be different from other stakeholder participants in future ISO talks with significant public policy reach. The ISO 26000 process has internally been relatively democratic, but it is one with an impact on other democratic processes that are not yet reflexively recognized within the ISO process. The second part of the way forward needs to be for governments to go to the WTO to find ways to reduce the potential impact of ISO on their policy space at national and international levels. The third, and potentially trickiest, area for action is to find a way to ensure that, where appropriate or necessary, government participants are freed up to be able to participate genuinely as experts.

For those whose governments see them as representatives of governments, there are real concerns that their positions and views in such talks potentially have an impact, through evolving international law, on the content of their governments' international obligations. ISO processes with public policy reach, like those of the ISO 26000 working group, cannot be treated as subject to the Chatham House Rule (essentially a rule designed to ensure free discussion by removing accountability for what is said),¹²⁶ as ISO's governing bodies themselves would like. For some participants, the positions taken within the working group have implications for public policy and hence for the accountability of governments. Denying citizens of those countries an opportunity to scrutinize the positions taken by their government

¹²⁶ See CHATHAM HOUSE RULE, http://www.chathamhouse.org.uk/about/chatham_houserule/ (last visited Oct. 22, 2010) ("When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed").

representatives within the process (positions that have policy impacts for those citizens) means denying a key element of democracy itself.

B. Theoretical Approaches

The variety of legal theories that address the shifting relationships between soft and hard law, between regulation, self-regulation, and co-regulation, or that seek to explain the reality of legal pluralism, are only able partially to explain or problematize the multiple relationships between ISO 26000 and public policy, between ISO 26000 and regulation in all its forms, and the wider implications of ISO 26000 for the role of the state.

In the ISO 26000 process, governments were participants, and their policies and instruments were sources of some of the external norms referred to. Governments are also directly addressed by the standard (at least in relation to some of their non-legislative functions) and both their future policies and the practices of organizations in their territories could potentially be substantially impacted by the standard.

Much new governance literature focuses on the consequences of new regulation or co-regulation or multi-stakeholder public policy networks for the shifting relationship between state and market or between state and economic actors. Notably, in their seminal work, Drahos and Braithwaite argue that globalization of business regulation has taken place through a messy process involving a web of state and non-state actors who exert influence at a variety of levels, and build global regulation through a variety of tools and norms in a process of competing principles and models in which no single set of actors emerges as dominant.¹²⁷ But this is only partially relevant in the case of ISO 26000: ISO 26000 does not set normative guidance that is limited to market actors.

Regime theory might provide useful ways to organize an analysis of the multiple points of intersection between ISO 26000 and external norm-setting frameworks.¹²⁸ For example, taking the idea of "nesting" reviewed by Alter and Meunier as an entry point,¹²⁹ ISO could be understood as part of the

127 JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000).

128 See Ken Abbott & Duncan Snidal, *Nesting, Overlap and Parallelism: Governance Schemes for International Production Standards*, Memo for Alter-Meunier Princeton Nesting Conference (Feb. 2006), available at <http://www.princeton.edu/~smeunier/Abbott%20Snidal%20memo.pdf>.

129 Karen J. Alter & Sophie Meunier, *Literature Review on Nesting* (Nw. Disp. Resol. Res. Center, Working Paper No. 322, 2005), available at <http://www.princeton.edu/~smeunier/AlterMeunierlitreview.pdf>.

outer layer of a system of nested governance. The layers of the system are composed of the relationship between international and national standards bodies respectively.¹³⁰ Alternatively, the idea of overlapping regimes which deal with overlapping issues in a horizontal, not hierarchically ordered relationship draws attention to the relationship between ISO 26000 and other (corporate) social responsibility instruments that exist outside the ISO's members.

In a third approach (designed for its explanatory value in relation to international production standards), the idea of parallelism has been put forward as "the sometimes supportive, sometimes competitive relations among independent governance schemes within an issue area."¹³¹ This draws attention to the relationship between ISO 26000 and the various existing (corporate) social responsibility standards developed by organizations represented within the process, such as the UN Global Compact, GRI, AccountAbility or Social Accountability International, the standards listed in Annex A of the standard, and the variety of (corporate) social responsibility standards developed by member standards bodies within the ISO hierarchy.

None of these three approaches encompasses the full range of ISO 26000's normative relations. For example, the text of ISO 26000 draws into the organizational social responsibility realm instruments that were not specifically designed with organizational social responsibility in mind (such as the Universal Declaration on Human Rights). It is difficult for that reason to understand these instruments or their associated institutions as parts of nested, overlapping or even parallel regimes: Parts of their content have been borrowed by ISO 26000 and inserted in a distinct context. Equally, it is abundantly clear from the ISO 26000 process that the WTO forms part of a system which includes ISO; yet regime theories do not readily encompass that relationship. They provide a variety of approaches for analyzing and explaining the fit between ISO 26000 and a range of other social responsibility norm-setting fora, but no mechanism for generating normative preferences for a desirable relationship.

The branch of systems theory that has evolved through the work of Gunther Teubner and others on autopoeisis has some descriptive explanatory force in relation to the issues under consideration, as does work on

¹³⁰ Though arguably the parallel is not wholly convincing, given that Alter and Meunier, as cited in Abbott & Snidal, *supra* note 128, at 4, define nesting in terms of "more specific institutions being part of broader institutions," and (more resonantly) use the metaphor of Russian dolls.

¹³¹ Abbott & Snidal, *supra* note 128, at 3.

policy networks. But autopoiesis insists that systems are "normatively closed," seeing "no norms other than those which they produce as being valid."¹³² This is intuitively limiting save insofar as it provides an incentive to expand system boundaries to account for the dynamic relationship between intergovernmental, governmental and private governance norms. And the analysis of ISO 26000 public policy interfaces indicate that both theories are prone to underperformance when it comes to problematizing the multiple ways in which citizens (rather than the state itself, or markets and economic actors) are impacted by the state's engagement in private norm-setting activities.

A large part of the apparent theoretical gap could be filled by a theory of the shifting relationships and points of interface between social systems for the organization of decision-making and the ideal of democratic decision-making within organizations (such as ISO), and political systems for the organization of decision-making at the level of the state.¹³³ These distinct *loci* for democratic decision-making speak directly to a distinction between democracy as a political ideology located within political institutions and related processes, and its expression as a way of life in society and all its organizational manifestations.¹³⁴ In the latter form, democracy finds expression, for example, in calls for democratic decision-making within organizations. The political dimensions of democracy, in this Article, pertain to democracy as practiced within democratic countries. The wider societal dimensions of democracy pertain to participatory (or democratic) participation in decision-making with wider public significance, including that within ISO 26000.¹³⁵

Political democracy together with an understanding of the unique and distinctive role of the state, as distinct from organizational democracy and the idea that anyone with an interest is simply a stakeholder, explain the

132 Julia Black, *Constitutionalising Self-Regulation*, 59 MOD. L. REV. 24, 44 (1996).

133 Of course, some will find this distinction between social and political democracy problematic, since the social may also be intensely political. See Catherine E. Rudder, *Private Governance as Public Policy: A Paradigmatic Shift*, 70 J. POL. 899, 900 (2008). The democracy of ISO 26000 is itself political democracy.

134 FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* (2007).

135 Halina Ward & Anandini Yoganathan, *What Is Democracy? A Review of Approaches, Models and Their Relevance to an Enquiry into 'The Future of Democracy in the Face of Climate Change'* (The Future of Democracy in the face of Climate Change Project, Paper Two, Mar. 2010) (unpublished manuscript), available at <http://www.fdsd.org/wordpress/wp-content/uploads/Paper-Two-what-is-democracy.pdf>.

discomfort felt by those working group participants (the author included) who sought actively to limit the policy reach of ISO 26000.

A view of social responsibility that sees it as an inherently market-driven construct is more likely to see its content as inherently amenable to multi-stakeholder consensus-building no matter who the participants are (perhaps with the proviso that the process should be internally democratic). This market-centered view of social responsibility partially explains the unwillingness on the part of some government participants to countenance any explicit effort to restrict the reach of the standard into public policy or decision-making by public sector actors. For as a market-driven construct, the market of organizations alone, rather than any higher set of normative values related to the role of the state, should determine the application of the standard.

Analysis of ISO 26000 highlights a set of interesting empirical insights in search of a guiding theoretical framework. One might expect to find that framework within the discipline of political science. For the time being, however, it does not appear to have been developed. U.S. academic and political scientist Catherine Rudder argues that political scientists should reimagine their discipline fully to incorporate what she calls "private governance" within its domain.¹³⁶ She suggests that existing approaches shut off "discussion of whether people affected by the decisions of these groups should have a say in their decision making." The distinctive analytical challenges presented by ISO 26000 reinforce Rudder's argument. But the democracy imperative for such engagement is not so simple, in the case of ISO and of ISO 26000, as her argument suggests.

In a transnational multi-stakeholder process like that of ISO 26000, people affected arguably *do* have a say if one adopts rather loose ideas of representation. But these are not *the same* people as those to whom those government experts in the process from countries claiming to be or actually aspiring to democracy are accountable. And arguably people affected by ISO 26000 are not represented *at all* in a system which gives voice on the basis of balanced expertise rather than representation, because the system is not concerned with the idea of representation.

The problem remains: What kind of democracy should ISO's processes adopt now that its standards are increasingly reaching more and more deeply into areas of public (state) policy reach and competence? And what would be an optimal fit between internal ISO democracy and the external democracy

136 Rudder, *Supra* note 133.

of the political realm in states whose citizens' future policy choices may be affected, or their lives impacted, by ISO?

C. Towards a New Theory of Transnational Democracy?

This Article leads finally to the question: What are the implications of the ISO 26000 public policy interface, in its multiple forms, not for the *authority* or *reach* of the state (ultimately unchallenged), nor for its relationship with markets or the economy as a whole, but for democracy as a political system?

The relationship between ISO 26000 and democracy evolves on at least four planes. First, one might seek to assess whether the ISO process itself is democratic. Second, one could consider the impact of ISO 26000 (or ISO itself) upon democracy at the national level. In the third place, one could consider those provisions of ISO 26000 that are relevant in setting expectations of democratic processes in other kinds of organizations (i.e., the organizations addressed by the standard). And finally, one might consider the contribution of ISO 26000 to global democracy.

Voluntary or private standards are rarely characterized in terms of their contribution to democracy. If anything, what is more common is the assertion that standards are undemocratic. For example, Anthony Ogus highlights a lack of "democratic legitimacy" as one of three traditional critiques of self-regulation.¹³⁷ Similarly, Jem Bendell argues that many private standards initiatives are not accountable, especially to actors in the South.¹³⁸ Alongside these criticisms, there is also a literature which examines directly the potential for *democratic governance* of standards. For example, Sacha Courville suggests that key elements are effective representation of relevant stakeholders, periodic reviews of standards, and effective monitoring systems.¹³⁹

Almost any way it is cut, in principle the ISO 26000 process was relatively democratic.¹⁴⁰ However, whilst there have been considerable efforts to ensure

137 Anthony Ogus, *Rethinking Self-Regulation*, 5 O.J.L.S 97 (1995).

138 Jem Bendell, *In Whose Name? The Accountability of Corporate Social Responsibility*, 15 DEV. PRAC. 362 (2005).

139 Sasha Courville, *Social Accountability Audits: Challenging or Defending Democratic Governance?*, 25 LAW & POL'Y 269 (2003); Anne Tallontire, *CSR and Regulation: Towards a Framework for Understanding Private Standards Initiatives in the Agri-Food Chain*, 28 THIRD WORLD Q. 775 (2007).

140 See, e.g., ROBERT DAHL, *ON DEMOCRACY* (1998) (proposing criteria for a democratic process, namely: effective participation, voting equality, enlightened understanding, control of the agenda and inclusion).

representation of various stakeholder groups in the working group process, and to encourage balance across stakeholder interests in the mirror committees of national standards bodies, ISO has no mechanism for ensuring that national standards bodies follow its recommendations, nor to censure those that do not. Similarly, there is no standardization of processes for selecting stakeholder group representatives from national mirror committees to the international working groups. ISO's processes, which are conducted exclusively in English, are weighted in favor of those with a native knowledge of the language. And whilst it is no mean achievement that there was a greater number of participants from developing than developed countries in the international working group process overall,¹⁴¹ the balance in no way represented the relatively greater share of the world's population in developing rather than developed countries. Greater attention to each of these areas would allow ISO to make greater claim to its processes being representative and democratic.

Given ISO 26000's impact on state policies (e.g., via its connection to WTO rules or through the progressive development of international law interpreted, in part, through the evidence of the behavior of states within the process), we might wish to consider the relationship between ISO 26000's processes and the processes through which democratic governments form policy elsewhere in the international terrain.

In intergovernmental processes, there is no doubt that the final responsibility for legally ratifying and implementing legally binding intergovernmental instruments lies with states alone. Civil society actors are not fully enfranchised in these processes: they have no right to vote. States remain central.¹⁴² By contrast, in ISO decision-making generally and ISO 26000 specifically, there is no ratification mechanism for states, nor any working or normative assumption that states are central, but merely an agreement amounting to an understanding that the standard does not directly

141 221 experts from national standards bodies in developing countries and 136 from those of developed countries, for example, at the seventh WGSR meeting in Quebec in May 2009. See the presentation at http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/3973638/8007666/8141018/6%2C_Report_of_the_secretariat%2C_Quebec.pdf?nodeid=8140313&vernum=-2.

142 *But see* James Cameron & Ruth Mackenzie, *Access to Environmental Justice & Procedural Rights in International Institutions*, in *HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION* 129, 135 (Alan Boyle & Michael Anderson eds., 1996) (arguing that the participation of nongovernmental organizations in international processes signals a challenge to the primacy of the state in international law and relations).

address social responsibility in the regulatory functions or political processes of the state.

Given that in reality there are many democracies at different levels of society, a democracy framing of ISO 26000 has the potential to help work out the relationship between representative democracy at the political level and the deliberative democracy of standards-setting. Equally, thinking on deliberative democracy or other forms of democracy may offer helpful benchmarks for evaluating voluntary environmental and social standards. Understanding standards in terms of their interface with democracy in all these senses has the potential to jolt actors within the standards community to fresh understandings of their roles. It offers a powerful framework to facilitate consideration of fairness and equity in standard-setting, and a reminder that the narrow views of a vocal minority should not be allowed unfairly to determine the livelihood outcomes of a larger, yet absent, majority. Ideas of democracy, in other words, should help to frame how we understand the role of voluntary environmental and social standards in global governance.

Leaving aside, for one moment, critiques of the role of special interest groups or vested interests in the state policy process grounded in political economy,¹⁴³ an extremely simple democratic narrative might be formulated along the following lines. When we, the people, elect our representatives at national and subnational levels, we know that there will be occasions when they (and the civil servants and others who assist and advise them) will need to represent us at the international level; for example in global discussions over climate change. We have a general expectation that the positions taken by our representatives may be traced back either to the promises that they made to us as citizens when we elected them, or to subsequent open, transparent, and ideally deliberative processes of policy formulation. Sometimes, our representatives need to formulate positions on the hoof, in which case we expect those positions to be broadly in line with higher level pledges made to us as citizens.

At a minimum, we expect, in Western democracies, that we will be able to hold our representatives to account for the positions that they take in international negotiations on our behalf.¹⁴⁴ Additionally, we

¹⁴³ See, e.g., Donald Wittman, What is so Special about Special Interest Politics, Paper presented in White Oak Tobin Project Conf. (Feb. 2008) (pointing to the tendency of political economy to ignore the significance of contested elections and voting in analysis of the purported influence of special interest politics in the United States).

¹⁴⁴ It has become gradually more commonplace over the past quarter-century for intergovernmental negotiating processes to admit representatives of

can increasingly feel confident that there will be external nongovernmental observers present during those negotiations who will be scrutinizing our representatives' positions, helping them to resolve difficult issues in a way that reflects or advances their policy commitments, and ensuring that we know what the positions were. We know, too, that ultimately, if our representatives are unhappy with what is agreed in such international processes, they are free to decide not to ratify or accede to any resulting agreements. After all, they represent sovereign states.

A more cynical narrative would be different. It might, for example, point to the role of vested interests in undermining accountability to the voting public at both national and international levels. It might point to the many deals between governments that are done behind closed doors, away from the monitory scrutiny of citizens. And it might choose to examine the reality of horse-trading across agenda areas and institutional settings; the limited negotiating capacity of some governments; the armlock resulting from the economic dependency of some nations upon others; the fiction of equal power in a "one nation one vote" system where in reality economic might speaks louder than mere sovereignty; the lack of a global parliament;¹⁴⁵ or the dominance of larger nongovernmental organizations and richer nations in international negotiating processes. All of these are failings in global democracy.

Contrast these narratives, each perfectly plausible, with the ISO 26000 process. The dogma that all ISO 26000 working group participants were experts helped to manage the huge challenge of consensus-building among 350 or 400 people (450 experts by the time of the final WGRS meeting in Copenhagen in May 2010),¹⁴⁶ but failed to provide adequate responses to the distinctive dilemmas of representation and accountability

nongovernmental organizations or civil society to negotiations as observers. In some processes, for example that leading to the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, civil society participants have been admitted as negotiators or allocated a variety of fact-finding or advocacy roles. See United Nations Economic Commission for Europe (UNECE), Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 163 U.N.T.S 131 (1998), *available at* <http://www.unece.org/env/pp/documents/cep43e.pdf>.

¹⁴⁵ See, e.g., UNPA CAMPAIGN, <http://www.unpacampaign.org> (last visited Oct. 22).

¹⁴⁶ See the presentation from the WGRS Secretariat at http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/8742970/9225278/6%2C_Report_of_the_secretariat%2C_Copenhagen.pdf?nodeid=9224951&vernum=-2.

that faced government participants. And as the representative structures within the process evolved, experts also became members (and in some cases representatives) of stakeholder groups within the process.

That dogma of experts rather than representatives coupled with ISO's consensus rule meant that familiar intergovernmental sources of bargaining power (particularly economic bargaining power) were not available to government experts within the process. Deals were indeed done, but they were done within and across stakeholder groups. Government experts from more populous or more economically powerful governments did not inherently have any more power than an expert from a small Latin American NGO. Equally, there was only limited potential for horse-trading into issues outside the WGSR, given its multi-stakeholder rather than intergovernmental nature.¹⁴⁷

ISO's entry into new areas that are already associated with significant bodies of public policy instruments — such as human rights or labor — opens up new battlegrounds for public policy. And in those new battlegrounds, governments that do not practice pluralism or that are otherwise able to ensure that their views dominate in national delegations, may find that they are able more effectively to advocate for their policies than a pluralist multi-stakeholder delegation. ISO does not distinguish between governments or their experts depending on how democratic or how accountable to citizens they are.

Government experts within the ISO 26000 WGSR found themselves in an unusual position. For whilst many were there as government stakeholder group experts on multi-stakeholder national delegations, the function of those other stakeholders on the national delegation was not (as in an intergovernmental negotiation) to assist or press government experts to secure a better outcome for their nation, ensure accountability, or secure greater publicity for issues under discussion. Instead, all delegation members were themselves negotiating partners and individual experts in the WGSR, with no inherent duty of allegiance to their national (in principle multi-stakeholder) delegation. Government experts knew that whatever they might think of ISO 26000, no individual government could exercise a right of veto nor choose for the standard not to apply in its territory.

The lack of any accessible model or blueprint(s) on the differentiated roles

¹⁴⁷ Though rumors abounded, particularly towards the end of the process, that the Government of China, which had invested considerable effort in advocacy on the margins of the process, might expend additional efforts to secure "No" votes from those national standards bodies that had not been involved in the process at all. In the event, China voted "Yes."

of individuals, NGOs, economic actors and other stakeholders in standards-setting processes hampers the smooth integration of voluntary environmental and social standards within mainstream notions of transnational or global governance. This is because participants in standard-setting processes do not currently have access to any framework that can build understanding on when to accord deference to different actors. Strikingly, the WGSR leadership and ISO itself preferred to encourage experts informally to respect the Chatham House Rule.¹⁴⁸ In a process with wider public policy implications, this has the effect of restricting public accountability for government experts.

At the same time, ISO itself lacks political accountability. When international treaties are negotiated by small groups of government representatives, they may be implemented into domestic law at the national level by government actors who are accountable to their citizens. In many countries, the parliament is involved directly in the ratification or implementation process. And even in countries where international treaties are self-executing, national courts have a role in their enforcement. By contrast, ISO standards take effect without any parallel level of political or judicial scrutiny.

Must we simply accept that this messiness is a feature of an emerging transnational democracy, in which states and government actors are increasingly no more than one more actor among others in a governance web defined simply in terms of the interests of multiple stakeholders? The idea that the world can, given globalization of the economy and communications and our increasing interconnectedness as human beings, be effectively ordered by nation-states has after all for some time been deeply challenged. Certainly, ISO 26000 shows international organizations jockeying for position and government experts at times taken aback by the reality of a multi-stakeholder consensus-building process in which economic might is not right.

Perhaps from this perspective the debate over the *possible* and highly technical implications of the WTO's rules represented no more than the futile efforts of outpaced institutions (states) to protect their old territory? I do not think so. For until we have worked out how we want democracies to interact as between social (non-state) institutions and *loci* of democratic decision-making and participation on the one hand, and the political institutions and democratic processes of the state on the other, we cannot claim in any meaningful way to be moving towards an integrated transnational democracy.

148 See CHATHAM HOUSE RULE, *supra* note 126.

On one hand, the defensive approach of some WGSR participants might be seen as a pointless flight from the reality of globalized decision-making and a global social responsibility agenda in which market actors and civil society, independently of government, play a significant role in raising and framing behavioral expectations. On the other, it can be understood as an effort to plug a breach in a dam whose banks were formerly solidly built of the turf of international trade facilitation rather than environmental or social policy.

ISO 26000 emerges out of a corner of global governance (ISO) which currently has expansionist tendencies. It has made use of relatively democratic processes. But any commitment of ISO to democracy is imperfectly formed because it has no coherent narrative for how it meshes with other systems of democracy elsewhere in the political landscape, even as it impacts on them. Grounding the process of norm development in expertise rather than representation helps ISO to manage complex multi-stakeholder processes, but it does not ultimately demonstrate a systemic commitment to the ideal of democracy.

ISO 26000 points directly to the potential explanatory and normative value of a unifying theory of transnational democracy that is capable of encompassing the internal democracy of transnational private governance processes, as well as political democracy at the level of the state and its expression in international processes. Legal theory will have an important contribution to make, descriptively and normatively, in working through the parameters of such a framework. But political scientists too need to engage, problematizing, defining and redefining shifting patterns of the demos, of representation, expertise, accountability, participation, power and voice for our globalized polycentric world.

When that missing theoretical framework has been constructed in such a way that democracy is nurtured, and sustainable development fostered as its outcome, we may collectively have achieved a step change in our intellectual capacity to draw pictures of a good life; one founded in democracy across borders, in cooperation and consensus-building, and in respect for difference. The ISO 26000 process, for all its flaws, has much to teach us in that endeavor.