FOUNDATION FOR DEMOCRACY AND SUSTAINABLE DEVELOPMENT

The ISO 26000 international guidance standard on social responsibility: implications for public policy and transnational democracy

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Introduction

In September 2010, ISO, the International Organisation for Standardisation, adopted an ambitious International Guidance Standard on Organisational Social Responsibility, ISO 26000.[2] The five-year process of developing ISO26000 has offered a touchstone for multistakeholder processes that define expectations for ethical behaviour. The standard might even be understood as a signpost along the way to 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".[3] For its enthusiasts, the standard represents a groundbreaking experiment in multistakeholder governance and norm-setting. For critics, ISO 26000 is a watershed in ISO's trespasses into areas of broad public policy concern. Arguably, this extension of ISO's reach began in the mid 1990s, marked by the ISO 14000 series of environmental management standards.[4] Today, ISO works on a wide range of issues that have a direct nexus with public policy, including carbon emissions, health and safety, nanotechnology and biofuels.[5]

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 regulations and standards.

An ISO social responsibility standard could potentially matter a great deal to the uptake of social responsibility. But if organisations consider it irrelevant, inapplicable or obtuse, it might not turn out 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 paper 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 paper 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 paper goes a step further to consider in outline possible implications

of ISO 26000 for emergent transnational democracy, and calls for the development of an appropriate theoretical framework to account for those implications.

A general understanding of corporate social responsibility and sustainable development is assumed throughout.

ISO and the international standards community

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

ISO[6] – the International Organisation for Standardisation – was established in 1947. Its mandate was to promote standards in international trade, communications and manufacturing. That same year the General Agreement on Tariffs and Trade (GATT) was adopted. ISO is a non-governmental 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 (ITC). 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 bodies. ISO's rules of procedure are set out in the 'ISO Directives', which it shares with IEC.[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 *"General 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, and this has not changed in the face of the fact that "*society .. is becoming increasingly used to getting information at essentially no cost to the individual seeking the information".[10]* ISO's entry into new areas has also generated expectations of free access to its standards. ISO is now developing standards in areas that have a close connection to areas of (government) public policy concern such as environmental protection, human rights, and labour. When governments publish norms addressing these areas, they enter the public domain and copyright does not generally attach.[11] Even when private actors

(such as non-governmental organisations - NGOs) initiate processes to develop guidance for organisations – for example in the form of codes of conduct - these often do not carry a price-tag.

ISO's standards development processes are far from unsubsidised, however. On the contrary, both private and private sector funders often offer sponsorship to cover the cost of hosting ISO committee or working group meetings, or to secure balanced participation.

Many stakeholders feel 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. The ISO hierarchy has refused to deviate from its basic business model, which it enforces aggressively.[12]

Whilst the text of the Final Draft International Standard has been made available to those directly involved in its negotiation and adoption, in September 2010, the ISO Secretariat's Legal Department wrote to one European non-governmental organisation to ask that it remove a link to the text of the FDIS where it had been posted on the website Scribd and not to "*advertise any links that infringe our copyright".[13]* Scribd was one of many places on the internet where the text of the Final Draft International Standard had been made available for free download in breach of ISO's claimed copyright.

History of the ISO 26000 process

In 2002, ISO's Consumer Policy Committee (COPOLCO) published a report on the value of 'corporate social responsibility' standards.[14] 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 appointed a multistakeholder Strategic Advisory Group (SAG) on Corporate Social Responsibility to advise ISO's Council on a) whether ISO should proceed with the development of ISO deliverables in the field of corporate social responsibility; and b) if so, to determine the scope of the work and the type of deliverable.[15] The SAG was convened with 24 members, together with two representatives of the ISO Secretariat.[16] 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. The grouping also included two NGO participants, from the International Institute for Sustainable Development and from WWF International.

The SAG reported in 2004[17] and made a series of (non consensus-based) recommendations to ISO's Technical Management Board.[18] 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 for NGOs. In response, the SAG recommended a standard on 'social responsibility' rather than a 'CSR' standard as originally envisaged by ISO. This 'docial responsibility' scope of work was later confirmed by the standards development mandate from ISO's Technical Management Board.[19] ISO therefore found itself in uncharted territory. Importantly, 'organisational social responsibility' came with no established boundaries on the respective roles of

public policy-makers and market actors. From the start, the ISO 26000 process was an exercise not in harmonisation but in agenda-setting.

The SAG suggested seven conditions for the development of a guidance standard, five of which speak directly to the public policy implications of the process, recommending 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 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 inter-governmental 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 ILO's 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.
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*."

WWF's representative on the SAG, Gordon Shepherd, submitted a minority view in which he highlighted five areas of particular concern with the majority document. Among them were two which would have reined in the 'agenda-setting' dimension of the ISO 26000 endeavour. 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*" [italics added].

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 endeavour from some of the developing country delegates present appeared to be a critical element in framing the "general consensus" in favour of a standards development process.[20] That same week, ISO's executive management body, the "Technical Management Board" met and resolved[21] that ISO begin work on a standard. 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' 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. The text:

> "*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*"[22]

A New Work Item Proposal (NWIP)[23] to develop an international standard on Social Responsibility was approved in January 2005.[24] 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, that "*The document shall be an ISO standard providing guidance and shall not be intended for third-party certification*", and third, 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') shall be used throughout the standard, and stipulated that only one standard shall be developed.[25]

The NWIP also identifies a number of issues that "*may affect the feasibility of this activity that require additional consideration by the ISO Working Group*". These included the applicability of the ISO Standard to all types and sizes of organizations; regional differences relating to legal requirements, customs or cultural differences, physical environmental conditions and economic development; and an intriguing note that "*the indication that ISO should address what is non-legal (leaving the legal issues to inter-governmental organizations) may not be helpful*". It never became clear what might have been meant by this.

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".[26] This became the International Working Group on Social Responsibility (WGSR).

The Secretariat for the new working group was allocated to two standards bodies; those of Brazil (ABNT) and Sweden (SIS); in what was, for ISO, an unusual 'North-South' twinning arrangement. The Secretariat was made up of a mix of standards body staffers and experts. Chair Jorge Cazeira and Vice-Chair Staffan Soderberg[27] were both employed by businesses.[28]

The NWIP specified[29] that participants in the working group, referred to as 'experts', should be organized within six stakeholder categories: Consumers, Government, Industry, Labour, non-governmental organisation (NGO) and 'other' (later renamed 'service, support, research and others'; in practice a mix of academics, consultants and standards bodies).

Working group participants were either nominated via national 'mirror' committees within participating national standards bodies or could enter the process as 'Liaison D' organisations (in practice a variety of organisations with international reach approved as such by ISO and with up to two experts each).[30]

National delegations to the 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 working group. And 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 working group took place largely on the basis of stakeholder groups. These groups, together with the basic idea of a 'North-South' balance, provided a basic organising framework for subsequent nomination and selection of representatives on various sub-groups, including most importantly an Integrated Drafting Task Force. This latter body, accountable to the WGSR, was created when it became abundantly clear that the entirety of the work could not be conducted in a plenary of more than 300 participants (470 in total by the time of the 2010 Copenhagen meeting including observers) and that some continuity was needed in the small groups set up to take forward particular topics.

The WGSR itself provided guidance on how to identify organisations and individuals in the various 'stakeholder' categories. There was some discussion about boundaries within stakeholder groups,[31] and also some movement of individuals across groups,[32] but this did not cause significant tensions.

The first International Working Group 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.[33] A Task Group (TG1) was established to find ways of ensuring balanced participation across regions and stakeholder groups, in particular through fundraising efforts. 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 working group to complement those laid down by the ISO/TMB. A Chair's Advisory Group was also established to provide strategic advice to the Chair and Vice Chair. And three additional task groups (TGs 4 5 and 6) were established to take forward drafting of different parts of the standard.

The WGSR structures evolved during the course of the process. TGs 4 5 and 6 were disbanded and their leadership absorbed within a 24-member 'Integrated drafting task force' (IDTF) established at the Vienna WGSR meeting in November 2007. The IDTF, accountable to the working group as a whole, was to review and revise the evolving text of the ISO 26000 drafts as a whole.[34] The IDTF mandate was subsequently extended at the conclusion of the 6th working group meeting of 2008.[35] The IDTF, under the Chairmanship of South African consultant and academic Jonathon Hanks, became critically 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.

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.[36]

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 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.[37]

Participants with English as a first language were at an undoubted advantage. And an intervention from the floor that was in intergovernmental terms quite undiplomatic, but nonetheless struck a chord could gather considerable support. Government experts found that there was often little that they could 'trade' for support within a multistakeholder process. Substantive knowledge also counted for a great deal. Early suspicions that some experts were there as 'spoilers' of the process gradually became more muted, rising once more towards the end of the process.[38]

ISO's procedures placed the WGSR at the heart of the drafting process. Initially, consensus within the working group was the key aim as the text developed through a series of Working Drafts. Gradually, decision-making input was extended beyond working group 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' organisations with international reach also play a full part in the WGSR, but do not have a formal 'vote'. Their views are nonetheless actively sought in the quest for consensus.

The so-called 'Committee Draft' of a 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 the working group rather than individual working group experts. Thereafter, the standard moves to the next, 'Draft International Standard' 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. Following further amendments within the working group to address comments and thereby build consensus, a revised 'Draft International Standard' text is itself circulated for a five-month voting period in which standards bodies are invited to determine whether they consider that the text may subsequently move to the publication of a 'Final Draft International Standard'.

Going into the Copenhagen May 2010 8th WGSR meeting, the essential votes in favour of moving on to a final draft international standard (FDIS) had already been cast.[39] The outcome had only been narrowly in favour of a move to FDIS however, with 79% of P-members in favour and a total of 18 negative votes of the total 78 votes cast; 23%. Just two more negative votes would have meant a second Draft International Standard rather than progress to an FDIS. The task in Copenhagen was therefore to make sufficient progress in addressing outstanding comments and issues to ensure that an FDIS would pass immediately, on a final vote, to an adopted standard.

The Final Draft International Standard was circulated for a two-month voting period on 12th July 2010. The voting threshold for approval was a two thirds majority of the votes cast by standards bodies within the international working group on social responsibility (so-called 'P-members') in favour, and not more than one-quarter of the total votes cast (from all ISO member bodies, including those that had not participated directly in the process) are negative.[40] Abstentions were not counted in the vote. On September 13th the ISO Secretariat announced that the Standard had been approved,[41] with 93% of those 77 votes eligible to be counted in favour. Eleven ISO members abstained, and those votes were not counted. Of the 71 P-members voting, 66 were in favour of adoption, with just five P-members submitting negative votes: those of 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'.

ISO 26000 in outline

The Final Draft International Standard (FDIS) version of ISO 26000[42] is a 106 page document with 7 principal clauses, two Annexes and a bibliography.

An 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 organisations. A *Figure* contains an overall schematic overview of the standard.

The broad Scope of the standard is outlined in Clause 2. This includes definitions of key terms, including 'social responsibility', 'sustainable development', 'organisation', 'international norms of behaviour' and 'sphere of influence'. It also contains a statement on the standard's implications under the rules of the World Trade Organisation (discussed further below), and sets out a number of other framing issues, including a statement that "*This 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*".

Clause 3, 'Understanding social responsibility', is a general narrative introduction to social responsibility, its characteristics, and recent trends. It also distinguishes between social responsibility and sustainable development, and concludes with a clause on the State and social responsibility.

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*" (Clause 4.1). The seven substantive Principles set out in Clause 4 which address (respectively): accountability; transparency; ethical behaviour; respect for stakeholder interests; respect for the rule of law; respect for international norms of behaviour; and respect for human rights.

Clause 5 contains guidance on an organisation's 'recognition of its social responsibility' and 'identification of and engagement with its stakeholders', to reflect good practice on identification of and engagement with 'stakeholders'; individuals or groups with rights, claims or specific interests that should be taken into account alongside the interests of owners, members, customers or constituents.

Clause 6 is the longest part of the standard. It contains substantive guidance on seven so-called 'core subjects': 'organizational governance'; human rights; labour practices; the environment; 'fair operating practices'; consumer issues, and community involvement and development. The broad approach 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 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' (considered further below).

Annex A and competition between norms

ISO 26000's *Annex A* contains 'examples of voluntary initiatives and tools for social responsibility'. It became a testing group for a 'competition among norms' induced by the potential for ISO to take a place at the apex of the burgeoning body of 'corporate social responsibility' standards; a potential derived from the body's brand recognition, the broad stakeholder and geographic reach of its processes, and a business-led demand for convergence in the overall in the overall body of available guidance on (corporate) social responsibility.

A Box (*Box 21*) in the main body of the standard explains that inclusion in the Annex does not "*constitute a judgement by ISO on the value or effectiveness of any of the initiatives or tools for social responsibility listed in the annex*", nor "*any form of endorsement by ISO of that initiative or tool*".

The *Annex* proved extremely controversial. One concern was that ISO 26000 should not *de facto* 'grandfather' certain existing standards, making them a *de facto* and static baseline reference point, by referencing them directly. In contrast, some working group 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.

Others were deeply concerned that the listing of certifiable initiatives within the Annex must not inadvertently give rise to the implication that ISO 26000 itself somehow endorsed certification as a means of verifying adoption of ISO 26000, with the attendant potential for significant discriminatory

impact upon smaller producers. The Annex was among the key triggers for the Chinese delegation's opposition to the Draft International Standard.

The Annex also attracted the criticism of the UN Global Compact. In June 2009, Georg Kell, Executive Director of the Global Compact Office wrote to Robert Steele, Secretary-General of the International Organization for Standardization requesting that *"with respect to the Annex... the reference to the United Nations Global Compact be removed"*.[43] 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*".[44] The letter continues: "*the current reference to the UN Global Compact does not provide the UNGC with the prominence it deserves*".[45]

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 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. The complaint was lodged whilst voting on the final adoption of the standard was under way.[46] ISO TMB had not made any pronouncement on the complaint by the time ISO 26000 was declared adopted, on 13th September 2010.

ISO, governments and public policy

International standards in national law and policy

International standards developed in the private sector do public policy-makers a favour in some respects. By 'privatising' 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 normalisation.

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 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.[47]

There has been relatively little research on the relationship between the normative content of voluntary environmental and social standards and public policy and legislation. One exception is research carried out in 2008 by the ISEAL Alliance, a membership-based organisation whose full members are all initiatives or organisations setting voluntary social and environmental standards.[48] ISEAL's review focused on how governments use voluntary standards[49]. This is different to 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 standards). However, the ISEAL work offers a major contribution to what is rather a scant field. ISEAL notes that "*Governments 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'…" (ISEAL, 2008). The study considers ten case study examples of governments using voluntary standards. Nine of the ten consider how governments have 'engaged with standards systems members of the ISEAL Alliance' and one considers how they have 'linked to them'.

ISEAL's report identifies why governments might engage with standards, identifying (among others) five 'governance drivers'.

- Best practice in independent verification (by outsourcing the burden of verifying whether live marine ornamentals were being imported into Israel; or incorporating FSC certification into Bolivia's forestry law)
- International recognition and credibility (when the Tunisian government based its national organic agriculture policy in part on IFOAM Basic Standards)
- Sharing Resources (because of the cost savings benefit to the government of Israel in the instance cited above)
- Reputational Risk Management (for example in relation to forest harvesting in a Guatemalan biosphere reserve).

The impact of international standards on 'international custom'

ISO standards also connect with government public policy via the positions taken by government participants in the process. 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 that underpins 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…*"[50]Government participants in the WGSR therefore have a far wider set of 'non-negotiable' positions, potentially, than their non-governmental counterparts.

A handful of government experts in the ISO 26000 working group recognised these implications. 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.*"[51]

An article published in August 2008, shortly before the 6th Working Group meeting, quotes a representative of the US 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*."[52] Subsequently, in a letter to Sweden's Trade Minister following that WGSR meeting,[53] the then-US 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 likewise asserts a number of 'principles' on which there is no international consensus.*"

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 further below) was a particularly deep concern. China's government experts advocated instead a principle of 'respect for difference'.

The applicability of ISO 26000 to states

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. In the WGSR, experts were further sub-divided into 'stakeholder groups'. A government stakeholder group was among them, but had no special status.

ISO 26000's adoption of the concept of 'organisational 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 'organisations'?

Whilst governments, Ministries, local authorities and public agencies of all kinds are clearly 'organisations', the idea that ISO and its members bodies might proactively offer guidance to public organisations *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.

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 favour the removal of text designed to circumscribe the reach of ISO 26000 to government or state entities as 'organisations'. Most bizarrely, at the 6th Working Group meeting in Santiago in September 2008, the government stakeholder group itself presented in plenary the results of an informal poll of the industry and labour stakeholder groups on the question of how the standard should apply to governments. The result of this 'consultation' exercise was in essence 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 agreed to reinsert text to this effect.

The eventual compromise reflected in Clause 3.4 of the Standard, titled "the state and social responsibility" is 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 indispensible 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. Nonetheless, governmental organizations, like any other organization, 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*"[54]

The Standard's definition of 'organization' eventually adopted also explicitly excludes "*government acting in its sovereign role to create and enforce law, exercise judicial authority, carry out its duty to establish policy in the public interest and hono[u]r the international obligations of the state*".[55]

These provisions need to be read alongside the standard's 'WTO clause' in clause 1 of the Final Draft International Standard (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..."*[56]

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 notion 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 policy-making on issues addressed by the standard.

Deference to national law in ISO 26000

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*".[57]

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 "The 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; remain informed of all legal obligations; and periodically review its compliance".

The principle of respect for the rule of law is also clearly reflected in guidance on labour issues, including for example a provision in paragraph 6.4.2.2 that: "*Where the law is adequate but government enforcement is inadequate, an organization should abide by the law...*"

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 favour of respect for the rule of law, with guidance on Community Development allowing for exceptions to an overall idea that organizations should not engage in economic activities with 'organizations' that have difficulty in meeting legal requirements save for in very limited circumstances.[58]

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 non-discrimination on grounds of sexual orientation within human rights and equal opportunities and non-discrimination parts of the standard.[59] Many comments from national delegations argued, in identical format, that "*[t]he inclusion of "sexual orientation" conflicts with religion, national laws and local culture*"[60] The concern generated appears to have been so great as to prove decisive to a number of countries in their decisions to vote 'no'.[61] The 18 'no' votes at the DIS stage included Bahrain, Iran, Kuwait, Libya, Oman, Qatar, Saudi Arabia, and the UAE (though not all commented on the issue of sexual discrimination).[62]

Non-discrimination on grounds of sexual orientation might reasonably be held to be an emergent norm of responsible organisational behaviour. But the reality is that same-gender sexual relations remain outlawed, in a variety of ways, more than 70 countries.[63] 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'.

Deference to international law and institutions

   Memoranda of Understanding

Both the 2004 ISO Technical Management Board resolution which set in chain the ISO 26000 process and the New Work Item Proposal 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*".[64] The New Work Item Proposal is more circumspect, stating that the standard should "*be consistent with and not in conflict with existing documents, international treaties and conventions*"[65] (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 organisations.

The International Labour Organisation (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.

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

The ISO-ILO Memorandum sets out terms for cooperation between ISO and the ILO[66] "*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 world-wide, including fundamental rights at work*". In effect, the MoU placed the ILO's representatives on a different footing to 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 labour provisions in relation to the draft standard.

Other international organisations followed suit. By October 2006, the UN Global Compact (with which the ILO is itself affiliated) had also signed an MoU with ISO[67] 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".[68] The MoU also gives the Compact a pre-emptive right to participate in the Chairman's Advisory Group.[69]

In May 2008, a final 'intergovernmental organisation' MoU was signed between the Organisation for Economic Cooperation and Development (OECD) and ISO.[70]

Both the ILO and the Global Compact Memoranda pre-empt consensus-based WGSR decision-making on their place at the table on relevant WGSR subcommittees. Indeed, the ILO's MoU provides for full participation not only by the ILO but also "its tri-partite constituency' at the ILO's request". 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*". The 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*".

The ILO's Memorandum of Understanding is also significantly more strongly worded on substantive links between ISO 26000 and international labour standards. It specifies that guidance 'will be' (not 'needs to be') 'fully' consistent with the object and purpose of ILO international labour standards and their interpretation by the competent bodies of the ILO and 'in no way detract from the provisions of those standards'. 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*".[71]

Initially, a range of UN organisations including the WHO, UNIDO, UNEP and UNCTAD, were all represented within the international working group. Gradually however, as policy or funding priorities shifted, a number of these organisations dropped out. And 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, alongside other experts from a variety of organisations (including governments and industry) 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 organisations 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 Kernaghan Webb, a Canadian who had previously been lead author of the 2002 ISO Consumer Policy Committee (COPOLCO) report on corporate social responsibility.[72]

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

The Principle of Respect for International Norms

Perhaps the single most controversial provision in the entire text of ISO 26000 is a principle of 'respect for international norms of behaviour'. In essence, this Principle is designed to provide guidance to organisations who 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 behaviour; 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 experts from NGOs. One suggestion was that the guidance ought simply to offer the unhelpful injuncture 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 US and Canada were particularly concerned about efforts to ground the principle 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 5th, 6th and 7th working group 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 2008 Santiago working group meeting a fragile consensus emerged.

International norms of behaviour in the Standard are now defined as "*expectations of socially responsible organizational behaviour derived from customary international law, generally accepted principles of international law, or intergovernmental agreements that are universally or nearly universally recognized*".[73] The Principle of respect for international norms of behaviour is stated as follows: *'an organization should respect international norms of behaviour, while adhering to the principle of respect for the rule of law'.*[74]

Substantive guidance offered by the Principle has five distinct components:

> "*In countries where the law or its implementation does not provide for minimum environmental or social safeguards, an organization should strive to respect international norms of behaviour.*
>
> *In countries where the law or its implementation significantly 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, 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.*[75]

A text box on 'understanding complicity' goes on to distinguish between legal and non-legal meanings of the word 'complicity'.[76]

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

standard). Instead, it suggests that international norms of behaviour are the appropriate reference point 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 organisations 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 Principle refers (and even lawyers would no doubt find much to debate). Even so, as guidance, the international norms principle addresses a very significant and controversial area of social responsibility.

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' in different settings which they proposed should take precedence over the principle of respect for international norms of behaviour. China invested considerable effort in promoting its position to other standards bodies around the world between working group meetings.

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 principle as a means of undermining the principle of respect for international norms of behaviour. The text box proposal was dropped, and China raised once again its proposal for a principle of 'respect for difference'. That proposal 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 organisations only to engage with individuals or entities with power or authority). Following strong advocacy from the Chinese delegation, text 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 eventual Chinese 'yes' vote, working group 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.*"

ISO 26000 and the Ruggie Mandate

The negotiation of ISO 26000 took place in the shadow of another ongoing 'social responsibility' process within the United Nations; that led by Professor John Ruggie as Special Representative of the Secretary General on Business and Human Rights.[77]

There were a number of informal contacts between working group members and members of Professor Ruggie's team as the ISO 26000 process evolved. More formally, Professor Ruggie wrote a Note in November 2009[78] in which he appealed to working group experts to resolve differences between his process and that of ISO 26000 in favour of his own process. He began by underscoring the authority of his process, referring to the "*United Nations "protect, respect 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 conceptualisation of the term than that of his own process). The Note identified one reference which Professor Ruggie considered inconsistent with his own report and suggested that the Guidance was internally inconsistent on the issue of 'sphere of influence'. He 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 working group experts endeavoured to respond positively to Professor Ruggie's input during the Copenhagen WGSR meeting of May 2010.[79]

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 operationalise a framework that had been adopted by the United Nations following an earlier process of analysis and enquiry led by him. But Professor Ruggie's process was overall unarguably less inclusive or broad-based than that of ISO 26000.

ISO 26000, trade barriers and the World Trade Organization

A number of working group 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 The Economic Times on 5th May 2010 reported that:

> *"The 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".[80]*

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.

The government of India had convened a meeting of World Trade Organization (WTO) Member representatives (and, it was rumoured, 'no' voters to the DIS) in Geneva prior to the Copenhagen meeting to air concerns over trade-related issues in the proposed standard. These included not only WTO issues, but also the concern to find ways to prevent purported 'certification' to ISO 26000, which could, India feared, inadvertently raise new trade barriers for its producers.

ISO 26000 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:[81]

> "*An 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 chain..*".

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,[82] but serves simply to explain how some key provisions of one WTO Agreement generated controversy within the WGSR.

In general terms, the various rules of the World Trade Organization regulate the international trade impacts of various kinds of direct import and export restrictions (import and export bans, for example), as well as the less direct international trade impacts of product-related 'technical regulations' and 'standards' (as defined for the purposes of the WTO's rules; in practice to include voluntary standards that have 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, [83] it was provisions in the WTO's Agreement on Technical Barriers to Trade (TBT Agreement) which most directly affected the negotiating positions of government experts in the WGSR. The TBT Agreement says that members of the WTO shall use 'relevant international standards' as the basis for their so-called 'technical regulations' where relevant international standards exist or their completion is imminent (Article 2.4) unless circumstances spelled out in the Article exist. 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 (Article 2.5). In these two ways, the existence of an 'international standard' has a very direct impact on public policy decisions made by WTO Members.

Concerns highlighted by government and a handful of NGO experts in the WGSR addressed two 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 product 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 the Standard. This is because a WTO Member wishing to depart from the

guidance of ISO 26000 for purposes of a technical regulation (for example in order to adopt a more stringent technical regulation) in an area where the standard was considered 'relevant' might find that they were forced to justify the more stringent technical regulation 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 relevant international standards.

A further important distinction for purposes of the WTO discussion within the ISO's Social Responsibility working group lies between "non product-related production or process methods", and those which are product-related. Non product-related process 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.

ISO 26000 contains a number of references to non product-related production and processing methods.[84] For example, clause 6.5.2.2 says that:

> *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.*

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 Working Group was hampered throughout by the fact that ISO could not comment on the likelihood that various WTO dispute scenarios might arise. Neither was there (is there) any mechanism for seeking an opinion from the WTO Secretariat to help experts to resolve the issues[85].

No expression of intent within the standard could ever bind WTO Members. But the argument of those experts who sought WTO text within the standard was that a clear statement of intent within ISO 26000 might be taken into account in other fora and was therefore worth including.

Most of the individual experts within the ISO 26000 standards development 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 US government expert (at the time under the Bush administration) to press for text to address the WTO issues at the Santiago working group meeting were met with deep suspicion from many other participants.

In Quebec in May 2009, US and Canadian government experts led 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 (e.g. potentially with EU members over trade restrictions on genetically modified products).

Chinese and Indian government experts shared US and Canadian concerns, and 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 were initially opposed to any 'WTO box'. Not only did they take the view that such text could water down the standard, but they also had no in principle objection 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 (as indeed it is). Denmark's government expert too appeared to follow this position in Quebec.

Ultimately, most working group 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.

In any event, 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 providing a 'shield' for policy action that offended certain states. But those impacts would arise as a direct result of the obligations that WTO Members had taken upon themselves.

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 World Trade Organization. The Scope Clause of the standard 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 Marrakesh 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"[86]*

ISO 26000 and the precautionary approach[87]

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.[88] 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.[89]

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.[90]

One of the most commonly cited formulations of the precautionary approach appears in Principle 15 of the 1992 Rio Declaration on Environment and Development,[91] an intergovernmentally agreed '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".*

The idea of precaution is also centrally important in intergovernmental negotiations to tackle the global issue of climate change. There, where it is controversial in part because of lack of agreement over the global distribution of 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.[92]

In the WGSR, 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 organisations.

The precautionary approach was a source of tension throughout the WGSR process. 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). And a handful of governments argued against the Rio Declaration language, 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 working group 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 the rules of the WTO. An additional underlying concern (implicitly rather than explicitly) was the potential implications of positions taken by government experts within the working group 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 15 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 Draft International Standard 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...
>
> **the 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".[93]

In contrast, the reference to the precautionary approach in the Consumer section of the standard *omitted* the words 'cost-effective'. This lack of consistency undermined the internal coherence of the standard as a whole, and so the IDTF invited the working group to revise the text. At the same time, an Indian government expert sought to introduce language, inspired by the WTO's Agreement on Sanitary and Phytosanitary Measures of the World Trade Organisation. He wanted the standard to provide guidance to organisations that had taken measures based on a precautionary approach to the effect that they should seek to generate scientific evidence within a reasonable period of time or (in later discussion) to review scientific evidence from time to time. That proposal did not gain the wider support necessary to secure a consensus.

The discrepancy between the references to the precautionary approach required a compromise from consumer advocates, who had successfully managed to secure the omission of the limiting words 'cost-effective' in the consumer reference to the precautionary approach. Consumers International indicated that consumer stakeholders might be willing to consider some compromise, so long as the costs to be considered were not limited to short-term costs.

Text was drafted in a so-called 'Clause-Specific Meeting' of several dozen experts. The new proposal was that both the consumer and the environment 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 proposal was strongly opposed by the US government expert.

A smaller group met again during the evening and was able to agree on a further compromise. However, overnight it became apparent that that compromise text remained unacceptable to the US government expert's client Department in Washington. The fall-back was to return to the text

initially deemed to have reached consensus-minus-one in the *ad hoc* group. The US government expert's sustained opposition to the qualification to the term 'cost effectiveness' was duly made clear during the final plenary of the Copenhagen WGSR meeting.

Canadian and Indian government experts also expressed their disagreement with the precautionary approach text. In the case of the Canadian government expert, the reasons included an argument that a footnote referring to the 2000 Cartagena Protocol on Biosafety to the 1992 Convention on Biological Diversity[94] ought to be removed on grounds that the Protocol is 'scientifically baseless' and 'not relevant to precaution'.[95] However, Canadian and Indian government experts chose not to express their interventions as 'sustained opposition'. The precautionary approach text was deemed by the Working Group leadership to have attained sufficient consensus.

The positions of the Indian, US and Canadian government experts on the precautionary approach can in many respects be seen as an inevitable consequence of the current unjoined-up link between ISO and public policy. The three experts brought the political positions of their governments to a private multistakeholder 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 international law may have given them no alternative.

Ten key insights and three 'design steps'

Introduction

What lessons lie within this analysis of the relationship between ISO 26000 and a) state actors within or b) drawn towards the process; and between ISO 26000 and c) 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?

The paper has attempted to describe the range of textual and negotiating interactions between ISO 26000 and public policy. To undertake this exercise is loosely to take a systems perspective, with the components of the system under analysis formed of the policies (and in part the politics) and values of international organisations and state actors engaged with the ISO 26000 process; the international working group at the heart of the ISO 26000 process; and the constitutive rules, procedures and dynamics of ISO overall and, in part, of the World Trade Organization, other intergovernmental agreements (with varying kinds of normative force) and the idea of 'the rule of law' which forms one of the central Principles of ISO 26000.[96]

A more complete analysis (including a justification for these suggested system boundaries) must, needs be, be the subject of a different study. For example, this paper has not considered in any detail the internal dynamics, governance structures or values of the organisations from which the 'experts' in the working group process 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 of 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 earlier in this paper.

Ten key insights

1) At the heart of the ISO 26000 negotiating mandate lay a series of built-in compromises and preconditions for the development of the standard. Participants in the WGSR were required to respect those preconditions, many of which concerned the relationship between the proposed standard and public policy or the state.

Most significantly for purposes of the present paper, the multistakeholder Strategic Advisory Group (SAG) whose work paved the way for the start of the formal ISO 26000 process recommended that ISO proceed, not with a 'corporate social responsibility' standard, but an 'organisational social responsibility' standard. This recommendation was a direct result of industry advocacy within the SAG and was subsequently adopted in ISO's mandate to the WGSR. It fundamentally changed the character of the process to an exercise in 'agenda-setting' rather than consolidation.

The core focus on 'social responsibility' also placed the central 'accounting unit' of an analysis of the implications of the standard for public policy in a different place to that which might have resulted from a standard on 'corporate social responsibility'. Here was a standard development process that had no basis in an established community of policy and practice on 'social responsibility'. Working group participants often (though not always) built on a derivative idea of 'social responsibility' as an amplification of 'corporate social responsibility'. But there could be no assumption that 'social responsibility' would simply be a linear extension of corporate social responsibility applied to organisations that were not principally (or only incidentally) market actors. One consequence was that the role of government and the state in the substantive guidance offered by the standard was a repeated source of disagreement and discussion.

The creation of a new and untested 'policy community' as a natural consequence of the standard's focus on 'social responsibility' contained a mismatch: for whilst a majority of the experts in the WGSR were there because of their knowledge of, or relationship to, the market-driven concept of 'corporate social responsibility', the standard that they were developing was designed to speak to non-market actors too.

In theoretical terms, this makes less relevant those theoretical frameworks that would analyse 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' (e.g. Levi-Faur (2006)[97]). Some of these theoretical approaches do indeed extend beyond 'state' and 'market' to 'society',[98] 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. Systems approaches rather than dichotomous binary distinctions are a more appropriate starting point for descriptive analysis.

2) ISO's business model is partly commercial, since ISO relies on sales of its standards for revenue. That core business model was fundamentally unaltered by the ISO 26000 process, despite appeals

from working group participants to recognise that the ISO 26000 process demanded a different approach.

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 pre-eminence 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*' (Damato, 2007). 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 endeavour. Certainly, the adoption of ISO 26000 will reinforce ISO's value-added within the overall global regulatory web.

3) Within the ISO 26000 process, several intergovernmental organisations, led by the ILO, were successful in creating special negotiating, review and pre-emption rights for themselves. This effectively generated a new layer of rules of engagement outwith ISO's Directives which had to be accommodated within the WGSR.[99] Additionally, leaders of two UN-endorsed processes sought, through written appeals, to (in one case) give 'their' process more prominence within the content of the standard, and (in the other) to align its content with the evolving normative content of their process.

4) Competition between 'social responsibility norms', and their place in an overall 'marketplace of norms',[100] can be seen most clearly in discussions over the content of 'Annex A' of ISO 26000, which lists a variety of existing social responsibility initiatives. Some working group experts sought to maximise the visibility or significance of 'their' standards; others sought to limit the risk that an ISO 26000 mention for another standard or initiative could somehow amount to some kind of imprimatur. Efforts to create a wider field for a competition between norms, thereby minimising the impact of ISO 26000, were also in evidence in Chinese experts' calls for respect for 'the principle of difference'.

5) Participants in the ISO 26000 international working group process successfully agreed special internal rules of procedure. These rules of procedure may be reasonably expected to have an impact on future ISO processes by providing a source of inspiration for others.[101]

Many working group participants saw the organisation's willingness to adapt its ways of working as a key benchmark of its competence to enter new territory. ISO proved itself generally willing to rise to the challenge, with the crucial exception of its refusal to compromise significantly in relation to its practice of charging for access to standards. That continuing path-dependency was seen as a betrayal of trust by working group participants who had expended considerable human and financial resources to help shape the standard. ISO's business model may hamper future expansion of ISO's normative territory should it be subjected to sustained attack from external advocacy groups.

6) Government stakeholder group experts within the ISO 26000 international working group held differing views of their roles within the process. Some were acutely aware of the relationship between their government's policies and the positions that they as individuals took within the

process. These government stakeholder group experts did not treat themselves as 'experts' who were free to deploy the entirety of their knowledge and expertise as individuals within the process as they saw fit. Rather, they were executors of their government's policies. Some sought regular advice or instructions from parent or client Ministries or headquarters. A small number of government stakeholder group experts were also conscious of the possible implications of positions taken by them for the progressive development of international law through state practice, most acutely in relation to discussion of the 'precautionary approach'. Some (but not all) experts who were employed by international organisations aimed principally to secure maximum visibility and normative force for 'their' processes or norms within the standard.

Not all government stakeholder group experts felt that their interventions were constrained by their responsibility faithfully to promote and replicate established policy. Some in practice appeared to act freely as individual experts.

7) Government stakeholder group experts held differing views of the role of the state within the new concept of 'social responsibility'. Some held a vision of social responsibility that encompassed the state itself as an organisation that was properly addressed by the concept - for example in relation to public procurement functions. Others were concerned to limit the governmental reach of the standard, or to restrict the extent to which it could impact on their policy space in currently unforeseeable or undesirable ways.

8) Uncertainty over the WTO law implications of ISO 26000 caused significant controversy. This was 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. That it arose was a by-product of ISO's expansion to 'social responsibility'.

ISO 26000 demonstrated 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. Adjusting those obligations could ensure that states were more readily able to accede to the fictional idea that their representatives within the process were no more than 'experts', expressing individual views.

ISO and the WTO are interconnected. Their interaction fundamentally affects the content of the global governance system in ways that each without the other would not (a system, after all, is more than the sum of its parts – Damato, 1995). 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 (cf Teubner, 1983, Gaines and Kimber, 2001). The WTO and ISO need to acquire a connected reflexive capacity if it turns out that they do not already have it.

9) ISO 26000 shows considerable deference to the authority of state action as the source of a pre-eminent set of normative expectations for organisational behaviour. In this respect, the standard is

far from 'collapsing' the distinction between public and private (Black, 2002), seeking instead, rather explicitly, to delineate it. Examples within the text of the standard include the principle of 'respect for the rule of law', textual restrictions to the reach of the principle of 'respect for international norms' to ensure respect for that principle, and efforts to tackle the opposition of delegations from Gulf states and predominantly Muslim countries to references to 'sexual orientation'.

This respect for the state as a source of norms goes beyond what might naturally be imported into the concept of 'social responsibility' from the narrower (market- based) idea of 'corporate social responsibility'. Among participants in the WGSR, a (qualitative) observation would be that deference to the state came naturally from most working group participants as part of the values that they brought to the process. Exceptions related to the positions taken by 'unpopular governments' within the process, including government experts from Canada, India, the United States and China in those circumstances when their positions clashed with strongly held collective visions within the working group of the content of 'social responsibility'.

10) ISO 26000 was created through the largest and most diverse, process in ISO's history. International working group meetings regularly attracted over 300 active participants.[102] The process offers multiple insights for the design of future multistakeholder negotiations.

Internally, the ISO 26000 process was relatively democratic, albeit more accessible to fluent English language speakers 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, working group participants by and large became more comfortable with the idea of 'representative' rather than 'direct' engagement playing a significant role within the working group. 'Representatives' showed considerable commitment to ensuring that difficult or more controversial issues were open to deliberation by the working group as a whole. And the ISO principle of decision-making based on consensus, coupled with the reality that organisations could in future potentially experience impacts from ISO 26000 whether 'their' governments supported it or not, created powerful incentives to resolve genuine differences.

Insights from ISO 26000 for the future design of intergovernmental processes in which states alone ultimately have power to 'agree' or 'disagree' through ratification (or otherwise) are necessarily more limited, but far from non-existent in light of the multiple procedural innovations – determined by the working group itself – that characterised the evolution of the standard. What did not work in terms of advancing consensus was rejected; what did work, once introduced, was retained.

Three design steps

Three much needed 'system design' steps flow from this analysis. For as ISO's involvement with key issues of public policy action such as human rights, environment and labour gets deeper and broader, the tensions between government policy and multistakeholder negotiation of good organisational practice (clearly revealed by discussions over the precautionary approach within ISO 26000) 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' to other stakeholder representatives 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 recognised 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 truly 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, 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 the accountability of governments. Denying citizens of those countries an opportunity to scrutinise the positions taken by their government representatives within the process (positions that have policy impacts for those citizens) means denying a key element of democracy itself.

The inadequacy of existing theory

The variety of legal theories that address the shifting relationships between 'soft' and 'hard law', between 'regulation', 'self-regulation', 'co-regulation', or that seek to explain the reality of legal pluralism are only able partially to explain or problematise 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, 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 organisations 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 'multistakeholder public policy networks' for the shifting relationship between 'state' and 'market' or between 'state' and 'economic actors'. Notably, in their seminal work, *Global Business Regulation*, (Cambridge University Press, 2000), Drahos and Braithwaite argue that globalisation 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. 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'. Rather, the shift from 'corporate social responsibility' to 'social responsibility' is substantively significant.

Regime theory might provide useful ways to organise an analysis of the multiple points of intersection between ISO 26000 and external norm-setting frameworks.[103] For example, taking the idea of 'nesting' reviewed by Alter and Meunier (2005) as an entry point, ISO could be understood as part of the 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.[104]

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*".[105] This draws attention to the relationship between ISO 26000 and a) the various existing (corporate) social responsibility standards developed by organisations represented within the process such as the UN Global Compact, GRI, AccountAbility or Social Accountability International; b) the standards listed in Annex A of the standard, and c) 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 'organisational social responsibility' realm instruments that were not specifically designed with social responsibility in mind (such as the Universal Declaration on Human Rights). It is difficult to understand these instruments or their associated institutions as parts of 'nested', 'overlapping' or 'parallel' 'regimes'. 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 analysing 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 policy networks. But autopoeisis insists that systems are 'normatively closed', seeing 'no norms other than those which they produce as being valid' (Black, 1996). 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 under-performance when it comes to problematising 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 a) social systems for the organisation of decision-making and the ideal of democratic decision-making within organisations (such as ISO) and b)political systems for

the organisation of decision-making at the level of the state.[106] These distinct locuses 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' (Zakaria, 2007) in society and all its organisational manifestations. In the latter form, democracy finds expression, for example, in calls for 'democratic decision-making' within organisations. The *political* dimensions of democracy, in this paper, pertain to democracy practised 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 (Ward and Yoganathan, 2010).

Political democracy together with an understanding of the unique and distinctive role of the state, as distinct from organisational democracy and the idea that anyone with an interest is simply a 'stakeholder', explain the 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' as an inherently market-driven construct; one that is therefore inherently amenable to multistakeholder consensus-building no matter who the participants, so long as the process is internally 'democratic' 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.

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, it does not appear to have been developed.

US academic and political scientist Catherine Rudder (Rudder, 2008) argues that political scientists should reimagine their discipline fully to incorporate what she calls 'private governance' within its domain. 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 and 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 that 'people affected by the decisions of these groups should have a say in their decision making' suggests.

In a transnational multistakeholder process like that of ISO26000, 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 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 of the political realm in states whose citizens' future policy choices may be affected, or lives impacted, by ISO?

Integration of multiple democracies: towards a new theory of transnational democracy?

This paper 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 organisations (i.e. in the organisations addressed by the standard). And finally, one might consider the contribution of ISO 26000 to 'global democracy'.

Voluntary or private standards are rarely characterised in terms of their contribution to democracy. If anything, what is more common is the assertion that standards are 'undemocratic'. For example, Ogus (2005) highlights a lack of 'democratic legitimacy' as one of three traditional critiques of 'self-regulation.' Similarly Jem Bendell (2005) argues that many private standards initiatives are not accountable, especially to actors in the South.

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.[107]

Almost any way it is cut, in *principle* the ISO 26000 process was relatively democratic.[108] However, whilst there have been considerable efforts to ensure 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 'standardisation' of processes for selecting stakeholder group representatives from national mirror committees to the international working groups. Greater attention to these areas would allow ISO to make greater claim to the 'representativity' and 'democracy' of its processes.

There are other weaknesses, too. ISO's processes, which are conducted exclusively in English, are weighted in favour of those with a native knowledge of the language. And whilst it is no mean achievement that there was greater number of participants from developing than developed countries in the international working group process overall,[109] the balance in no way represented the relatively higher size of the world's population in developing rather than developed countries.

It is the public policy implications of ISO 26000 (i.e. its implications for state or subnational policy) that make its 'democracy' nexus an important area for analysis. 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 behaviour 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. If ISO 26000 eventually meshes with public policy in a variety of additional, ways, because state actors choose to refer to it or absorb it within their own policy approaches to social responsibility, we might wish to consider the rationale for taking inspiration from ISO 26000 or for according it authority, and how that might fit with the preferences of citizens, at national level, expressed through participatory or deliberative processes.

In intergovernmental processes there is no doubt that the final responsibility for legally ratifying and implementing legally binding instruments lies with states alone. Civil society actors are not fully enfranchised in these processes: they have no right to vote. States remain central.[110] In 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; merely an agreement amounting to an understanding that the standard does not directly 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 potential to help to 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 potential to jolt people 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,[111] 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.[112] Additionally, we can increasingly feel confident that there will be external non-governmental observers present during those negotiations who will be scrutinising 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;[113] or the dominance of larger non-governmental organisations 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 WGSR meeting in Copenhagen in May 2010),[114] but failed to provide adequate responses to the distinctive dilemmas of representation and accountability 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; a situation that might be regarded as far more 'democratic' than the reality of unequal states bargaining in a 'one nation one vote' process. Equally, there was only limited potential for horsetrading into issues outside the ISO 26000 working group process given its multistakeholder rather than intergovernmental nature.[115]

Government experts within the ISO 26000 WGSR found themselves in an unusual position. For whilst many were there as government stakeholder group experts on multistakeholder '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

working group, with no inherent duty of allegiance to 'their' national 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 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 ISO26000 working group leadership and ISO itself preferred to encourage experts informally to respect the 'Chatham House Rule' (essentially a rule designed to ensure free discussion by removing any accountability for what is said).[116][117] In a process with wider public policy implications this has the effect of removing public accountability for government experts.

Must we simply accept that this messiness is a feature of an emerging 'transnational democracy', in which states and government actors must needs be accept that there are increasingly times and spaces in which they are 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 globalisation 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 organisations jockeying for position and government experts at times taken aback by the reality of a multistakeholder 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 locuses 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.

On one hand, the defensive approach of some working group participants might be seen as a pointless flight from the reality of globalised 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 behavioural 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 multistakeholder 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, problematising, defining and redefining shifting patterns of the demos, of representation, expertise, accountability, participation, power and voice for our globalised 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, consensus-building, and in respect for difference. The ISO 26000 process, for all its flaws, has much to teach us in that endeavour.

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[2] The International Guidance Standard is due to be published in November 2010.

[3] 17th May 2010. Contemporaneous note taken by the author

[4] See the description of the ISO 14000 family at http://www.iso.org/iso/iso_14000_essentials

[5] See further the listing at http://www.iso.org/iso/standards_development/technical_committees/list_of_iso_technical_committees.htm

[6] The name is not an acronym, but rather derived from the Greek for 'balance'

[7] Paul Bryden, Report of the Secretary-General to the ISO General Assembly, Dubai, October 2008, General Assembly 05/2008 (Add.), available online via http://www.iso.org/iso/livelinkgetfile?llNodeId=188625&llVolId=-2000

[8] See
http://www.iso.org/iso/standards_development/processes_and_procedures/iso_iec_directives_and_iso_supplement.htm

[9] Source: ISO/IEC Guide 2:2004

[10] Rob Steele, Report of the Secretary-General to the ISO General Assembly, Cape Town, September 2009, General Assembly 05/2009 (Add.) available online via
http://www.iso.org/iso/livelinkgetfile?llNodeId=289002&llVolId=-2000

[11] See e.g. United States Code Title 17 Chapter 1, s.105, Subject Matter of Copyright: United States Government Works

[12] Council Resolution 32/2009 (Free availability of ISO 26000). In what seemed to most participants a minor concession, ISO's Secretary-General agreed that the Draft International Standard (rather than the final version) would be made freely available.

[13] Bart Slob, *ISO asks Linkedin Group to delete link to copy of ISO/FDIS 26000 on Scribd LinkedIn discussion group*, at
http://www.linkedin.com/groupItem?view=&gid=1813396&type=member&item=30312469&qid=1bfb15a5-79b3-4696-893a-b224358303a0&goback=%2Egmp_1813396

[14]"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", Final report, ISO COPOLCO, May 2002, available online at
http://www.basisboekmvo.nl/files/The%20desirability%20and%20feasibility%20of%20ISO%20corporate%20social%20responsibility%20standards.pdf

[15] See materials at http://inni.pacinst.org/inni/CSR.htm

[16] See http://www.iisd.org/standards/csr_members.asp

[17] ISO Advisory Group on Social Responsibility, *Working Report on Social Responsibility*, April 30 2004, see
http://inni.pacinst.org/inni/corporate_social_responsibility/WorkingReportonSR.pdf

[18] ISO/TMB AG CSR N32, April 2004

[19] ISO/TMB Resolution 35/2004 and ISO/TMB N26000

[20] Tom Rotherham, pers comm., May 2010

[21] ISO/TMB Resolution 35/2004, available online at
http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/02_news/resolution35.html

[22] *Ibid*

[23] ISO/TMB N26000, available online at
http://inni.pacinst.org/inni/corporate_social_responsibility/SR_NWIP.pdf

[24] See http://inni.pacinst.org/inni/inni_online_update_8.htm. Two additional documents issued by the TMB set out the basic operating procedures for the working group established to manage the process.

[25] *Ibid*; as distinct from a series of guidance standards covering different aspects of social responsibility

[26] See http://inni.pacinst.org/inni/corporate_social_responsibility/SR_NWIP.pdf

[27] From the second working group meeting onwards after the initial Vice-Chair Catarina Munck af Rosenschöld resigned. She was due to take maternity leave.

[28] Staffan later joined WWF-Sweden

[29] See http://inni.pacinst.org/inni/corporate_social_responsibility/SR_NWIP.pdf and
http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/04_organization/N048_rev1.pdf

[30] In the ISO 26000 process, some 40 'Liaison' organisations nominated experts to take part.

[31] Particularly so within the NGO group which was occasionally joined by experts from standards bodies, NGOs whose members were largely businesses; standards-setting NGOs including AccountAbility and SAI; and research organisations who saw themselves as NGOs – such as IIED.

[32] e.g. the Global Reporting Initiative's switch from 'NGO' to 'SSRO'

[33] ISO/TMB/WG SR N 15, available online via
http://isotc.iso.org/livelink/livelink?func=ll&objId=3973639&objAction=browse&viewType=1

[34] ISO/TMB/WG SR N 132, resolution 2, details the composition and mandate of the IDTF

[35] ISO/TMB/WG SR N 154, resolution 5

[36] ISO/TMB/WG SR N49, 30th September 2005, available online via
http://inni.pacinst.org/inni/corporate_social_responsibility/ISO26000DesignSpecificationN49.pdf

[37] This was particularly evident in discussion of the 'international norms' principle, and in presentation of the draft design specification to some 200 participants in Bangkok plenary by a small and diverse working group which had worked until after 2am to agree on a proposal to put forward.

[38] Particularly as the Chinese delegation grew in size and became more audible in raising its concerns.

[39] ISO/TMB/WG SR N 175

[40] See ISO/TMB/WG SR WG SR Leadership Statement, 17th December 2009. In the event, only 11 non-'P-members' voted, six of them positively. See ISO/TMB/WG SR N 196

[41] ISO/TMB/WG SR N 196, available online at http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/N196_Result_of_ballot_ISOFDIS_26000.pdf?nodeid=9779426&vernum=-2

[42] ISO/FDIS 26000:2010(E). The final published version of the standard was not available at the time of writing, in September 2010. ISO/FDIS 26000 is not publicly available, but is on file with the author. References to clauses of 'the standard' throughout, refer to the numbering in ISO/FDIS 26000 as approved by the final ballot process ending on 12th September 2010.

[43] See http://www.scribd.com/doc/16741502/20090619-Letter-from-Global-Compact-to-ISO.

[44] *Ibid.* 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.

[45] *Ibid*

[46] Appeal from India against decision on Annex A of ISO 26000, http://www.scribd.com/doc/36059833/2010-07-23-Appeal-from-India-against-decision-on-Annex-A-of-ISO-26000, 23rd July 2010

[47] http://ec.europa.eu/enterprise/policies/single-market-goods/files/blue-guide/guidepublic_en.pdf

[48] http://www.isealalliance.org/content/about-us

[49] ISEAL Alliance, *Governmental Use of Voluntary Standards: Innovation in Sustainability Governance*, September 2008, available online at
http://www.isealalliance.org/_data/n_0001/resources/live/R079_GUVS_Innovation_in_Sustainability_Governance.pdf

[50] Ian Brownlie, *Principles of Public International Law*, 7th Edition, 2008.

[51] Clause 1, line 163 in the FDIS version of the Standard.

[52] Crosslands Bulletin, U.S. Proposes Major Surgery on ISO 26000, August 2008

[53] Letter from Susan C. Schwab to Minister Ewa Björling, stamped October 27 2008. On file with the author.

[54] Clause 3.4, lines 502-516 in the FDIS version of the Standard

[55] Clause 2.12, Note 1, lines 225-227 in the FDIS version of the Standard.

[56] Lines 157-158 in the FDIS version of the text.

[57] Clause 2.18, line 253 in the FDIS version

[58] Clause 6.8.7.2, lines 2816-2821 in the FDIS version

[59] ISO/DIS 26000, Clauses 6.3.7.1 and 6.3.10.2, ISO/TMB/WG SR N 172

[60] ISO/TMB/WG SR N 176

[61] Personal communication with an IDTF member

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[62] ISO/TMB/WG SR N 176. Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and UAE all voted to adopt ISO 26000 eventually. See ISO/TMB/WG SR N 196. Libya did not vote, and Iran abstained.

[63] For an imprecise assessment, see http://en.wikipedia.org/wiki/LGBT_rights_by_country_or_territory. A number of states outlaw homosexual acts between men, but not women.

[64] ISO/TMB Resolution 35/2004

[65] ISO/TMB N26000

[66] http://inni.pacinst.org/inni/corporate_social_responsibility/MoU%20ILO%20&%20ISO.pdf

[67]

http://inni.pacinst.org/inni/corporate_social_responsibility/N082%20MoU%20ISO%20UN%20Global%20Compact.pdf

[68] *Ibid* Article 2

[69] *Ibid* Article 4

[70]

http://inni.pacinst.org/inni/corporate_social_responsibility/N144,%20ISO%20OECD%20Agreement%20on%20SR.pdf

[71] http://inni.pacinst.org/inni/corporate_social_responsibility/MoU%20ILO%20&%20ISO.pdf, Article 2

[72] See http://www.iso.org/iso/pressrelease.htm?refid=Ref826;

[73] ISO 26000, Clause 2.11

[74] ISO 26000, Clause 4.7

[75] *Ibid*

[76] *Box 4* – understanding complicity.

[77] 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 operationalise the framework.

[78] Professor John Ruggie, Note on ISO 26,000 Guidance Draft Document, Undated, available online at http://www.scribd.com/doc/23098499/Nota-de-John-Ruggie-sobre-la-ISO-26000-Nov-2009

[79] ISO/TMB/WG SR – IDTF N111 – Copenhagen Key Topics Discussion Document, Key Topic 12

[80] *India opposes move to link CSR, Trade*, The Economic Times, 5th May 2010, on file with the author

[81] Clauses 6.6.6.1 and 6.6.6.2, lines 2131-2132 and 2151-2153 respectively in the FDIS version

[82] 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 International Institute for Sustainable Development, April 2007, available online at *http://inni.pacinst.org/inni/General/IISD_ISO26000WTOpaper.doc*

[83] In addition to the Technical Barriers to Trade Agreement, there are additional concerns relating to conformity assessment, to the Agreement on Sanitary and Phytosanitary Measures, and a range of other WTO rules, which are not considered in any detail here.

[84] For another example, see Clause 6.7.5.2

[85] 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 deliver any response from the WTO Secretariat. The problem is on both sides.

[86] Clause 1, at lines 157-163 in the FDIS version of the Standard

[87] This section draws in part on the author's blog post at http://www.fdsd.org/2010/05/iso2600-governments-and-precaution

[88] See http://www.gdrc.org/u-gov/precaution-7.html and http://207.57.19.226/journal/Vol11/No4/110815.pdf for examples

[89] In a 1995 case before the International Court of Justice, Judge Weeramantry, in a dissenting opinion in the *Nuclear Tests* case, argued that the 'precautionary principle' was gaining increasing support as part of the international law of the environment

[90] Principle 7 says that "Businesses should support a precautionary approach to environmental challenges". See http://www.unglobalcompact.org/aboutthegc/thetenprinciples/principle7.html

[91] See http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163

[92] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*. For a summary of the dispute, which began with a US request for consultations in 2003, and links to key documents, see http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm

[93] Clause 6.5.2.1, ISO/DIS 26000, ISO/TMB/WG SR N 172, at lines 1825-1830

[94] Available online at http://bch.cbd.int/protocol/text/

[95] Contemporaneous note made by the author. The text of the Canadian government expert's intervention was not made available to the Working Group members.

[96] This draws on Edelman and Suchman's (2007) description of the role of law in creating the 'constitutive environment' of organizations, and on an extension of Swedberg's (2003) argument 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.*"

[97] David Levi-Faur (2006: 520) argues that "*Regulatory 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*"

[98] See e.g. Greta Krippner (2001), who argues that "*markets are treated in [the governance] literature as the other of the social economy, rather than constitutive if it.*"

[99] However, the consent of ISO to a final Memorandum of Understanding between ISO and the Global Reporting Initiative (UNEP-affiliated but effectively a non-governmental multistakeholder 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.

[100] Cf Marcussen and Kaspersen's (2007) concept of institutional competitiveness, which they describe 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*" (at p 2).

[101] For example, in ongoing discussions within ISO TC 229, the Technical Committee (and associated subcommittees or working groups) dealing with nanotechnology. See further http://www.iso.org/iso/iso_technical_committee?commid=381983

[102] See e.g. ISO's Press Release after the 6th Plenary meeting of the ISO working group on social responsibility, 18th September 2008, at http://www.iso.org/iso/pressrelease.htm?refid=Ref1158: "The meeting was one of the largest ISO standards development meetings ever held with 386 experts attending from 76 ISO member countries and 33 liaison organizations".

[103] This paragraph draws heavily on the typology set out by Abbott and Snidal, 2006

[104] Though arguably the parallel is not wholly convincing given that Alter and Meunier (as cited in Abbott and Snidal, 2006) define nesting in terms of "more specific institutions being part of broader institutions", and (more resonantly) use the metaphor of Russian dolls

[105] Abbott and Snidal, 2006

[106] Of course, some will find this distinction between 'social' and 'political' democracy problematic, since the 'social' may also be intensely 'political'. Furthermore, if the term 'politics' pertains simply to 'the allocation of values' (Rudder, 2008, citing Easton 1953), the democracy of ISO 26000 is itself 'political democracy'.

[107] In an article on 'Social accountability audits: challenging or defending democratic governance?', Law and Policy, 25, 2003, pp 269 – 297, Cited in Anne Tallontire's paper "CSR and regulation: towards a framework for understanding private standards initiatives in the agri-food chain", *Third World Quarterly*, 28(4)**,** pp775-791.

[108] For example, as considered against the criteria for a 'democratic process' proposed by Robert Dahl in his work *On Democracy* (1998), namely: effective participation, Voting equality, Enlightened understanding, Control of the agenda and Inclusion

[109] 221 experts from national standards bodies in developing countries and 136 from those of developed countries, for example, at the 7th 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

[110] Though for the contrary argument, that the participation of non-governmental organisations in international processes signals a challenge to the primacy of the state in international law and relations , see Cameron and Mackenzie, 1996

[111] On which, see the 'debunking' paper by Donald Wittman (2008). Wittman points 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 US.

[112] It has become gradually more commonplace over the past quarter-century for intergovernmental negotiating processes to admit representatives of non-governmental organisations 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 (see See http://www.unece.org/env/pp/documents/cep43e.pdf) civil society participants have been admitted as negotiators or allocated a variety of fact-finding or advocacy roles.

[113] See e.g. materials on the website of the Campaign for a UN Parliamentary Assembly at http://www.unpacampaign.org

[114] See the presentation from the WGSR 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

[115] Though rumours 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'.

[116] "*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*". See http://www.chathamhouse.org.uk/about/chathamhouserule/

[117] I was strongly encouraged to respect this working approach by both the leadership of the working group and a senior official within the ISO hierarchy when I proposed, on the final day of the Copenhagen working group meeting, that NGOs issue a press release denouncing the position taken by the US government expert in discussions about cost-effectiveness within the 'precautionary approach'.

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