

# ISO 26000 AND GLOBAL GOVERNANCE FOR SUSTAINABLE DEVELOPMENT

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HALINA WARD – 2012



SHAPING  
SUSTAINABLE  
MARKETS

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Shaping Sustainable Markets

Shaping Sustainable Markets is the new flagship research project for the Sustainable Markets Group at IIED.

Can markets be 'governed' to better benefit people and planet? This project explores the individual and combined impact of market governance mechanisms on sustainable development to find out what works where and why. Some of these mechanisms are well established. Others are innovative ideas yet to be tested in the real world.

We want to improve and broaden understanding of how market governance mechanisms can be designed and used to secure livelihoods and protect environments. Find out more about our work at <http://shapingsustainablemarkets.iied.org>.

We welcome your comments on this publication or other aspects of Shaping Sustainable Markets. Please contact [emma.blackmore@iied.org](mailto:emma.blackmore@iied.org).

Disclaimer

This paper represents the view of the author and not necessarily that of IIED.

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The descriptive analysis of ISO 26000 in this paper draws on background material prepared by Emma Blackmore of IIED's Sustainable Markets Group, and additionally on an earlier paper titled 'The ISO 26000 international guidance standard on social responsibility: implications for public policy and transnational democracy', published in revised form in the journal *Theoretical Inquiries in Law* (Ward, 2011).

The analysis of democracy, governance, sustainable development and global governance draws on Halina Ward's 2011 paper, *The Futures of Sustainable Development and of Democracy?*, and on *What is Democracy?*, her 2010 paper co-authored by Anandini Yoganathan. Both of these papers are available online via the FDSD website ([www.fdsd.org](http://www.fdsd.org)).

The subsection of Section 4, 'The value of a governance systems approach', draws in part on an unpublished draft discussion paper prepared at the request of the Pacific Institute: *Governance Framing of Voluntary Environmental and Social Standards: reflections on content and next steps* (Ward, 2010).

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## ACRONYMS AND ABBREVIATIONS

COPOLCO	Consumer Policy Committee (ISO)
CSR	corporate social responsibility
EU	European Union
FDIS	Final Draft International Standard (ISO)
IDTF	Integrated Drafting Task Force (IDTF)
IIED	International Institute for Environment and Development
ILO	International Labour Organization
ISEAL Alliance	The global association for social and environmental standards
ISO	International Organization for Standardization
MoU	memorandum of understanding
NWIP	New Work Item Proposal (ISO)
SAG	Strategic Advisory Group on Social Responsibility (ISO)
SSM	Shaping Sustainable Markets (IIED)
TBT	Technical Barriers to Trade (WTO)
TMB	Technical Management Board (ISO)
WGSR	International Working Group on Social Responsibility (ISO)
WTO	World Trade Organization

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# ISO 26000 AND GLOBAL GOVERNANCE FOR SUSTAINABLE DEVELOPMENT

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Summary	4
Foreword	6
Introduction	8
<hr/>	
<b>ONE – A PRIMER ON ISO 26000</b>	<b>10</b>
ISO as a market governance mechanism for sustainable development	10
The process of developing ISO 26000	15
ISO 26000 in outline	21
<hr/>	
<b>TWO – ISO 26000, NATIONAL AND GLOBAL PUBLIC GOVERNANCE</b>	<b>24</b>
ISO, governments and public policy	24
ISO 26000, deference to the role of states and to the rule of law	26
ISO 26000, deference to international law and international institutions	30
Testing the boundaries of deference: ISO 26000, the WTO and the precautionary principle	33
<hr/>	
<b>THREE – KEY CONCEPTS: SUSTAINABLE DEVELOPMENT AND GOVERNANCE</b>	<b>38</b>
Defining sustainable development	38
Participatory decision making and democracy within sustainable development	40
Governance	43
Good governance	44
The shape of global governance: some alternative conceptions	46
‘Good’ global governance?	49
<hr/>	
<b>FOUR – A WAY FORWARD</b>	<b>52</b>
Tackling governance dissonances	52
The value of a ‘governance systems approach’	59
<hr/>	
<b>REFERENCES</b>	<b>63</b>
<hr/>	
<b>BOXES</b>	
Box 1.1: What is ISO and how does it function?	11
<hr/>	
<b>FIGURES</b>	
Figure 1.1: Participation of ‘experts’, countries and D-liaison organisations in WGSR	12
Figure 1.2: Geographical balance of participation in WGSR	12
Figure 1.3: Participation of stakeholders in WGSR by sector	13
Figure 1.4: Participation in WGSR by gender	13

# SUMMARY

ISO 26000 is a new international guidance standard on social responsibility developed within the International Organization for Standardization (ISO) and adopted in 2010. The standard is the result of a five-year negotiation process involving an international working group and national committees in over 90 countries. Participants within the negotiating process were divided into stakeholder groups spanning governments, non-governmental organisations (NGOs), businesses, trade unions and international organisations.

ISO 26000 considers the impacts of all kinds of organisations – public and private – and their social responsibility generally. It makes sustainable development the overarching goal of the concept of 'organisational social responsibility'. The standard offers guidance across themes including human rights, labour, environment, consumer protection, fair operating practices and community development.

The brand recognition of ISO standards, coupled with their geographical reach and credibility among market actors, mean that ISO 26000 has the potential to generate significant impacts on the practice of social responsibility in markets from local to global. The reach and scale of these impacts mean that the interaction of ISO 26000 with states and public policy is also important. ISO 26000 is a market governance mechanism with significant implications for public policy, global governance and sustainable development.

The broad scope of the ISO 26000 standard, coupled with the close involvement of government experts within the negotiating process, created a number of dilemmas for members of the international working group. Many of the negotiating challenges concerned the relationship between ISO 26000 and governments (or states), and between the standard and national and

international processes and norms of public governance.

The standard as eventually adopted goes to some lengths to defer both to the unique role played by governments (and states) in the overall governance of social responsibility and to the principle of the rule of law at national level. Consequently, ISO 26000 excludes governments from the definition of 'organisation' for purposes related to the exercise of their unique sovereign functions. ISO 26000 reflects a broadly parallel sense of deference to international law and intergovernmental institutions. There are especially complex relationships between ISO 26000 and aspects of rules of the World Trade Organization (WTO), and between ISO 26000 and elements of international law such as the 'precautionary approach'.

Each of these points of intersection between ISO 26000, public policy, the roles of states, international law, and international institutions, are relevant in determining the quality of the overall contribution of ISO 26000 to global governance for sustainable development. Sustainable development is widely accepted to be a multifaceted challenge that needs to be pursued by a range of actors. Broad rights of access to information and the participation of all concerned citizens are considered indispensable to sustainable development.

Despite its many flaws in practice, democracy offers the most appropriate political system from which to pursue sustainable development. Market governance mechanisms should not undermine the practice of democracy in those circumstances where it is important for the political system to maintain its capacity to govern in the interests of sustainable development. This principle is reflected in those parts of ISO 26000 that express deference to states and to the rule of law – albeit (and importantly) without going so far

as to distinguish between more and less democratic states.

'Governance' generally concerns the set of systems that controls decision making and delivers its outcomes. The idea of 'good governance' tends to be state-centred, focused on the roles of public authorities. In contrast, governance *theory* has evolved to concern itself with the role of non-state actors in norm-setting, and the multiple forms of so-called 'new governance' involving a wide range of non-state actors and settings. Strikingly, governance theory has not tended to concern itself with the relationship between political democracy and market principles. Given the potential significance of democracy in delivering sustainable development, this theoretical gap needs to be addressed if we are to explain the contribution of market governance mechanisms to sustainable development.

The current reality of global governance is messy, disparate, diverse and many-layered. Even describing adequately what currently exists is difficult. At the same time, if we accept the significance of sustainable development as an important goal of human endeavour – even the most significant goal – the role of any particular process or institution in global governance *ought* to depend on its innate ability to sustain, or undermine, the human pursuit of sustainable development. As private governance systems (such as those of ISO) evolve, we might expect to see further experimentation in standard-setting that draws distinctions between states, and between states and other actors.

ISO 26000 is a work in progress from this perspective. It reveals no clear coherent narrative for how it meshes with other parts of the overall web of national and global governance, let alone national and global governance for sustainable development.

Four steps would help to tackle the overall 'governance dissonances' generated by ISO 26000 in ways that help to enhance the positive contributions of the standard to global governance for sustainable development:

- 1 Both ISO and governments should clarify how governments might be different from other stakeholder representatives (or experts) in future ISO talks with significant public policy reach.
- 2 Government participants in ISO processes should be free to participate genuinely as 'experts' rather than as representatives of states. One option would be to exclude government stakeholders from full participation in those aspects of ISO processes that carry implications for the evolution of international law.
- 3 Governments need to approach the WTO to find ways to reduce the impact of ISO on their policy space at national and international levels. This is because what happens within ISO potentially affects WTO members via their WTO obligations.
- 4 Guardian institutions for market governance mechanisms could help to ensure consideration of the interests of stakeholders not directly involved in the development of private standards.

The evolving relationship between market governance mechanisms and public governance, both national and global, has not been adequately considered to date. This relationship matters for sustainable development, and there is real potential for a pioneering initiative to lead the way in exploring it.

# FOREWORD

ISO 26000 – an international guidance standard on social responsibility – is a relatively new market governance mechanism. It was adopted in September 2010 following a five-year process of negotiation which centred on a multi-stakeholder International Working Group on Social Responsibility (WGSR) – one of the biggest and most diverse working groups ever established by the International Organization for Standardization (ISO). The working group involved up to 450 nominated experts from ISO members in more than 90 countries.

ISO 26000 is of interest to Shaping Sustainable Markets – and indeed sustainable development – for a number of reasons. It offers lessons on the use of multi-stakeholder processes in the development of private voluntary standards, and market governance mechanisms more broadly. It also demonstrates how analysis of the impact and contribution of a given market governance mechanism to sustainable development should focus on more than just its direct impact on the economy, society or environment. If, and how, a mechanism interacts with (and thereby enhances or undermines) policymaking, wider political processes and global governance is also important for sustainable development. This paper persuasively shows why.

As the world's largest developer and publisher of international standards and a network consisting of standards institutes from 162 countries, ISO has an international reputation and significant geographical reach. As a result, ISO 26000 has the potential to generate significant impacts on the practice of social responsibility in markets from the local to the global. Though ISO 26000 is a standard, it is a 'guidance standard' and not a certification standard. Organisations therefore cannot become ISO 26000 certified. This may make its impact harder to analyse and attribute. However, a number of private standards bodies (e.g. in Denmark and Portugal) are already looking to develop certification based on ISO 26000 – implying that there is market demand for a certifiable standard on organisational social responsibility. Tracking the development, uptake and impact of ISO 26000, and any certifiable standards based on ISO that emerge, will be important. The impact of ISO on the practice of social responsibility will be explored further in a future paper for Shaping Sustainable Markets.

As this paper highlights, the potential impact of ISO 26000 goes beyond organisational social responsibility; it has implications also for public policy and global governance and therefore the wider pursuit of sustainable development. Market governance mechanisms do not operate in a vacuum – they interact with other mechanisms, including regulatory mechanisms. Analysing individual market governance mechanisms as individual, hermetically-sealed instruments without considering their impact upon, or relationship with, political democracy as practised by and within states, would be to underplay a significant part of their implications for sustainable

development. If political democracy is the political system best suited to delivering on sustainable development, any market governance mechanism that weakens democracy ultimately weakens the pursuit of sustainable development.

ISO 26000 is interesting in terms of its content and scope of application. ISO 26000 considers the impacts of all kinds of organisations – private *and public* – and their social responsibility generally. It makes sustainable development the overarching goal of the concept of 'organisational social responsibility'. The standard is extensive, offering guidance across themes including human rights, labour, environment, consumer protection, fair operating practices and community development. While ISO 26000 excludes governments from the definition of 'organisation' for purposes related to the exercise of their unique sovereign functions, governments are included in the definition of organisations in all other cases. The paper explains that 'ISO 26000 reflects a broadly parallel sense of deference to international law and intergovernmental institutions. The standard as eventually adopted goes to some length to defer both to the unique role played by governments (and states) in the overall governance of social responsibility and to the principle of the rule of law at national level.' Despite this, the standard is not free from dilemmas related to governance and policymaking (and therefore global governance for sustainable development), as the paper explains.

The process of negotiating ISO 26000 generated a number of 'governance dissonances' – potential conflicts or tensions between the standard and public governance/policymaking which could have implications for sustainable development more broadly. The first concerned the involvement of government representatives in the WGSR. When government representatives participate in transnational multi-stakeholder consensus-building, they bring all the positions that they bring to other intergovernmental settings. Experts from governments, for example, who were uncomfortable with the inclusion of the precautionary principle in the 1992 Rio

Declaration (Principle 15) and elsewhere, argued against the inclusion of 'Principle 15 language' in the ISO standard too, since that might otherwise imply that they were happy to reinterpret international law. Despite the fact that these experts were representing the positions of their governments (rather than acting freely as individual 'experts'), their views were treated in substantively the same way as those of experts from other stakeholder groups. The WGSR discussion over the precautionary approach demonstrated that government political positions and consensus-building processes in which all participants are notionally equal do not always work well together.

Other dissonances include those relating to the preference for the use of 'relevant international standards', to create state product regulations (referred to as Technical Standards), under the WTO's Agreement on Technical Barriers to Trade. There was concern that ISO 26000, as an international standard, could be cited in support of unnecessarily trade-restrictive technical regulations. The existence of an 'international standard' like ISO 26000 therefore potentially has a direct impact on public policy decisions made by WTO members. The paper suggests that governments need to go to the WTO to find ways to reduce the impact of ISO on their policy space at national and international levels. The paper also recommends the establishment of guardian institutions for market governance mechanisms to help ensure consideration of the interests of stakeholders not directly involved in the development of private standards.

The kind of analysis employed in this paper is typically absent from the analysis of impact of private standards and market-based instruments. But it could help us gain a more comprehensive understanding of the contribution of market governance mechanisms to sustainable development in its broadest sense – as the paper does in relation to ISO 26000. The challenge now is for us to apply the lessons of this analysis to other market governance mechanisms.

**Emma Blackmore, Series Editor**

# INTRODUCTION

This paper is part of the Shaping Sustainable Markets (SSM) initiative of the International Institute for Environment and Development (IIED). The SSM initiative is a flagship research project aiming to investigate the contribution of market governance mechanisms to sustainable development. The paper focuses on a single example of a market governance mechanism: ISO 26000, an international guidance standard on social responsibility. The International Organization for Standardization (ISO) formally adopted ISO 26000 in September 2010 and published it in November 2010 (ISO, 2010a).

The paper's core premise is that, to understand the contribution of market governance mechanisms to sustainable development, as the SSM project seeks to do, it is important to go beyond simply evaluating the direct sustainable development impacts of implementing market governance mechanisms. A more systems-oriented approach is appropriate, and should include (but not be limited to) consideration of the given mechanism's place within, and its impact upon, global governance for sustainable development.<sup>1</sup>

A systems approach to evaluating the contributions of different market governance mechanisms to sustainable development involves considering such mechanisms in relation to their interaction with each other. This approach has the potential to enhance understanding of the full range of sustainable development impacts arising from market governance mechanisms. Because sustainable development is a global challenge, it can be delivered only with the involvement of global governance.

The question is: what *kind* of global governance? Focusing on ISO 26000 as one example could contribute to wider understanding of the overall role of market governance mechanisms in global governance for sustainable development.

The relationship between the ISO 26000 standard and global governance for sustainable development, then, is the focus of this paper. The paper has four main sections. Section 1 is a primer on some essential features of ISO 26000. It explains why ISO 26000 may be considered a 'market governance mechanism' for the purposes of IIED's research project. It then describes how ISO 26000 was developed, and outlines its substantive content. Section 2 provides illustrations of how ISO 26000 impacts on, draws inspiration from and interacts with public dimensions of sustainable development governance and evolving global governance for sustainable development.

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1. In this respect, the paper adds a further layer to an already-crowded list of deficiencies in methodologies for the impact of certification (as distinct from standards more generally). See Hassell (2008).

Section 3 outlines a framework for assessing the implications of ISO 26000 for global governance. It considers the evolution of the concept of sustainable development, highlights the place of participatory decision-making within sustainable development, and briefly reviews approaches to understanding governance. This section aims to demonstrate that interactions between ISO 26000, participatory decision making, democracy and governance are important for sustainable development. Further, it is not in the interest of sustainable development for market governance mechanisms to undermine state and government functions.

Section 4 offers four suggestions for tackling possible governance dissonances generated by ISO 26000, to enhance the contribution of the standard to global governance for sustainable development. In conclusion, this section reflects on why a systematic approach towards enhancing the contribution of market governance mechanisms to 'global good governance for sustainable development' might be worthwhile.

It is important to  
go beyond simply  
evaluating the  
*direct* sustainable  
development  
impacts of MGMs

# ONE

# A PRIMER ON ISO 26000

## ISO AS A MARKET GOVERNANCE MECHANISM FOR SUSTAINABLE DEVELOPMENT

The International Organization for Standardization (ISO) was established in 1947. Its mandate is to promote standards in international trade, communications and manufacturing. ISO functions as a non-governmental international private body (Box 1). As of June 2008, its activities had generated a total of 17,300 standards within the current collection of ISO standards (Bryden, 2008). Essentially, ISO is a federation of national standards bodies from 162 countries (ISO, 2011b). ISO itself is non-governmental, but some of its members are public-sector bodies, such as the Standards Council of Canada, and Mexico's national standards body, the General Bureau of Standards (Dirección General de Normas, DGN).

ISO's rules of procedure are set out in the 'ISO Directives', which it shares with another international standards body, the International Electrotechnical Commission (IEC).<sup>2</sup> These Directives provide much of the overall constitutional framework for decision making within ISO. Most significantly, most stages (aside from the final voting stages) of any ISO standards-development process emphasise decision making by consensus. For ISO's purposes this is defined as:

*General agreement, characterized by the absence of sustained opposition to substantial issues by any important part of the concerned interests, 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. (ISO/IEC, 2004)*

ISO 26000, an International Guidance Standard on Social Responsibility, was adopted in September 2010, following a five-year process of negotiation centred on a multi-stakeholder, International Working Group on Social Responsibility (WGSR). The WGSR was the biggest and among the most diverse of all working groups established by ISO.

Negotiating positions and wider engagement also took place through national working groups ('mirror committees'), and culminated in a voting process open to all ISO members. Meetings of the WGSR involved up to 450 nominated individual experts<sup>3</sup> from 92 ISO members ('P members' in ISO's terminology, as described in Box 1.1) and 42 Liaison D organisations (those recognised by ISO as having international reach). In the ISO 26000 WGSR, participants included the United Nations Global Compact, the Global Reporting Initiative, Social Accountability International, Transparency International and the International Institute for Environment and Development. Figures 1.1–1.4 show different aspects of participation in the Working Group between 2005 and 2010.

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2. ISO/IEC Directives and ISO Supplement, available online at [www.iso.org/iso/standards\\_development/processes\\_and\\_procedures/iso\\_iec\\_directives\\_and\\_iso\\_supplement.htm](http://www.iso.org/iso/standards_development/processes_and_procedures/iso_iec_directives_and_iso_supplement.htm)

3. 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](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)

## BOX 1.1: WHAT IS ISO AND HOW DOES IT FUNCTION?

'ISO is a network of the national standards institutes... one member per country, with a Central Secretariat in Geneva, Switzerland, that coordinates the system. ISO is a non-governmental organization that forms a bridge between the public and private sectors. On the one hand, many of its member institutes are part of the governmental structure of their countries, or are mandated by their government. On the other hand, other members have their roots uniquely in the private sector, having been set up by national partnerships of industry associations' (ISO, 2011a).

This combination of private- and public-sector representation gives ISO the ability to reach consensus on 'solutions that meet both the requirements of business and the broader needs of society' (ISO, 2011b). It could be argued that this is reflected in ISO's decision to create a standard for social responsibility that is applicable to both private and public sectors.

The General Assembly is the ultimate authority of the ISO, although the Council carries out most of the governance functions. The Council meets twice a year and its membership is rotated to ensure that it is representative of ISO's membership. All member bodies are eligible for appointment/election to the Council (ISO, 2011c).

ISO's country network consists of member bodies, correspondent members and subscriber members.

- A **member body** of ISO is the national body 'most representative of standardization in its country'. Only one such body for each country is accepted for membership of ISO. Member bodies are known as 'P members', and entitled to participate and exercise full voting rights on any technical or policy committee of ISO.
- A **correspondent member** is usually an organisation in a country which does not yet have a fully developed national standards activity. Correspondent members do not take an active part in the technical and policy development work, but are entitled to be kept fully informed about the work of interest to them.
- **Subscriber membership** has been established for countries with very small economies. Subscriber members pay reduced membership fees that nevertheless allow them to maintain contact with international standardisation.

FIGURE 1.1: PARTICIPATION OF 'EXPERTS', COUNTRIES AND D-LIAISON ORGANISATIONS IN WGSR

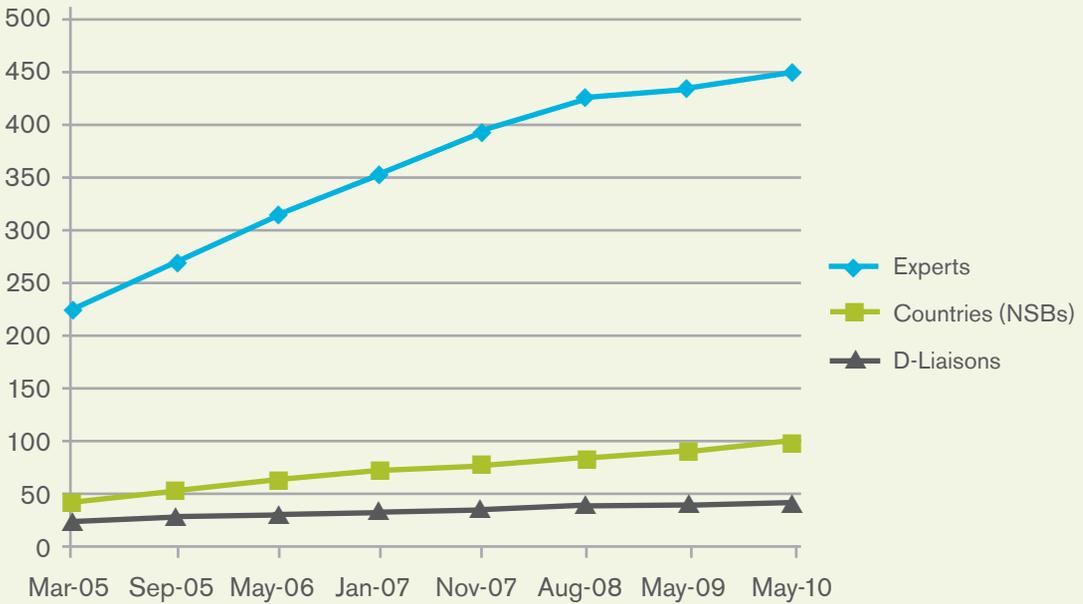


FIGURE 1.2: GEOGRAPHICAL BALANCE OF PARTICIPATION IN WGSR

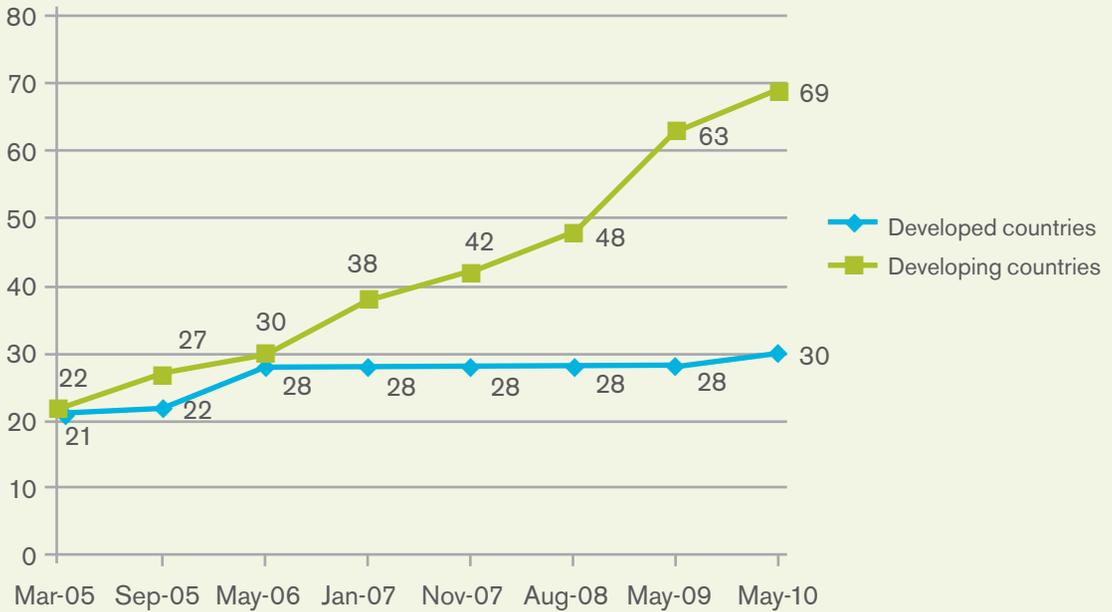


FIGURE 1.3: PARTICIPATION OF STAKEHOLDERS IN WGSR BY SECTOR

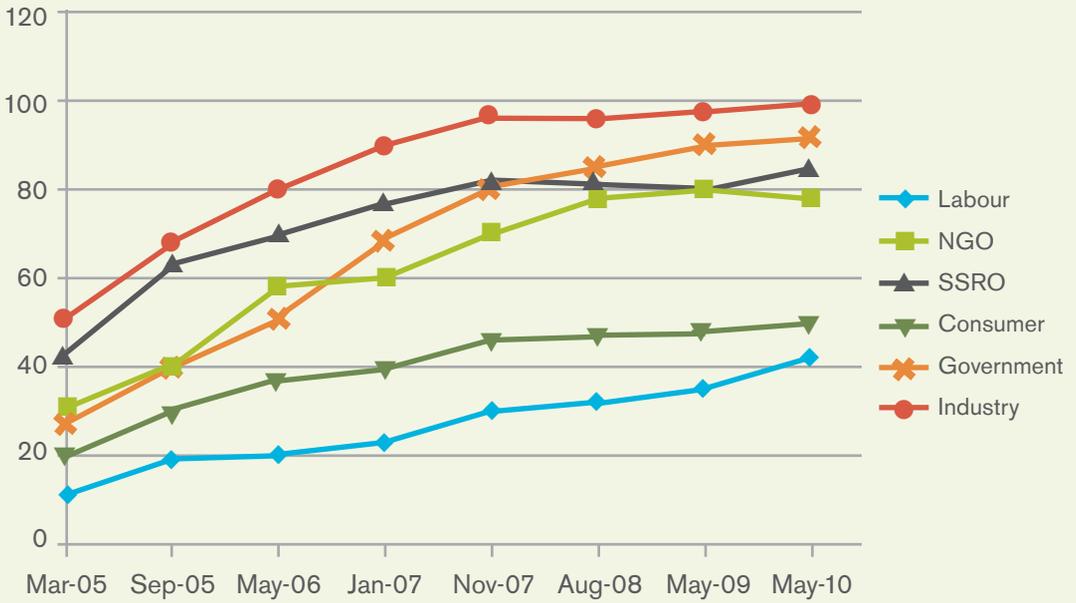
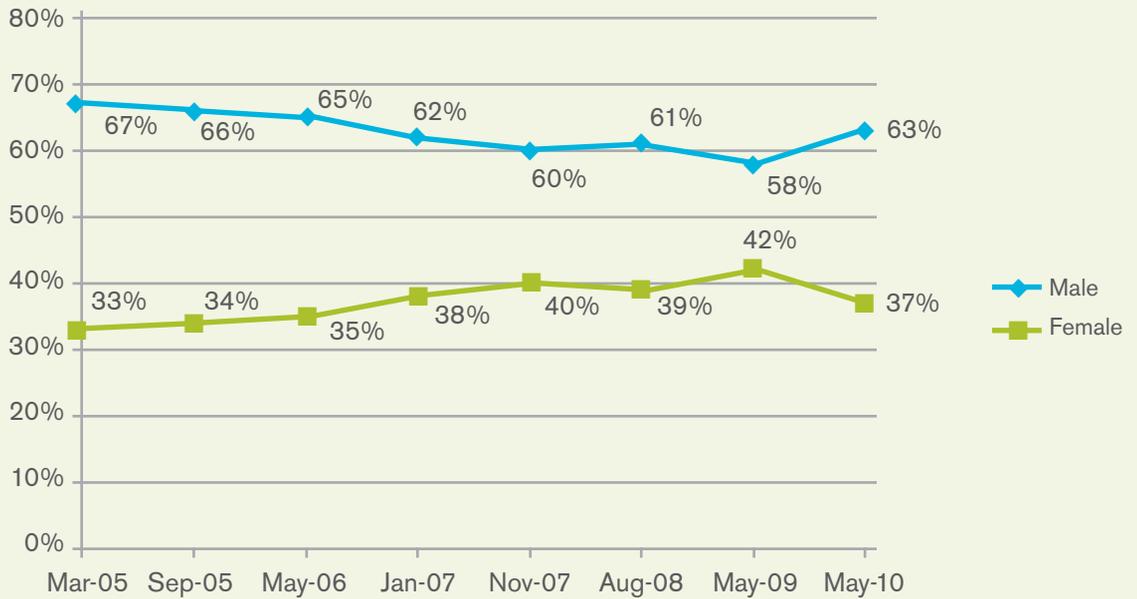


FIGURE 1.4: PARTICIPATION IN WGSR BY GENDER



Source for Figures 1.1–1.4: Emma Blackmore, based on ISO data (ISO, 2010b).

ISO 26000 defines social responsibility as the:

*responsibility of an organization for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour [that]... contributes to sustainable development, including health and the welfare of society,... takes into account the expectations of stakeholders,... is in compliance with applicable law and consistent with international norms of behaviour... [and] is integrated throughout the organization and practised in its relationships. (ISO, 2010a, Clause 2.18)*

ISO 26000 is intended to contribute directly to sustainable development and, further, makes sustainable development the overarching goal of social responsibility. The standard states that: '[w]hen approaching and practising social responsibility, the overarching goal for an organization is to maximise its contribution to sustainable development' (ISO, 2010a, Clause 4.1).

The standard explains that:

*social responsibility has the organization as its focus and concerns the responsibilities of an organization to society and the environment. Social responsibility is closely linked to sustainable development. Because sustainable development is about the economic, social and environmental goals common to all people, it can be used as a way of summing up the broader expectations of society that need to be taken into account by organizations seeking to act responsibly. Therefore, an overarching goal of an organization's social responsibility should be to contribute to sustainable development. (ISO, 2010a, Clause 3.3.5)*

This paper uses the term 'sustainable development'. However, the word 'sustainability' (to reflect the end goal of sustainable development) is often used interchangeably with 'sustainable development'. In this paper, 'sustainable development' is understood to be both a process and an end goal in its own right – a choice determined partly by the greater prominence accorded to 'sustainable development' than to 'sustainability' in international instruments. ISO 26000 itself, however, *does* draw a distinction between the two, explaining that 'the object of sustainable development is to achieve sustainability for society as a whole and the planet' (ISO, 2010a, Clause 3.3.5).

Much of the inspiration for ISO 26000 emerged from the idea and practices of 'corporate social responsibility' (CSR). The CSR agenda has evolved largely as a set of market-based practices implemented by enterprises in response to market drivers, especially demands from consumers and civil society groups (including non-governmental organisations) for 'responsible' behaviour. The contributions of ISO 26000 to sustainable development will be determined almost exclusively by how organisations choose to adopt or apply its guidance in their *market* activities. This explains the relevance of ISO 26000 to IIED's work on market governance mechanisms.

ISO 26000 concerns the impacts of all kinds of organisations and their social responsibility generally, rather than specifically the role of organisations as market actors. In this respect it is agenda-setting, for there was no 'organisational social responsibility' agenda as such before the ISO 26000 process. However, ISO's brand recognition, geographical reach and credibility among market actors mean that it has considerable potential to make a positive

# ISO 26000 is intended to contribute directly to sustainable development by encouraging organisations to practise social responsibility

contribution to social responsibility in markets from global to local level. 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.

ISO is itself also a participant in markets because the norms set by its standards help to shape markets. Also, ISO's business model makes it dependent on raising revenue from the sale of standards in order to offset part of the cost of running its Secretariat and any unsponsored costs of standards-setting processes.

Many people involved in the development of ISO 26000 felt and continue to feel that the standard should have been made available free of charge in order to advance the wider cause of social responsibility. But ISO's core business model – partly commercial – was fundamentally unaltered by the ISO 26000 process, despite appeals from participants in the negotiating process to recognise that 'social responsibility' and the unique nature of the ISO 26000 process demanded a different approach (ISO, 2009).<sup>4</sup> The text of ISO 26000 costs 192 Swiss Francs (around £135 sterling), although this varies between countries, depending on translation and pricing decisions of national standards bodies.

ISO's business model sits uncomfortably with its rapidly evolving interventions in areas including human rights, labour and environment. 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. For enthusiasts however, ISO's highly evolved rules of procedure and its established capacity to convene participants and therefore expertise from around the world make ISO a hugely valuable forum for consensus-based norm-setting activities in complex areas of human and market endeavour.

## THE PROCESS OF DEVELOPING ISO 26000

Some of the tensions between ISO 26000 and governance of sustainable development by public institutions arise, as we shall see later, partly as a direct result of the involvement of government experts within the WGSR process and partly as a result of the negotiating mandate that was given to the WGSR. At the same time, the process of developing ISO 26000 was relatively inclusive. The following brief description of this process is intended to illuminate the contribution of ISO 26000 to global governance for sustainable development.

The formal process leading to the adoption of ISO 26000 in September 2010 began some eight years earlier. In 2002, ISO's influential Consumer Policy Committee (COPOLCO) published a report on the value of 'corporate social responsibility' standards (ISO COPOLCO, 2002). Subsequently, at the 2002 ISO General Assembly, ISO decided to consider developing 'management standards' on CSR.

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4. 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.

In 2003, ISO's Technical Management Board appointed a multi-stakeholder Strategic Advisory Group on Corporate Social Responsibility (SAG) 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.<sup>5</sup> The SAG had 24 members, along with two representatives of the ISO Secretariat.<sup>6</sup> The 24 included standards bodies, industry and academics, as well as representatives of the international trade union movement, the United Nations Global Compact, and one of the most significant international CSR initiatives – the Global Reporting Initiative. The grouping also included two NGO representatives: Tom Rotherham from the International Institute for Sustainable Development and Gordon Shepherd from WWF International.

The SAG reported in 2004 (SAG, 2004) and made a series of (non-consensus-based) recommendations to ISO's Technical Management Board (ISO/TMB, 2004a). The SAG recommended that ISO proceed with the development of a 'guidance document', rather than a '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 '*corporate* social responsibility' as originally envisaged by ISO. This 'social responsibility' scope of work was later

confirmed by the standards development mandate from ISO's Technical Management Board (ISO/TMB, 2004b; 2004c). ISO therefore found itself in uncharted territory. Importantly, 'organisational social responsibility' came with no established boundaries on the respective roles of public policymakers (governments or intergovernmental organisations) and market actors.

The SAG suggested seven conditions for the development of a guidance standard (ISO/TMB, 2004a), recommending that ISO should proceed only if it:

1. recognises that social responsibility involves a number of subjects and issues qualitatively different from those already dealt with by ISO
2. recognises that it does not have the authority or legitimacy to set social obligations or expectations which are properly defined by governments and intergovernmental organisations
3. recognises the difference between instruments adopted by authoritative global intergovernmental organisations and private voluntary initiatives that may or may not reflect the universal principles contained in the former
4. narrows the scope of the subject, to avoid addressing issues that can be resolved only through political processes
5. recognises through a formal communication the unique mandate of the International Labour Organization (ILO) in defining international norms on a many social issues

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5. For further information, see International NGO Network on ISO, <http://inni.pacinst.org/inni/CSR.htm>

6. See [http://www.iisd.org/standards/csr\\_members.asp](http://www.iisd.org/standards/csr_members.asp)

6. recognises that, due to the complexity and fast-evolving nature of the subject, it is not feasible to harmonise substantive social responsibility commitments
7. reviews its processes and where necessary makes adjustments to ensure meaningful participation by a fuller range of interested parties.

The first five of the seven conditions concern implications for public governance. The SAG stressed additionally that the guidance standard 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' (ISO/TMB, 2004a: 2).

WWF's representative on the SAG, Gordon Shepherd, submitted a minority view expressing concerns about the majority document. Shepherd's suggestions included that the recommendations need 'to more clearly state as a pre-requisite that 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*' (emphasis added, ISO/TMB, 2004a: 3).

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 such an 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 (Tom Rotherham, May 2010, personal communication). That same week, ISO's executive management body, the Technical Management Board (TMB) met and resolved that ISO begin work on a standard (ISO/TMB, 2004b). A specially established ISO TMB Task Force began drafting a 'New Work Item Proposal', which, together with the June 2004 TMB resolution, eventually set the overall scope of the work.

From the start, the TMB resolution established important parameters for the relationship between ISO 26000 and global governance mechanisms emanating from intergovernmental organisations, as it:

*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 (ISO/TMB, 2004b).*

The New Work Item Proposal (NWIP) (ISO/TMB, 2004d)<sup>7</sup> to develop an international standard on social responsibility was approved in January

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7. See [http://inni.pacinst.org/inni/corporate\\_social\\_responsibility/SR\\_NWIP.pdf](http://inni.pacinst.org/inni/corporate_social_responsibility/SR_NWIP.pdf)

2005 (International NGO Network on ISO, 2005).<sup>8</sup> Several constraining factors are particularly relevant to the overall tone and content of the standard. The NWIP stated that:

- '[t]he document shall be an ISO standard providing guidance and shall not be intended for third-party certification'
- 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'
- in line with the standard's status as 'guidance', the verb form 'should' (rather than 'shall') shall be used throughout the standard
- only one standard shall be developed, rather than a series of guidance standards covering different aspects of social responsibility (ISO/TMB, 2004d).

The NWIP also 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'. In this way, the NWIP mandated a degree of deference to governments and international law – a direction that was to prove controversial in

light of the standard's contribution to global governance for sustainable development.

The NWIP charged a working group of 'experts', accountable to ISO's TMB, with the task of developing a draft standard that 'represents a consensus of the views of the experts participating in the working group' (ISO/TMB, 2004d: 1). This became the International Working Group on Social Responsibility (WGSR).

The Secretariat for the new WGSR was allocated to two standards bodies – those of Brazil (ABNT) and Sweden (SIS) – in what was, for ISO, an unusual 'North–South' pairing. The Secretariat personnel were a mix of standards-body staffers and 'experts'. Chair Jorge Cajazeira and Vice-Chair Staffan Söderberg<sup>9</sup> were both employed by businesses.<sup>10</sup> The NWIP specified<sup>11</sup> that participants in the WGSR, referred to as 'experts', should be organised within six stakeholder categories: Consumer, Government, Industry, Labour, Non-governmental organisation (NGO) and 'Other' (later renamed 'service, support, research and others'). In practice, this resulted in a mix of academics, consultants and representatives of standards bodies (ISO/TMB, 2004c; 2005a).

WGSR experts were either nominated via national mirror committees within participating national standards bodies or could enter the process as

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8. Two additional documents issued by the TMB set out the basic operating procedures for the working group established to manage the process. See pages 18–22 of the TMB's letter to ISO member bodies, 7 October 2004, which also includes N26000: [http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/3974906/New\\_work\\_item\\_proposal\\_-\\_Social\\_Responsibility.pdf?nodeid=3978057&vernum=-2](http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/3974906/New_work_item_proposal_-_Social_Responsibility.pdf?nodeid=3978057&vernum=-2)

9. From the second WGSR meeting onwards, after the initial Vice-Chair Catarina Munck af Rosenschöld resigned.

10. Staffan later joined WWF-Sweden.

11. See [http://inni.pacinst.org/inni/corporate\\_social\\_responsibility/SR\\_NWIP.pdf](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](http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/04_organization/N048_rev1.pdf)

Liaison D organisations. The WGSR's working language was English, giving an advantage to those experts who had English as a first language.

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, to secure a broad-based multi-stakeholder process of negotiation. National standards bodies could also simply indicate an interest in the process without establishing mirror committees or participating directly in the working group. Provision was made for participation by 'observers'.

Participants in the WGSR were considered by ISO to be individual 'experts', but a major part of the strategising within the WGSR was based on discussion within each of the six stakeholder groups. It was caucuses based on these stakeholder groups, together with the basic idea of a 'North–South' balance, which provided a organising framework for subsequent nomination and selection of representatives on various subgroups, including most importantly an Integrated Drafting Task Force (IDTF). 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 (and 470 at the final 2010 WGSR meeting in Copenhagen). It was accepted that some continuity was needed in the small groups working on particular topics.

The first WGSR meeting in Salvador de Bahia, Brazil, in March 2005, was chaotic, as a group of over 200 people sought to achieve consensus on basic issues of organisation and procedures for the negotiating process. Nonetheless, some progress was made in defining detailed operating procedures and task groups (TGs) for the process (ISO/TMB, 2005b).

- TG1 was established to find ways of ensuring balanced participation across regions and stakeholder groups, in particular through fundraising efforts.
- TG2 was charged with developing external communication and dissemination tools.
- TG3 was established to devise internal guidance on special procedures for the WGSR to complement those laid down by the ISO/TMB.
- TGs 4, 5 and 6 were established to draft different parts of the standard.

A Chair's Advisory Group was established to provide strategic advice to the chair and vice-chair.

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 (ISO/TMB, 2005c). WGSR structures evolved further during the course of the process. TGs 4, 5 and 6 were disbanded and their leadership absorbed within the 24-member IDTF established at the Vienna WGSR meeting in November 2007 (ISO/TMB, 2007). The IDTF, accountable to the working group as a whole, was to review and revise the evolving text of the ISO 26000 drafts (ISO/TMB, 2007). The IDTF mandate was subsequently extended at the conclusion of the sixth WGSR (ISO/TMB, 2008). Under the chairmanship of South African consultant and academic Jonathon Hanks, the IDTF 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.

A pattern began to emerge during WGSR meetings, with the WGSR plenary or its Secretariat charging smaller groups of experts to work on collectively identified issues, reporting back to plenary for further discussion, and to test for, and ultimately arrive at, consensus. The IDTF in turn developed a procedure through which it sifted comments and suggested amendments to identify 'key topics' for discussion at WGSR meetings, and negotiated in smaller 'clause-specific' meetings.

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

The so-called Committee Draft (CD) 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. The Draft International Standard (DIS) stage comes next, if there is

considered (in this case by the WGSR leadership) to be sufficient consensus on the CD. A minimum threshold is a two-thirds majority of the P-members in the working group. Following further amendments within the working group to address comments and build consensus, a revised DIS text is 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 (FDIS).

Going into the ninth WGSR meeting, in Copenhagen in May 2010, the essential votes in favour of moving on to an FDIS had already been cast (ISO/TMB, 2010a). Of 78 votes cast, there were 18 negative votes; 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 FDIS was circulated for a two-month voting period on 12 July 2010. The voting threshold for approval was a two-thirds majority of the votes cast by 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) being negative (ISO/TMB, 2009).<sup>12</sup> On 13 September the ISO Secretariat announced that the standard had been approved, with 93 per cent of the 77 eligible votes in favour (ISO/TMB, 2010c).

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12. In the event, only 11 non-'P-members' voted, six of them positively. See ISO/TMB (2010c).

# There is little that ISO can do to prevent the development of certifiable social responsibility standards

Eleven ISO members abstained,<sup>13</sup> and those votes were not counted. Of the 71 P-members voting, 66 were in favour of adoption, with negative votes submitted by just five P-members: 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

ISO 26000 is a 107-page document with seven principal clauses, two annexes and a bibliography.

The standard provides guidance on how an organisation can determine the significance of issues related to social responsibility, how it can build social responsibility into its systems and procedures, how to raise awareness on social responsibility and how to communicate and report on social responsibility.

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. There is also a schematic overview of the standard.

Clause 1 outlines the broad scope of the standard, and includes a statement on the standard's implications under the rules of the World Trade Organization (discussed further below). It sets out a number of other framing issues, including that:

*[t]his International Standard is not a management system standard. It is not intended or appropriate for certification purposes or regulatory or contractual use. Any offer to certify, or claims to be certified, to ISO 26000 would be a misrepresentation of the intent and purpose of the International Standard. (ISO, 2010a, Clause 1)*

However, there is little that ISO can do to prevent the development of certifiable social responsibility standards. Deborah Leipziger (2010) explains that several countries are already exploring establishing national standards for ISO 26000 that could be used as certification standards, citing Portugal and Denmark as examples.

Clause 2 includes definitions of key terms, including 'social responsibility', 'sustainable development', 'organisation', 'international norms of behaviour' and 'sphere of influence'. This paper revisits some of these terms in more detail at later stages.

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 (also discussed below in this paper).

Clause 4 states: 'When approaching and practising social responsibility, the overarching objective for an organization is to maximise its contribution to sustainable development' (ISO,

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13. Algeria, Australia, Austria, Bangladesh, Germany, Hungary, Iceland, Islamic Republic of Iran, New Zealand, the former Yugoslav Republic of Macedonia, Vietnam; see ISO/TMB (2010c).

2010a, Clause 4.1). The seven substantive principles set out in Clause 4 address: accountability; transparency; ethical behaviour; respect for stakeholder interests; respect for the rule of law; respect for international norms of behaviour (considered further below); 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' (ISO, 2010a, Clause 5.1). The standard's definition of 'stakeholder' (ISO, 2010a, Clause 2.2) is considered one of its most significant achievements in the progressive development of social responsibility, and includes an 'individual or group that has an interest in any decision or activity of an organisation and whose interests could be affected by the decisions and activities of the organisation'. This recognises that stakeholders may include those well beyond the direct impact of an organisation's activities. The standard's emphasis on organisations identifying and engaging with stakeholders in order to make progress towards social responsibility is among its major achievements.

Clause 6 is the longest part of the standard. It contains substantive guidance on seven 'core subjects': organisational governance, human rights, labour practices, the environment, fair operating practices, consumer issues, and community involvement and development. For each 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 organisation 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). A text box (Box 17) 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 this annex', nor 'any form of endorsement by ISO of that initiative or tool'.

Annex A proved extremely controversial. One concern was that ISO 26000 might effectively endorse any initiatives referenced by name. 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. Some sought to maximise the visibility or significance of 'their' standards; 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, amplifying its potential for significant discriminatory impact on smaller producers. Efforts to create 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'.

The Annex also attracted the criticism of the UN Global Compact as an intergovernmentally housed set of social responsibility norms ([www.unglobalcompact.org](http://www.unglobalcompact.org)) In June 2009, Georg Kell, Executive Director of the UN Global Compact

Office, wrote to Robert Steele, Secretary-General of ISO, requesting that 'with respect to the Annex... the reference to the United Nations Global Compact be removed' (UN Global Compact, 2009). In the same letter, 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'.<sup>14</sup> The letter continues: 'the current reference to the UN Global Compact does not provide the UNGC with the prominence it deserves'.

This interaction exemplifies the wider fear that ISO 26000 could, by treating all named social responsibility initiatives equally, undermine the efforts of their promoters or institutional hosts. This can be seen in the implicit argument that if ISO 26000 were not actively to promote the Global Compact above other initiatives, it might be better that the Global Compact not be mentioned at all. Georg Kell's intervention reveals clearly one of the ways in which, through its influence on organisational behaviour, ISO can also affect global governance. Intergovernmental organisations, as well as private standards bodies, seek to shape organisational behaviour. As we shall see below, whether they, and governments, ought to claim pre-eminence in doing so – or rather *when* they ought to claim pre-eminence – was among the most difficult dilemmas within ISO 26000.

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14. 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.

# TWO

## ISO 26000, NATIONAL AND GLOBAL PUBLIC GOVERNANCE

### ISO, GOVERNMENTS AND PUBLIC POLICY

There is a range of ways in which private standards generally (as opposed to ISO 26000 specifically) interact with public governance and international and national legal frameworks. Three sets of interactions are particularly relevant when considering the implications of ISO 26000 for global governance for sustainable development:

1. the potential for private standards to be directly adopted within national and regional legal frameworks
2. the variety of other ways in which governments or other public-sector actors may choose to make use of private standards
3. the potential for government participation in the development of private standards to shape international law.

This section looks at each of these, before continuing to outline some of the *specific* interactions between ISO 26000 and public governance and international and national legal frameworks.

#### **International standards in national law**

International standards developed in the private sector do public policymakers a favour in some respects. By 'privatising' the process of developing highly technical standards with potentially significant implications for international trade but few wider implications for public policy, governments and civil servants (as well as taxpayers) are spared the burden of normalisation.

The European Union's (EU's) so-called 'New Approach' and the subsequently adopted 'Global Approach' and 'New Legislative Approach'

provide for European standards bodies (CEN, CENELEC and ETSI) to develop 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 establishing essential requirements that products must meet to be 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 (EC, 2000).

#### **Government use of standards**

There has been relatively little research on the relationship between the normative content of private (as distinct from public-sector-led) environmental and social standards on the one hand and public policy and legislation on the other. One exception is research by the ISEAL Alliance (2008), an organisation of initiatives or organisations that set and maintain voluntary social and environmental standards ([www.isealalliance.org/content/about-us](http://www.isealalliance.org/content/about-us)).

ISEAL's research focused specifically on how governments make use of voluntary standards:

*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'... [However] many governments still have underlying concerns they may feel need to be addressed before they fully engage with voluntary standards systems.*

(ISEAL Alliance, 2008: 8)

According to ISEAL, '[o]ften the benefits governments perceive relate to the governance (e.g. alignment to international norms, or multi-stakeholder decision-making) or operational practices (e.g. an existing system of independent verification) inherent to voluntary standards systems' (ISEAL Alliance, 2008: 14). (The term 'governance' here seems to relate principally to the internal governance of standards.)

Based on ten case studies, ISEAL's report identifies two kinds of 'drivers' encouraging governments to engage with standards – 'governance drivers' and 'mission drivers'. There are five 'governance' drivers:

1. best practice in independent verification (e.g. by outsourcing the burden of verifying whether live marine ornamentals were being imported into Israel, or incorporating FSC certification into Bolivia's forestry law)
2. international recognition and credibility (as when the Tunisian government based its national organic agriculture policy in part on IFOAM Basic Standards)
3. sharing resources (e.g. because of the cost-savings benefit to the government of Israel in the instance cited above)
4. reputational risk management (e.g. in relation to forest harvesting in a Guatemalan biosphere reserve)
5. promoting change without regulatory burden (e.g. through the adoption of sustainability-related public procurement targets).

In a sense, these 'governance drivers' exist only because of a market-oriented mindset within governments, focusing on the market access, competitiveness, or cost benefits to be gained through engagement with standards.

By contrast, 'mission drivers' exist when governments choose to engage with a voluntary standard 'because the standard's mission relates to the public policy objective it aims to deliver' (ISEAL, 2008). Three examples given in the ISEAL paper concern fair trade, labour practices (SA8000), and adding value to agricultural products (Rwanda's engagement with, rather than use of, the East Africa Organic Products Standard). In the case of ISO 26000, as we shall see, both 'market'- and 'policy'-oriented drivers were in play in the range of positions adopted by government experts in the WGSR process.

#### **The impact of international standards on 'international custom'**

ISO standards can connect with government public policy – specifically the international legal obligations accepted by states – via the positions taken by government experts within the process of standards development. This is because, as stated within Article 38(1) of the Statute establishing the International Court of Justice, 'international custom' is among the sources of international law and may provide evidence of a general practice accepted as law by states. In turn, state practice provides one of the material sources that underpin 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' (Brownlie, 2008).

Given these links between state practice and the evolution of international law, government experts in the WGSR had a far wider set of potentially non-negotiable positions than did their non-governmental counterparts. How they chose to behave and the positions they took as they expressed their opinions potentially shaped the international legal obligations of their countries. A few government experts in the WGSR recognised these implications. For example, in a letter to Sweden's Trade Minister following the sixth WGSR meeting, the then-US Trade Representative highlighted 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.<sup>15</sup>*

China was also concerned about how WGSR experts took inspiration from international agreements. The inclusion of a principle of respect for international norms within ISO 26000 (discussed further, below) was a particularly deep concern. An effort to limit the impact of ISO 26000 on customary international law lies behind the statement in ISO 26000, that the International Standard is not 'intended to be cited as evidence of the evolution of customary international law' (ISO, 2010a, Clause 1). The text is specific to ISO 26000, but the issue is a general one that could arise in other standards-setting processes involving government experts and contentious principles or norms of international law.

## ISO 26000, DEFERENCE TO THE ROLE OF STATES AND TO THE RULE OF LAW

This section turns from the general relationship between private standards and public governance to the substantive content of ISO 26000. Experts within the WGSR were at great pains to show deference to the unique role of states (both nationally and through participation in intergovernmental institutions) and to the idea of the rule of law. The text of the standard consistently defers to states and to the rule of law at the national level. The situation is different concerning points of intersection between ISO 26000 and international law and institutions. ISO 26000 reflects deference to international law, partly through the text itself and partly out of a novel procedural innovation adopted during the ISO 26000 negotiating process, namely agreement on a series of memoranda of understanding with international institutions.

### Deference to the unique role of states

ISO's rules of procedure contain no process for weighing the perspectives or interests of participants in different stakeholder groups within a working-group process. Rather, they view each participant, in principle at least, as an individual 'expert', whose view must be considered and, as necessary, negotiated, in the search for an overall consensus within the working group. A government stakeholder group was among the WGSR stakeholder groups, but held no special status in the process.

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

One immediate consequence of ISO 26000's adoption of the concept of 'organisational social responsibility' nagged at WGSR experts for some time. How should the guidance apply to public-sector actors, or to governments, as 'organisations'? In principle, it appeared that governments, ministries, local authorities and public agencies of all kinds might be directly addressed by the standard. And here was a dilemma: the idea that ISO and its member bodies might proactively (rather than reactively, in response to a request) offer guidance to public policymakers on their public policy functions was intuitively deeply unpalatable to many.

This distaste was partially reflected in the SAG's recommendation (highlighted above in this paper) that ISO recognise that 'it does not have the authority or legitimacy to set social obligations or expectations which are properly defined by governments and intergovernmental organisations' (ISO/TMB, 2004a). But the NWIP had stopped short of reflecting directly this recommendation, adopting instead only the unclear guidance that the standard 'not be intended to reduce government's authority to address the social responsibility of organizations' (ISO/TMB, 2004c). On the other hand, those who saw the development of an ISO standard as a manifestation of the market drive for social responsibility had less difficulty with the idea that it might apply to governments and public-sector actors as organisations.

Initially, governments seemed remarkably absent from this debate. Neither was there a unified NGO position on this issue in the WGSR. For some NGO experts from less democratic countries, or countries where human rights were consistently not respected, 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. For others, lending weight to, for example, pro-human-rights arguments was one thing (to be supported); but the idea that the source of that additional weight might be ISO was quite another. Some NGOs from developing countries also saw risks in ISO 26000 unwittingly (notwithstanding its mandate) becoming a protectionist tool that could be interpreted to limit market access for products from developing countries by increasing requirements for social responsibility.

By the time of the Santiago WGSR meeting in September 2008, this issue was still unresolved. In an extraordinary plenary moment, the government stakeholder group presented 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, and following further plenary discussion, did the government stakeholder group agree to (re)insert text to this effect.

In the first place, it was odd to say the least that the government stakeholder group had decided to consult only industry and, of the possible civil society stakeholders (who included consumer and NGO stakeholder groups), labour. In the second place, it was extraordinary that the government stakeholder group felt it necessary to conduct a consultation exercise to determine that the standard should not apply to the public-policy functions of government.

If an ISO international guidance standard on social responsibility were to speak directly to the political or policy processes of government, or to indicate expressly that the content of the standard should be a baseline for public policy, the result

would be very direct promotion of a kind of 'privatisation' of policy in areas related to social responsibility. ISO standards-development processes would effectively be elevated, in their policy reach, to present a substitute for the outcome of public-policy processes and democratic debate at national level.

The eventual compromise reflected in the final text of ISO 26000 is the result of a balancing act between market- and public-policy-oriented perspectives on the role of government and of the public sector in the development and implementation of social responsibility practices.

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

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

(ISO, 2010a, Clause 3.4)

The definition of 'organisation' eventually adopted within ISO 26000 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 honour the international obligations of the state' (ISO, 2010a, Clause 2.12, Note 1).

These provisions need to be read alongside the standard's 'WTO clause' in Clause 1 (discussed further, below), 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...' (ISO, 2010a, Clause 1). 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 habitually worked with the market-oriented notion of CSR or in the public-procurement realm (where standards offer a particularly useful source of inspiration), and those whose functions were more directly related to public policymaking on issues addressed by the standard.

### **Deference to the rule of law**

ISO 26000 defers, as detailed above, to the overall public policy role of governments. It also defers to national law – and more specifically to the core idea of respect for 'the rule of law'. This is among the key prerequisites of political democracy, reflecting the essential idea that a regime has accepted limits on its powers and is bounded by law rather than might (Ward and Yoganathan, 2010). ISO 26000'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' (ISO, 2010a, Clause 2.18).

The principle of 'respect for the rule of law' is also among ISO 26000's 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 adds that '[t]he rule of law refers to the supremacy of law and, in particular, to the idea that no individual or organization stands above the law and that government is also subject to the law'. The standard goes on to state that an organization should 'comply with legal requirements in all jurisdictions in which the organization operates... ensure that its relationships and activities fall within the intended and relevant legal framework; keep itself informed of all legal obligations; and periodically review its compliance' (ISO, 2010a, Clause 4.6).

The principle of respect for the rule of law is also reflected in guidance on labour issues. This includes, for example, a provision that: '[w]here the law is adequate, an organization should abide by the law, even if government enforcement is inadequate...' (ISO, 2010a, Clause 6.4.2.2).

There is on occasion a tension between national law, or the rule of 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. The potential dichotomy was resolved, within the ISO 26000 text, in favour of respect for the rule of law. Guidance on community development allows for only very limited exceptions to an overall idea that organisations should not engage in economic activities with those that have difficulty in meeting legal requirements (ISO, 2010a, Clause 6.8.7.2).

Tension between respect for national law and the idea of 'good social responsibility practice' emerged in a different way at the Draft International Standard (DIS) stage. In advance of the May 2010 Copenhagen WGSR meeting, a tension emerged explicitly, and apparently for the first time, between the views held within the mirror committees of a number of national standards bodies and provisions of ISO 26000. The tension concerned the use of the term 'sexual orientation' within the draft guidance on human rights and equal opportunities and non-discrimination (ISO, 2010a, Clauses 6.3.7.1 and 6.3.10.2). In the run-up to the final Copenhagen WGSR meeting, several country delegations had submitted written comments in identical format, arguing that '[t]he inclusion of "sexual orientation" conflicts with religion, national laws and local culture' (ISO/TMB, 2010b:8). The concern generated appears to have been decisive in some delegations' decisions to vote 'no' to the DIS (personal communication, IDTF member).<sup>16</sup>

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16. The number of Arab and Middle Eastern countries among the 18 voting 'no' at the DIS stage was striking. The 18 'no' votes included Bahrain, Iran, Kuwait, Libya, Oman, Qatar, Saudi Arabia, and the UAE (though not all commented on the issue of sexual discrimination).

While non-discrimination on grounds of sexual orientation, as much as gender, might reasonably be held to be an emergent norm of responsible organisational behaviour, the reality is that same-gender sexual relations remain outlawed, in a variety of ways, in more than 70 countries.<sup>17</sup> In a few, the relevant criminal offences carry the death penalty. 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 (ISO, 2010a, Clause 4.6).

'Sexual orientation' became the most hotly debated term during the final 2010 WGSR meeting in Copenhagen. Following several days of heated negotiations, the ambiguous term 'personal relationships' was eventually incorporated within the text of ISO 26000 in place of references to 'sexual orientation'. Deference to the rule of law took precedence over the emerging norm of non-discrimination on grounds of sexual orientation.

## ISO 26000, DEFERENCE TO INTERNATIONAL LAW AND INTERNATIONAL INSTITUTIONS

Both the WGSR and the eventual text of ISO 26000, then, reflect considerable deference to states and to the rule of law at the national level. The WGSR and ISO 26000 delivered a broadly parallel sense of deference to international law and intergovernmental institutions. One means of securing that deference, procedurally (in the form of memoranda of understanding between ISO and a number of intergovernmental organisations), was not subject to negotiation within the WGSR, but was determined by the ISO hierarchy outside

the setting of the WGSR. Two other reflections of deference were the result of positions taken by experts within the WGSR. The following three sections highlight each of these three areas in turn.

### Memoranda of understanding

Both the 2004 ISO TMB resolution which set in chain the ISO 26000 process (ISO/TMB, 2004b) and the NWIP (ISO/TMB, 2004c) 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.*

(ISO/TMB, 2004b)

The NWIP is more circumspect, stating that the standard should 'be consistent with and not in conflict with existing documents, international treaties and conventions' (as well as existing ISO standards) (ISO/TMB, 2004c). 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 Organization (ILO) was acutely aware from the start of the potential for difficulties to arise from 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

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17. For an imprecise assessment, see [http://en.wikipedia.org/wiki/LGBT\\_rights\\_by\\_country\\_or\\_territory](http://en.wikipedia.org/wiki/LGBT_rights_by_country_or_territory). A number of states outlaw homosexual acts between men, but not women.

# The eventual text of ISO 26000 reflects considerable deference to states and to the rule of law at the national level

meeting of the WGSR in 2005, the ILO had already negotiated a memorandum of understanding (MoU) on social responsibility with ISO, without reference to the WGSR (ILO/ISO, 2005). This followed naturally from the SAG recommendation that ISO should recognise 'through a formal communication the ILO's unique mandate' (ISO/TMB 2004a, point 5, page 1).

The ISO/ILO memorandum sets out terms for cooperation between ISO and the ILO 'with a view to ensuring that any ISO International Standard in the field of SR, and any ISO activities relating thereto, are consistent with and complement the application of international labour standards world-wide, including fundamental rights at work' (ILO/ISO, 2005). In effect, the MoU placed the ILO's representatives on a different footing from other experts within the WGSR. Subsequently, ILO representatives (often aligned with representatives of the international trade union movement) frequently aggressively (and quite properly) pursued their interpretations of international 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 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' (UN Global Compact/ISO, 2006, Article 2). The MoU also gives the Compact a pre-emptive right to participate in the Chairman's Advisory Group (UN Global Compact/ISO, 2006, Article 4). In May 2008, a final intergovernmental organisation MoU was signed between the Organisation for Economic Cooperation and Development (OECD) and ISO (OECD/ISO, 2008).

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' (OECD/ISO, 2008:3).

The ILO's memorandum of understanding is 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 will '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' (ILO/ISO, 2005, Article 2).

### The principle of respect for international norms

Perhaps the single most controversial provision within the entire text of ISO 26000 is a principle of 'respect for international norms of behaviour' (Clause 4.7). In essence, the principle offers guidance to organisations operating in areas or circumstances where national law is inadequate or conflicts with fundamental international norms. There was widespread agreement across stakeholder groups within the WGSR that the standard should address these circumstances, but little agreement on how best to frame the guidance or its content. A number of NGO experts felt strongly that certain overarching norms existed – 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 recommendation 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 CSR instruments and voluntary initiatives – an approach that might have both substantially undermined the legitimacy of the principle and generated greater tensions for governments.

During WGSR meetings, it became apparent that there was no way out of referring explicitly 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, however, was to reduce the accessibility of the standard to non-legally trained users. A fragile consensus emerged at the 2008 WGSR meeting in Santiago.

International norms of behaviour in ISO 26000 are 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' (ISO, 2010a, Clause 2.11). 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' (ISO, 2010a, Clause 2.11). Substantive guidance offered by the principle has five distinct components, followed by a text box (Box 4), 'Understanding complicity', which distinguishes between legal and non-legal meanings of the word 'complicity'.

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. But the guidance also reaches into an area of rapidly evolving good practice on social responsibility which seeks to encourage organisations to use their good offices ('legitimate opportunities and channels') to influence 'relevant' organisations and authorities to remedy any such conflict.

Government experts from the US and Canada were particularly concerned about efforts to ground the principle in international law. Chinese experts were adamant that national law must prevail no matter what the national or local circumstances. At the final WGSR meeting in Copenhagen in 2010, 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'. The Chinese proposal could have undermined the value of guidance in areas such as stakeholder engagement, for example. 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 Clause 1 is repeated in the preamble to the principles in Clause 4. In a compromise that may have proved critical to the eventual Chinese 'yes' vote, WGSR experts agreed to insert the following words: 'In applying this International Standard it is advisable that an organization take into consideration societal, environmental, legal, cultural, political and organizational diversity, as well as differences in economic conditions, while being consistent with international norms of behaviour' (ISO, 2010a, Clause 4.1).

The negotiation of a principle of respect for international norms ultimately reflected an uneasy compromise between the idea that the rule of law must be respected at all times, and the tension that this could generate for 'socially responsible' organisations in circumstances where the 'rule of law' is inadequate in terms of social responsibility. Ultimately, the WGSR felt unable to develop globally applicable norms for application in these circumstances from any sources other than states and international law. Norms of global public governance effectively trumped the opportunity presented by the global reach of ISO's private governance to break new ground.

## TESTING THE BOUNDARIES OF DEFERENCE: ISO 26000, THE WTO AND THE PRECAUTIONARY PRINCIPLE

ISO 26000 generated the greatest dissonances with global frameworks of public governance in two key areas. First, the substantive guidance offered by ISO 26000 was perceived by some as conflicting with international legal obligations accepted by members of the World Trade

Organization (WTO). Second, concern was expressed about the standard's use of the 'precautionary' principle of environmental protection and the effect on this of the obligations of states in terms of customary international law.

These areas are considered in turn below. Each demonstrates that the impacts of an individual market governance mechanism on sustainable development may in part be realised as a result of its relationship with *other* kinds of governance mechanism or process – regardless of whether or not the market governance mechanism is explicitly designed to contribute to sustainable development. How the tensions reflected here might best be resolved to enhance global governance for sustainable development is considered in Section 4 of this paper.

### ISO 26000 and the World Trade Organization

The interface between ISO 26000 and the rules of the WTO were a source of serious concern for some WGSR experts (Palmer, 2007). This can be illustrated briefly by looking at key provisions of one WTO agreement – the Technical Barriers to Trade (TBT) Agreement (WTO, 1994) – which generated controversy within the WGSR.<sup>18</sup>

The TBT Agreement incorporates a preference for state product regulations ('technical regulations') to be based on 'relevant international standards' where they exist (WTO, 1994, Article 2.4). Further, when a technical regulation accords with 'relevant' international standards it shall be 'rebuttably' presumed not to create an unnecessary obstacle to international trade (WTO, 1994, 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. An extension in the subject matter addressed by the private standards community means an extension in the reach of the standards that WTO members must consider under their WTO obligations.

Government and NGO experts in the WGSR were concerned that ISO 26000 might be used to support unnecessarily trade-restrictive technical regulations. They were also concerned that WTO rules could hamper policy innovation in some of the areas addressed by the standard. For example, a WTO member wishing to adopt a more

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18. 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.

stringent technical regulation (towards higher social or environmental standards) might find that this was made more difficult because such a regulation was not 'based on relevant international standards'.

A further important distinction lies between 'non-product-related production or processing methods', and those which are product-related. Non-product-related production or processing 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 under WTO rules – including those of the TBT Agreement – in different circumstances. ISO 26000 contains a number of references to non-product-related production and processing methods. For example:

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

(ISO, 2010a, Clause 6.5.2.2)<sup>19</sup>

If these (and other) references within ISO 26000 amount to guidelines on 'products or related production and processing methods', the relevant Clauses of ISO 26000 could fall within the definition of a 'standard' under the TBT Agreement. Consequently, they may *potentially* be considered 'relevant' for the purposes of obligations under the TBT Agreement.

While ISO has no mandate to compel the WTO or its members to behave in any particular way, WTO members do accept international legal obligations in terms of 'relevant' international standards. Therefore, some WGSR experts argued that they could hope to influence future interpretations of relevant WTO obligations in areas open to interpretation.<sup>20</sup> Ultimately, most WGSR experts could accept the general idea that ISO 26000 should not *necessarily* become a baseline for public policy in areas addressed by social responsibility. But the highly theoretical possibility that it could *de facto* become just that was for many of little interest. For other experts 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.

By the conclusion of the 2009 WGSR meeting in Quebec, it had become clear that no WGSR consensus would be possible without a reference in ISO 26000 to the WTO. The text eventually adopted includes language specifically designed

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19. For another example, see Clause 6.7.5.2.

20. Discussion within the WGSR was hampered throughout by the fact that ISO could not comment on the likelihood that various WTO dispute scenarios might arise. Neither was there (nor is there) any mechanism for seeking an opinion from the WTO Secretariat to help experts to resolve the issues. 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 text eventually adopted is designed to ensure a decoupling of ISO 26000 and the World Trade Organization

to ensure, to the greatest extent possible via ISO, a decoupling of ISO 26000 and the World Trade Organization. The clause on the scope of ISO 26000 state:

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

(ISO, 2010a, Clause 1)

The outcome here was less an expression of 'deference' to international law than a plea to WTO members to do their bit to limit the potential spillover from ISO 26000 into substantive WTO obligations. It can also be understood as an expression of a desire to maximise the space for innovation within the realm of global private governance free from the worry that lack of deference for the policy space of WTO members might be an inadvertent result.

## ISO 26000 and the precautionary approach<sup>21</sup>

Within environmental policy, the 'precautionary principle' is that lack of full scientific certainty about the risks of environmental damage should not be an excuse for postponing preventive measures. Not only is this 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.<sup>22</sup> International lawyers have on occasion even argued that the precautionary approach has been accepted so widely that it has become a principle of international environmental law (McIntyre and Mosedale, 1997). The precautionary approach is included as one of the ten principles of the United Nations Global Compact, where it is addressed to businesses rather than states.<sup>23</sup>

One of the most commonly cited formulations of the precautionary approach appears in Principle 15 of the Rio Declaration on Environment and Development, an intergovernmentally agreed output from 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.*

(UNCED, 1992)

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21. This section draws on the author's blog post at <http://www.fdsd.org/2010/05/iso2600-governments-and-precaution>.

22. See <http://www.gdrc.org/u-gov/precaution-7.html> and <http://207.57.19.226/journal/Vol11/No4/110815.pdf> for examples.

23. Principle 7 says that 'Businesses should support a precautionary approach to environmental challenges'. See <http://www.unglobalcompact.org/aboutthegc/thetenprinciples/principle7.html>

The idea of precaution is also centrally important in intergovernmental negotiations to tackle the global issue of climate change. There, it is controversial in part because of lack of agreement about the global distribution of costs and benefits of tackling climate change in line with precaution. Not all states agree on the circumstances and ways in which precautionary action is justified. The idea of precaution has also been used to justify trade-restrictive actions 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, which adversely affected US exports.<sup>24</sup>

In the WGSR, many experts argued strongly for the inclusion of the precautionary approach within ISO 26000, because it reflects the reality of good practice on social responsibility in many organisations. But the precautionary approach was a source of tension throughout the WGSR process. Some tension arose from the trade-related implications of the standard under the rules of the WTO. An additional underlying concern was the potential implications of positions taken by government experts within the WGSR process as a matter of state practice for purposes of the progressive development of international law. Experts from governments uncomfortable with the precautionary principle in the Rio Declaration (Principle 15) argued against the inclusion of 'Principle 15 language' in the ISO standard which might imply a reinterpretation of international law.

At the beginning of the Copenhagen WGSR meeting in May 2010, the Draft International Standard retained two separate references to the precautionary approach as a principle within guidance on the environment, and on consumer issues. Problematically, the text in each case differed. The reference to the principle in the environment section was:

*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.*

(ISO/DIS 26000, Clause 6.5.2.1, lines 1825–30)

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

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24. 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](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm)

The insertion of the additional text within the 'environmental' statement of the precautionary approach was a particular issue for experts (including the US government expert) concerned that the WGSR should not be interpreting or embellishing statements of international law. This discrepancy was resolved in favour of the precise language of the Rio Declaration.

The second discrepancy (the omission of 'cost-effective' in the consumer section) required a compromise from experts in the consumer stakeholder group. A revised draft was suggested in a small drafting group: '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.

In the final plenary of the Copenhagen WGSR meeting, the US government expert duly made clear her continued 'sustained opposition' to the qualification to the term 'cost-effective'. Canadian and Indian government experts also expressed their disagreement with the proposed text on the precautionary approach,<sup>25</sup> although they stopped short of expressing their interventions as 'sustained opposition'. The precautionary approach text was deemed by the WGSR leadership to have attained sufficient consensus. Procedurally, there was no imperative for the WGSR leadership to consider the source of the opposition to the text, nor to accord any particular weight to the fact that it came from government experts, rather than non-governmental stakeholders.

The positions of the Indian, US and Canadian government experts on the precautionary approach can be seen as an inevitable consequence of the current lack of coherence between ISO and public policy. The three experts brought the political positions of their governments to a private multi-stakeholder process of standard-setting. In reality, the concept of 'state practice' and its role in the evolution of international law may have given them no alternative. But in a private and multi-stakeholder process, these and other political positions were likely to carry less weight than in an exclusively intergovernmental setting. The text of ISO 26000 clearly defers to 'the role of the state', the rule of law, and the authority of international law and institutions. But when it came to the political positions of individual governments, government experts in the WGSR found that their views were treated in substantively the same way as those of experts from other stakeholder groups.

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25. The text of the Canadian government expert's intervention was not made available to WGSR experts (contemporaneous note).

# THREE KEY CONCEPTS: SUSTAINABLE DEVELOPMENT AND GOVERNANCE

This section looks more closely at the intersections between ISO 26000 and global governance for sustainable development. It explores the definition, meaning, implications and alternative ideas of key concepts including 'sustainable development', 'governance', 'good governance' and 'global governance'. It also examines the relationship between these concepts in forming a basis for 'good global governance for sustainable development'.

## DEFINING SUSTAINABLE DEVELOPMENT

ISO 26000 itself offers a contribution to defining sustainable development, although it is in part a surprising one. The standard incorporates a familiar definition of sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs' (ISO, 2010a, Clause 2.23). But how does this sit with a wider understanding of the meaning of sustainable development?

The term 'sustainable development' may first have been used in a mandate adopted by the International Union for the Conservation of Nature in 1969, but its introduction is most often pinned to 1987, and the publication of the report of the World Commission on Environment and Development (WCED). Known as the Brundtland report, this text defined sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs' (WCED,

1987: 8). The ISO definition, then, appears to draw directly on the Brundtland report.

However, a note to the ISO 26000 definition that was negotiated at the request of trade union expert Dwight Justice adds:

*Sustainable development is about integrating the goals of a high quality of life, health and prosperity with social justice and maintaining the earth's capacity to support life in all its diversity. These social, economic and environmental goals are interdependent and mutually reinforcing. Sustainable development can be treated as a way of expressing the broader needs of society as a whole.*

(ISO, 2010a, Clause 2.23)

This stand-alone interpretation (particularly the reference to 'prosperity') is at odds with many approaches to defining sustainable development, leaving open the question of whether the contribution of ISO 26000 to sustainable development (and its governance) should be assessed on its own terms, or with reference to wider notions of sustainable development, including those agreed intergovernmentally.

The genesis of sustainable development in global governance can be understood in part through the lens of a series of global conferences. The first three of these were: the UN Conference on the Human Environment, Stockholm, 1972; the UN Conference on Environment and Development, Rio de Janeiro, 1992; and the World Summit on Sustainable Development, Johannesburg, 2002.

Each of these conferences contributed to an intergovernmentally led, multi-stakeholder framing of the policy stage for the relationship between economy, environment and society.

Only Rio (the 'Earth summit') however, has delivered more than the typical 'soft law' declaratory fare of such global gatherings. The 1992 conference produced not only the Rio Declaration, 'Agenda 21' (a blueprint for action around the world by different groups and sections of society towards sustainable development) and a Statement of Forest Principles, but also two legally binding intergovernmental agreements: the Convention on Biological Diversity, and the UN Framework Convention on Climate Change.

A fourth major review of the state of sustainable development and our progress towards it is planned for 2012, in the form of a UN Conference on Sustainable Development. Dubbed 'Rio plus 20', it too is to be held in Rio de Janeiro.

In the four decades since the 1972 Stockholm Environment Conference, the overall institutional and political framework for the governance of sustainable development has taken root and flourished. Legal and policy principles, such as the 'polluter pays principle', the 'precautionary approach', or the 'principle of common but differentiated responsibility' (as between developed and developing countries), unheard of before the birth of 'sustainable development' thinking, have not only crystallised conceptually, but also found their way into numerous international agreements. Almost all countries have implemented environmental laws, and most

have a ministry of the environment or natural resources. The environment movement within civil society has also grown.

The core idea of sustainable development is that human activity and decision making needs to take account of environmental, social and environmental issues in an integrated way. This is connected at multiple levels to multiple areas of thought about how best to structure and guide human endeavour. The ISO 26000 definition of sustainable development reflects this core idea. While the three dimensions – social, economic and environmental – are commonly referred to as 'pillars' of sustainable development (or sustainability), there is no unanimous agreement on the number of pillars. Many analysts refer to 'governance' as the fourth pillar of sustainable development, and some argue for 'culture' as a fourth pillar (Nurse, 2006).<sup>26</sup>

Differing definitions of sustainable development, however, lead to difficulties in implementing it. There is also no global consensus on whether, in pursuing efforts to attain sustainability, the different forms of 'capital' that together make up sustainable development may be considered substitutable. Advocates of 'strong' sustainability argue that trade-offs as between social, natural and financial capital are acceptable only insofar as the total stock of natural capital remains intact. By contrast, a vision of 'weak' sustainability posits that different forms of capital may be traded off, one against another, so long as overall environmental, social and economic considerations are integrated. It is the weak model, unsurprisingly, that is politically dominant.

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26. In a variation, it is suggested that 'governance' and 'culture and politics' may be interchangeable, as in the suggestion that 'Recently, a fourth pillar called 'governance' or 'culture & politics' is often added to reflect the increasing importance of cultural and political elements in discussing policy performance'. See [http://crell.jrc.ec.europa.eu/Well-being/WB\\_Summary\\_JRC.pdf](http://crell.jrc.ec.europa.eu/Well-being/WB_Summary_JRC.pdf)

Arguably, only the weak model can be made compatible with the integration of economic development within sustainable development and assimilated within the kinds of balancing acts achieved through democratic decision making.

Another problem is that sustainable development theory is remarkably short on guidance on the levels at which sustainable development ought to be pursued – not least, between local and global. In practice, it is the real-world implementation of a variety of governance arrangements that determines the fit between, and allocation of, decision making to different levels. In addition, various internationally authoritative ‘sustainable development blueprints’, such as Agenda 21, have some directly relevant points of guidance.

A further challenge facing sustainable development emerges from the frequent misuse of the words. There has too often been a tendency to add the word ‘sustainable’ to any major problem facing society, as an expression of the desired outcome of efforts to tackle the problem (‘sustainable growth’, ‘sustainable education’, or ‘sustainable democracy’ even). Nevertheless, the concept of sustainable development has been adopted by almost all of the world’s states as an aspirational societal goal. Governments have supported declarations and agreements which set the scope of action to achieve sustainable development.

Some basic fault lines have remained consistently relevant. The relationship between state and market – expressed in part in the tension between ‘weak’ and ‘strong’ visions of sustainability – is pre-eminent among these, although it has become

increasingly complex. The blurring of boundaries between ‘public’ and ‘private’ and a massive roll-back of state roles with economic globalisation, privatisation, deregulation and self-regulation has been fostered by a vision of neoliberal economic growth dubbed the Washington Consensus.<sup>27</sup> At the same time, we have seen a rise in rhetoric and experimentation with multi-stakeholder consensus-based governance for social and environmental outcomes. It is hardly surprising therefore that ambiguity over the balance in the relationship between state and market is also reflected in different visions of the most appropriate governance mechanisms for sustainable development.

### PARTICIPATORY DECISION MAKING AND DEMOCRACY WITHIN SUSTAINABLE DEVELOPMENT

Principles of sustainable development provide some guidance on the kinds of decision making processes best suited to achieving sustainable development outcomes. Such guidance can also help to inform an understanding of the kinds of governance mechanisms that might offer the truest contribution to sustainable development. The report of the World Commission on Environment and Development, for example, notes that:

*Meeting essential needs requires not only a new era of economic growth for nations in which the majority are poor, but an assurance that those poor get their fair share of the resources required*

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27. Wikipedia on this occasion offers as good an insight as any into the concept: see [http://en.wikipedia.org/wiki/Washington\\_Consensus](http://en.wikipedia.org/wiki/Washington_Consensus)

# Sustainable development clearly embraces participatory decision making ... But it also presents two basic challenges to democracy and participation

*to sustain that growth. Such equity would be aided by political systems that secure effective citizen participation in decision making and by greater democracy in international decision making.*

(WCED, 1987: 8, emphasis added)

The outputs of both the 1992 Rio Earth Summit (UNCED) and the 2002 Johannesburg World Summit on Sustainable Development stress that sustainable development is a multifaceted challenge that needs to be pursued by a range of actors. And they emphasise that wide rights of access to information and participation are indispensable to sustainable development. Specifically, the intergovernmentally agreed Principle 10 of the Rio Declaration states:

*Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*

(UNCED, 1992, Principle 10)

Other international texts, including Agenda 21, one of the formal outputs of UNCED, stress the value of public involvement in environment and development solutions, broad public awareness, and the commitment and involvement of all social groups. Agenda 21 notes that:

*One of the fundamental prerequisites for the achievement of sustainable development is broad participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those which potentially affect the communities in which they live and work.*

(Sandbrook, 1992)

Sustainable development clearly embraces participatory decision making. But it also presents two basic challenges to democracy and participation. One of these is expressed in the 2002 Johannesburg Declaration on Sustainable Development:

*unless we act in a manner that fundamentally changes their lives the poor of the world may lose confidence in their representatives and the democratic systems to which we remain committed, seeing their representatives as nothing more than sounding brass or tinkling cymbals.*

(UN DESA, 2004)

Second, sustainable development has an *intergenerational* dimension (that is, between those alive today and those yet to be born). In the words of the 1987 Brundtland Commission, 'We act as we do because we can get away with it: future generations do not vote; they have no political or financial power; they cannot challenge our decisions' (WCED, 1987: 8). Herein lies a critically important challenge: to find a way to bridge the potential tension between the imperative to craft political systems capable of improving the lives of poor people and the need to

### THREE KEY CONCEPTS: SUSTAINABLE DEVELOPMENT AND GOVERNANCE CONTINUED

ensure that political systems deliver justice between present and future generations. *That* challenge is one that no democracy has effectively surmounted.

At the same time, it is democracy, with all its flaws, that is the political system most closely associated with and best able to deliver sustainable development outcomes. In part, this is because it is the only political system capable adequately of doing justice to the principles of participatory decision making, as associated with sustainable development. In part, it is because it is hard to conceive of anything other than a democracy delivering on intergenerational equity. And in part, it is because there is no other political system currently or recently in play that is grounded in wide rights of citizen participation or in wide rights of public access to information, let alone linked to respect for the rights enshrined in the Universal Declaration on Human Rights.

Democracy also has the appeal (and challenge) of supporting the idea that all human beings are inherently born equal. And there is the evidence that history seems to deliver no examples of any authoritarian political system that has genuinely been committed to sustainable development. This is not to say that it is pointless to pursue, or commit to, sustainable development if you happen not to have the luxury of living in a democracy. But *if* it is accepted that democracy is the most appropriate political system for the pursuit of sustainable development, it seems important that market governance mechanisms do not undermine political democracy in the pursuit of sustainable development.

There is a useful distinction between democracy as an essentially 'political' construct or ideology, and democracy as a wider social phenomenon or way of life in society and all its organisational manifestations (Zakaria, 2007). The *political*

dimensions of democracy relate to democracy as practised within 'democratic countries'. The wider *societal* dimensions of democracy relate to participatory (or 'democratic') participation in decision making with wider public significance, including decision making within ISO 26000 (Ward and Yoganathan, 2010).

If we accept that political democracy – in its ideal pro-sustainable-development forms, rather than in the multiple flawed forms in which it is currently practised – offers the most appropriate political system from which to pursue sustainable development, we must seek to integrate respect for political democracy within any normative theory of market governance mechanisms working for sustainable development. Analysing individual market governance mechanisms in isolation would be to underplay a significant part of their implications for sustainable development. The related assumption is that the extent to which a given market governance mechanism undermines or weakens political democracy will ultimately have implications for the effective pursuit of sustainable development.

Of course, democracy itself, as currently practised as a political system, has certain drawbacks from a sustainable development perspective:

- Liberal democracy tends to prioritise the short term. Elected representatives are tied into electoral cycles which are frequently no more than five years. There is a hard-to-resist tendency to distribute resources to voters in the period immediately before elections, and to leave the resolution of serious, long-term systemic challenges to other (as yet unelected) governments.
- Democracies struggle to represent and reflect under-or un-represented interests, and systems

of general elections tend to aggregate specific interests. No wonder then that 'the development of policy networks that include representatives of opposing socio-political interests is sometimes seen as a more practicable modern form of interest representation' (Mayntz, 2003).

- Liberal democracy is linked to liberal markets. For example, political scientist Robyn Eckersley argues that deep-seated tensions between liberal democracy and capitalist markets have ensured that 'historically, environmental protection has remained subservient to capitalist economic growth' (Eckersley, 2006). In many contemporary democracies, a commitment to continuous economic growth has acquired the status of a non-negotiable goal in its own right. A focus on democracy and its relationship with market governance mechanisms that are themselves in some way creatures of the market (as ISO itself is) therefore implies a focus on one of the more problematic aspects of democracy working for sustainable development. By definition, market governance mechanisms work with the grain of the market, not against it.
- Other challenges to the ability of democracy to deliver sustainable development include: securing effective ongoing engagement of citizens; the need to balance expertise and raw 'opinion'; the power of the mass media to mobilise but also to manipulate; the behind-the-scenes influence of 'non-voting' actors such as big businesses; voter apathy; and continuous accountability of elected representatives.

This is not to undermine the international legal significance of respect for territorial sovereignty, or the role of statehood in distributing costs and benefits of sustainable development policy. Rather, it is to suggest that market governance mechanisms should not undermine the practice of

democracy as a political system *in those circumstances where* it is important for the political system to maintain its capacity to govern in the interests of sustainable development.

As noted above, ISO 26000 could be said to lack sensitivity for representative democracy as a *political* construct by failing to accord any special status to government experts (let alone those from more or less 'democratic' countries). However, the relatively democratic nature of ISO 26000 may lend it more legitimacy and inherent sustainable development value than state-centred decision making *in those circumstances where* two of the most basic procedural principles of sustainable development – wide rights of public participation and of access to information – are fundamentally and consistently undermined.

## GOVERNANCE

The term 'governance' spans a number of different possible meanings. One simple definition is that governance is 'the art of steering societies and organizations' (Institute on Governance, 2011). An alternative approach describes governance as 'the traditions, institutions and processes that determine how power is exercised, how citizens are given a voice, and how decisions are made on issues of public concern' (Institute on Governance, 2011). This approach focuses on the role of 'citizens' rather than 'consumers' or 'individuals'.

The idea of governance is not the exclusive preserve of the public sector, nor need it focus exclusively on the roles of citizens. Indeed it cannot, for power in society is not exclusively exercised by citizens or the private sector, and neither are mechanisms for channelling power exclusively concentrated in the hands of the public sector. This latter point is clear from UNDP and from World Bank definitions (World Bank, 2009), in which governance is:

## THREE KEY CONCEPTS: SUSTAINABLE DEVELOPMENT AND GOVERNANCE CONTINUED

- how 'power is exercised through a country's economic, political, and social institutions' (World Bank, 2009)
- 'the rule of the rulers... by which authority is conferred on rulers, by which they make the rules, and by which those rules are enforced and modified. Thus, understanding governance requires an identification of both the rulers and the rules, as well as the various processes by which they are selected, defined, and linked together and with the society generally' (World Bank, 2009)
- 'exercise of economic, political, and administrative authority to manage a country's affairs at all levels. It comprises mechanisms, processes, and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations, and mediate their differences' (UNDP).

An alternative approach brings the notion of accountability into the definition of governance. Thus, governance can be understood as determining 'who has power, who makes decisions, how other players make their voice heard and how account is rendered' (Institute of Governance, 2011).

The Commission on Global Governance (revisited below) has defined governance as:

*the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and cooperative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest.*

(CGG, 1995, Chapter 1)

For the purposes of this paper (which needs to be capable of embracing the idea of market governance mechanisms and standards such as ISO 26000) the term 'governance' can perhaps usefully be used as shorthand to refer to the norms, processes, tools and institutions through which the exercise of power in society is channelled to achieve desired outcomes. Governance is about the set of systems that control decision making and deliver its outcomes – in our case, those that relate to or impact on sustainable development.

### GOOD GOVERNANCE

At national level, a body of thinking and practice on the idea of *good* governance has also emerged. In contrast to the broad idea of governance, ideas about good governance tend to be *state*-centred, driven by the programmes and projects of international institutions and donor agencies. But neither the idea of 'governance' nor that of 'good governance' is inherently or normatively tied to a particular political system.

There are many problems with the available characterisations of 'good governance', most notably (from a sustainable development perspective) the central role that they give, in some formulations, to economic growth as distinct from the economic development that many would say lies at the heart of sustainable development. For example, the OECD considers that good governance 'encompasses the role of public authorities in establishing the environment in which economic operators function and in determining the distribution of benefits as well as the relationship between the ruler and the ruled' (cited in World Bank, 2009).

The *World Development Report* goes further when it suggests that mechanisms for assuring good governance have three key elements:

1. internal rules and restraints – for example, internal accounting and auditing systems, independence of the judiciary and the central bank, civil service and budgeting rules
2. voice and partnership – for example, public–private deliberation councils, and service-delivery surveys to solicit client feedback
3. competition – for example, competitive social-service delivery, private participation in infrastructure, alternative dispute-resolution mechanisms, and outright privatisation of certain market-driven activities (World Bank, 1997).

The evolution of governance theory also throws up some particularly relevant challenges for the purposes of this paper. Renate Mayntz, reviewing the history of governance theory, argues that, when the focus on the state as the central actor within governance theory had shifted, neoliberal economic thinking evolved to emphasise the potential for market regulation rather than top–down regulation to achieve societal goals. And, in a related move, political ideology turned ‘to the potential contradiction between market principles (or capitalism) and democracy’ (Mayntz, 2003). But this tension did not permeate *governance* thinking. Instead, governance theory followed the grain of dominant neoliberal economic thought and began to investigate horizontal forms of organisation and norm-setting, and beyond that to consider ideas of self-regulation ‘in the shadow of hierarchy’.

Subsequently, theories of ‘new governance’ focusing on the consequences of ‘new regulation’

or ‘co-regulation’ or ‘multi-stakeholder public policy networks’ emerged to describe and account for the shifting relationship between ‘state’ and ‘market’ or between ‘state’ and ‘economic actors’. ISO clearly places itself within this tradition when it argues that:

*Regulation can be considered to be static and comes from top down, standardization works from the bottom up, is dynamic in nature and simplifies development. Because it is based on voluntary action, consensus and openness, the result is a positive commitment, rather than a restrictive sense of obligation. The intention is also that the standard will contribute to greater awareness and wider observance of existing legislation and regulation.*<sup>28</sup>

If governance theory has failed to account for the problematic relationship between market principles and democracy, US academic and political scientist Catherine Rudder argues conversely that political scientists should re-imagine 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 [groups engaged in private governance] should have a say in their decision making’ (Rudder, 2008: 900). Rudder’s emphasis is essentially the ‘democratisation’ of private governance. This idea has considerable resonance in the context of market governance mechanisms for sustainable development, if for no other reason than the strong connections between sustainable development and democracy.

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28. ISO 26000 – Social Responsibility: FAQs. See [http://www.iso.org/iso/iso\\_catalogue/management\\_and\\_leadership\\_standards/social\\_responsibility/sr\\_faqs.htm](http://www.iso.org/iso/iso_catalogue/management_and_leadership_standards/social_responsibility/sr_faqs.htm)

## THE SHAPE OF GLOBAL GOVERNANCE: SOME ALTERNATIVE CONCEPTIONS

Global governance theory emerged in parallel with the great debate of the 1990s on globalisation of the economy and communications. This coincided with rising global environmental concern, and intensification of intergovernmental efforts to conclude international environmental agreements. Also at this time, the emphasis on the state as the central unit of analysis shifted. Economic globalisation and an increase in neoliberal economic thinking gave rise to increasing interest in the role of non-state actors in shaping governance across territorial boundaries, as well as to 'new governance' thinking with its focus on the shifting relationship between state and market. This ran parallel to concern, within political theory, for the consequences for democracy of rising political significance of economic actors.

In 1995, as the processes of economic globalisation were gathering pace with the creation of a World Trade Organization, the Commission on Global Governance issued its report, *Our Global Neighbourhood*. The Commission, largely composed of a high-ranking and influential group of 'governance practitioners', had been established in 1992<sup>29</sup> 'in the belief that international developments had created a unique opportunity for strengthening global cooperation to meet the challenge of securing peace, achieving sustainable development, and universalizing democracy' (CGG, 1995: 359).

The Commission's basic aim was 'to contribute to the improvement of global governance' (CGG, 1995: 368). It was to analyse 'the main forces of global change, examine the issues facing the world community, assess the adequacy of global institutional arrangements and suggest how they should be reformed or strengthened' (CGG, 1995: 368). Like theorists before and since, the Commission asserted that 'At the global level, governance has been viewed primarily as intergovernmental relationships, but it must now be understood as also involving non-governmental organizations (NGOs), citizens' movements, multinational corporations, and the global capital market' (CGG, 1995: 2). The Commission described global governance as 'a broad, dynamic, complex process of interactive decision making that is constantly evolving and responding to changing circumstances' (CGG, 1995: 4).

The current reality of global governance is messy, disparate, diverse and many-layered. Even describing what currently exists, without getting into questions of what 'ought' to be, is a vexing task. Some alternative approaches are highlighted below.

### Layers of governance systems: nesting, overlapping, parallelism

One contemporary descriptive approach to understanding global governance frameworks arises out of the broad field of regime theory, and (as elaborated by Alter and Meunier, 2005) uses the idea of 'nested' governance. In a nested system, layers exist in a hierarchically ordered relationship. An example is the relationship

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29. Like the Brundtland Commission (World Commission on Environment and Development), the Commission on Global Governance was chaired by a Swede, in this case Ingvar Carlsson, Prime Minister of Sweden. Its 28 members from around the world had all held high-level political offices or been leaders of NGOs or businesses.

# The current reality of global governance is messy, disparate, diverse and many-layered

between international and national private standards bodies that are members of the International Organisation for Standardization and mediated by the hierarchical relationship established in ISO's top-level rules of procedure – the ISO Directives.<sup>30</sup>

A second conceptual approach uses the idea of 'overlapping' regimes, understood as regimes that deal with overlapping issues in a horizontal, not hierarchically ordered, relationship. Applying this approach draws attention to the relationship between different kinds of policy instruments addressing the same thematic aspects of sustainable development (laws, partnerships, declarations of intent, or industry codes of conduct, for example).

A third approach, specifically designed for its explanatory value in relation to international production standards, makes use of the idea of 'parallelism'. This is understood as 'the sometimes supportive, sometimes competitive relations among independent governance schemes within an issue area' (Abbott and Snidal, 2006: 4). Each of these three approaches focuses on the relationship between different governance systems or instruments addressing overlapping or similar fields. But none is capable of adequately encompassing the full range of normative relations between many market governance initiatives, let alone their relationship with other aspects of global governance.

## Distinctions between governance actors: regulatory theory

While thinkers on international relations were shifting the focus of their attention to account for the increasingly significant role of non-state actors in global governance, regulatory theory evolved to take account of the broad 'web' of actors increasingly involved in setting publicly available normative frameworks for application by third parties. One particular milestone was the book, *Global Business Regulation* (Drahos and Braithwaite, 2000). The authors argue that globalisation of business regulation has taken place through a messy process involving a web of actors – state and non-state – that 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.

## Global public policy networks

Multi-stakeholder, partnership-based decision making to resolve the polycentric challenges facing humankind is another strand of contemporary thinking about global governance. As an example of this approach, *Critical Choices: the United Nations, Networks, and the Future of Global Governance*, examines the role of 'global public policy networks' as one among a possible suite of creative new arrangements that can help 'governments, other organizations, both public and private, and individuals around the world to work together to address pressing global problems' (Reinicke and Deng, 2000: xi). Global public policy networks, for these purposes, are 'protean things', but 'link together interested

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30. Though arguably the parallel is not wholly convincing given that Alter and Meunier (as cited in Abbott and Snidal, 2006: 4) define nesting in terms of 'more specific institutions being part of broader institutions', and (more resonantly) use the metaphor of Russian dolls.

individuals and institutions not only from diverse countries but also from diverse sectors of activity: local, national, and regional governments; transnational corporations and other businesses and their associations; and what has come to be called civil society' (Reinicke and Deng, 2000: xi).

*Critical Choices* highlights the pivotal role played by the twin forces of political and economic liberalisation and 'technological revolution'. These two forces combined to create not only an operational gap for public policymakers and institutions, but also a participatory gap manifested by exclusion of the general public or particular stakeholders from deliberations over issues characterised by increased complexity. Global public policy networks, it is argued, emerged as a response that performed a range of functions including negotiating and setting global standards, and helping to 'close the participatory gap'. The book's emphasis on multi-stakeholder engagement and partnership, and their potential to contribute to resolution of polycentric global challenges, represented a milestone in an overall trend for reflection on the role of non-governmental stakeholders and networks within the fabric of global governance.

### **Political science approaches: Held's 'cosmopolitan democracy'**

Governance theory and political science have diverged in ways that weaken both fields in terms of their ability to account for the wider significance of market governance mechanisms. One approach from political scientist David Held provides a basis for reconciling these two branches of thought. Held proposes a 'cosmopolitan model' of democracy that brings together the multiple realities of democracy as both a political system and a 'way of life'. Taking account of contemporary globalisation (in the widest sense of 'interconnectedness') he

suggests that 'the case for cosmopolitan democracy is the case for the creation of new political institutions which would coexist with the system of states but which would override states in clearly defined spheres of activity where those activities have demonstrable transnational and international consequences (Held, 2006: 305).

Held points to two distinct requirements of cosmopolitan democracy. First, the territorial boundaries of systems of accountability should be restructured, so that issues which escape the control of the nation state can be brought under better democratic control. Second, the role (and place) of regional and global 'regulatory and functional agencies' should be rethought, so that they provide a more 'coherent and effective focal point' in public affairs.

### **Democratising intergovernmental decision making**

One normative response to the problems of democratic decision making on issues that inherently transcend boundaries is to create a system of genuinely democratic global government. A number of advocates are working towards this goal. Proposals for 'world parliaments' or 'citizens' assemblies' operating at international level aim to bring accountability of intergovernmental processes to 'citizens of the world', rather than only to territorially defined units of government and their associated voters.

Another popular argument for a system of global government arose in the late 1990s and early 2000s, when debates on the impacts and institutions of economic globalisation were at their height. (And before 'security' narratives took over in the Western world following the attacks on the New York World Trade Center and other targets on 11 September 2001.) The central idea was that globalisation made national public policies less meaningful, and that a system of global

government is an inevitable consequence of globalisation.<sup>31</sup> In practice, unsurprisingly, nation states have not proved happy to restrict their policy space in the way that this would imply (particularly given the counter-trend provided by the so-called 'War on Terror' to unilateral or plurilateral decision making based on small coalitions of the willing). Nevertheless, a movement for democratic global governance remains.

For example, the World Federalist Movement advocates global governance along federalist principles:

*Created in 1947, [the World Federalist Movement] WFM has been dedicated to ensuring democratic global structures accountable to the citizens of the world, the division of international authority among separate agencies and a separation of powers among judicial, executive and parliamentary bodies. Only truly democratic and representative bodies can have legitimate authority over all levels of government. WFM is concerned with protecting the rights of every person on the planet and preserving the environment for the global community.*

([www.wfm-igp.org/site/about](http://www.wfm-igp.org/site/about))

The UN Parliamentary Assembly calls for a Parliamentary Assembly within the United Nations, composed of a maximum of 700–900 representatives drawn from the entirety of the UN membership, initially as an advisory body but gradually with greater legislative functions.<sup>32</sup> These initiatives and others are designed to

provide systems of (numerically limited) representation at global level through the election of representatives. They too can be understood – from both political-science and multidisciplinary perspectives – as a contribution to the overall range of approaches to understanding global governance.

## 'GOOD' GLOBAL GOVERNANCE?

What would be 'good' global governance? One starting point might be extrapolation from the national level – where 'good governance' appears to have a strong economic dimension. But prescriptions of good governance that exist at national level have not evolved to offer insights into what forms of global governance collectively amount to 'good global governance'. As Thomas Weiss puts it, 'there is no clear-cut equivalent at the global level to the national prescriptions of democratisation and economic liberalisation as the constituent components of human governance' (Weiss, 2000). He predicts that 'in light of its universality and scope, the UN will have a special role, albeit not a monopoly, on future leadership for global governance' (Weiss, 2000). But, as Vince Cable notes in his book *Globalization and Global Governance*, 'the role of the UN in the economic field is negligible' (Cable, 1999). Furthermore, if 'universality' and 'scope' alone act as indications of possible future leadership roles in global governance, we should look more closely at ISO.

In any event, other than analytically (as a description of what is happening already),

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31. For example, as in Hertz (2001), although Hertz advises market-based citizen action through consumer and boardroom activism.

32. See generally the materials at [www.kdun.org](http://www.kdun.org), and in particular Bummel (2010).

### THREE KEY CONCEPTS: SUSTAINABLE DEVELOPMENT AND GOVERNANCE CONTINUED

'universality' and 'scope' ought not to be any more than incidental indicators of the normative leadership role of any particular institution or process in the business of global governance. While ISO has universality and scope, it does not have 'legitimacy' in the public sphere. It cannot because, as we have seen, it has not yet worked out how *not* to undermine public-sector actors, despite its attempts not to undermine processes of global governance. Instead, other criteria including legitimacy, authority and inclusiveness, and democratic qualities (alongside universality and scope) are more appropriate indicators of leadership roles in 'good' global governance.

Furthermore, the role of any particular process or institution in global governance *ought* to depend on its innate ability to sustain, or undermine, the human pursuit of sustainable development. From this perspective, for example, the institutions of the global economic architecture (including the World Bank, the International Monetary Fund and the World Trade Organization) need to be seen simply as servants of those institutions and processes that are better-equipped to pursue sustainable development.

Decision making by public institutions at both local and national levels will remain vitally important to the pursuit of sustainable development for the foreseeable future. This is partly because public institutions have developed the best mechanisms for finding legitimate, accountable and democratic ways of allocating costs and benefits of pursuing sustainable development between different decision-making levels. Also, this is partly because there are some things that only governments can do. Governments have a monopoly on primary legislation, for example, and from any perspective, however market-oriented, legislation must remain

an essential part of the sustainable development toolkit. Public institutions need the skills, competences and systems best suited to the achievement of sustainable development, and market governance mechanisms should not undermine the acquisition and maintenance of those skills and systems.

Is it important that market governance mechanisms do not undermine the role of *nation states* in delivering sustainable development? From a sustainable development perspective, it seems overall more important to protect and secure the resilience of democracy than that of statehood. The idea of public participation integrated within the broad concept of sustainable development can be understood as a 'meta-principle' over and above the idea of geographically defined territorial boundaries. At the same time, political democracy itself can be closely associated with sustainable development, and its practice should not be undermined by market governance mechanisms.

The public-policy and wider 'democracy' implications of ISO 26000 shine a light on the failure of governance theory to follow developments in political science, particularly the shift towards investigating the tension between market principles and democracy. As Mayntz puts it, 'horizontal cooperation and negotiation in networks can be no substitute for democracy'. She argues that:

*to recognise the existence of a problem of accountability where policy-making occurs in mixed public/private networks is not the same as trying to include the input part of the policy process explicitly into the theoretical paradigm of political governance. This challenge has not been met so far, and it is indeed a question whether the*

*integration of democracy theory and governance theory as we know it would over-extend the latter.*

(Mayntz, 2003)

At the international level, it is the existence of statehood rather than the political system practised by a particular state that attracts deference, through respect for territorial sovereignty. This basic idea seems to be reflected in ISO 26000. As private governance systems continue to become more sophisticated, and understanding deepens of the global governance implications of the relationship between democracy as a political system and democracy as a system of social organisation, we might expect to see further experimentation in standard-setting. This could distinguish between states by the connection between national or local circumstances and principles of democracy in both senses.

ISO 26000 shows that the time has come to seek to achieve the integration between democracy theory and governance theory that Mayntz calls for. Indeed, the imperative of sustainable development demands it.

# FOUR

# A WAY FORWARD

## TACKLING GOVERNANCE DISSONANCES

In May 2010, Danish Minister for Economic and Business Affairs Brian Mikkelsen described ISO 26000 as a 'milestone in the history of global cooperation'.<sup>33</sup> But it is a milestone marking a work in progress, rather than a coherent view of global cooperation amounting to 'cosmopolitan global governance for sustainable development' (after Held, 2006). At present, the state, citizens and economic actors continue to have quite different roles, responsibilities and accountabilities from local to global levels.

David Held's 'cosmopolitan democracy' (Held, 2006) potentially indicates a way forward that could fill the theoretical gap between governance and political theories. It could also lead towards an approach that could help to unpack the shifting relationships and points of interface between social systems – for the organisation of decision making and the ideal of democratic decision making within organisations (such as ISO) – and political systems for organising decision making at the level of the state.<sup>34</sup>

Ideas about 'multi-stakeholder public policy networks' (Reinicke and Deng, 2000) might well be attractive in the struggle to create normative coherence in the apparent chaos of globalisation, but they fail to provide for truly cosmopolitan

democracy. Such networks have not evolved to 'override states in clearly defined spheres of activity'. Rather, they have the potential to snag against, interfere with, and even undermine, decision making by states. The development of ISO 26000 shows that multi-stakeholder decision making can sit uncomfortably with established systems of global governance in which governments (rather than individuals or non-governmental organisations and interest groups) hold the final decision-making authority.

When government representatives participate in transnational multi-stakeholder consensus-building, they bring all the positions that they bring to other intergovernmental settings. Indeed, they cannot do otherwise, for the positions taken by government representatives in such fora are for the time being among the relevant factors at which international lawyers are required to look when determining the current state of international law between nations. The ISO 26000 discussion of the precautionary approach shows that government political positions and consensus-building processes in which all participants are notionally equal do not always work well together. This tension is among the 'governance dissonances' that are likely to need resolution, partly by means of amendment to the rules of the World Trade Organization over the coming two decades.<sup>35</sup>

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33. Opening session of the Copenhagen WGSR meeting, 17 May 2010. Contemporaneous note taken by the author.

34. Some will find this distinction between 'social' and 'political' democracy problematic, since the 'social' may also be intensely 'political'. 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'.

35. See further the author's blog post at [www.fdsd.org/2010/05/iso2600-governments-and-precaution](http://www.fdsd.org/2010/05/iso2600-governments-and-precaution)

ISO 26000 emerges from a corner of global governance (ISO) which currently has expansionist tendencies. But ISO has no coherent narrative for how it meshes with other parts of the overall web of national and global governance – let alone national and global governance for sustainable development. Grounding the process of standards development in expertise rather than representation helps ISO to manage complex multi-stakeholder processes, but it does not ultimately demonstrate a systemic commitment to the ideal of democracy.

In this, ISO reflects a gap in thinking about 'new governance' too. For example, one 'new governance' theorist, Julia Black (1996) suggests four types of relationship between 'self-regulation' and the state: mandated, coerced, sanctioned and voluntary self-regulation. In a later paper, Bartle and Vass (2007) categorise self-regulatory schemes according to the *form* of state involvement. They highlight two broad categories (mandated and non-mandated) and a number of subcategories. Yet these categorisations do not adequately map onto ISO 26000/public-policy nexuses, because those nexuses do not flow from the *form* of state involvement in the standard.

Both Black, and Bartle and Vass envisage the relationship between the state and regulatory processes as diverse and multiply layered (heterarchical) rather than hierarchically, vertically ordered with the state on top. At the same time, the typologies of Black and of Bartle and Vass appear to assume that it is the *state*, rather than the (self-)regulation itself that determines the

nature of the relationship between the two.<sup>36</sup> In ISO 26000, as we have seen, states were not entirely free to determine their relationship with the standard, for they found themselves participating in a process with uncertain outcomes and impacts for their own policy goals, and without any right of veto. The two typologies are more relevant in addressing choices made by states in determining how they will choose to relate to *implementation* of the standard (a subject which is beyond the reach of this paper).

As ISO's involvement with key issues of global public policy action such as human rights, environment and labour gets deeper and broader, the tensions between government and intergovernmental policy and law, on the one hand, and multi-stakeholder negotiation of good organisational practice, on the other, will increase. These tensions were pronounced during the negotiation of ISO 26000 in discussions on the precautionary approach. However, they were also evident in discussions on the principle of respect for international norms, the proposed principles of 'difference' and 'common but differentiated responsibilities', and concerning the relationship between ISO 26000 and the WTO.

The onus necessarily falls principally on governments themselves to find a way to deal with the wider implications of ISO under the WTO and in international law. But there are also actions that can be taken by ISO itself. In principle, many of those actions could be applied broadly similarly to standards-development processes at the national level. ISO clearly has the capacity to adapt:

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36. Julia Black's elaboration of de-centred regulatory systems tends to emphasise that the key dynamic is not between regulator and regulated but between multiple actors within and between complex systems (Black, 2001, cited in Bartle and Vass, 2007).

participants in the ISO 26000 working group, for example, successfully agreed special internal rules of procedure, designed to ensure balanced participation and representation. These rules of procedure may reasonably be expected to have an impact on future ISO processes by providing a source of inspiration for others.<sup>37</sup>

Many WGSR experts were sceptical about ISO's entry into the new domain of social responsibility, as opposed to the more familiar corporate social responsibility. However, they saw ISO's willingness to adapt its ways of working to the reality of a multi-stakeholder, near-global process focused at least as much on ethical as on market considerations as a key benchmark of its competence to enter this new territory. ISO proved itself generally willing to rise to the challenge – albeit with the crucial exception of its refusal to compromise in any significant way in relation to its practice of charging for access to standards.

There are four areas in which action could usefully be taken to tackle the 'governance dissonances' that arise between ISO 26000, governance, and global governance for sustainable development. These four are discussed below. Tackling these dissonances would also advance towards a properly joined-up market governance system better suited than the current messy web of relationships and impacts to the achievement of sustainable development.

### How governments are different

Both ISO and governments should clarify how governments might be 'different' from other stakeholder representatives in future ISO talks

with significant public policy reach. The ISO 26000 process was internally relatively democratic, but with impacts on other democratic processes not yet reflexively recognised within the ISO process. In principle, the broad public policy reach and implications of ISO and other private standards suggest that it is highly desirable to seek to bring the insights and expertise of public policy actors to bear on the process of standards development. However, matters of national or subnational public policy and questions of international law deserve separate consideration.

Concerning ISO 26000 and national public policy, the principal challenges arose out of the potential reach of ISO 26000 to governments as *organisations*. In the market-oriented setting of an ISO working group or technical committee, the extraordinary ISO 26000 experience of government experts consulting with labour and industry on how the standard might apply to states shows that leaving this to states themselves to decide on an *ad hoc* basis is not sufficient.

Some government experts 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 affect their policy space in currently unforeseeable or undesirable ways. Equally, some government stakeholders were acutely aware of the relationship between their government's policies and the positions that they took as individuals within the process. These stakeholders did not treat themselves as 'experts' who were free to

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

# Some government experts saw themselves as executors of their government's policies rather than as independent experts

deploy the entirety of their knowledge and expertise as individuals within the process as they saw fit, but rather as executors of their government's policies. Some sought regular advice and instructions from their parent or client ministries or organisational headquarters during the course of the working group meetings. A small number of government stakeholder group experts were aware 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 experts employed by international organisations aimed principally to secure maximum visibility and normative force for 'their' processes or norms within the standard.

In contrast, there were some government stakeholder-group experts in the ISO 26000 process, from local authorities, ministries, or international organisations, who did not feel that their interventions were constrained by a responsibility to promote and replicate established policy. Some appeared in practice to act freely as individual experts. This variation in approach needs to be addressed systematically by ISO – in consultation with governments. However, it would be a simple matter for ISO's central structure simply to instruct as a matter of course that no technical committee or working group has a mandate to issue guidance or develop norms purporting to address how governments or states should behave in relation to the exercise of functions that are exercisable exclusively by states as a direct consequence of their sovereign status.

Civil society actors from states that are *not* democratic might counter that an ISO standard can be a useful advocacy tool when engaging with their governments. But there are many other tools

that could be deployed in such circumstances, even if they do not carry the ISO branding. And, other than expediency, there seems little justification for according to the multi-stakeholder processes of ISO such authority that there is any particular reason to bolster this potentially convenient circumstance.

A separate issue concerns how ISO standards potentially speak to areas that have *already* been subject to public policy – decisions across a range of countries, for example in relation to substantive guidance on labour rights or environmental policy. Here, it might simply be helpful to issue guidance for working groups and technical committees that the practice should be first to seek the views of those government experts on the substantive matter under discussion, before continuing to discuss and negotiate the issue in the ordinary way. In the event that it is not possible to arrive at a consensus view, there should be a clear statement on the sources of continued difference, to assist the working group or technical committee leadership in deciding whether sufficient consensus has been reached.

To those who might protest that this approach leaves too much in the hands of working group and technical experts without guaranteeing respect for the views of public policy actors, it is worth noting that ISO 26000 shows considerable deference to the authority of state action. In this respect, the standard is far from 'collapsing' the distinction between public and private, as political scientist Julia Black would have it (Black, 2002: 6), seeking instead, rather explicitly, to delineate it. Examples within the text of ISO 26000 include the principle of 'respect for the rule of law', 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

some delegations 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'. Deference to the state came naturally from most WGSR experts as part of the values they brought to the process.

#### Freeing government participants to act as 'experts'

Where appropriate or necessary, government participants need to be able to participate genuinely as 'experts' in ISO processes. The present lack of any accessible model on the differentiated roles of individuals, NGOs, economic actors and other stakeholders in standards-setting processes hampers the smooth integration of market governance mechanisms on environmental and social issues within mainstream notions of transnational or global governance. For those whose governments see them as public servants acting as representatives of governments or states, there are real concerns that their positions and views in talks could affect evolving international law on the content of their governments' international obligations as states.

There are two options: one easy but possibly unpalatable, and one difficult and lengthy. The first option would be simply to exclude government participants from full participation in those aspects of ISO processes that carry implications for the evolution of international law. One could imagine a process in which an issue might be declared (at the behest of any government expert) of 'public international law' importance. This would then trigger a switch in the role of government experts from full participation to 'advisory'. The other, non-government, experts would then be free to arrive at a negotiated consensus. The government experts would be

able to hold their national positions while informing (but not dictating) any particular outcome. Clear documentation that might accompany such declarations and the ensuring discussion could secure greater transparency and accountability.

In some cases concerning issues declared of 'international legal importance', intergovernmental organisations might continue to play the guardianship role they assigned to themselves via memoranda of understanding in the ISO 26000 process. This involves checking text against existing international agreements. Such an approach would work well for issues already subject to clear intergovernmental agreement, but it would not be adequate for 'live' issues of intergovernmental negotiation where international institutions had no clear mandate to pursue a particular line.

The second option would be to seek adaptation in the sources of international law themselves, so that views expressed by government experts are understood *not* to be expressions of state practice. This would be politically challenging and might not achieve its desired outcome. Seeking such an exclusion would almost certainly mean that government experts should preface each relevant intervention in a standard-setting process with a disclaimer. In extreme cases, it might also entail amendment to Article 38.1(b) of the Statute of the International Court of Justice to make it clear that international custom derived from state practice cannot be derived from the positions taken by state or government experts in private standard-setting processes.

There is one other relevant issue that is clearly for ISO to deal with. ISO processes with public policy reach, like those of the ISO 26000 WGSR, should not be treated as subject to the Chatham House Rule of non-attribution. Currently ISO's

governing bodies appear to encourage experts to treat verbal exchanges within ISO working groups as non-attributable, to encourage free and frank exchanges of views.<sup>38</sup> Yet, for some experts, positions taken within the WGSR have implications for public policy and hence for the accountability of governments – as well as the evolution of international law. If citizens of countries are denied the opportunity to scrutinise the role played by their government experts, this denies the accountability of government which is a key element of democracy.

### Re-negotiating the relationship with the WTO

Governments need to go to the WTO to find ways to reduce the impact of ISO on their policy space at national and international levels. It might be politically difficult to see how, among other competing priorities, such a process might be initiated. However, it is clear that some states (particularly the US, Canada, India and China) have woken to the risks inherent in ISO's expanding reach, and also to the possible unforeseen (if not unforeseeable) implications under the WTO's rules.

ISO 26000 may have become an arena for competing visions of the normative shape of global governance to be played out between states (as between much of the EU and North America, for example, in the case of the precautionary approach). Those competing visions carry implications for national and subnational policy decisions, and could restrict national policy processes that carry the authority of government or state. If this is the case, there is an urgent need to adapt the WTO to the reality. States do not have the authority to prevent ISO from tackling new policy arenas, for, as we have seen, ISO is a creature both of and for the market. But states can find a way to curtail ISO's impacts upon those arenas that lie firmly within their negotiating authority.

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

ISO, they must necessarily seek to reform those obligations. What happens within ISO potentially affects WTO members via their WTO obligations. Adjusting those obligations could ensure that states are more readily able to accede to the idea that their representatives within the process are no more than 'experts', expressing individual views. ISO and the WTO are interconnected. And they form a system that is greater than the sum of its parts. Their interaction fundamentally affects the content of the global governance system in ways that each without the other would not.

The WTO and ISO need to acquire a systematic capacity to adjust their respective procedures and obligations, each one in light of the other, if they do not already have it. Initially, this kind of connected reflexive capacity might mean that those governments concerned about the WTO implications of ISO 26000 begin to take steps to adjust their obligations under the WTO to secure an adjustment in the optimal overall balance between the two.

### Building guardian institutions for market governance mechanisms

Market governance mechanisms, in common with much global governance, do not have the means to ensure consideration of the interests and/or needs of stakeholders not directly involved in the development of private standards. There is no external check, for example, to appraise the impact of the standard upon future generations. And in those cases where participation in the process of developing a market governance mechanism is unbalanced, there are no mechanisms to rebalance the substantive outcomes of the norm-setting process by reference to what *might* have emerged had participation been more balanced.

In pursuing a consensus among participants in each standards-development process, ISO tends to assume that whoever chooses to participate are the 'right' people. There is no mechanism for abandoning or pausing a process until a fully balanced group of stakeholders has been brought together. Just as the ILO created for itself a guardian role in relation to international labour standards within the ISO 26000 process, there

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38. The Chatham House Rule provides that '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/>) In the ISO 26000 process, the Rule was invoked on the final day of the Copenhagen WGSR meeting to discourage some NGO experts from issuing a press release highlighting the position taken in the concluding plenary by one of the government experts. NGOs subsequently decided (for other reasons) not to issue the press release.

may be a case for developing broadly parallel guardian functions in other areas. The ISO 26000 memoranda of understanding point the way to one possible approach, based on *ad hoc* agreements.

The idea of evolving guardian institutions also has resonance in a 2004 Council of Europe Green Paper on the future of democracy in Europe (Schmitter and Trechsel, 2004). This devotes considerable attention to the role in decision making of what it describes as 'guardian institutions' – institutions made up of experts. Over the past 20 to 30 years, the paper argues, the scope of democratic decision making has been eroded both as a result of 'guardian institutions' addressing problems by relying on specialised knowledge and expertise rather than citizen engagement or political representation, and through public policymaking through agreements with stakeholder-based (rather than citizen-based) governance networks. The latter itself is a manifestation of the increasing 'porosity' between public and private spheres. On one hand, decision making 'increasingly requires specialised knowledge and expertise' (Schmitter and Trechsel, 2004:64). On the other, one consequence is that chains of delegation become longer and longer, and the voice of citizens weaker.

The future of democracy itself, argues the Green Paper, will depend on responses to two questions:

1. Can the apparent loss of democratic legitimacy be compensated by other forms of legitimacy underlying 'guardian' and 'governance' institutions?
2. Can non-majoritarian institutions of guardianship/governance be reconciled with and justified by reforms in democratic practices?

In this case, the aim of a 'guardian institution' for market governance mechanisms would be to ensure that genuinely democratic practices were at the heart of both the process and the substantive content of the mechanisms, so ensuring that they were optimally equipped to contribute to sustainable development. The process for selecting the guardians, and their locations, would be critically important to perceptions of such an office.

To continue this exploration, might some kind of 'issue ombudsman' emerge from within the standards community to offer advisory opinions or recommendations on questions surrounding the relationship between emerging market governance mechanisms and other, existing, mechanisms? Might such a mechanism even emerge from within the United Nations itself? It is imperative that guardian institutions carry both legitimacy and authority if they are effectively to offer input with the potential to trump the views of participants within the process of developing a market governance mechanism. The basis upon which they offer their input must also be clearly set out in advance.

One possible approach might be, on request from an interested party, to assess the implications of a market governance mechanism for named 'missing stakeholders' (including those yet to be born). Another might be to carry out an assessment of the implications of market governance mechanisms for public policy and governance in its broadest sense. Suggestions like these on the further development of guardian institutions embed a deep understanding of the place of intergovernmentally agreed and universal norms within the community of global governance actors. They also acknowledge the potential impact of market governance mechanisms on public policy at national and subnational levels,

# Ideas of democracy offer a powerful framework to facilitate consideration of fairness and equity in standard-setting

and their significance for the global governance of sustainable development.

## THE VALUE OF A 'GOVERNANCE SYSTEMS APPROACH'

In a piece of work for US-based NGO, Pacific Institute, cognitive linguists Real Reason identify (without seeking to define) three cognitive 'frames' used to describe and understand voluntary environmental and social standards as a whole. For the purposes of IIED's research project, the idea of 'voluntary environmental and social standards' can be understood to refer to those market governance mechanisms that are not mandated through state legislation and that address environmental and/or social issues.

Based on a review of a diverse range of English-language literature (although predominantly American English), Real Reason (2009) label the three cognitive frames as:

- market framing, which 'imposes market reasoning on the whole of the standards and certification arena' (page 9)
- governance framing, which conceives of standard-setting as a process of governance (page 13)
- communication framing, in which the 'things that standards and certification do' are understood as processes of communication (page 18).

The governance framing '[a]ligns closely with values of the standards community' (Real Reason, 2009: 14). This sentiment alone contains an important justification for further development of a governance systems approach to assessing market governance mechanisms. A 'systems approach' here is used in the loose sense of understanding the multiple interactions, points of intersection and feedback loops between

different governance mechanisms with which voluntary environmental and social standards relate at different levels.

Ideas of democracy should also help to frame how we understand the role of voluntary environmental and social standards generally, and ISO 26000 in particular, in global governance. Ideas of democracy offer a powerful framework to facilitate consideration of fairness and equity in standard-setting. They provide a reminder that the narrow views of a vocal minority should not be allowed to determine unfairly the livelihood outcomes of a larger, yet absent, majority.

There are multiple ways to approach the interface between voluntary environmental and social standards and 'governance'. Distinctions can be drawn for example between:

- efforts to ensure that voluntary environmental and social standards themselves reflect principles of organisational 'good governance'
- the contribution of voluntary environmental and social standards to 'good governance' of organisations that they address (or their role in governing the environmental and social impacts of organisations that they address)
- the implications of voluntary environmental and social standards for 'good governance' by the nation state in those countries where they are formulated or take effect
- the implications of voluntary environmental and social standards for 'global governance' (which ought itself to be in some sense normatively 'good'). What, for example, should be the role of voluntary environmental and social standards in the context of efforts to build governance frameworks adapted to 21st-century environmental and social challenges?

This paper has focused largely on the third and fourth of these four possible senses of 'governance' framing of those market governance mechanisms that are standards. Real Reason's descriptions of the 'governance frame' do not speak directly or equally to all of these concerns, but Real Reason identify a sense that voluntary environmental and social standards are a response to failure of public sector governance (Real Reason, 2009). The ISEAL Alliance (2008:8), too, suggests that: 'Voluntary multi-stakeholder standards systems developed as a response to perceived market or government failures to effectively deliver on an ethical outcome.' A paper for the ISEAL Alliance, reviewing methodologies for impact assessment of certification, notes '[c]ertification bypasses the state's conventional role of regulating for the collective good of its citizens because states have proven largely unable and/or unwilling to significantly restrict the abuse of common endowments through legislation – especially across international trade' (Hassell, 2008: 5).

From this starting point, voluntary standards may be understood as: (a) responses to a governance gap, and potentially also (b) responses that in and of themselves present governance challenges. These two ways of understanding the governance framing of standards may not, however, speak directly to the wider range of governance implications of voluntary environmental and social standards. There is certainly evidence that the standards community has paid significant attention to 'filling governance gaps' with standards and then ensuring that the standards themselves are governed 'well', or in line with ideas of 'good governance'. At the same time, the rapid evolution and take-up of environmental and social standards in the marketplace has had effects on the behaviour of governments, and more widely on governance by public-sector

actors. However, this area suffers from an extraordinary lack of attention within the community of actors on standards (or market governance mechanisms).

For example, the ISEAL review of impact-assessment methodologies notes that 'Southern activists are further concerned that well-intentioned certification can disrupt labour conditions such as by... stimulating a voluntary process that undermines public regulations' (Hassell, 2008: 8). Yet, ISEAL has not developed guidance on how to assess the impact of standards systems on public regulations. In ISEAL's code of good practice, *Assessing the Impacts of Social and Environmental Standards Systems*, an informative list of 'potential key impact issues' spans 'environmental, socio-economic, others', but does not address the impact of standards systems on *other* governance approaches (ISEAL Alliance, 2010: 8). This extraordinary blind spot in ISEAL's (and others') impact-assessment methodologies is one that needs to be addressed for the sake of good governance on sustainable development.

A governance, and global governance, analysis of market governance mechanisms has potential to help a contemporary vision of 'good' global governance to emerge. It provides a lens through which, normatively, to analyse the gaps between different governance approaches, and the dissonances created. And it also reaches into areas of sustainable development policy that have not thus far received the analytical or practical attention that their impacts deserve.

Inevitably, analysing the contribution of ISO 26000 to global governance of sustainable development is partly dependent on the chosen vision of global governance. For example, taking a normatively limited view of global governance (one concerned principally with the interplay between

different governance actors, recognising that in an increasingly polycentric world global governance includes many more actors than states), the focus might initially be on the content of ISO 26000 in terms of sustainable development. In a separate line of investigation, attention might turn to the take-up of the standard and the mechanisms for disseminating it, its accessibility to and potential impact on a range of different people and interests, and possibly the fairness and/or inclusiveness of the process for development of the standard.

This approach – a sort of ‘Drahoš and Braithwaite (2000) plus principles of sustainable development’ approach to assessing the contribution of market governance mechanisms to global governance – is as far as many standards practitioners or sustainable development advocates have gone to date. It is an approach that reflects little embedded view on the normative roles and responsibilities of different actors, tending to see them all as equal. And it offers little guidance on what *ought* to be the negotiated outcome of the points of tension between standards and intergovernmental global governance and/or public policy that have been highlighted in this paper.

Attention to ‘good governance of standards’ should not be at the expense of efforts to strengthen either ‘good public governance’ or ‘good global governance’. This provides an entry point for a much wider analytical approach – one that forms the core argument of this paper. That is: it might be useful to analyse the contribution of a market governance mechanism to global governance only *after* developing a normative vision of what constitutes ‘good’ global governance. In particular, such a vision calls for reflection on what essential roles should be preserved for nation states and/or traditional

forms of intergovernmental ‘global governance’ within that process.

The nature of the public governance impacts arising out of a market governance mechanism should not simply be left to individual standards-setting or revision processes to negotiate upon. A more systematic approach is needed. Sustainable development advocates need to develop a normative view on the desirability of features of national and global sustainable development governance that are themselves affected by market governance mechanisms.

In the context of ISO’s well-developed internal governance system, a systematic approach to creating desirable relationships between ISO standards and public governance (from local to global) is perhaps easier to implement than in the myriad of other market governance mechanisms and settings affecting sustainable development. At the same time, this paper has offered four examples (above in this section), drawing on the ISO 26000 experience, of ways in which a systematic approach to enhancing the contribution of market governance mechanisms to ‘global good governance for sustainable development’ might be realised. Many of these suggestions are relevant well beyond the setting of ISO. An example here is the proposal to adjust the obligations of WTO members in light of the rapidly expanding reach of ‘relevant’ international standards and the subsequent effects on members’ obligations under, in particular, the WTO TBT Agreement.

Clearly, there is a significant gap in analysis and practice, which this paper seeks to address. However, while this paper has highlighted the sustainable development value of democracy as a political system, it has not proposed a comprehensive framework for understanding how to distinguish between the relationship between

market governance mechanisms and different *kinds* of states (more or less democratic). This should be revisited with the benefit of insights from a wider range of market governance mechanisms.

Sustainable development, with its emphasis on participatory decision making and democracy, demands that a normative view is taken of the advantages and disadvantages of certain governance interactions. Market governance mechanisms should not simply be understood as a practical substitute for ineffective public governance. As a next step, the ideas put forward in this paper could usefully be tested and refined in light of experience with other market governance mechanisms. The evolving relationship between market governance mechanisms and public governance, both national and global, has not been adequately considered to date. It matters for the progressive development of each of these areas of endeavour. There is real potential for a pioneering initiative to lead the way.

The evolving relationship between market governance mechanisms and public governance has not been adequately considered to date

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# ISO 26000 AND GLOBAL GOVERNANCE FOR SUSTAINABLE DEVELOPMENT

ISO 26000 is a new international standard on social responsibility developed by the International Organization for Standardization (ISO). It offers guidance across themes including human rights, labour, environment, consumer protection, fair operating practices and community development. The brand recognition of ISO standards, ISO's geographical scope and its credibility among market actors mean that ISO 26000 has the potential to improve the practice of social responsibility in local and global markets. The reach and scale of ISO 26000's impacts has important implications for governance and public policy.

Standards – and market governance mechanisms more broadly – should be analysed not only in terms of their direct impact on environmental, social and economic factors but also in terms of their interaction with policymaking and global governance.

The evolving relationship between market governance mechanisms and public governance, both national and global, has not been adequately considered to date. But this relationship matters for sustainable development.

This paper describes the development of the ISO 26000 standard and discusses the dissonances that emerged in relation to policymaking, global governance and consequently sustainable development. The paper suggests a number of steps that could be taken to maximise the positive contributions of ISO 26000 to global governance for sustainable development and offers lessons for the analysis of other market governance mechanisms.



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