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## Private Standardization in Public International Lawmaking

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# PRIVATE STANDARDIZATION IN PUBLIC INTERNATIONAL LAWMAKING

*Janelle M. Diller\**

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## INTRODUCTION

The interplay between market forces and legal compulsion is as old as the Code of Ur-Nammu,<sup>1</sup> yet the financial incentives for social conformity have never been more patent. In what may be its most ambitious effort yet, the International Organization for Standardization (ISO) recently launched the International Standard ISO 26000:2010 (ISO 26000) on social responsibility (SR), a new voluntary standard providing guidance to any

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\* Deputy Legal Adviser, International Labour Organization (ILO), Geneva, Switzerland. This Article was prepared in the Author's personal capacity and does not represent the policy or opinions of the ILO or the International Labour Office. The Author is grateful for the documentary and factual contributions of Emily Sims of the ILO.

1. The Code of Ur-Nammu, a law code written on a tablet in the Sumerian language around 2100–2050 B.C., institutes monetary fines for bodily injury. Its market-based approach contrasted with the principle of *lex talionis* (eye for an eye, tooth for a tooth) used in Babylonian law to impose a punishment identical to the offense. SAMUEL NOAH KRAMER, *THE SUMERIANS: THEIR HISTORY, CULTURE AND CHARACTER* 84–85 (1963).

organization on good practices in SR.<sup>2</sup> ISO 26000 provides wide-ranging guidance on areas of social and environmental conduct that are relevant to public policy and regulation. The single ISO-branded package offers a new product that markets publicly developed legal norms for commercial use. It operates through a system of voluntary compliance based on market reputation for SR and is largely delinked from public regulatory mechanisms.<sup>3</sup>

This Article explores the emerging role of private international standardization in addressing, on a global scale, public interests and issues traditionally addressed through international public law and policy. It assesses the advantages and limitations of such private action, using the development and launch of ISO 26000 as an example. The Article assesses the purpose for and process of developing ISO 26000. It reviews the factors that motivated ISO's decision to develop such a standard and examines the search for legitimacy and accountability in the "multistakeholder" process leading to its final submission to ISO member bodies for a vote. The analysis focuses in particular on the interaction between private and public actors, including governments and international organizations, and specifically on ISO's cooperation with the International Labour Organization (ILO), the specialized U.N. agency whose mandate is to establish and supervise international labor standards, one of the subjects with which ISO 26000 was integrally concerned.

The Article posits that, where matters of public interest and policy are concerned, more deliberate coordination should guide the interaction between private standardization regimes and public international governance structures to ensure that the actions in both spheres are consistent with the

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2. International Organization for Standardization [ISO], *ISO 26000: Guidance on Social Responsibility*, Ref. No. ISO 26000:2010(E) (2010). The name ISO derives from the Greek word *isos*, meaning "equal." The acronym is used as a name of the organization in all languages. *Discover ISO: ISO's Name*, ISO, [http://www.iso.org/iso/about/discover-iso\\_isos-name.htm](http://www.iso.org/iso/about/discover-iso_isos-name.htm) (last visited Feb. 5, 2012). The object of the organization, devised in a 1946 meeting of delegates of national standards bodies from twenty-five countries in London, was "to facilitate the international coordination and unification of industrial standards." *Discover ISO: ISO's Origins*, ISO, [http://www.iso.org/iso/about/discover-iso\\_isos-origins.htm](http://www.iso.org/iso/about/discover-iso_isos-origins.htm) (last visited Feb. 5, 2012). Although ISO standards are voluntary in principle, in practice they may accrue a compulsory market effect if they become widely accepted by the industry concerned. *Discover ISO: The ISO Brand*, ISO, [http://www.iso.org/iso/about/discover-iso\\_the-iso-brand.htm](http://www.iso.org/iso/about/discover-iso_the-iso-brand.htm) (last visited Feb. 5, 2012).

3. ISO standards are branded as voluntary, market driven, and based on consensus among experts in the field. *Discover ISO: The ISO Brand*, ISO, [http://www.iso.org/iso/about/discover-iso\\_the-iso-brand.htm](http://www.iso.org/iso/about/discover-iso_the-iso-brand.htm) (last visited Feb. 5, 2012). Most ISO standards are purchased by companies for their unique technical content so that they can obtain third-party assessment and certification of their conformity with the standard in order to gain access to, or become more competitive in, the global marketplace. *Discover ISO: Why Conformity Assessment Is Important*, ISO, [http://www.iso.org/iso/about/discover-iso\\_why-conformity-assessment-is-important.htm](http://www.iso.org/iso/about/discover-iso_why-conformity-assessment-is-important.htm) (last visited Feb. 5, 2012); *What Is Conformity Assessment?*, ISO, [http://www.iso.org/iso/resources/conformity\\_assessment/what\\_is\\_conformity\\_assessment.htm](http://www.iso.org/iso/resources/conformity_assessment/what_is_conformity_assessment.htm) (last visited Feb. 5, 2012). In contrast, ISO 26000 is derived and adapted from policy instruments and norms already developed in public international law that serve as the basis for public compliance and oversight mechanisms.

respective rights and duties of the actors involved and effectively promote social and economic progress. This Article proposes that a “Protocol of Good Practice” be developed, using existing international rules and policies, to govern the conduct of private actors and clarify their responsibility for the effects of their conduct in the public sphere. Elements for such an instrument can be found in international human rights and trade law and draw on the recognized duties of private actors and the responsibilities of governments under international and domestic law. The proposed starting point is a principle of coordination for organizing private standardization in relation to public policy fields, which includes ways of determining the priorities to be given to already-initiated public action and of avoiding conflict in the exercise of private mandates and action to give effect to private standards. This approach builds on the comparative advantages of public and private action and encourages complementarity between the two spheres as necessary for effective action in line with the rights and duties of public and private actors under international law. The proposals remain to be tested.

#### I. THE PATH TOWARD AN ISO STANDARD ON SOCIAL RESPONSIBILITY

The decision to develop ISO 26000 moved ISO far beyond its traditional focus on the technical standards that, as a private organization,<sup>4</sup> it establishes for particular goods and services in order to address market needs and facilitate international trade and business activity. ISO has published more than 16,000 international standards, most of which address narrow technical or scientific market needs targeting particular industries. Less numerous but highly visible are ISO’s management systems standards for quality assurance systems (9000 Series) and environmental management systems (14000 Series); third-party certification is among the mechanisms used for assessing conformity with two of the major standards in these

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4. ISO itself is not a public organization. It is a membership organization comprising national standards institutes from more than 150 countries, with one member per country. *Discover ISO: Who Can Join ISO*, ISO, [http://www.iso.org/iso/about/discover-iso\\_who-can-join-iso.htm](http://www.iso.org/iso/about/discover-iso_who-can-join-iso.htm) (last visited Feb. 5, 2012) [hereinafter *Who Can Join ISO*]. ISO currently operates with 162 members and a Central Secretariat in Geneva. *ISO Members*, ISO, [http://www.iso.org/iso/about/iso\\_members.htm](http://www.iso.org/iso/about/iso_members.htm) (last visited Feb. 5, 2012) [hereinafter *ISO Members*]; *Governance and Operations*, ISO, [http://www.iso.org/iso/about/governance\\_and\\_operations.htm](http://www.iso.org/iso/about/governance_and_operations.htm) (last visited Feb. 5, 2012). The members are not delegates of national governments, but may be part of the governmental structure of their own countries or operate subject to governmental mandates; other members are from the private sector and are established by national partnerships of industry associations. See *Who Can Join ISO*, *supra*; *ISO Members*, *supra*. The *ISO Statutes and Rules of Procedure* govern the organization and are “ratified” by its members. ISO, ISO STATUTES AND RULES OF PROCEDURE (14th ed. 2000). For regulatory matters not addressed in the *ISO Statutes and Rules of Procedure*, the law of the country in which ISO has its seat applies. *Id.* art. 22.

series, ISO 9001 and ISO 14001.<sup>5</sup> Both the 9000 and 14000 series apply to all organizations, not just specific industries, although a number of applications to specific sectors have recently evolved.<sup>6</sup> In other situations, where the subject to be addressed is deemed insufficiently mature or too controversial to be developed into an ISO international standard, ISO typically opts instead to develop reports and other products that, unlike international standards, are not exclusive and compete by offering different technical solutions.<sup>7</sup>

ISO 26000 is similar to ISO 9001 and ISO 14001 in that it is intended for use by any organization. It differs, however, from those standards in several important ways. ISO 9001 and ISO 14001 (and their specific applications)<sup>8</sup> take a management system approach, and thus on their faces remain content neutral as to the results achieved.<sup>9</sup> ISO 26000, in contrast,

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5. Although ISO is responsible for developing, maintaining, and publishing standards, third-party certification is carried out independently of ISO by conformity-assessment bodies controlled by national authorities. These bodies are particularly active in industrialized regions of the world; ISO and its partner, the International Electrotechnical Commission (IEC), publish guides for conformity assessment activities. *See* ISO, ISO & CONFORMITY ASSESSMENT 4 (2005), available at [http://www.iso.org/iso/casco\\_2005.pdf](http://www.iso.org/iso/casco_2005.pdf). In ISO's periodic survey of the number and range of certificates, ISO 9001 was reported by ISO to have reached over one million certifications in 2009, the vast majority of which were recorded in Europe and the Far East (nearly eighty-five percent by 2009). *See* ISO, ISO SURVEY OF CERTIFICATIONS 1 (2009), available at <http://www.iso.org/iso/survey2009.pdf> (charting growth and distribution of certifications).

6. Certification standards have adapted ISO's management system approach to specific sectors or aspects thereof, including automotive, customer satisfaction, energy, food safety, information security, health care, local government, medical devices, petroleum and gas, ship recycling, and supply chain security; a risk management standard has also been applied specifically, but is not a certification standard. *Specific Applications*, ISO, [http://www.iso.org/iso/iso\\_catalogue/management\\_and\\_leadership\\_standards/specific\\_applications.htm](http://www.iso.org/iso/iso_catalogue/management_and_leadership_standards/specific_applications.htm) (last visited Feb. 5, 2012).

7. *See Schematic Representation of ISO Deliverables*, ISO, [http://www.iso.org/iso/standards\\_development/processes\\_and\\_procedures/deliverables/deliverables\\_schema-2.htm](http://www.iso.org/iso/standards_development/processes_and_procedures/deliverables/deliverables_schema-2.htm) (last visited Feb. 5, 2012). Where more than one technical solution may be capable of being adopted, the nonexclusive proposals are left open to competition so long as there is no conflict with existing ISO standards. Examples include publicly available specifications (PAS) and technical specifications (TS). *ISO/PAS Publicly Available Specification*, ISO, [http://www.iso.org/iso/standards\\_development/processes\\_and\\_procedures/deliverables/iso\\_pas\\_deliverable.htm](http://www.iso.org/iso/standards_development/processes_and_procedures/deliverables/iso_pas_deliverable.htm) (last visited Feb. 5, 2012); *ISO/TS Technical Specification*, ISO, [http://www.iso.org/iso/standards\\_development/processes\\_and\\_procedures/deliverables/iso\\_ts\\_deliverable.htm](http://www.iso.org/iso/standards_development/processes_and_procedures/deliverables/iso_ts_deliverable.htm) (last visited Feb. 5, 2012). International workshop agreements (IWAs) are intermediate technical specifications that essentially operate as normative documents in the marketplace but may evolve into de facto standards and later be transformed into ISO standards. *International Workshop Agreement*, ISO, [http://www.iso.org/iso/standards\\_development/processes\\_and\\_procedures/deliverables/iso\\_iwa\\_deliverable.htm](http://www.iso.org/iso/standards_development/processes_and_procedures/deliverables/iso_iwa_deliverable.htm) (last visited Feb. 5, 2012).

8. *See supra* note 6.

9. Although the literal requirements of the standards may be content neutral, the indirect impact of the ISO 14000 series on regulatory levels of environmental standards has been the subject of much debate. ILO, *Overview of Global Developments and Office Activities Concerning Codes of Conduct, Social Labelling and Other Private Sector Initiatives Addressing*

prescribes both process- and results-based objectives for organizational conduct. These objectives span a wide variety of subjects essential to public life—human rights, labor practices, the environment, fair operating practices, consumer protection, and community involvement and development. In addition, ISO 26000, like all ISO standards, is for sale: companies and others purchase ISO standards to become more competitive in the global marketplace, in many cases by obtaining third-party certification of their compliance with a standard.<sup>10</sup> Nonetheless, ISO 26000 is expressly intended for guidance only and not for certification, unlike the 9001 and 14001 standards.<sup>11</sup> The lack of certification may render ISO 26000's effects on market actors less immediately evident. In practice, ISO 26000 could either compromise regulatory standards by generating market competition that lowers the expectation for acceptable social behavior below the universal minimum threshold set by governments through international legal standards, or complement them by encouraging socially responsible conduct beyond what is legally required. For example, if private standards set the minimum age for child labor below that fixed by international treaties and legislation, they will reinforce the motivation to hire underage workers; if private standards fix the age higher than that required by law, they might encourage an upward age limit.

ISO 26000 thus represents a new generation of international private standardization initiatives that thrusts the private sphere into a more organized and direct commerce with public policy matters typically subject to public law and regulation. The standard also heralds a pioneering innovation in the manner of approaching private sector duties, including those of businesses and other organizations. Previously, individual private voluntary initiatives, notably in corporate social responsibility (CSR), comprised a relatively informal market, each initiative seeking to enhance companies' market reputation by satisfying codes, social labels, or other initiatives based on diverse combinations of legal norms, industry standards, and personal values.<sup>12</sup> Now, the widespread use of a single one-size-fits-all private

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*Labour Issues*, ¶ 24, ILO Doc. GB.273/WP/SDL/1 (Rev. 1) (Nov. 1998) [hereinafter *Codes of Conduct Overview*], available at <http://www.ilo.org/public/english/standards/re/m/gb/docs/gb273/sdl-1.htm>.

10. See, e.g., *ISO 9001—Quality Management Standard*, ISOQAR, <http://www.isoqar.com/iso9001/qualintro.htm> (last visited Feb. 5, 2012) (offering accreditation and stating that ISO 9001 certification “gives a competitive edge to an organisation’s marketing”).

11. See *supra* note 5 and accompanying text. In the ISO family of standards, there are two general types of standards: recommendations or guidance standards, and the more well-known requirements standards, for which certification is possible. According to the ILO, “[e]nterprises on a world-wide scale have sought third-party certification of conformity” with ISO standards, especially the management systems standards, “but some enterprises in developing countries have reported limitations in access to recognized certification services.” *Codes of Conduct Overview*, *supra* note 9, ¶ 24.

12. See *Codes of Conduct Overview*, *supra* note 9, ¶¶ 10–12. There is no single definition of corporate social responsibility (CSR); however, the term generally implies a form of

international standard poses the risk of guiding private actors in a manner as yet uncoordinated with public regulation on matters of compelling public interest.

## II. THE DECISION TO DEVELOP AN ISO STANDARD ON SOCIAL RESPONSIBILITY

This Article's analysis starts with ISO's expansion of its management systems standards into "management and leadership standards," launched principally through ISO 26000. This point of departure marks a notable shift in focus for ISO; in general, private standardization pursues goals of a technical and objective nature, rather than assessing publicly recognized standards related to governance, development, and human rights, as ISO 26000 does.<sup>13</sup>

In 2005, ISO 26000 was conceived as a proposal for a "guidance standard" applicable to all organizations. Following the usual procedure, the new work item proposal (NWIP) received an affirmative vote by ISO member bodies.<sup>14</sup> Choosing to use a guidance standard rather than a certification standard<sup>15</sup> marked a distinctive step forward from a decade earlier. In 1996, a Swiss nongovernmental organization (NGO), Bread for All, suggested adopting a social management standards series, a proposal that ISO did not then endorse.<sup>16</sup> At the time, voluntary private initiatives in SR were emerging in diverse forms and content (for example, in company codes of conduct, social labels, and investor initiatives).<sup>17</sup> Accreditation organizations and auditing firms sought to capitalize on this market by offering services for verifying responsible conduct, focusing especially on management systems. Indeed, growing "[e]vidence suggest[ed] that companies with

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self-regulation by businesses voluntarily taking levels of responsibility for the impact of their activities beyond that legally required. *See id.*

13. *See infra* Parts V–VI; *see also* *Management and Leadership Standards*, ISO, [http://www.iso.org/iso/iso\\_catalogue/management\\_and\\_leadership\\_standards.htm](http://www.iso.org/iso/iso_catalogue/management_and_leadership_standards.htm) (last visited Feb. 5, 2012).

14. *See infra* notes 35–43 and accompanying text. In general, ISO members decide to develop new standards by voting on a proposal typically developed by ISO national members themselves at the request of specific sectors of business or industry. For nontechnical and cross-sectoral matters, three ISO policy development committees provide guidance. *How ISO Develops Standards*, ISO, [http://www.iso.org/iso/about/how\\_iso\\_develops\\_standards.htm](http://www.iso.org/iso/about/how_iso_develops_standards.htm) (last visited Feb. 5, 2012). The idea that evolved into ISO 26000 was initially discussed in the Committee on Consumer Policy (COPOLCO) as a matter relevant to consumers' views. *What COPOLCO Does*, ISO, [http://www.iso.org/iso/resources/resources\\_consumers/what\\_copolco\\_does.htm](http://www.iso.org/iso/resources/resources_consumers/what_copolco_does.htm) (last visited Jan. 22, 2012). The Technical Management Board (TMB) designated that the Swedish and Brazilian ISO member bodies should be proposed as project leaders (Swedish Standards Institute [SIS] and Associação Brasileira de Normas Técnicas [ABNT] respectively). *See infra* note 66 and accompanying text.

15. *See supra* note 11 and accompanying text.

16. *Codes of Conduct Overview*, *supra* note 9, ¶ 25.

17. *See, e.g., id.* ¶¶ 31 n.29, 68–93.

well-functioning quality assurance management systems (including compliance with the ISO 9000 series) also tend[ed] to have effective systems of implementation for labour-related codes provisions.”<sup>18</sup> Other standards systems of relevance to such outcomes included “financial accounting, environmental accounting, and HSE [health, safety, and environment] management; ILO-recommended occupational health and safety management systems; and environmental management standards of the ISO 14000 series.”<sup>19</sup> Some nongovernmental entities sought to adapt an ISO-standards approach to social standards for enterprise. A U.S.-based research institute, the Council for Economic Priorities, launched a generic management system standard for enterprise, with a third-party certification process, “Social Accountability 8000” (SA8000), in the late 1990s. SA8000 was one of the first standards to be explicitly based in part on ILO conventions and recommendations and to be inspired by the generic ISO model for management systems.<sup>20</sup>

By the turn of the twenty-first century, as international legal norms and guidelines became more commonly used as points of reference to define the goals embedded in company codes and social labels, the disparate content of initiatives became less pronounced.<sup>21</sup> The United Nations and other public international organizations developed initiatives jointly with the private sector to encourage complementarity. The U.N. Secretary-General, for example, developed the U.N. Global Compact to encourage businesses and other stakeholders to align their ongoing activities with ten principles drawn from internationally recognized human rights, labor, and environmental instruments of a legal and policy nature.<sup>22</sup> The Global Reporting Initiative

18. *Id.* ¶ 63.

19. *Id.* ISO’s various management systems “share[d] basic steps in common, including setting a clear and detailed enterprise policy, allocating managerial resources for effective dissemination of the policy (including translation), developing and implementing tools for monitoring, reporting, and taking corrective action, including training programmes.” *Id.*

20. Unlike the ISO accreditation system that engages multiple national accreditation bodies, SA8000 certification was offered only through an accreditation agency set up by the Council for Economic Priorities working with private inspection enterprises that it accredited under nonpublic criteria. See ISO, *SA8000: Management System Standard for ‘Social Accountability,’* at 13, ISO 9000 NEWS 5/1998 (1998). The accredited agencies themselves were not necessarily certified as in compliance with SA8000. *Id.*

21. See, e.g., Amy Lehr, *Old and New Governance Approaches to Conflict Minerals: All Are Better than One*, 52 HARV. INT’L L.J. ONLINE 148, 150–53 & n.2 (2010), [http://www.harvardilj.org/2010/11/online\\_52\\_lehr/](http://www.harvardilj.org/2010/11/online_52_lehr/). The normative convergence evident among the private rule-making efforts in the field of CSR has been hailed as an emerging “lex mercatoria” symptomatic of a “new governance.” Joe W. (Chip) Pitts III, *Corporate Social Responsibility: Current Status and Future Evolution*, 6 RUTGERS J.L. & PUB. POL’Y 334, 341 (2009). For the earlier disparities in content, see *Codes of Conduct Overview*, *supra* note 9, ¶¶ 46–59.

22. The U.N. Global Compact describes itself as “a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption.” U.N. GLOBAL COMPACT, <http://www.unglobalcompact.org/> (last visited Feb. 5, 2012). For an



(GRI)—which originated from a U.S. nonprofit organization, the Coalition for Environmentally Responsible Economies (CERES), and is now a key collaborator with the U.N. Environment Programme (UNEP)—established an assessment framework for business responsibility as a public-private coalition.<sup>23</sup> The U.N. Subcommission on the Promotion and Protection of Human Rights, a U.N. Charter-based body, undertook to codify human rights “norms” for transnational and other businesses,<sup>24</sup> an effort that was eventually superseded in 2011 by a framework of Guiding Principles on Business and Human Rights intended to apply to all states and businesses, regardless of type or size.<sup>25</sup>

In 2001, ISO reported consumer concerns on what it termed the “social integrity” of corporations’ operations in the global marketplace.<sup>26</sup> It then launched a feasibility study and online forum on the value of CSR standards through its Committee on Consumer Policy (COPOLCO).<sup>27</sup> By 2004, a

annual fee, companies join the Global Compact and participate in exchanges of experience with other companies and interested organizations, and have access to Global Compact’s management tools and resources. *How to Participate*, U.N. GLOBAL COMPACT, [http://www.unglobalcompact.org/HowToParticipate/Business\\_Participation/index.html](http://www.unglobalcompact.org/HowToParticipate/Business_Participation/index.html) (last visited Feb. 5, 2012).

23. *What Is GRI?*, GLOBAL REPORTING INITIATIVE [GRI], <https://www.globalreporting.org/information/about-gri/what-is-GRI/Pages/default.aspx> (last visited Feb. 26, 2012).

24. Comm. on Human Rights, Subcomm. on the Promotion and Prot. of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 55th Sess., Aug. 13, 2003, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

25. Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31, Annex (Mar. 21, 2011) (by John Ruggie).

26. Malaysian Ass’n of Standards Users, *SR Background*, MALAY. OFFICIAL HOMEPAGE ON SOC. RESP. (Sept. 25, 2008, 10:35 AM), [http://www.standardsusers.org/mysr/index.php?option=com\\_content&view=article&id=47&Itemid=54](http://www.standardsusers.org/mysr/index.php?option=com_content&view=article&id=47&Itemid=54). Although ISO has not defined the term “social integrity,” the later report of its Advisory Group expressed some concern that voluntary SR initiatives could actually act as a substitute for more meaningful actions or responses and thereby delay more substantive progress on some issues. ISO ADVISORY GRP. ON SOC. RESPONSIBILITY, WORKING REPORT ON SOCIAL RESPONSIBILITY 73 (2004) [hereinafter ADVISORY GROUP REPORT], available at [http://isotc.iso.org/livelink/livelink/fetch/8929321/8929339/8929348/3935837/3974906/ISO\\_SR\\_Advisory\\_Group\\_-\\_Report.pdf?nodeid=3978167&vernum=-2](http://isotc.iso.org/livelink/livelink/fetch/8929321/8929339/8929348/3935837/3974906/ISO_SR_Advisory_Group_-_Report.pdf?nodeid=3978167&vernum=-2).

27. ISO Comm. on Consumer Policy COPOLCO Workshop, Port-of-Spain, Trin. & Tobago, June 10, 2002, *Corporate Social Responsibility: Concepts and Solutions*, CIF 02-062, available at [http://inni.pacinst.org/inni/corporate\\_social\\_responsibility/Proceedings\\_of\\_COPOLCO\\_CSR\\_workshop\\_Trinidad\\_meeting.pdf](http://inni.pacinst.org/inni/corporate_social_responsibility/Proceedings_of_COPOLCO_CSR_workshop_Trinidad_meeting.pdf); see also ISO Working Grp. on Soc. Responsibility [WGSR], *Background*, ISO, [http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/07\\_gen\\_info/backg.html](http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/07_gen_info/backg.html) (last updated Sept. 20, 2010). In an exceptional step, internal preparatory documents of ISO 26000 were archived for public use. See ISO WGSR, *Committee 05. Working Area*, ISO, <http://isotc.iso.org/livelink/livelink?func=ll&objId=3935837&objAction=browse&sort=name> (last visited Feb. 5, 2012).

“multistakeholder” Advisory Group established by the ISO Technical Management Board (ISO/TMB)<sup>28</sup> issued an extensive report and final recommendations in a non-consensus-based process. With a single dissenting voice, the Advisory Group proposed a standard on “social responsibility” rather than one on “CSR,” subject to specific conditions recognizing that ISO did not have the authority or legitimacy to set social obligations or expectations that are properly defined by governments and intergovernmental organizations (IGOs).<sup>29</sup> Although ISO rules emphasize consensus decisions wherever possible, it is notable that this decision on a fundamental new direction in ISO’s standard setting was taken with a dissenting voice.

In a determinative step, the ISO/TMB concluded that “due to the complexity and fast-evolving nature of the subject, it is not feasible to harmonize substantive social responsibility commitments.”<sup>30</sup> The ISO/TMB resolution followed the expanded scope first proposed by the Advisory Group and recommended an SR standard for all organizations rather than a standard

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28. ISO/TMB Res. 35/2004 (June 24–25, 2004), available at [http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/02\\_news/resolution35.html](http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/02_news/resolution35.html); Press Release, ISO, ISO Weighs Results of Conference on Social Responsibility (June 24, 2004), <http://www.iso.org/iso/pressrelease.htm?refid=Ref921>. The fourteen-member Technical Management Board (ISO/TMB), advises the twenty-member ISO Council on organization, coordination, strategic planning, and programming of ISO’s technical work. *ISO Council*, ISO, [http://www.iso.org/iso/about/structure/structure\\_council.htm](http://www.iso.org/iso/about/structure/structure_council.htm) (last visited Feb. 5, 2012). Although the ISO Council controls the operations of ISO through its officers and twenty elected-member bodies, the ISO/TMB is responsible for all aspects of the technical work, including liaising with other standardization bodies, examining proposals for new fields of ISO activity, and establishing and dissolving technical committees. *Technical Management Board (TMB)*, ISO, [http://www.iso.org/iso/standards\\_development/governance\\_of\\_technical\\_work/technical\\_management\\_board.htm](http://www.iso.org/iso/standards_development/governance_of_technical_work/technical_management_board.htm) (last visited Feb. 5, 2012). Overall strategic direction of ISO is referred to voting members who meet for an annual General Assembly. *General Assembly*, ISO, [http://www.iso.org/iso/about/structure/structure\\_ga.htm](http://www.iso.org/iso/about/structure/structure_ga.htm) (last visited Feb. 5, 2012).

29. The scope was expanded beyond business ostensibly to avoid capture of the new standard as an accountability tool by NGOs. ADVISORY GROUP REPORT, *supra* note 26, at 68; ISO, *Recommendations to the ISO Technical Management Board*, at 1, ISO Doc. ISO/TMB AG CSR N 32 (Apr. 30, 2010), available at [http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/3974906/ISO\\_SR\\_Advisory\\_Group\\_-\\_Recommendations\\_to\\_the\\_ISO\\_Technical\\_Management\\_Board.pdf?nodeid=4274012&vernum=-2](http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/3974906/ISO_SR_Advisory_Group_-_Recommendations_to_the_ISO_Technical_Management_Board.pdf?nodeid=4274012&vernum=-2). In a minority opinion, the World Wildlife Federation expressed concerns about the lack of clarity regarding the value added to existing CSR initiatives, the absence of recognition of the importance of environmental issues, the proposed scope beyond business, the necessity for more diverse stakeholder engagement, and the need for transparency and public reporting on implementation of any such ISO deliverable. *Id.* at 3–4.

30. ISO/TMB Res. 35/2004, *supra* note 28 (establishing an ISO/TMB task force to develop a new work item proposal for the International Standard under specific conditions including an agreement between ISO and the ILO to “govern cooperation between ISO and ILO in the area of social responsibility”). The ISO/TMB resolution followed an ISO Conference on Social Responsibility held on June 21–22, 2004, which reported general consensus on moving forward. Press Release, ISO, *supra* note 28.

focused on CSR.<sup>31</sup> The decision was predicated on “the pre-conditions stipulated by the [Advisory Group] for ISO activity in the field of SR” that “constitute a package.”<sup>32</sup> In noting these preconditions, the ISO/TMB acknowledged that SR involved a number of questions “qualitatively different from [those] traditionally . . . dealt with by ISO” and recognized the “role of governments and intergovernmental organizations [in setting] social obligations or expectations.”<sup>33</sup> Although international instruments adopted by IGOs were recognized, the ISO/TMB determined that “there is scope for private voluntary initiatives in the field of SR” and supported developing an agreement with ILO to govern cooperation between ISO and ILO in the area of SR and to adjust ISO processes “where necessary to ensure meaningful participation by the full range of interested parties.”<sup>34</sup>

### III. THE PROCESS OF DEVELOPING ISO 26000

In October 2004, ISO circulated to ISO member bodies for a vote an NWIP on SR, recalling that the Advisory Group had deliberated about ISO’s potential involvement in the field of CSR.<sup>35</sup> Drawing on the founding resolution of the ISO/TMB and the Advisory Group’s work, the justification for a new standard noted the “market confusion that may be caused by the steadily increasing number of SR initiatives,” concluding that the “need is urgent” and that an international standard “may encourage organizations that know and have good experience with the ISO ‘brand,’ to operationalize their SR commitments.”<sup>36</sup> The NWIP’s goal was a document that was “flexible enough to support current initiatives, conventions and tools as well as future developments in this field.”<sup>37</sup> The letter addressed to ISO members accompanying the NWIP noted that the ISO/TMB had recognized “that ISO will be entering into a new area of standardization, in which it will need to engage new groups of stakeholders,” and had “decided that, the work would be conducted in a working group directly under the responsibility of the TMB,” which would “require some adaptation of ISO’s normal working methods.”<sup>38</sup> The NWIP stated that the International Standard should aim at providing

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31. ISO/TMB Res. 35/2004, *supra* note 28.

32. *Id.*

33. *Id.*

34. *Id.*

35. Letter from M.A. Smith, TMB Secretariat, ISO, to ISO Member Bodies (Oct. 7, 2004) (enclosing for voting the New Work Item Proposal—Social Responsibility with Annexes); ISO, *New Work Item Proposal—Social Responsibility*, ISO Doc. ISO/TMB N 26000 (Oct. 7, 2004), [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) [hereinafter *NWIP*]. For the Advisory Group and founding resolution, see *supra* notes 26, 29–30, and accompanying text.

36. *NWIP*, *supra* note 35, Annex B, §§ d–e.

37. *Id.* Annex B, § d.

38. *Id.* at 1.

“guidance to enable an organization to formulate SR systems taking into account communication of stakeholders. It is not intended for certification purpose [sic], or regulatory or contractual use.”<sup>39</sup> Nonetheless, the ISO/TMB was obliged later to clarify that the standard was not to be a management system standard.<sup>40</sup> The NWIP notably oversimplified the Advisory Group’s approach by summarizing only that the Group’s “indication that ISO should address what is non-legal (leaving the legal issues to inter-governmental organizations) may not be helpful.”<sup>41</sup> Rather, in discussing issues that may affect the feasibility of the standard setting, the Advisory Group Report itself had debated at some length about the capacity of ISO to undertake such a process and whether its procedures were flexible enough to permit the necessary reliance on the expertise of IGOs and others outside of national standards bodies.<sup>42</sup>

Following a positive vote on the NWIP by ISO members,<sup>43</sup> the ISO/TMB established a Working Group on Social Responsibility (WGSR).<sup>44</sup> In the five-year drafting process that followed, the ISO WGSR involved approximately 450 experts, including government representatives, several hundred observers from nearly one hundred countries, and a large number of IGOs and NGOs.<sup>45</sup> ISO 26000’s development brought with it the search for legitimacy through representativity,<sup>46</sup> fairness in operating

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39. *Id.* Annex A, § 4.

40. ISO/TMB Res. 38/2005 (undated), available at [http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/02\\_news/Technical%20Management%20Board%20resolution%2038.pdf](http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/02_news/Technical%20Management%20Board%20resolution%2038.pdf).

41. *NWIP*, *supra* note 35, Annex B, § c (referring to the ADVISORY GROUP REPORT, *supra* note 26, at 86).

42. ADVISORY GROUP REPORT, *supra* note 26, at 84.

43. ISO/TMB, *Table of Replies on the New Work Item Proposal Social Responsibility ISO/TMB N 26000*, ISO Doc. ISO/TMB/WG SR N 7 (Feb. 25, 2005), available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=3974912&objAction=Open&vernum=1>. Of the thirty-seven Participating members (P-members) replying, four voted “No” and twenty-nine voted “Yes” to adding the new work item to ISO’s agenda. *Id.* at 1–2. The member bodies that expressly recognized the need for closer coordination with the ILO were from Canada, Germany, Russia, and the United States. *Id.* at 6, 9, 14, 16; see also ISO WGSR, Salvador, Braz., March 2005, *Report of the Secretariat: First Meeting of ISO/TMB/WG Social Responsibility*, [http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/3973638/3973639/4243588/Annex\\_B%2C\\_Report\\_of\\_the\\_Secretariat.pdf?nodeid=4243699&vernum=-2](http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/3973638/3973639/4243588/Annex_B%2C_Report_of_the_Secretariat.pdf?nodeid=4243699&vernum=-2) (presenting voting results to the first meeting of the WGSR).

44. See ISO/TMB Res. 35/2004, *supra* note 28. The WGSR started its work by reviewing comments of national member bodies and nominated experts on its organization of work. See ISO, *Proposal for the Organizational Structure of and Terms of Reference for the ISO/TMB/WG Social Responsibility*, at 4–5, ISO Doc. ISO/TMB/WG SR N 3 (Jan. 20, 2005) [hereinafter *Proposal for Organizational Structure*], available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=3974908&objAction=Open&vernum=1>.

45. *ISO 26000 Project Overview*, ISO, [http://www.iso.org/iso/iso\\_catalogue/management\\_and\\_leadership\\_standards/social\\_responsibility/sr\\_iso26000\\_overview.htm](http://www.iso.org/iso/iso_catalogue/management_and_leadership_standards/social_responsibility/sr_iso26000_overview.htm) (last visited Feb. 5, 2012).

46. See *infra* Part III.A.

procedures,<sup>47</sup> coherence in normative interaction with internationally recognized legal standards and guidance,<sup>48</sup> and continuity in the postpublication stage.<sup>49</sup>

### A. Question of Representativity

To address the broad swath of issues touching governmental and public interests in the development of ISO 26000, ISO launched an elaborate system for stakeholder participation<sup>50</sup> in the process based on six stakeholder categories: consumers; government; industry; labor; NGO; and services, support, research, and others.<sup>51</sup> This deliberate attempt to broaden participation in developing ISO 26000 beyond the usual participation of governments, industry, and consumers was a response to the recognition of the relatively narrow industrialized-country base of dominant ISO interests and actors. Although the membership of ISO includes much of the world, the actual influence held among ISO's members is weighted toward industrializing and developed country members.<sup>52</sup> Correspondent and subscriber members, with less-than-full member-body status and fewer voting rights,

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47. See *infra* Part III.B.

48. See *infra* Part III.C.

49. See *infra* Part III.D.

50. ISO 26000 Project Overview, *supra* note 45.

51. ISO WGSR, *Guidance on Stakeholder Categories in the ISO/TMB/WG SR*, at 1, ISO Doc. ISO/TMB/WG SR N 48 rev. 1 (Sept. 30, 2005) [hereinafter *Guidance on Stakeholder Categories*], available at [http://www.iso.org/sites/ConsumersStandards/en/pdf/N048\\_rev1.pdf](http://www.iso.org/sites/ConsumersStandards/en/pdf/N048_rev1.pdf). This guidance recognized the "importance of ensuring balanced participation" and for that purpose excluded those with "inherent conflict[s] of interest," such as "enterprises and other organizations that offer services related to standardization, including certification, registration, accreditation and related consulting services (SRI services)." *Id.* at 1, 5. For the definition of "labor," the WGSR used the definition of "workers' representatives" in ILO Convention No. 135 because this "definition provides the basis for an understanding at the international level as to what constitute genuine workers' organizations . . . in any specific situation or country. National standard bodies should invite the most representative workers' organization to nominate an expert." *Id.* at 6 (quoting ILO Convention No. 135 Concerning Protection and Facilities to Be Afforded to Workers' Representatives in the Undertaking art. 3, adopted June 23, 1971, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C135>). When in doubt, the guidance suggested consulting the International Trade Union Confederation (ITUC) or ILO, both of which were involved in the process. *Id.* For NGOs, the guidance recommended selecting only nonprofit associations with public interest objectives related to SR topics or any of its component issues and requiring that sources of funding be revealed and in particular that grants or membership dues from, or fee-based services to, for-profit entities "should not be a significant proportion of an NGO's overall funding or compromise the autonomy of its governance." *Id.* at 7.

52. The need to improve the participation of developing countries in ISO's processes is addressed explicitly in the ISO Action Plan for Developing Countries 2005–2010. ISO, ISO ACTION PLAN FOR DEVELOPING COUNTRIES 2005–2010, at 2 (2004), available at [http://www.iso.org/iso/prods-services/otherpubs/pdf/actionplan\\_2005-en.pdf](http://www.iso.org/iso/prods-services/otherpubs/pdf/actionplan_2005-en.pdf).

are almost entirely from developing countries.<sup>53</sup> Similarly, the great majority of technical work, including formation of standards, is done by developed country members that are more likely to have sufficient financial resources to send groups of experts to meetings and support the experts' work on standards.<sup>54</sup>

At the international level, experts were appointed through ISO's members, the national standards bodies (NSBs), on the basis of ISO-crafted criteria. At the national level, the stakeholder categories were to be represented in so-called mirror committees, established by the national member bodies, that were responsible for developing "national positions" on the draft standard in its progressive phases, including the Committee Draft (CD) or Draft International Standard (DIS). ISO member bodies were to transmit the mirror committees' positions to ISO.<sup>55</sup> At both levels, it was the ISO national member bodies that nominated the experts or other individuals in the remaining stakeholder categories.<sup>56</sup> Thus, the quality of participation ultimately relied on the way in which those selections were made by the NSBs. It was this aspect of the process that was challenged in the end as ineffective by the International Organization of Employers (IOE), representing a constituent group of ILO. As the IOE noted, "the experts in the ISO/TMB

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53. *Id.* (noting that developing countries are one hundred percent of subscriber members and ninety-four percent of correspondent members). There are three categories of ISO membership: member bodies, correspondent members, and subscriber members. Only a member body, which is considered the national body "most representative of standardization in its country," is entitled to participate and exercise full voting rights on any ISO technical committee or policy committee. *Member Bodies*, ISO, [http://www.iso.org/iso/about/iso\\_members/member\\_bodies.htm](http://www.iso.org/iso/about/iso_members/member_bodies.htm) (last visited Feb. 5, 2012). For difficulties facing developing country enterprises in the context of various standards requirements, see generally World Trade Org. [WTO] Comm. on Technical Barriers to Trade, *Background Paper by the Secretariat: Restrictive Trade Effects of Standards, Technical Regulations and Conformity Assessment Procedures*, G/TBT/W/42 (Apr. 28, 1997).

54. See ILO Director-General, *Report of the Director-General: Fifth Supplementary Report: Collaboration Between the International Labour Organization and the International Organization for Standardization (ISO) Addendum: General Information on the International Organization for Standardization (ISO)*, ¶¶ 2-3 & nn.2-3, ILO Doc. GB.298/15/5 (Mar. 9, 2007) (observing that developing country members "held only 2 per cent of the secretariats of all ISO technical committees, subcommittees and working groups").

55. ISO WGSR, *Resolutions from the Third Meeting of ISO/TMB/WG SR, Lisbon, Portugal 2006-05-15-19*, Res. 10, ISO Doc. ISO/TMB/WG SR N 74 (May 19, 2006) [hereinafter *Third Meeting of the WGSR*], available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=5332590&objAction=Open>. The WGSR agreed on "the need to have active mirror committees structured in accordance with the guidance provided by WG SR and authorize[d] TG [Task Group] 1 to survey experts and NSBs concerning the operation of mirror committees." *Id.*

56. At the international level all ISO national member bodies were to nominate up to six experts and six observers to the WGSR, and to make every reasonable effort to nominate one from each of the six stakeholder categories, with limited exceptions permitted. ISO WGSR, *Operating Procedure on Registration of Experts and Observers*, ¶ 1, ISO Doc. ISO/TMB/WG SR N 73 (May 19, 2006), available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=8217875&objAction=Open&vernum=1>.

WGSR were selected by the ISO national standards bodies, in many cases with little or no consultation with the stakeholder group they were selected to represent. Indeed, experts were not even required to belong to the stakeholder group they were supposedly representing.”<sup>57</sup> The resolutions of the WGSR and ISO/TMB meetings throughout the process similarly evidence a preoccupation with the state of representation in the process. Repeated calls were made through the process for identification of major organizations or groups missing from the process,<sup>58</sup> and the need to increase local legitimacy through stakeholder participation in the mirror committees was stressed.<sup>59</sup>

To assist in financing developing country participation, the ISO WGSR set up a system for external donor financing through a trust fund, which received contributions from a handful of governments and from another handful of multinational companies.<sup>60</sup> The financing mechanism early on faced challenges in terms of the principles on which donations would be accepted and sponsorship would be implemented. The mechanism’s stated purpose was to “increase and broaden stakeholder involvement to ensure the credibility and enable effective participation in the ISO 26000 standardiza-

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57. Int’l Org. of Employers [IOE], *IOE Position on the Final Draft International Standard (FDIS) of the ISO 26000 Guidance on Social Responsibility* (Sept. 8, 2010), available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=3935837&objAction=browse&sort=name> (included in file titled “x Comments received on ISO FDIS 26000.zip”).

58. ISO WGSR, *Resolutions from the Second Meeting of ISO/TMB/WG SR, Bangkok, Thailand 2005-09-26–30*, Res. 7, ISO Doc. ISO/TMB/WG SR N 50 (Sept. 30, 2005) [hereinafter *Second Meeting of the WGSR*], available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=4545341&objAction=Open>.

59. The WGSR repeatedly recalled the need for participation of different stakeholders at the national level in order to increase “local legitimacy of the ISO SR process for the subsequent implementation of the standard,” as a lack of sufficient participation of all stakeholder categories was a persistent problem. ISO WGSR, *Survey on ISO 26000 Mirror Committees*, at 1, ISO Doc. ISO/TMB/WG SR N 78 (undated) [hereinafter *Survey on ISO 26000 Mirror Committees*], available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=5773211&objAction=Open>; see also ISO WGSR, *Resolutions from the 5th Meeting of ISO/TMB/WG SR, Vienna, Austria, 2007-11-05–09*, Res. 9, ISO Doc. ISO/TMB/WG SR N 132 (Nov. 9, 2007) [hereinafter *5th Meeting of the WGSR*], available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=6936335&objAction=Open>; ISO WGSR, *Resolutions from the 7th meeting of ISO/TMB/WG SR, Quebec, Canada, 2009-05-18–22*, Res. 8, ISO Doc. ISO/TMB/WG SR N 170 (May 23, 2009), available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=8157452&objAction=Open>. Along with its national consensus position, each ISO member body was requested to submit a list of the stakeholder groups that participated in developing the national position, explaining why one or more stakeholder categories did not participate, and (where it existed) transmit any substantive opposition from national stakeholder groups, detailing the reason for the opposition. ISO, *ISO/TMB/WG SR Operating Procedure Providing Guidance on National Input to the WG SR*, at 2, ISO Doc. ISO/TMB/WG SR N 131 rev 1 (Sept. 5, 2008) [hereinafter *WGSR Guidance on National Input*], available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=8217889&objAction=Open>.

60. *Third Meeting of the WGSR*, *supra* note 55, Res. 8–9. See *infra* note 65 and accompanying text.

tion in the development of the SR standard<sup>61</sup> and “to fund involvement of under-represented stakeholders from developed and developing countries.”<sup>62</sup> The operating principles of the fund emphasized diversity, independence, and transparency in receiving and recognizing donations, and a special procedure was instituted to decide on acceptability of donations over \$10,000.<sup>63</sup> The principles of sponsorship gave priority to prespecified stakeholder categories addressing the problem of underrepresented categories and regions, and a screening process and criteria were put in place to seek balance, continuity, and value of contribution among those who received the funds.<sup>64</sup> The donors were publicly and repeatedly thanked.<sup>65</sup>

## B. Operational Issues

### 1. Operating Structures

The leadership structures and operating procedures of the working group that developed ISO 26000 were influential in determining the scope and content of the Final Draft International Standard (FDIS). A hybrid system of appointment and election existed, but appointment was the rule for the most influential positions.<sup>66</sup> The ISO/TMB itself appointed the Chairs of

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61. ISO, ISO/TMB/WG ON SOCIAL RESPONSIBILITY: SR TRUST FUND § 2.1 (2006) [hereinafter SR TRUST FUND], available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=5732558&objAction=Open>.

62. *Third Meeting of the WGSR*, *supra* note 55, Res. 8.

63. SR TRUST FUND, *supra* note 61, §§ 2.2–6.

64. *Id.* §§ 3.1–4.

65. Donors thanked in 2006 included the Finnish Government, Swedish International Development Cooperation Agency (SIDA), Norwegian Agency for Development Cooperation (NORAD), Japanese Industrial Standards Committee (JISC), Swiss State Secretariat on Economic Affairs (SECO), Austrian Development Agency (ADA), and others. *Third Meeting of the WGSR*, *supra* note 55, Res. 7. By 2007, mention of thanks included companies: Novo Nordisk A/S and Suzano Papel e Celulose SA (whose representative was the Chair of the WGSR). ISO WGSR, *Resolutions from the 4th Meeting of ISO/TMB/WG SR, Sydney, Australia, 2007-01-29–2007-02-02*, Res. 6, ISO Doc. ISO/TMB/WG SR N 107 (Feb. 2, 2007) [hereinafter *4th Meeting of the WGSR*], available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=6161021&objAction=Open>. Later that year, other companies were noted—namely Petrobras and SONY—as well as the Dutch Minister of Foreign Affairs. *5th Meeting of the WGSR*, *supra* note 59, Res. 5. In 2008, the Standards Council of Canada was thanked for contributing to the Trust Fund. ISO WGSR, *Resolutions from the 6th Meeting of ISO/TMB/WG SR, Santiago, Chile, 2008-09-01–05*, Res. 12, ISO Doc. ISO/TMB/WG SR N 154 (Sept. 5, 2008), available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=7571477&objAction=Open>.

66. See, e.g., ISO, PARTICIPATING IN THE FUTURE INTERNATIONAL STANDARD ISO 26000 ON SOCIAL RESPONSIBILITY § 1.3 (2006), available at [http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/3974906/Participating\\_in\\_the\\_future\\_International\\_Standard\\_ISO\\_26000\\_on\\_Social\\_Responsibility.pdf?nodeid=5286037&vernum=-2](http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/3974906/Participating_in_the_future_International_Standard_ISO_26000_on_Social_Responsibility.pdf?nodeid=5286037&vernum=-2) (“TMB . . . assigned the leadership of the working group collectively to Brazil (ABNT) and Sweden (SIS.)”); ISO WGSR, *Selection Process for TG Leadership*, ISO Doc. ISO/TMB/WG SR N 46



the WGSR, which consisted of a “twinned” leadership between developing and developed countries.<sup>67</sup> For the second-highest positions, the WGSR Secretariat issued calls for nominations of task group leaders that included qualification criteria, but there was no transparency in the review of nominations.<sup>68</sup> After the publication of ISO 26000, the “twinned approach” to leadership, done on a selective basis, survived as ISO’s postpublication organization for ISO 26000, a result in line with the request made by the WGSR itself at its final meeting.<sup>69</sup>

In the drafting structure, the Chairs of the WGSR were assisted by a Chairmen’s Advisory Group (CAG) composed of a hybrid of appointed and elected members. The CAG included the WGSR Chairs and Secretaries, the Task Group (TG) conveners, and up to two representatives from each stakeholder category.<sup>70</sup> The process for selection of these representatives was to be managed by the stakeholder group itself, which was instructed only to follow the “twinning” principle of selecting one representative each from a developed and a developing country and to provide “information to WG to justify leadership role [sic] including a description of the selection process.”<sup>71</sup> The WGSR “recommend[ed] the stakeholder groups to seek balance on other criteria (e.g. gender, geography and expertise).”<sup>72</sup> Additional repre-

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(Sept. 29, 2005) [hereinafter *Selection Process for TG Leadership*], available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=8217865&objAction=Open>.

67. ISO/TMB Res. 35/2004, *supra* note 28. The twinning concept involved sharing of secretariats and chairmanships by developing and developed countries. The appointed WG Chairs were corporate representatives: Mr. Jorge E.R. Cajazeira of Suzano Papel e Celulose, Brazil, was Chair; Ms. Catarina Munck af Rosenschöld of Volvo Car Corporation, Sweden, was Vice-Chair. The Secretaries were representatives of SIS Sweden and ABNT Brazil. *Proposal for Organizational Structure*, *supra* note 44, at 3, 5.

68. *Selection Process for TG Leadership*, *supra* note 66. Review was done by the WGSR Chairs in consultation with the Chairmen’s Advisory Group (CAG). *Proposal for Organizational Structure*, *supra* note 44, at 3.

69. ISO WGSR, *Resolutions from the 8th Meeting of ISO/TMB/WG SR, Copenhagen, Denmark, 2010-05-17-21*, Res. 9, ISO Doc. ISO/TMB/WG SR N 193 (May 21, 2010) [hereinafter *8th Meeting of the WGSR*], available at <http://www.iso26000cph2010.dk/graphics/Samfundsansvar.dk/iso26000cph/documents/N193%20Draft%20Resolutions%20Copenhagen%20May%202010.pdf> (proposing terms of reference and composition); ISO WGSR, *Post Publication Organization*, at 1, ISO Doc. ISO/TMB/WG SR N 192 rev 1 (May 21, 2010) [hereinafter *Post Publication Organization*], available at [http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/8742970/N192\\_rev1%2C\\_Post\\_Publication\\_Organisation.pdf?nodeid=9245762&vernum=-2](http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/8742970/N192_rev1%2C_Post_Publication_Organisation.pdf?nodeid=9245762&vernum=-2). See *infra* notes 165–166 and accompanying text.

70. *Proposal for Organizational Structure*, *supra* note 44, at 3–4.

71. ISO WGSR, *Resolutions from the First Meeting of ISO/TMB/WG SR, Salvador, Brazil 2005-03-07-11*, Res. 2, ISO Doc. ISO/TMB/WG SR N 15 (Mar. 17, 2005) [hereinafter *First Meeting of the WGSR*], available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=3973643&objAction=Open>.

72. *Id.* The function of the CAG was advisory only, not decision making. It assisted the chairs and secretariats of the WGSR in coordination, planning, and steering and advised on strategic and critical issues, balanced representation in the TGs, newly identified developments within the subject area, and gaps between those developments and WGSR outcomes. *Id.* Res. 4.

sentatives to the influential CAG were designated by the WGSR Chair “if necessary to ensure balance of representation (gender, regional distribution, etc.)”<sup>73</sup> Thus, neither the stakeholder groups’ selection processes nor the process used by the Chair to designate additional representatives were fixed or reported in a transparent way.

## 2. Operating Procedures

As a result of the unusual scope of ISO 26000 in relation to ISO’s traditional focus on technical standards, a tension persisted during the development of ISO 26000 between the use of the established procedures for standards development under the ISO/International Electrotechnical Commission (IEC) Directives—and the use of ad hoc procedures “over and above” the usual procedures, even when used only as exceptions or exemptions to the established procedures.<sup>74</sup> General operating procedures based on the ISO/IEC Directives were set out at the first meeting of the WGSR,<sup>75</sup> but special procedures were submitted a number of times as the process evolved, subject to approval by the ISO/TMB.<sup>76</sup> In general, decision making followed the rule of consensus; no voting was permitted in the WGSR or its subsidiary bodies. The WGSR used the definition of “consensus” in the ISO/IEC Directives:

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73. *Id.* Res. 1.

74. *NWIP*, *supra* note 35, Annex E, §§ 1.1, 4 (providing that any exception or exemption requests must be accompanied by a rationale and submitted to the ISO/TMB). The ISO/IEC Directives were adopted in the context of ISO’s earlier generation of standards that require technical expertise and thus the participation of technical experts.

75. *See First Meeting of the WGSR*, *supra* note 71, Res. 21–22. The operating procedures were subject to comments received before the first meeting, and the recommendations of the Operating Procedures TG that had been co-chaired by the ISO Central Secretariat, were submitted to the WGSR for approval. *Id.* Res. 22. The WGSR resolved that the foundation for its operating procedures was Part 1 of the ISO/IEC Directives. *Id.* Res. 21.

76. The need for ad hoc procedures beyond the procedures established in the ISO/IEC Directives surfaced almost immediately. *See generally* ISO WGSR, *SR WG Procedures—Compilation*, ISO Doc. ISO/TMB/WG SR N XXX (Jan. 28, 2009) [hereinafter *WGSR Procedures*], available at [http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/8162140/WG\\_SR\\_procedure\\_compilation\\_%2D\\_2009%2D01.pdf?nodeid=7939915&vernum=-2](http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/8162140/WG_SR_procedure_compilation_%2D_2009%2D01.pdf?nodeid=7939915&vernum=-2). For example, definitions of stakeholder categories and instruction to national standards bodies for the selection of participants were subjects of written guidance. *Guidance on Stakeholder Categories*, *supra* note 51, at 1 (“This guidance is a work in progress and, where necessary and based on experience, the ISO/TMB/WG/SR may in the future provide additional or revised guidance for any of these stakeholder categories.”). The participation rights of observers, especially where experts believed the rights granted to an observer diluted their own influence, resulted in the WGSR Chairs creating a new procedure for notification and consultation with the expert (it was unclear whether the observer had an opportunity to be heard). ISO WGSR, *Operating Procedure on Observers, Special Advisors and Balanced Participation*, ISO Doc. ISO/TMB/WG SR N 72 (May 19, 2006), available at [http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/8162140/WG\\_SR\\_procedure\\_compilation\\_%2D\\_2009%2D01.pdf?nodeid=7939915&vernum=-2](http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/8162140/WG_SR_procedure_compilation_%2D_2009%2D01.pdf?nodeid=7939915&vernum=-2).

Consensus: 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.<sup>77</sup>

In implementing this consensus rule, the WGSR or TG Secretariat recorded in the meeting minutes formal notifications by experts of their “sustained opposition” when made at the same meeting at which the decision was taken;<sup>78</sup> it was then the responsibility of the Chair (or convener when necessary), in consultation with the WGSR Secretary and WGSR leadership, to decide if the sustained opposition was on a “substantial issue” or by “an important part of the concerned interests.”<sup>79</sup> No definition of “substantial issue” was provided; the only guidance given was that “[i]n deciding on whether the objection is made by an important part of the concerned interests, the Chair/Convener should consider developed/developing country and stakeholder representation.”<sup>80</sup>

The same consensus rule applied to decision making at the national level in the mirror committees, with the additional criterion that all stakeholder groups’ positions should be treated equally, regardless of the number of individuals included in the respective group.<sup>81</sup> Although this principle was already reflected in international-level procedures, the national positions were to be developed by all interested parties at the national level. Since decision-making procedures were independently determined at the national level, the rule aimed to ensure that the different interests represented by the stakeholder groups would all be adequately reflected in national positions. The criteria for assessing consensus should be based on the number of stakeholder groups in favor or opposed, not the

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77. *WGSR Procedures*, *supra* note 76, Res. 22. The ISO/IEC Directives were updated in 2011, but the relevant language quoted by the WGSR remains identical. ISO & IEC, ISO/IEC DIRECTIVES, PART 1: PROCEDURES FOR THE TECHNICAL WORK § 2.5.6 (8th ed. 2011) [hereinafter ISO/IEC DIRECTIVES] (emphasis added), available at [http://www.iec.ch/members\\_experts/refdocs/iec/isoiecdir-1{ed8.0}en.pdf](http://www.iec.ch/members_experts/refdocs/iec/isoiecdir-1{ed8.0}en.pdf).

78. *First Meeting of the WGSR*, *supra* note 71, Res. 22, § 1.

79. *Id.*

80. *Id.* Appeals were permitted from procedural decisions, and could be raised by experts at the TG level to the WGSR, and within the WGSR to the ISO/TMB. *Id.* § 3. The general provisions for appeal procedures for standardization activities are set out in an ISO Supplement. ISO, ISO/IEC DIRECTIVES: SUPPLEMENT—PROCEDURES SPECIFIC TO ISO 11–12 (2d ed. 2011) [hereinafter ISO PROCEDURES SUPPLEMENT], available at [http://isotc.iso.org/livelink/livelink/fetch/2000/2122/3146825/4229629/4230450/4230452/Supplement\\_-\\_Procedures\\_specific\\_to\\_ISO\\_%28the\\_\\_ISO\\_Supplement\\_%29\\_2nd\\_edition\\_%28PDF\\_format%29\\_.pdf?nodeid=10579742&vernum=-2](http://isotc.iso.org/livelink/livelink/fetch/2000/2122/3146825/4229629/4230450/4230452/Supplement_-_Procedures_specific_to_ISO_%28the__ISO_Supplement_%29_2nd_edition_%28PDF_format%29_.pdf?nodeid=10579742&vernum=-2).

81. ISO WGSR, *Development and Submission of National Positions to the WG SR*, at 2, ISO Doc. ISO/TMB/WG SR N 131 rev 1 (Sept. 5, 2008), available at [http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/8162140/WG\\_SR\\_procedure\\_compilation\\_%2D\\_2009%2D01.pdf?nodeid=7939915&vernum=-2](http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/8162140/WG_SR_procedure_compilation_%2D_2009%2D01.pdf?nodeid=7939915&vernum=-2).

absolute number of individuals in favor or opposed. However, the committees were instructed that, when developing national positions, "each individual's position should be treated equally, regardless of whether or not the individual participates at the international level in the WG/SR."<sup>82</sup> Despite the efforts to ensure adequate representation of all interests in the mirror committees, incomplete representation, particularly of trade unions, persisted throughout the process.<sup>83</sup>

Along with the national consensus position, each ISO member body was to submit a list of the stakeholder groups that participated in developing the national position; if any of the six groups were lacking, the member body was asked to explain why one or more stakeholder categories did not participate. In addition, when a national stakeholder group substantively opposed the national position taken on a particular issue, the ISO member body was to transmit that fact along with the position, informing the WGSR of the reason for the opposition.<sup>84</sup>

### 3. Operational Role of Public International Organizations

A number of public international organizations played an influential role in the development of ISO 26000. In particular, ILO enjoyed a prominent status and exercised special influence as a result of commitments agreed to in a Memorandum of Understanding (MoU) for cooperation in the field of SR signed between ISO and ILO on March 4, 2005.<sup>85</sup> The ISO/TMB had supported the creation of an MoU to govern cooperation with ILO from the start, reflecting a priority arising from the Advisory Group.<sup>86</sup> At its first

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82. *Id.*

83. ISO surveyed its member bodies participating in the ISO 26000 process, among other reasons, to "identify gaps and improvement opportunities in the operation of the ISO 26000 mirror committees." *Survey on ISO 26000 Mirror Committees*, *supra* note 59. The replies from forty-three experts in thirty-three countries demonstrated that only "[fifty percent] of the experts from developing countries consider[ed] that representatives from the six categories of stakeholders [were] participating in their mirror committee," and seventy-six percent of the experts from developed countries affirmed full representation of stakeholder categories. Only one labor expert was represented among the forty-three experts that replied. See PONTIFICA UNIVERSIDAD CATÓLICA DE VALPARAISO & INTERAMERICAN CSR NETWORK, ISO SOCIAL RESPONSIBILITY MIRROR COMMITTEE SURVEY: TASK GROUP 1 FUNDING AND STAKEHOLDER ENGAGEMENT 2-3, 7, available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=6195481&objAction=Open>.

84. *WGSR Guidance on National Input*, *supra* note 59.

85. See Memorandum of Understanding Between the International Labour Organization and the International Organization of Standardization in the Field of Social Responsibility, Mar. 4, 2005, ISO Doc. ISO/TMB/WG SR N 18, <http://isotc.iso.org/livelink/livelink?func=ll&objId=3974921&objAction=Open> [hereinafter ILO-ISO MoU]. In practical terms, for example, the ILO representative served in a leading role on the Ad Hoc Group on Design Specification Comments, which decided a number of important questions relating to the scope and substance of the draft standard. *Second Meeting of the WGSR*, *supra* note 58, Res. 2 (appointing Emily Sims of ILO as one of four conveners of the Ad Hoc Group on Design Specification Comments).

86. See *supra* notes 28, 30, and accompanying text.

meeting, the WGSR resolved to adopt operating procedures to help implement the ILO-ISO MoU by recognizing

the special status of ILO as reflected in the MoU signed between ILO and ISO on 4 March 2005 . . . specifically, the leadership of the WG as well as of any of its subgroups will consult ILO when starting their work and regularly thereafter (at the different drafting and circulation stages) to identify early on any ILO issues that may come up and thus ensure the effective and timely implementation of articles 1.2, 2.1 through 2.4, 6.1 and 6.2 of the MoU. Participation of ILO and its constituents in any of the subgroups will be guided by the provisions of Article 5 of the MoU.<sup>87</sup>

The decision of the WGSR relating to ILO gave effect to an ISO/TMB resolution confirming the “commitment to collaboration between the two organizations [ISO and ILO] on the basis of the guiding principles proposed by the ILO as pre-requisites to preparation of a Memorandum of Understanding between the two organizations.”<sup>88</sup> The ISO-ILO MoU based cooperation on a common commitment that

any guidance or other ISO International Standard to be developed in the area of social responsibility, which implicates ILO issues will be fully consistent with the object and purpose of the provisions of international labour standards incorporated in ILO instruments, and their interpretation by the competent bodies of the ILO and in no way detract from the provisions of those standards.<sup>89</sup>

Further, any ISO postpublication activities, “insofar as they implicate ILO issues, will: Facilitate greater awareness and wider observance of international labour standards . . . [c]omplement the role of governments in ensuring compliance with international labour standards; and [p]ermit application without discrimination as to type and size of all concerned.”<sup>90</sup> In addition, the MoU grants priority to international labor standards in any cases of conflict during the development or after the publication of any ISO standard in the field of SR, as well as in any cases of conflict between an ISO standard and any private initiative with which ISO may collaborate.<sup>91</sup> The MoU also stated that “any ISO activities in the field of social responsibility will avoid addressing ILO issues that should only be resolved through

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87. *First Meeting of the WGSR, supra* note 71, Res. 29.

88. ISO/TMB, *Resolutions Adopted by the Technical Management Board at Its 32nd Meeting, 10–11 February 2005, Geneva (Switzerland)*, Res. 3/2005, ISO Doc. ISO/TMB/WG SR N 12, available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=3974917&objAction=Open>. For the ILO-ISO MoU, see *supra* note 85.

89. ILO-ISO MoU, *supra* note 85, art. 2.1.

90. *Id.* art. 2.2.

91. *Id.* art. 2.3.

representative political or legal processes, and which the Parties agree to identify in consultation.”<sup>92</sup>

As a result of ILO’s favored treatment, other international institutions sought similar treatment although, unlike ILO, they were technically operating as D-liaison organizations under the generally applicable rules that ISO has fixed for such organizations.<sup>93</sup> By November 2006, the U.N. Global Compact had entered into an agreement with ISO on SR that called for consistency in content with its ten principles.<sup>94</sup> By May 2008, the Organisation for Economic Co-operation and Development (OECD) had a similar agreement calling for consistency with the principles and standards of OECD guidelines and their implementation provision, Article 2.1.<sup>95</sup> Like ILO, the OECD required a commitment that ISO activities would “facilitate greater awareness and wider observance” of its own publicly adopted instruments.<sup>96</sup> These two agreements differed from the ISO-ILO MoU, however, in several key respects. First, the other MoUs did not provide for a separate influence of the public organizations on the outcome of the vote by ISO member bodies on the final ISO standard. Unlike the ILO-ISO MoU, the later agreements did not require ISO to circulate the IGOs’ comments on the FDIS at the decisive final moment to the voting member bodies.<sup>97</sup> Instead they followed the general rules of the ISO/IEC Directives under which support is sought from D-liaison organizations and is then taken into account by the ISO/TMB after the vote rather than prior to submission to a vote, a timing with less potential impact than that provided for the ILO. Second, unlike the ILO-ISO MoU, the other MoUs allowed ISO more influence on policy matters in the public organizations through reciprocity provisions; both the OECD and U.N. Global Compact agreements permit ISO to participate in the public organization’s structures and procedures relating to further

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92. *Id.* art. 2.4.

93. D-liaison organizations may make technical contributions to and participate actively as members of an ISO working group, but at the time of submission of matters to member bodies, they have no vote. ISO/IEC DIRECTIVES, *supra* note 77, § 1.17.3.1; *see id.* § 1.7.1.

94. Memorandum of Understanding Between the United Nations Global Compact Office and the International Organization for Standardization (ISO), art. 2.1, Jun. 11, 2006, ISO Doc. ISO/TMB/WG SR N 82, <http://isotc.iso.org/livelink/livelink?func=ll&objId=5936532&objAction=Open> [hereinafter ISO-Global Compact MoU].

95. Memorandum of Understanding Between the Organisation for Economic Co-operation and Development (OECD) and the International Organization for Standardization (ISO) in the Area of Social Responsibility, art. 1.1, May 21, 2008, ISO Doc. ISO/TMB/WG SR N 144, <http://isotc.iso.org/livelink/livelink?func=ll&objId=7369892&objAction=Open> [hereinafter ISO-OECD MoU].

96. *Id.* art. 2.7.

97. *Cf.* ILO-ISO MoU, *supra* note 85, arts. 2.1.2–3 (“Any committee or enquiry draft . . . will be the subject of a pre-circulation process seeking the full and formal backing of the ILO relating to any of the elements in such draft Standard that implicate ILO issues prior to circulation for vote and/or comment . . . . In the event ILO does not provide the backing . . . ILO’s comments . . . will be circulated, together with the draft Standard . . . to all statutory ISO members . . . prior to submission to a vote by any ISO body.”).

development of their relevant instruments.<sup>98</sup> In the case of the OECD, this access is governed by the OECD's rules of procedure and "on the Decision by the Council governing [OECD's] Relations with International Non-Governmental Organisations."<sup>99</sup> The implications of these commitments are striking as they give ISO, the private organization, access to the public decision-making processes of the two public organizations.

Despite their diversity, all the agreements concluded between ISO and the public international organizations reflect that, where public international standards are so integrally involved in a private standardization initiative, ISO's traditional D-liaison-status operating structure does not go far enough to effectively represent the expertise and perspectives of international organizations beholden to the collective will of their member states. ISO's operating procedures, as set out in the ISO/IEC Directives, permit D-liaison organizations to submit their comments at the same time as ISO's P-members vote at the CD stage, and the D-liaison organizations have the opportunity to provide full and formal backing to ISO at the DIS stage.<sup>100</sup> Neither stage permits direct influence by D-liaison organizations on ISO member bodies. Only the ILO-ISO MoU moved beyond ISO's established procedural constraints by providing that any comments submitted by the ILO would be circulated by ISO to the voting members at the time of their review and vote on the FDIS. In essence, this circulation was envisaged as a means of communication between ILO and the ISO member bodies themselves at a decisive moment. In the absence of this feature, ILO's comments would normally have been treated as comments of an organization in liaison with ISO under its Directives and would have been submitted to the ISO/TMB at the time that the vote already taken by the member bodies was reported.<sup>101</sup>

This close interaction of public and private standards spheres in the development of ISO 26000 provides ample justification for further innovations in operating procedures to help establish an appropriate balance between private standardization and public mandates. For example, it would be helpful in such cases to provide for an additional procedure by which the comments of publicly mandated organizations like the United Nations, its specialized agencies, and the OECD would help to inform national member

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98. ISO-OECD MoU, *supra* note 95, art. 4.2; ISO-Global Compact MoU, *supra* note 94, art. 4.2.

99. ISO-OECD MoU, *supra* note 95, art. 4.2 (referring to the governance process and decision-making organ by which ISO participation in appropriate OECD bodies would be approved).

100. *NWIP*, *supra* note 35, Annex E, at 2.

101. Compare ISO WGSR, *Result of Ballot ISO/FDIS 26000*, at 6, ISO Doc. ISO/TMB/WG SR N 196 (Sept. 13, 2010) [hereinafter *FDIS Ballot*], available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=9779426&objAction=Open>, with ILO, *Comments of the International Labour Office for Circulation with ISO/FDIS 26000: 2010(E)*, ISO Doc. ISO/TMB WG SR N 194 (2010) [hereinafter *Comments for Circulation*], available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=10223140&objAction=Open>.

bodies that operate in the context of laws and policies set by the countries that, in many cases, also act as member states of the international organizations concerned. In addition, greater deference to already established public norms and policies should guide private bodies in making decisions involving public mandates, including through higher-level resolution of conflicts when they arise. In contrast, the procedure used in developing ISO 26000, which was based on the general ISO procedures, required public international organizations to appeal to the private structures established by ISO as a nongovernmental international organization, such as a TG or the ISO/TMB, to review a decision adverse to its mandate or to decisions and standards established by its member states in whose countries the ISO member bodies operate.<sup>102</sup> Under this procedure, the private sector prevails over public authority unless proven otherwise, a situation that reverses the recognized role of government in the exercise of public authority over private conduct.

Despite the need for more deliberate coordination of the public and private spheres in developing private standards relating to public policy, the ISO's *Principles for Developing ISO and IEC Standards Related to or Supporting Public Policy Initiatives* (ISO Principles)<sup>103</sup> adopted during the development of ISO 26000, reflect ISO's choice as an organization to revert to its fixed structures and procedures used for highly technical discussions and to discourage *sui generis* arrangements of the sort negotiated during the ISO 26000 process, such as the ILO MoU.<sup>104</sup> The idea of a restructured interaction in the event of a compelling decision to move forward in other similar situations is discussed further below.<sup>105</sup>

#### 4. Meaningful Participation: Foreign Languages

The ISO WGSR leadership recognized that representativity without information and transparency would render participation meaningless. For that reason, the role of language became an important dynamic in the drafting process. Although English speakers remained at a decided advantage throughout the process, the WGSR set up Translation Task Forces (TTFs) to

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102. ISO PROCEDURES SUPPLEMENT, *supra* note 80.

103. ISO, PRINCIPLES FOR DEVELOPING ISO AND IEC STANDARDS RELATED TO OR SUPPORTING PUBLIC POLICY INITIATIVES (2007) [hereinafter ISO PRINCIPLES], available at [http://www.iso.org/iso/principles\\_for\\_developing\\_iso\\_and\\_iec\\_standards\\_related\\_to\\_or\\_supporting\\_public\\_policy\\_initiatives.pdf](http://www.iso.org/iso/principles_for_developing_iso_and_iec_standards_related_to_or_supporting_public_policy_initiatives.pdf). The ISO Principles derive from ISO's 2007 General Assembly Open Session on International Standards and Public Policy and are intended as guidance to ISO's internal structures. The Open Session was denominated "At the Crossroads" and its panelists, including a representative of the U.N. Global Compact, sought to "explore the new relations between public authorities and policies and voluntary standardization." Open Session of the ISO General Assembly 2007, International Standards and Public Policies, Sept. 20, 2007, at 6 (program brochure), available at <http://www.iso.org/iso/livelinkgetfile?llNodeId=114735&llVolId=-2000>. See *infra* notes 182–190 and accompanying text.

104. ISO PRINCIPLES, *supra* note 103, at 2.

105. See *infra* Part VI.



translate documents that its members considered essential to permit or facilitate exchanges between experts, observers, and liaison organizations, and to give information on the work of the WGSR to those countries and regions in dedicated networks. Such TTFs were established for French, Spanish, Arabic, Russian, and German, in that sequence; the French effort began about six months after the first meeting of the WGSR, and the German one, two years later.<sup>106</sup>

At the time of ISO 26000's publication, the issue of translating the official authoritative legal texts that were quoted in ISO 26000 arose again. It was the subject of ILO comments on the FDIS that were circulated to all ISO member bodies urging national member bodies to defer to competent public authorities (principally labor ministries) regarding translations of ILO terminology.<sup>107</sup> The comments aimed to ensure that the wording adopted in the authoritative text of ISO 26000, where it tracked ILO conventions and terminology, would be consistently translated by ISO members in their translations of ISO 26000 into their national languages, because such translations are not certified by ISO as accurate or official.

### C. Search for Normative Coherence

From the start, coherence between ISO 26000 and relevant international legal and social norms was a planned outcome. The NWIP clarified that it was

expected that the standard will . . . foster greater awareness and wider observance of agreed sets of universal principles as expressed in United Nations conventions and declarations including the Global Compact principles and particularly the Universal Declaration of Human Rights, [ILO] Declarations on Fundamental Principles and Rights at Work, The Rio Declaration on Environment and Development and the United Nations Convention Against Corruption . . . [and will] compliment [sic] and avoid conflicts with other existing SR standards and requirements.<sup>108</sup>

Complementary roles were thus foreseen for both international and national law and standards on the one hand, and private voluntary initiatives on the other hand, a vision that reflected the somewhat dubitable presumption that due convergence already existed between the two spheres.<sup>109</sup>

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106. A Spanish Translation Task Force (TTF) created an official Spanish version of ISO 26000. *First Meeting of the WGSR*, *supra* note 71, Res. 26–28. The French standards institute, Association Française de Normalisation (AFNOR), took responsibility for translation into French of draft standards at the DIS and FDIS stages. *Second Meeting of the WGSR*, *supra* note 58, Res. 34. Arabic and Russian TTFs were created thereafter, *Third Meeting of the WGSR*, *supra* note 55, Res. 1–2, and a German TTF was formed later on, *5th Meeting of the WGSR*, *supra* note 59, Res. 16.

107. *Comments for Circulation*, *supra* note 101.

108. *NWIP*, *supra* note 35, Annex B, § f.

109. *See id.* Annex B.

The means for assuring due deference to policy and lawmakers in order to achieve normative coherence were unclear and even doubtful from the start. The terms of reference in the NWIP stated that “leaving the legal issues to inter-governmental organizations . . . may not be helpful.”<sup>110</sup> ISO recognized from the beginning that “it is necessary to consider the activities of other bodies that have developed or are developing SR standards, norms, guidelines and tools.”<sup>111</sup> For ISO, this meant including both IGOs and non-governmental international SR initiatives in the process.<sup>112</sup> The result was a development process that relied heavily on two fundamental, and sometimes competing, sources of input: *expertise* on the one hand, including from representatives of public international organizations with relevant mandates, and the participation of *representative interest groups* on the other hand.<sup>113</sup> The strategy, simply stated, was to put the right stakeholders together and achieve consensus among them. In general, for ISO 26000, ISO followed four phases of development: designing the standard, elaborating on the subject matter, drafting the provisions, and obtaining approval through consensus.

In the design phase, a proposal for design specifications sent to ISO member bodies revealed the significant implications of such a standard for international legal norms.<sup>114</sup> The aim was to create a standard that “provides guidance to enable an organization to formulate SR systems taking into account communication of stakeholders,” though it was “not a management system standard.”<sup>115</sup> Part One was conceived to be “Generic Guidance for all types of Organizations” and included core subjects and relevant issues, such as legal issues, human rights issues (including labor rights), human resource issues, health and safety issues (for employees’ and more broadly), product and service issues, environmental issues, community issues, stakeholder issues, anticorruption issues, and governance issues.<sup>116</sup> ISO 26000 was intended to provide guidance on the relation between SR and the following fields: the law (national and international), international norms (distinguished from international law in some sense that was not evident), domestic and intergovernmental political processes, and regional and cultural differences.<sup>117</sup> Part Two of the proposed specifications was to cover

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110. *Id.* Annex B, § c.

111. *Id.* Annex D.

112. The NWIP specified a number of SR initiatives that needed to be considered “as their standards could be affected by the introduction of an ISO deliverable.” *Id.* Annex D (referring to, for example, the GRI, the Forest Stewardship Council [FSC], and the Fair Labor Association [FLA]).

113. *See supra* Part III.A.

114. ISO WGSR, *ISO Guidance Standard on Social Responsibility—ISO 26000: Proposal for Design Specification*, ISO Doc. ISO/TMB/WG SR N 31 (2005), <http://isotc.iso.org/livelink/livelink?func=ll&objId=4329261&objAction=Open> [hereinafter *Proposal for Design Specification*].

115. *Id.* at 1. *See also supra* note 30 and accompanying text.

116. *Proposal for Design Specification, supra* note 114, pt. 1, § 5.

117. *Id.* pt. 1, § 6.

“Specific Guidance for Particular Types of Organizations . . . in addition to and distinct from material provided in Part 1.”<sup>118</sup> The “particular types of organizations” corresponded to the particular stakeholder categories: government organizations, NGOs, commercial organizations (including industry), consumer organizations, labor organizations, and other organizations (later specified as “service, support, research and others”).<sup>119</sup>

A highly selective combination of expertise and representative interests guided the work to implement the design specifications. At its first meeting, the WGSR received comments that had been submitted on the circulated design proposal. At its second meeting, an Ad Hoc Group on Design Specification Comments was composed, led by a small number of selected participants, including ILO (represented by an official from the International Labour Office) and its constituents (represented by labor and employer members).<sup>120</sup> That Ad Hoc Group’s decisions were reflected in a revised draft Design Specification drafted by another Ad Hoc Group on Design Specification Drafting, composed of approximately sixteen people, two of whom were leaders in the Ad Hoc Group on Design Comments. The others were nominated by the leadership members.<sup>121</sup> The Design Specification was adopted within six months of the first meeting of the WGSR.<sup>122</sup>

A number of structures within the WGSR advanced the elaboration of the specifications and the drafting stages. Without a doubt, the selection of members for these structures, often determined by the WGSR leadership,<sup>123</sup> defined the substantive outcome. A series of TGs—first interim groups to draft issues papers and then standard-writing groups—were used to elaborate the approach to the various specifications.<sup>124</sup> The TGs, given terms of reference, dealt in three main relevant areas: scope, SR context, and SR principles; guidance on core SR subjects and issues; and guidance for organizations on implementing SR.<sup>125</sup> Seven core subjects were assigned respectively to drafting teams: organizational governance, human rights, labor practices, the environment, fair operating practices, consumer issues,

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118. *Id.* pt. 2.

119. *Id.*; *Guidance on Stakeholder Categories*, *supra* note 51, at 1.

120. *Second Meeting of the WGSR*, *supra* note 58, Res. 2. Representatives came from labor and from the IOE. *See id.*; *see also* 1st ISO Social Responsibility Plenary Meeting, Mar. 7–11, 2005, *List of Participants ISO/TMB/WG Social Responsibility*, at 5, 6, available at [http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/3973638/3973639/4243588/Annex\\_A%2C\\_Attendance\\_list.pdf?nodeid=4242844&vernum=-2](http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/3973638/3973639/4243588/Annex_A%2C_Attendance_list.pdf?nodeid=4242844&vernum=-2) (identifying Adam Greene and Thomas Thomas with industry and labor, respectively).

121. *Second Meeting of the WGSR*, *supra* note 58, Res. 3–4, 19.

122. *See* ISO WGSR, *ISO Guidance Standard on Social Responsibility—ISO 26000: Design Specification*, ISO Doc. ISO/TMB/WG SR N 49 (Sept. 30, 2005), available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=4557938&objAction=Open>.

123. *See supra* notes 56–58 and accompanying text.

124. *Second Meeting of the WGSR*, *supra* note 58, Res. 5.

125. *Id.* Res. 20–22.

and community involvement and development.<sup>126</sup> A number of the subjects, including but not limited to labor, touched on international labor standards, for which ILO considered itself competent to raise concerns as “ILO issues” under the ILO-ISO MoU. Liaison representatives were established to coordinate issues to be addressed in two or more groups,<sup>127</sup> and internal liaisons with other work on related subjects in ISO technical committees were ensured.<sup>128</sup> As the input was delivered, an Integrated Drafting Task Force served as a powerful means to coordinate input from the drafting teams established within the TGs. The Integrated Drafting Task Force was charged with maintaining transparency by tracking changes to reports, writing “clarifications on how stakeholder representation [was] ensured,” and producing reports “based on consensus.”<sup>129</sup> Complaints over the lack of transparency in accepting and rejecting some of the inputs were frequent, as the Integrated Drafting Task Force processed and responded to thousands of comments in the various stages of the draft standard.<sup>130</sup>

The tension between the role of standards based in law and the role of private voluntary initiatives<sup>131</sup> became evident as the drafting process matured. The rule of respecting the primacy of intergovernmental instruments and subordinating private initiative standards, as first articulated in the ILO-ISO MoU, led to a need to distinguish exactly what were “authoritative international instruments” that would require deference.<sup>132</sup> ILO experts shared the view, based on an internal ILO legal opinion, that the “authoritative character” of ISO’s international standards and other instruments were the result of an act of official endorsement by the specific authorized organ

126. 4th Meeting of WGSR, *supra* note 65, Res. 3. For a list of the members of the drafting teams, see ISO, TG 5 DRAFTING TEAMS, [http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/4591396/4591399/6227179/WG\\_SR\\_TG5\\_Drafting\\_Teams\\_established\\_in\\_Sydneyrev\\_2007%2D12%2D11.pdf?nodeid=7013931&vernum=-2](http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/4591396/4591399/6227179/WG_SR_TG5_Drafting_Teams_established_in_Sydneyrev_2007%2D12%2D11.pdf?nodeid=7013931&vernum=-2).

127. Second Meeting of the WGSR, *supra* note 58, Res. 24.

128. E.g., *id.* Res. 29 (confirming internal liaison with ISO/TC 207, Environmental Management).

129. ISO WGSR, *Process for WG SR Integrated Drafting*, at 1, ISO Doc. ISO/TMB/WG SR N 130 rev 1 (Sept. 3, 2008), available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=6942047&objAction=Open>.

130. ISO WGSR, *Minutes, Constitution of Integrated Drafting Task Force, IDTF*, § 3.4, ISO Doc. ISO/TMB/WG SR N 133 (Nov. 15, 2007), available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=6942543&objAction=Open>. Responses to approximately 3400 comments were recorded for the CD version of the standard alone. ISO WGSR, *Comments Received on ISO/CD 26000 (WG SR N 157)*, ISO Doc. ISO/TMB/WG SR N 161 (Mar. 25, 2009) [hereinafter *Comments Received*], available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=7998977&objAction=Open>.

131. See *supra* notes 99–101 and accompanying text.

132. See 5th Meeting of the WGSR, *supra* note 59, Res. 19; ISO WGSR, *Contribution to Development of the Community and Society: Drafting Team Final Report*, § 4.3, ISO Doc. ISO/TMB/WG SR TG5 (Dec. 6, 2007), available at [http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/4591396/4591399/7027478/DCS\\_%2D\\_DT\\_final\\_report\\_071206\\_rev.pdf?nodeid=7027686&vernum=-2](http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/4591396/4591399/7027478/DCS_%2D_DT_final_report_071206_rev.pdf?nodeid=7027686&vernum=-2) (referring to previous discussions in standard-setting TGs, such as “Issues for further discussion” (authoritative instruments)).

concerned.<sup>133</sup> In the end, ISO 26000 did not clearly distinguish the intergovernmental initiatives based on such publicly recognized international standards from nongovernmental initiatives drawn largely from their own definitions of socially responsible conduct. In an effort to respond to the commitment in the ILO-ISO MoU to consistency and complementarity with existing SR initiatives, an annex was added to ISO 26000 listing various initiatives and attempting to compare them. The annex, entitled “Examples of Voluntary Initiatives and Tools for Social Responsibility,”<sup>134</sup> is described as “informative” and expressly states that participation or use of any of the listed initiatives or tools is not a precondition for an organization to be socially responsible.<sup>135</sup> The criteria that must be met to be included in the annex pertain to subject matter, international and interorganizational breadth, and accessibility without charge, but the annex further explains that inclusion in the annex does not constitute an endorsement by ISO.<sup>136</sup>

Nevertheless, the annex created major controversies. Governments sought to prevent any legal implications arising from an ISO-monitored list of initiatives, including in the context of international trade agreements.<sup>137</sup> At the same time, the annex initiatives’ supporters “sought to maximize the visibility or significance of ‘their’ standards” to enhance their own influence.<sup>138</sup>

In the end, the consensus approval that ISO 26000 received, while not determinative of normative coherence, indicated at least some achievement—albeit limited in time because international law evolves over time and the full normative impact of the standard’s provisions can only be understood in operation. The level of consensus on ISO 26000 was measured sequentially over several draft versions—three Working Drafts, the CD, the DIS, and the FDIS.<sup>139</sup> The progressive convergence of support was obtained

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133. ILO OFFICE OF THE LEGAL ADVISER, LEGAL ISSUES ARISING IN THE CONTEXT OF THE ISO DRAFT STANDARD ON SOCIAL RESPONSIBILITY 1 (2007) (on file with author).

134. The annex already appeared under this title in the Draft International Standard version as Annex A. ISO WGSR, *Draft International Standard: Guidance on Social Responsibility*, at 82, ISO Doc. ISO/TMB/WG SR N 172 (2009) [hereinafter *WGSR DIS*], available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=8385467&objAction=Open>.

135. *Id.* at x. The proposal was developed on the basis that an annex of initiatives should not be seen to endorse any initiative presented. ISO, *Proposed Annex on Social Responsibility Initiatives*, at 1, ISO Doc. IDTF N053—ISO 26000 WD4.1 (Mar. 11, 2008), available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=7188059&objAction=Open>. In its informative and illustrative character, the annex resembles the interim products used by ISO when standardization is not yet mature. The development of the annex casts some doubt on ISO’s position at the start that harmonization of approaches to social responsibility was not possible and that the goal should be standardization. See *supra* note 30 and accompanying text.

136. See, e.g., *WGSR DIS*, *supra* note 134, at 83.

137. Halina Ward, *The ISO 26000 International Guidance Standard on Social Responsibility: Implications for Public Policy and Transnational Democracy*, 12 THEORETICAL INQUIRIES L. 665, 698–700 (2011).

138. *Id.* at 684.

139. The voting results on the CD, DIS, and, ultimately, FDIS show progressively more support. See ISO WGSR, *Result ISO/CD 26000, Guidance on Social Responsibility*, ISO Doc.

by avoiding several key issues relating to the operation of the private standardization and public spheres of law and policy. To the extent that ISO 26000 could have been viewed as an international standard affecting the development of technical regulations by states under the Technical Barriers to Trade (TBT) Agreement,<sup>140</sup> some governments and other participants viewed it as reducing the national-level policy space already provided for in the TBT Agreement, or as giving rise to unnecessary trade restrictions.<sup>141</sup> Eventually, an express disclaimer was added to the scope clause of ISO 26000, providing that the standard is not intended to be interpreted as an “international standard” for the purpose of providing a basis for a presumption or finding that a measure is consistent with World Trade Organization (WTO) obligations. ISO 26000 further disclaimed itself as a basis for legal action in any other international, domestic, or other proceeding or as evidence of the evolution of customary international law.<sup>142</sup>

When the DIS was submitted to ISO members for their vote, ISO stated that it would give all comments, whether submitted by its NSBs or by liaison organizations, fair and equitable treatment in order to further enhance consensus.<sup>143</sup> Although this approach might appear nondiscriminatory at the outset, the result of providing equal weight to participants in different situations, with different constituencies, and with varying relevance to the issues at hand, was not necessarily benign in effect. Continuing disagreement marked the use of the comments as the basis for constituting the DIS text. The formal vote among member bodies on the DIS showed disagreement among important blocs: of P-members voting, seventy-nine percent in favor (required threshold of two-thirds in favor); of member bodies voting there were eighteen negative votes out of seventy-eight, resulting in twenty-three percent negative, just under the twenty-five percent negative required to block the process toward the FDIS.<sup>144</sup> Regional blocs were evident: Arab states almost all voted negatively,

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ISO/TMB/WG SR N 160 (Mar. 25, 2009), available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=8000253&objAction=Open>; ISO WGSR, *Preliminary Voting Result ISO/DIS 26000*, ISO Doc. ISO/TMB/WG SR N 175 (Feb. 15, 2010) [hereinafter *Preliminary Voting Result*], available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=8718817&objAction=Open>; *FDIS Ballot*, *supra* note 101.

140. Agreement on Technical Barriers to Trade art. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

141. See, e.g., *Comments Received*, *supra* note 130, at 33, 52, 54–55, 61 (including comments from member bodies of Canada and Malaysia, and from representatives of business organizations); see also Ward, *supra* note 137, at 699–700 (discussing concerns of the Canadian, Chinese, Indian, and U.S. governments).

142. For a discussion of the negotiation on “WTO-proofing” the text, see Ward, *supra* note 137, at 700–01.

143. See ISO WGSR, *Clarifying the Rules and Procedures for CD, DIS, FDIS*, at 13, 15, ISO Doc. ISO/TMB/WG SR N 169 (May 16, 2009), available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=8160798&objAction=Open>.

144. *Preliminary Voting Result*, *supra* note 139, at 1.

along with China, Malaysia, Russia, Slovakia, Turkey, and Vietnam.<sup>145</sup> Important member bodies featured among the abstentions: Austria, Germany, Iceland, Italy, the United Kingdom, and New Zealand.<sup>146</sup> Some governments were alarmed at the potential implications for trade;<sup>147</sup> others thought the standard did not go far enough.<sup>148</sup> Had abstentions been counted toward the quota, the vote would have failed and another DIS version would have been required. Indeed, for a process targeting operational consensus, to move forward without counting abstentions as well as negative votes could arguably demonstrate a lack of confidence in the overall acceptance of ISO 26000, even though, technically speaking, consensus may be achieved when it is defined as insufficient objections to moving forward.

Between the DIS vote and the FDIS vote, progress toward consensus was made. The FDIS vote brought significantly more favorable percentages: ninety-three of voting P-members voted “Yes,” and only six percent of all member bodies voting voted “No”; five negative votes out of member bodies voting were recorded.<sup>149</sup> However, new abstentions from those member bodies that had approved the DIS emerged at the time of the FDIS: Australia, Bangladesh, Hungary, Israel, and Macedonia.<sup>150</sup> Two member bodies actually switched from “Yes” to “No” votes (Luxembourg and the United States), and Iran switched from “No” to an abstention.<sup>151</sup> With a change to a controversial provision on discrimination for reasons of sexual orientation, the Arab bloc switched from “No” to “Yes” (Bahrain, Kuwait, Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, and the United Arab Emirates), as did China and Cyprus.<sup>152</sup> India remained opposed.<sup>153</sup>

In the final stage, in response to ISO’s request for its full and formal backing of the FDIS, ILO replied<sup>154</sup> that it was considering whether the FDIS was fully consistent with international labor standards and practices and would not detract from them, as provided in the ILO-ISO MoU. According to ILO, this determination involved (1) the current content of ISO 26000; and (2) the impact of its future implementation, including through ISO activities and publications for promotion and any periodic review.<sup>155</sup> On

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145. *Id.* at 2–4.

146. *Id.*

147. Ward, *supra* note 137, at 699–700 (discussing concerns of the Canadian, Chinese, Indian, and U.S. governments).

148. *Comments Received*, *supra* note 130, at 28–29 (listing comments from Jamaica).

149. *FDIS Ballot*, *supra* note 101, at 1.

150. *Id.* at 2–4.

151. *Id.* at 3–4.

152. *Id.* at 2–4.

153. *Id.* at 2. An appeal of the national member body of India, disputing the decision to add the annex of initiatives, was dismissed by the ISO/TMB in June 2010. ISO/TMB Res. 115/2010 (Sept. 13–14, 2010) (copy on file with author). See *supra* note 135 and accompanying text.

154. *Comments for Circulation*, *supra* note 101, ¶ 3.

155. *Id.*

the first point, ILO concluded that the cooperation with ISO had “resulted in provisions in the FDIS, which, insofar as ILO issues are implicated, do not appear to conflict with international labor standards as currently understood and applied.”<sup>156</sup> On the operational impact point, ILO referred to still-pending efforts to establish with ISO “specific and concrete arrangements to ensure the standard’s consistency, over time, with international labor standards and practices.”<sup>157</sup> There was

a need for measures that can reliably ensure that, *as applied*, the Standard will i) be consistent with and facilitate the observance of international labor standards, ii) be applied without discrimination, and iii) ensure that international labor standards take priority where conflicts or questions arise on ILO issues, including in relation to periodic revision.<sup>158</sup>

ILO’s business and workers’ representatives’ social partners diverged in their views on the final outcome. The International Trade Union Confederation (ITUC) cautiously supported the standard, saying that it would “contribute to a better understanding of social responsibility through its clarification of important concepts” and that the “text provides a comprehensive distillation of responsible labour practices that are consistent with the international labour standards of the ILO.”<sup>159</sup> The global workers’ organization qualified its support in its FDIS comments, stating the belief that the “so-called ‘multi-stakeholder process’ used has serious flaws and is not suitable for public policy issues[,] which are best addressed through democratic and representative political processes.”<sup>160</sup> The IOE, which had also participated closely in ISO 26000’s development, withheld its full and formal backing of the FDIS due to the “persistent confusion about what ISO 26000 is and is not, the push for certification by national standards bodies, and the process used to develop the guidance,” which it considered not sufficiently consultative with representatives of the main stakeholders.<sup>161</sup> In contrast, the U.N. Global Compact submitted comments as a liaison organization approving the FDIS with no reservations.<sup>162</sup>

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156. *Id.* ¶ 4.

157. *Id.* ¶ 5.

158. *Id.*

159. ITUC, *News: ITUC Supports New International Standard on Social Responsibility*, ITUC-CSI (Sept. 20, 2010), <http://www.ituc-csi.org/ituc-supports-new-international.html?lang=en>.

160. ITUC, ITUC Comment on ISO 26000 FDIS (Sept. 10, 2010), available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=3935837&objAction=browse&sort=name> (included in file titled “x Comments received on ISO FDIS 26000.zip”).

161. IOE, *supra* note 57, at 4.

162. *See FDIS Ballot*, *supra* note 101.



#### D. Search for Postpublication Continuity

The question of continuity following ISO 26000's publication persists at the time of this writing. There was no expectation of continuing life for the "ISO SR community" after disbanding of the WGSR, unlike the ongoing public sector structures for supervising standards set by law or policy. In the postpublication phase, ISO has tackled the challenge of maintaining stakeholder networks, engagement of NSBs and their stakeholders, and the engagement and role of MoU partners like ILO and the U.N. Global Compact.<sup>163</sup> Apart from ISO press releases, the decisions and activities undertaken in relation to ISO 26000 following its publication remain largely unavailable to the public, in contrast to the documents of the now disbanded WGSR, which were made available online.<sup>164</sup> The result suggests that the implementation phases of the private standard will seek to engage public entities' involvement, again, in a manner and only to the extent decided by the private leadership.

Following publication of ISO 26000, the ISO/TMB deferred the organization of postpublication activities to the Swedish Standards Institute (SIS) and the Associação Brasileira de Normas Técnicas (ABNT) (Sweden's and Brazil's member bodies, respectively), which had chaired the WGSR. In so doing, the ISO/TMB requested the twinned leadership take into account the WGSR proposals regarding postpublication organization.<sup>165</sup> The ISO Central Secretariat (ISO/CS) was to work together with the twinned leadership in dealing with inquiries from international-level organizations, and national member bodies were encouraged to maintain committees of experts at the national level based on multistakeholder composition and balance.<sup>166</sup> By November, SIS and ABNT announced the ISO 26000's postpublication organization (PPO).<sup>167</sup> The terms of reference for the PPO were defined as assessing and advising ISO/TMB on any proposals to revise ISO 26000; advising ISO/CS on requests for interpretation of ISO 26000 from NSBs; advising ISO/CS on promotion, communication, and training activities; gathering and reporting to ISO/CS information on good and bad practices in using ISO 26000; reviewing and assessing results; and advising ISO/TMB.<sup>168</sup> The three main structures of the ISO 26000 development

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163. ISO/TMB Res. 114/2010 (Sept. 13–14, 2010) (on file with author); *see also 8th Meeting of the WGSR*, *supra* note 69, Res. 8, 10.

164. ISO/TMB Res. 114/2010, *supra* note 163, Annex 2; SIS, ISO 26000 Post PUBLICATION ORGANIZATION (2010), *available at* [http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/3974907/10335362/PPO%2C\\_Post\\_Publication\\_Organization\\_for\\_ISO\\_26000\\_activities\\_.pdf?nodeid=11967859&vernum=-2](http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/3974907/10335362/PPO%2C_Post_Publication_Organization_for_ISO_26000_activities_.pdf?nodeid=11967859&vernum=-2).

165. ISO/TMB Res. 114/2010, *supra* note 163, ¶ 3.

166. *Post Publication Organization*, *supra* note 69; ISO/TMB Res. 114/2010, *supra* note 163.

167. SIS, *supra* note 164.

168. *Id.* These functions follow the Proposed Terms of Reference for Post Publication Organization suggested by the WGSR at its last meeting. *Post Publication Organization*, *supra* note 69.

phase were replicated: a PPO Secretariat is led by SIS and ABNT; the WGSR Advisory Group has been reincarnated as a PPO Stakeholder Advisory Group (PPO SAG) with two additional representatives for each stakeholder category; and a PPO NSB Information Network (PPO NIN) recreates a network akin to the mirror committees, with a maximum number of two members per country.<sup>169</sup>

A vital question persists concerning how provisions of ISO 26000 relating to authoritative legal instruments are to be handled under the responsibility of the private leadership. At the time of voting on ISO 26000, ITUC had qualified its support of the FDIS provisions relating to labor by stating: "With respect to follow-up we are convinced the ILO must be provided an authoritative advisory role on all questions relating to ILO issues in the promotion or implementation of this standard."<sup>170</sup> In its comments on the FDIS,<sup>171</sup> ILO had sought further specificity in the organization of its post-publication cooperation with ISO. The terms of the ILO-ISO MoU apply expressly to the postpublication implementation of ISO 26000, including development, promotion, interpretation, and periodic review of ISO 26000, drawing on the basis of the general commitments in the MoU.<sup>172</sup> This included an authoritative advisory role for ILO on all questions relating to ILO issues in the promotion or implementation of ISO 26000, including questions raised by ISO members, a role that ISO accepted in the postpublication operating guidelines.<sup>173</sup> Additionally included was an assurance that official translations of international labor standards would revert to ILO-approved local language texts and a guarantee of prior consultation on ISO decisions involving ILO issues.<sup>174</sup> Similarly, questions relating to international instruments cited in ISO 26000 were to be directed to the respective responsible organization.<sup>175</sup> Proposed operating guidelines are expected to be developed for "how issues of interpretation will be dealt with including how questions related to authoritative instruments will be interpreted."<sup>176</sup>

The future impact of ISO 26000 in the marketplace also remains in question. Efforts by NSBs to develop national certification variants of ISO 26000 run counter to the statement in the text of the standard itself "that ISO 26000 'is not intended or appropriate for certification purposes . . . Any offer to certify, or claims to be certified, to ISO 26000 would be a

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169. SIS, *supra* note 164. The first two structures were suggested by the WGSR at its final meeting. *Id.*

170. See ITUC, *supra* note 160.

171. See *supra* note 101 and accompanying text.

172. ILO-ISO MoU, *supra* note 85, at 4.

173. SIS, *supra* note 164, at 2.

174. *Comments for Circulation*, *supra* note 101.

175. *Post Publication Organization*, *supra* note 69. Questions related to international instruments cited in the bibliography of ISO 26000 are to be directed to the respective "responsible organization," although it is not clear how the "responsible organization" will be determined. *Id.* at 2.

176. *Id.* at 1.

misrepresentation of the intent and purpose and a misuse of” the standard.<sup>177</sup> Fewer than two months after publication of ISO 26000, the independent International Accreditation Forum (IAF), whose members accredit certification bodies as competent to issue certifications, passed the following resolution, noting that ISO 26000 itself explicitly states that it is not intended or appropriate for certification:

The General Assembly, acting on the recommendation of the Technical Committee, resolved that there will not be any accredited certification to ISO 26000 (publication date 1 November 2010).

....

Therefore, Certification Bodies are strongly urged not to promote or provide certification to ISO 26000 and Accreditation Bodies and Certification Bodies are requested to report any misuse or need for certification, to the ISO Central Secretariat.<sup>178</sup>

At the international level, bridging documents have been proposed by voluntary initiative programs like GRI and AccountAbility 1000.<sup>179</sup>

Ironically, ISO’s self-professed “business model” may make more difficult the continuity of the SR community to the extent that it was based on representativity. From the first draft of ISO 26000, a copyright notice was inserted, referencing ISO’s usual rules for copyright protection and its customary exception for reproduction of working drafts or CDs for use by participants in the ISO standards development process.<sup>180</sup> As a result, the ILO and ISO agreed to a restrictive licensing arrangement for ILO to use the standard under specified conditions with its constituents in situations where ISO 26000 may affect the operations and activities of the constituents.

177. IOE, *supra* note 57, at 4 (quoting ISO 26000) (emphasis omitted). The IOE reported that the Danish standards body was preparing a domestic standard for certification based on ISO 26000. *Id.* It noted that national certification would perversely replace the core message of ISO 26000 that an organization should carefully consider its responsible impacts rather than substituting an empty certification. *Id.*

178. Press Release, ISO, It’s Crystal Clear. No Certification to ISO 26000 Guidance Standard on Social Responsibility (Nov. 30, 2010), available at <http://www.iso.org/iso/pressrelease.htm?refid=Ref1378> (emphasis omitted).

179. E.g., GRI, GRI AND ISO 26000: HOW TO USE THE GRI GUIDELINES IN CONJUNCTION WITH ISO 26000 (2010), available at [http://www.globalreporting.org/NR/rdonlyres/E5A54FE2-A056-4EF9-BC1C-32B77F40ED34/0/ISOGRIReport\\_FINAL.pdf](http://www.globalreporting.org/NR/rdonlyres/E5A54FE2-A056-4EF9-BC1C-32B77F40ED34/0/ISOGRIReport_FINAL.pdf); ACCOUNT ABILITY, AA1000 STAKEHOLDER ENGAGEMENT STANDARD 2011: FINAL EXPOSURE DRAFT (2011), available at <http://www.accountability.org/images/content/3/6/362/AA1000SES%202010%20PRINT.pdf>.

180. ISO WGSR, *Guidance on Social Responsibility*, ISO Doc. ISO/TMB/WG SR N 55, ISO/WD 26000 (Mar. 28, 2006), available at <http://isotc.iso.org/livelink/livelink?func=ll&objId=5167446&objAction=Open&vernum=1> (bearing the phrase “© ISO 2006—All rights reserved” on the cover).

To the extent that representativity of stakeholders was sought, the very restriction of the use of ISO 26000 belies its design and aim of complementing public activity in the public interest. Follow-up action on ISO 26000 is taken, in line with ISO's statutory practice, through decisions beyond the public eye, and few avenues exist for stakeholders in communities at large to be informed or to meaningfully participate in the ISO 26000 activities that directly affect them. The lack of transparency and accountability in the follow-up to ISO 26000 appears indeed to fall short of the principles of accountability and transparency set out in ISO 26000 itself; an organization should be transparent in its decisions and activities that affect society and the environment and should be accountable for the effects it has on society, the economy, and the environment.<sup>181</sup>

#### IV. LEGAL AND POLICY CONTEXT FOR INTERNATIONAL STANDARDS RELATING TO PUBLIC POLICY

The development of ISO 26000 illustrates the new "leadership" approach to ISO standard setting that provokes fundamental questions about the role of private standardization in areas of public policy and lawmaking and about the function of private actors in global governance systems. In 2007, amid the process of developing ISO 26000, the ISO General Assembly adopted the ISO Principles "to guide ISO and IEC committees developing standards related to or supporting public policy initiatives."<sup>182</sup> Although the expressed intent is to guide ISO in its work at the intersection with public policy, the ISO Principles fail to provide the guidance needed to decide when to use the private ISO standard-setting mechanism to address issues involving public policy and how to develop and implement such standards when they are justifiable. Internal controls are necessary to ensure the effective compliance of ISO with its duties as a private actor in standardization; those duties include respecting human rights and other principles fundamental to the rule of law and ensuring the legitimacy, transparency, and accountability of ISO's decisions as is similarly expected of it under the legal standards of the WTO relating to the TBT Agreement.

The self-avowed objective of the ISO Principles is to ensure that ISO standards "can properly support and be used by public authorities."<sup>183</sup> The underlying policy, which is considered "a reasonable goal," is to "make their portfolio of standards more visible to public authorities and, equally important, ensure that its standards address the relevant needs and concerns of the public authorities."<sup>184</sup> The ISO Principles recognize that private

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181. *E.g.*, *WGSR DIS*, *supra* note 134, §§ 4.2–.3.

182. ISO PRINCIPLES, *supra* note 103, at 1.

183. *Id.*

184. *Id.*

voluntary organizations like ISO and its partner organization, IEC,<sup>185</sup> are “not directly representative of government interests” and that “[n]ational positions on ISO or IEC standards are not necessarily government positions, although government experts may participate in developing the positions.”<sup>186</sup> Nonetheless, the ISO Principles assert that it has been shown “that ISO and IEC standards are capable of providing valuable support to the implementation of public policy.”<sup>187</sup> The section on “Background Context” describes the ISO mandate as providing “voluntary standards that support the programs of government authorities, who need standards that meet the WTO TBT criteria and that support technical regulations and/or procurement actions.”<sup>188</sup>

Four general points emerge from the ISO Principles themselves. Standards related to or supporting public policy initiatives should (1) be based on objective information and knowledge on which there is global consensus, not subjective judgments; (2) not seek to establish, drive, or motivate public policy, regulations, or social and political agendas; (3) not supplant the role of governments or treaty organizations; and (4) follow existing operational approaches and participation models already in the ISO/IEC Directives.<sup>189</sup> In the implementation section, the ISO Principles further affirm that “ISO and IEC shall actively support and promote the principles for international standardization established in the WTO TBT Agreement and subsequent decisions of the TBT Committee regarding the development of international standards.”<sup>190</sup>

Although the ISO Principles refer to providing international standards in line with the TBT Agreement,<sup>191</sup> ISO’s procedures to secure such a result—and the actual exercise of its discretion in areas relating to public policy—reveal the need for significant reform of ISO’s decision making, development, and implementation in relation to its “leadership” standards. The TBT Agreement serves as the primary international instrument addressing the role of international standardization in the context of domestic technical regulations. Under the Standards Code in the predecessor framework of the

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185. For general information on the IEC, see generally IEC, <http://www.iec.ch> (last visited Feb. 26, 2012).

186. ISO PRINCIPLES, *supra* note 103, at 1.

187. *Id.*

188. *Id.* For a description of the TBT criteria, see *infra* notes 191–200 and accompanying text.

189. ISO PRINCIPLES, *supra* note 103, at 1–2.

190. *Id.* at 2 (Implementation). For the TBT Committee decision establishing criteria for developing international standards, see *infra* note 197.

191. ISO PRINCIPLES, *supra* note 103, at 1–2. In the Background Context section, ISO states that it has been and will “continue to be [an] effective provider[] of voluntary standards that support the programs of government authorities, who need standards that meet the WTO TBT criteria.” *Id.* at 1. In the Implementation section, ISO states that it “shall actively support and promote the principles for international standardization established in the WTO TBT Agreement.” *Id.* at 2. For the TBT Agreement, see *supra* note 140.

General Agreement on Tariffs and Trade (GATT),<sup>192</sup> ISO committed itself to follow the principles that now underlie the current Code of Good Practice for the Preparation, Adoption and Application of Standards annexed to the TBT (TBT Code of Good Practice).<sup>193</sup> Under the TBT Code of Good Practice, parties commit to avoiding the creation of unnecessary obstacles to international trade and, importantly, to using relevant international standards, where they exist or are imminent, as a basis for developing private standards.<sup>194</sup> The ISO Principles reaffirm ISO's intention to actively support the commitments in fields relating to or supporting public policy initiatives and to ensure that ISO's standardization activities do not hinder, but indeed support, the programs of governments by providing standards that meet the WTO TBT Agreement criteria.

ISO's reference to the TBT Agreement criteria in the ISO Principles implies that, for ISO, the TBT Code of Good Practice commitment extends beyond standardization activities that fall strictly within the scope of the TBT Agreement's provisions and applies also to standardization in public policy fields beyond the TBT Agreement.<sup>195</sup> This implication contrasts with the unilateral declaration of ISO that ISO 26000 was not an "international standard" for purposes of the Marrakesh Agreement (to the extent its provisions covered

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192. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

193. TBT Agreement, *supra* note 140, Annex 3 (Code of Good Practice). Since 1979, under the TBT Agreement's predecessor code, "ISO has taken the commitment and implemented all the necessary measures to ensure that ISO's International Standards are fully compliant with the requirements set by the Agreement on Technical Barriers to Trade of the WTO." *The Establishment of the GATT Standards Code*, ISO, [http://www.iso.org/iso/about/the\\_iso\\_story/iso\\_story\\_gatt\\_standards\\_code.htm](http://www.iso.org/iso/about/the_iso_story/iso_story_gatt_standards_code.htm) (last visited Feb. 5, 2012). The plurilateral Standards Code of the GATT was superseded by the multilateral TBT Agreement in the framework of the Marrakesh Agreement Establishing the World Trade Organization. TBT Agreement, *supra* note 140. A Ministerial Decision taken in Marrakesh recommended that the WTO enter into an MoU with ISO to establish an information system to receive notifications of commitment by standardizing bodies to the Code of Good Practice. WTO, Uruguay Round Ministerial Decision on Proposed Understanding on WTO-ISO Standards Information System, adopted by the Trade Negotiations Committee on Dec. 15, 1993, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 66, *available at* [http://www.wto.org/english/docs\\_e/legal\\_e/37-dtbt1.pdf](http://www.wto.org/english/docs_e/legal_e/37-dtbt1.pdf). The WTO and ISO subsequently agreed to an MoU on the subject, and the ISO General Assembly adopted a resolution "commit[ting] itself to promoting positive responses to the provisions of the WTO TBT Code of Good Practice . . . regarding information on standards development." WTO TBT Committee, Minutes of the Meeting Held on 21 April 1995, ¶ 47, TBT/M/48 (June 28, 1995), *available at* [http://www.wto.org/gatt\\_docs/English/HTM/M48.WPF.htm](http://www.wto.org/gatt_docs/English/HTM/M48.WPF.htm).

194. TBT Agreement, *supra* note 140, Annex 3, ¶¶ E, H.

195. By its terms, the TBT "deals only with technical regulations, standards and conformity assessment procedures related to products or process and production methods" (PPMs), *id.* Annex 1, ¶ 2, and expressly excludes services and mandatory standards. It further recognizes that the terms, as defined in ISO/IEC Guide 2: 1991, also cover services and mandatory as well as voluntary standards. *See id.*

SR in processes and production methods (PPMs)).<sup>196</sup> In any event, it is not ISO but the WTO, and possibly other international organizations, that would likely have (or share) the authority to decide whether the TBT and other international legal regimes apply to ISO's actions in developing and implementing ISO 26000. Even when an ISO international standard may not come under the definition of an "international standard" for purposes of the TBT Agreement,<sup>197</sup> the TBT Agreement criteria and framework lend useful guidance, whether directly or by analogy, to the way in which ISO should exercise its discretion in fields relating to public policy.<sup>198</sup>

The consensus that, along with personal liberties under law, private actors have duties and are responsible for the effects of their actions on others operates as a motivating principle in international and domestic legal systems.<sup>199</sup> This principle underlies the specialized international legal framework for international standardization within the Marrakesh Agreement,<sup>200</sup> for which ISO plays a distinctive role in facilitating trade and business activity through private standardization.<sup>201</sup> The TBT Agreement offers a principled framework for coordinating public and private actors in standardization to the extent that its underlying aim is "to ensure that technical regulations and standards . . . and procedures for assessment of conformity with technical regulations and standards do not create unneces-

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196. In its scope provision, ISO 26000 expressly states that "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." Ward, *supra* note 137, at 701 (quoting *ISO 26000*, *supra* note 2, at 157–63). See also *supra* note 141 and accompanying text.

197. The term "International standard" under the TBT is defined as follows:

Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.

TBT Agreement, *supra* note 140, Annex 1, ¶ 2. The note that follows the definition explains that standards "as defined by ISO/IEC Guide 2 cover products, processes and services" while the TBT Agreement deals only with "products or processes and production methods." *Id.*

198. See *infra* Conclusion and Next Steps.

199. For a review of international legal sources, and constitutional and other national legal provisions pertaining to duties and responsibilities of the individual in relation to the state, see generally Special Rapporteur of the Subcomm'n on Prevention of Discrimination & Prot. of Minorities, *The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms Under Article 29 of the Universal Declaration of Human Rights: A Contribution to the Freedom of the Individual Under Law*, ¶¶ 66–170, U.N. Doc. E/CN.4/Sub.2/432/Rev. 2 (1983) (by Erica-Irene A. Daes) [hereinafter *Limitations on Human Rights and Freedoms Under Article 29*].

200. See TBT Agreement, *supra* note 140.

201. See *supra* note 193 (discussing the MoU between ISO and WTO).

sary obstacles to international trade.”<sup>202</sup> The TBT Agreement and its Code of Good Practice, to which ISO and many of its member bodies have committed themselves,<sup>203</sup> together shape the framework within which such international standardization is deemed appropriate. Reflecting the policy of autonomy left to WTO members, the TBT Agreement recognizes the right of a country to take certain necessary and self-protective measures.<sup>204</sup> Other provisions commit members to give one another advice and technical assistance on standardization matters and to ensure that the standardizing bodies in each territory give effect to the provisions of the Code of Good Practice.<sup>205</sup> Under the TBT Code of Good Practice, private actors commit to national and equal treatment for products from any other WTO member territory. Private actors also commit to duties not to prepare, adopt, or apply standards with a view to, or with the effect of, creating unnecessary obstacles to international trade; to use relevant international standards as a basis for the development of standards where they exist or their completion is imminent; to avoid duplication or overlap with the work of other standardizing bodies, including at the international level; and to achieve a national consensus on the standards they develop.<sup>206</sup>

In a landmark decision in 2000, the WTO TBT Committee issued a Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2 and 5 and Annex 3 of the Agreement (TBT Principles).<sup>207</sup> The TBT Principles include guidance for international standards bodies when developing international standards, guides, and recommendations, including voluntary standards like those elaborated by ISO.<sup>208</sup> Their aim is “to ensure transparency, openness,

202. TBT Agreement, *supra* note 140, pmb1.

203. See *supra* note 193.

204. See TBT Agreement, *supra* note 140, pmb1., art. 2.2. The provision reads, in pertinent part:

[N]o country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices . . . subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.

*Id.* pmb1.

205. *Id.* arts. 4, 11.

206. *Id.* Annex 3, ¶¶ D–H.

207. WTO TBT Comm., *Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade*, Annex 4, G/TBT/9 (Nov. 13, 2000) [hereinafter *Second Triennial Review*]. The Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement, is reported in this annex.

208. See *id.* Annex 4. The Decision addresses principles and procedures to be observed when elaborating international standards, guides, and recommendations as mentioned under



impartiality and consensus, effectiveness and relevance, coherence, and to address the concerns of developing countries.”<sup>209</sup> In annexing the Principles, the WTO TBT Committee stressed that:

In order for international standards to make a maximum contribution to the achievement of the trade facilitating objectives of the [TBT] Agreement, it was important that all Members had the opportunity to participate in the elaboration and adoption of international standards. Adverse trade effects might arise from standards emanating from international bodies as defined in the Agreement which had no procedures for soliciting input from a wide range of interests. Bodies operating with open, impartial and transparent procedures, that afforded an opportunity for consensus among all interested parties in the territories of at least all Members, were seen as more likely to develop standards which were effective and relevant on a global basis and would thereby contribute to the goal of the Agreement to prevent unnecessary obstacles to trade.<sup>210</sup>

The TBT Principles emphasize six main issues: transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and the participation of developing countries. As to transparency, the Principles state that “[a]ll essential information regarding current work programmes . . . should be made easily accessible to at least all interested parties.”<sup>211</sup> As to impartiality and consensus, the Principles provide that, throughout the standards development process, “meaningful opportunities” to contribute should be available to all relevant bodies of WTO members,<sup>212</sup> and “impartiality should be accorded” in relation to “access to participation in work; submission of comments on drafts; consideration of views expressed and comments made; decision-making through consensus; . . . dissemination of the international standard; fees charged for documents; . . . and revision of the international standard.”<sup>213</sup> As to effectiveness and relevance, the TBT Principles provide that international standards are “to effectively respond to regulatory and market needs” and not “distort the global market” or “give preference to . . . specific countries or regions.”<sup>214</sup> In emphasizing coherence and the need to “avoid development of conflicting international standards,” the TBT Principles state that “it is important that international standardizing bodies avoid duplication of, or overlap with, the work of other international standardizing bodies. In this respect, cooperation and coordination with oth-

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Articles 2, 5, and Annex 3 of the TBT Agreement for the preparation of mandatory technical regulations, conformity assessment procedures, and voluntary standards. *Id.* Annex 4, ¶ 1.

209. *Id.*

210. *Second Triennial Review*, *supra* note 207, ¶ 20.

211. *Id.* Annex 4, ¶ 3.

212. *Id.* ¶ 8.

213. *Id.* ¶ 9.

214. *Id.* ¶ 10.

er relevant international bodies is essential.”<sup>215</sup> In an implicit reference to the limited access and capacity that pose obstacles for developing country participants in standardization processes, the TBT Principles require that developing countries not be “excluded de facto from the process.”<sup>216</sup>

Along with the *lex specialis*<sup>217</sup> of the TBT Agreement, other fields of international law (in particular human rights law) impose not only responsibility on governments to protect against private abuses, but also impose horizontal duties on private actors to assume responsibility for effects of their actions on other private actors. The principle of mutuality, which motivates the foundational instrument of modern human rights law, the Universal Declaration of Human Rights (UDHR),<sup>218</sup> recognizes that everyone, including private persons, has a duty to respect the rights of others.<sup>219</sup> The UDHR proclaims that “every individual and every organ of society” is to “promote respect for these rights and freedoms . . . [and] secure their universal and effective recognition and observance.”<sup>220</sup> In particular, the exercise of each person’s rights and freedoms are “subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”<sup>221</sup> In any event, an individual’s “rights and freedoms may in no

215. *Id.* ¶ 12.

216. *Id.* ¶ 13.

217. *Lex specialis* refers to a body of law that governs a specific subject matter, which, under rules of legal interpretation, prevails in case of conflict with law of a general nature. The scope and application of the doctrine, *lex specialis derogat legi generali*, are the subject of ongoing debate. See generally JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 94–108, 385–417 (2003); Anja Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, 74 NORDIC J. INT’L L. 27 (2005). This situation, however, presents no conflict as commonly understood in legal theory, and the law of human rights, which includes customary and *jus cogens* norms, would continue to apply together with the special provisions of the TBT Agreement relevant to ISO.

218. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc A/RES/217(III), pmbl. (Dec. 10, 1948) [hereinafter UDHR]. The principle of horizontal duties is recognized in the UDHR and further elaborated in international and regional human rights treaties and declarations. See *infra* note 219. The correlation between rights, on the one hand, and duties of individuals and of society, on the other hand, was recognized and developed extensively in the foundational inquiry that informed the drafting of the UDHR. E.g., John Lewis, *On Human Rights*, in HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS 54, 56 (U.N. Educ. Sci. & Cultural Org. ed., Greenwood Press 1973) (1948).

219. See, e.g., *Limitations on Human Rights and Freedoms Under Article 29*, *supra* note 199, ¶ 230; ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 1, 140 (1993); Richard McKeon, *The Philosophic Bases and Material Circumstances of the Rights of Man*, in HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS, *supra* note 218, at 35, 45.

220. UDHR, *supra* note 218, pmbl. This proclamation by the U.N. General Assembly is reinforced in the reference to “member of society” in Article 22. *Id.* art. 22; see JANELLE DILLER, SECURING DIGNITY AND FREEDOM THROUGH HUMAN RIGHTS: ARTICLE 22 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 29–30, 45–46 & 121 (2012).

221. UDHR, *supra* note 218, art. 29(2).

case be exercised contrary to the purposes and principles of the United Nations.”<sup>222</sup> The UDHR’s emphasis on individual rights and duties has been elaborated in subsequent international human rights treaties and declarations, including the international covenants on human rights, which recognize specifically that the individual has duties to other individuals and to the community, and a responsibility to strive for the promotion and observance of the rights recognized in the international covenants.<sup>223</sup>

In its responsibility to ensure against private abuses under international human rights law, public authority has obligations to directly protect individuals from the infringement of their human rights by other nonstate actors, including business and other NGOs, such as ISO. Private standardization relating to public policy may not explicitly discriminate, for example, on the basis of race, sex, economic or social status, or other prohibited grounds. Nonetheless, where standards have that effect, such disparate impact would come within the proscription of international human rights law and, in particular, widely ratified treaties recognizing states’ obligations to ensure nondiscrimination in both public and private spheres.<sup>224</sup> In cases of disparate impact, the country in which the discriminatory effect occurs would thus be obligated to remedy the discrimination and eliminate its ongoing effect.<sup>225</sup>

222. *Id.* art. 29(3).

223. *See, e.g.*, International Covenant on Civil and Political Rights pmbl., *opened for signature* Dec. 19, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights pmbl., *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

224. *See, e.g.*, U.N. Charter arts. 1(2)–(3), 13(1)(b), 55(c), 76(c); ICCPR, *supra* note 223, arts. 2(1), 3, 26; ICESCR, *supra* note 223, art. 2(2); International Convention on the Elimination of All Forms of Racial Discrimination arts. 1(4), 2(2), *opened for signature* Mar. 7, 1966, S. TREATY DOC. NO. 95-18, 660 U.N.T.S. 195; Convention on the Rights of the Child art. 2, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3; Convention Relating to the Status of Refugees art. 3, *opened for signature* July 28, 1951, 189 U.N.T.S. 137; ILO Convention No. 100 Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value art. 3, *adopted* June 29, 1951, <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C100>; ILO Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation art. 2, *adopted* June 25, 1958, <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C111>; ILO Convention No. 156 Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities art. 3, *adopted* June 23, 1981, <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C156>; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 7, *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 3; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27(3), *adopted* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75(1), *adopted* June 8, 1977, 1125 U.N.T.S. 3.

225. As explained by the Committee on the Elimination of All Forms of Racial Discrimination created under the International Convention on the Elimination of All Forms of Racial Discrimination, “[a] distinction is contrary to the Convention if it has either the purpose or the effect of impairing particular rights and freedoms. This is confirmed by the obligation placed upon States parties by article 2, paragraph 1 (c), to nullify any law or practice which has the effect of creating or perpetuating racial discrimination.” U.N. Comm. on the Elimination of

The international legal duties to respect the human rights of others<sup>226</sup> apply to all private actors, including private standards bodies such as ISO. As generally applicable rules of international law, these duties cover all standardizing action, including action within the scope of specialized regimes such as the TBT Agreement, and impose on standards bodies a responsibility to ensure that their activities do not infringe on or result in injury to the rights of others.

## V. ISO EXERCISE IN THE LEGAL CONTEXT

The application of the relevant provisions of the TBT Agreement and the WTO TBT Committee's interpretative principles, as well as the general rules of international human rights law,<sup>227</sup> demonstrate that several fundamental safeguards are lacking in ISO's approach to standards development and action in fields of public policy. In their decision-making, development, and implementation phases, ISO policies and procedures need reevaluation in light of the TBT requirements to ensure that any initial decision and subsequent development by ISO of international standards affecting public policy meet the TBT Committee's threshold international principles of transparency, openness (meaningful participation), impartiality and consensus, effectiveness and relevance, and coherence, and meet the imperative to address the concerns of developing countries.<sup>228</sup>

The first area for improvement involves the criteria and process that ISO uses to make decisions to develop standards in fields that largely concern public policy. At present, the system does not take sufficient account of relevant regulatory needs, as required for private standards under the TBT Agreement and its related Principles on developing international standards. Under the TBT Code of Good Practice, "[w]here international standards exist or their completion is imminent, the standardizing body shall use them, or the relevant parts of them, as a basis for the standards it develops"<sup>229</sup> so as to avoid duplication or overlap with the work of other standardizing bodies,

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All Forms of Racial Discrimination, General Recommendation No. 14: Definition of Discrimination (Art. 1, para. 1), U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (May 27, 2008). This approach has been adapted generally to the obligations of states in relation to the right to nondiscrimination under international human rights law. *See, e.g.*, U.N. Human Rights Comm., General Comment No. 18: Non-Discrimination, ¶¶ 2, 6–7, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (May 27, 2008).

226. *See supra* notes 219–221 and accompanying text.

227. For *lex specialis*, see *supra* notes 191–216 and accompanying text. To the extent that ISO activity extends beyond the scope of the TBT Agreement, as was arguably the case with various aspects of ISO 26000, it could be that standardizing bodies have no further direct obligations to governments in relation to the TBT Code of Good Practice. However, international human rights law and other sources of international law apply to impose duties on both governments and their national member bodies for action affecting the rights of others, even beyond the *lex specialis* of the TBT. *See supra* notes 218–224 and accompanying text.

228. *See supra* notes 210–216 and accompanying text (discussing TBT Principles).

229. *See* TBT Agreement, *supra* note 140, Annex 3, ¶ F.

including at the international level.<sup>230</sup> The TBT Principles on developing international standards further provide, in relation to effectiveness and relevance, that international standardizing bodies “take account of relevant regulatory or market needs, as feasible and appropriate, as well as scientific and technological developments in the elaboration of standards.”<sup>231</sup> In contrast, the ISO decision-making process is driven nearly entirely by market needs; regulatory needs serve primarily as background context.<sup>232</sup> The ISO Principles speak to creating “market-driven International Standards” that are “market relevant” and “based on objective information and knowledge on which there is global consensus, and not on subjective judgments.”<sup>233</sup>

This approach draws on an earlier ISO adaptation of the TBT Principles from 2004. In referring to the TBT principle on effectiveness and relevance, the ISO/TMB coined the term “globally relevant standard” in its own statement of policy and principles.<sup>234</sup> These 2004 ISO/TMB principles require that the “commitment to participate in the development of and the feasibility of preparing International Standards shall be demonstrated at the outset of a standards development project.”<sup>235</sup> Under this principle, one of three possibilities guides the determination of whether and how to enter a new field of private standardization activity. The possibilities consist of whether

a globally relevant international Standard presenting one unique international solution in all of its provisions is feasible; an International Standard is feasible that presents options in specific provisions to accommodate existing and legitimate market differences where justified; or the preparation of a globally relevant International Standard is not feasible and work should not be undertaken in such circumstances.<sup>236</sup>

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230. *Id.* ¶ H.

231. *Second Triennial Review*, *supra* note 207, Annex 4, ¶ 11.

232. *See, e.g.*, ISO PRINCIPLES, *supra* note 103, at 1 (“ISO and IEC are committed to creating market-driven International Standards, based on objective information and knowledge on which there is global consensus, and not on subjective judgments, in order to provide credible technical tools that can support the implementation of regulation and public policy initiatives.”).

233. *Id.*

234. ISO, ISO/TMB POLICY AND PRINCIPLES STATEMENT: GLOBAL RELEVANCE OF ISO TECHNICAL WORK AND PUBLICATIONS § 1 (2004), available at [http://www.iso.org/iso/global\\_relevance\\_of\\_iso\\_technical\\_work\\_and\\_publications.pdf](http://www.iso.org/iso/global_relevance_of_iso_technical_work_and_publications.pdf). The ISO/TMB Global Relevance Statement was based on the work of a Global Relevance Task Force established by the ISO/TMB at the request of the ISO Council. *Id.* The ISO/TMB defined global relevance as the “required characteristic of an International Standard that it can be used/implemented as broadly as possible by affected industries and other stakeholders in markets around the world.” *Id.* § 2.

235. *Id.* § 3.2.

236. *Id.*

Notably, the references to a “unique international solution” and “existing and legitimate market differences” are presented solely in a market context:

It is recognized that in some instances various solutions exist to meet unique aspects of the local markets in different regions and countries. With globalization and the unification of markets, these market differences should be minimized over time and evolve into one global market. Simply projecting one solution that accommodates one market (but not others) as the International Standard will not force markets to evolve and coalesce. In such cases, the markets and their related industries will look elsewhere for standards that better accommodate their needs, and ISO will lose its relevance for those markets and industries.<sup>237</sup>

At the outset, a distinctive balance, taking account of both market and public interests, must be found to properly assess the need for private standardization in fields of public policy. The current models for market-driven diagnoses of the need for private standardization in fields of public policy miss the distinction between the knowledge process that drives market innovation and the processes that drive policy and lawmaking in democratic systems. Without this distinction, the appropriate balance between the roles of private and public decision making is lost. The processes for public policy making and legislation that are based on the will of the people<sup>238</sup> are expressed most evidently in democratic systems grounded on judgments of public interest informed by representative consultations and decided by accountable officials. These processes do not necessarily rely only on objective information or market incentives, unlike the guiding parameters for developing international standards relating to public policy that are set out in the ISO Principles.<sup>239</sup>

To secure the aim of coherence as envisioned in the TBT Principles, the ISO approach to public policy should specify how to ensure appropriate boundaries for private standardization in fields that call for due deference to publicly established norms. At present, this is not the case, either in principle or in practice. Although the ISO Principles affirm that “the development of regulation, public policy and/or the development and interpretation of international treaties are the role of governments or treaty organizations,”<sup>240</sup> the means for ensuring coherence with this principle rest merely on the guideline that private standardization should proceed “without seeking to establish, drive or motivate public policy, regulations, or

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237. *Id.*

238. UDHR, *supra* note 218, art. 21(3) (“The will of the people shall be the basis of the authority of government . . .”).

239. See ISO PRINCIPLES, *supra* note 103. For details, see *supra* notes 182–190 and accompanying text.

240. ISO PRINCIPLES, *supra* note 103, at 1.

social and political agendas.”<sup>241</sup> This formulation leaves unaddressed the possibility of de facto impact where compulsory market influences from a standard may affect the achievement of public policy or regulatory goals. In contrast, the means in the TBT Principles for ensuring coherence are firm: duplication and overlap with other international standards is to be avoided, and “cooperation and coordination with other relevant international bodies is essential.”<sup>242</sup> This elaboration is based on the obligation in the TBT Code of Good Practice to avoid overlap or duplication.<sup>243</sup> As discussed below, means should be explored for identifying how to adequately ensure that private standardization does not result in overlapping and inconsistent subject matter with preexisting public norms.<sup>244</sup> Such an approach, which will avoid moving ahead where there is doubt expressed by governments directly or through international organizations, will ensure against hindering, in principle or practice, the sovereignty of states exercised in a representative and accountable manner.

The second general area for reform involves the procedures to ensure meaningful participation of all governments concerned where private international standardization may add value to a field of public policy that is already regulated. Adequate measures should be developed in a suitable forum that includes those states whose standardizing bodies participate in ISO to ensure a proper operational balance between public authority and private action. The ISO Principles, and their effect as demonstrated in the context of developing ISO 26000, fell short of the thresholds for transparency, openness, and impartiality set out in the TBT Principles.<sup>245</sup> This is due in part to the mismatch between the vast public arenas sought to be addressed and the inherently private, closed nature of ISO’s structures and ways of working.<sup>246</sup> The ISO Principles themselves aim only to ensure that the potential for conflicting agendas can be avoided by a clear understanding of the relationship between the standard and the public policy initiative and by early intervention of public authorities in the standards development process.<sup>247</sup> The ISO 26000 experience shows that, when ISO standards require reference to or use of authoritative international instruments, it is the public authorities, expending often-scarce public resources, that are expected to reformulate and rearticulate public standards in a private forum.<sup>248</sup> The private forum brings

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241. *Id.*

242. *Second Triennial Review, supra* note 207, Annex 4, ¶ 12.

243. TBT Agreement, *supra* note 140, Annex 3, ¶ H.

244. *See infra* notes 257–266 and accompanying text.

245. *See supra* Part III.B.

246. *See supra* Part III.C.

247. *See* ISO PRINCIPLES, *supra* note 103, at 1.

248. *See id.* (“[T]he intervention of the public authorities in the standards development process should occur as early as possible. . . . [I]n many cases experts representing regulatory authorities are actively participating in the development of ISO and IEC International Standards . . .”).

not only different actors but different processes that diverge from the guarantees of representativity, transparency, and accountability to which the exercise of public authority typically is held. In contrast, the approach of the TBT Agreement offers a method for balancing public sector inputs where needed in international standardization activity, requiring that WTO “[m]embers shall play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations.”<sup>249</sup> To ensure such a “full part” result, a preemptive right of public authoritative action could be recognized and operate with ISO in much the same way that other private actors are required to defer to public authority in national and international contexts.<sup>250</sup> Criticisms of the lack of sufficient deference surfaced in the elaboration of ISO 26000 as governments demanded that simple references to treaty texts replace the WGSR attempts to reword the texts in ways that could “reinterpret, mischaracterize or misstate” their content.<sup>251</sup>

In launching a new “leadership” series of standards, ISO faces a set of new roles, responsibilities, and interactions for which modified approaches of working are essential. Nonetheless, the ISO Principles defer to existing operational approaches and participation structures and directives that have been used successfully in the development of technical standards based on objective knowledge and use of experts, a model that may not necessarily apply effectively to the fields of public policy in which ISO is interested. As a further impediment, the ISO Principles specifically propose to avoid “the use of special committee structures, procedures or participation models” as these “may compromise . . . credibility and suitability.”<sup>252</sup> Such an approach

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249. TBT Agreement, *supra* note 140, art. 2.6. Technical regulations, as defined in the TBT Agreement, are mandatory and deal only with product characteristics or their related PPMs, including terminology, symbols, packaging, marking, or labeling requirements as they apply to a PPM. By its terms, the TBT “deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods” and expressly excludes services and mandatory standards. *Id.* Annex 1, art. 2. It further recognizes that the terms as defined in ISO/IEC Guide 2: 1991 also cover services and mandatory as well as voluntary standards. *Id.*

250. See *supra* notes 221–224 and accompanying text (discussing human rights obligations under national and international law).

251. *E.g.*, Ward, *supra* note 137, at 702 (quoting the U.S. Trade Representative’s submission to the sixth WGSR meeting).

252. ISO PRINCIPLES, *supra* note 103, at 2. According to ISO, its standards are developed on the basis of the principles of industry-wide consensus and voluntary involvement of all marketplace interests, including manufacturers, vendors, users, consumer groups, testing laboratories, governments, engineering professions, and research organizations. *Id.* at 1; *cf.* ISO/IEC DIRECTIVES, *supra* note 77, §§ 1.17.2.2, 1.17.3.2. The standards development process is governed by specific rules defined in the ISO/IEC Directives. *Id.* § 2. This approach may have arisen from the experience of the MoUs with the ILO, U.N. Global Compact, and the OECD. See *supra* notes 85–99 and accompanying text. As discussed above, the ILO-ISO MoU granted a status distinct from D-liaison organizations under the ISO rules. In so doing,



presumes that models and structures that have worked in highly technical contexts will also succeed in public policy oriented spheres, even though the processes and types of dialogue are distinct from each other. Where highly technical or scientific subject matter must be agreed upon, breadth and diversity of expertise is required. However, where public policy is concerned, a different type of consultation is needed in order to serve the democratic mandate. This consultation involves representative stakeholders, meaningfully informed of the issues, whose authority derives, not from individual expertise, but from their status as duly elected representatives of the community they serve. Expert dialogue is evident in the “case studies of successful . . . standards efforts that support public policy initiatives” cited in the ISO Principles relating to “medical devices and greenhouse gas emissions, and IEC standards related to radio interference, safety of household appliances, [and] ships and marine technology.”<sup>253</sup> These cases exemplify ISO’s “valuable support to the implementation of public policy”<sup>254</sup> through international standards involving situations where established scientific and technical purposes and techniques were applied to complement a broader public purpose established by public authority.

ISO 26000 was of a fundamentally different nature in both its orientation and scope. ISO’s decision at the start to shift from CSR, addressing market actors, to SR,<sup>255</sup> addressing all organizations in society, diluted the exercise’s focus on market needs. It further encouraged an expansive coverage of subject matter already well developed in relevant international standards in the public sphere that, for the most part, did not require technical or scientific expertise, unlike the examples listed above.

## VI. PROPOSALS FOR A LEGALLY SUSTAINABLE FRAMEWORK

The interaction of private standardization and public policy should be structured in a way to avoid situations where, in areas of publicly established consensus, a new consensus is sought by means of a privately convened process that, unlike public processes, cannot be fully representative of the interests of society. The result, demonstrated by ISO 26000, tends to review and recast the original decisions of the publicly convened representative stakeholders by requiring the consensus of a new set of actors with a less representative composition and operating under different procedures and for different purposes.<sup>256</sup> Such scenarios present a genuine risk of compromising the public democratic processes based on the rule of law by

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other international organizations sought and were granted similarly specific accords within the two years following the start of the process. *See supra* notes 85–99 and accompanying text.

253. *See* ISO PRINCIPLES, *supra* note 103, at 2.

254. *Id.* at 1.

255. *See supra* note 29 and accompanying text (discussing the single dissenting voice upon the Advisory Group’s recommendation for SR, not CSR).

256. *See* the discussion on representativity and procedures, *supra* Part III.A–B.

requiring a new consensus between public actors broadly representing the community and private actors representing various stakeholders concerned—a consensus that adds little or no value and poses a potential risk to the democratic process of law and policy making. In addition, a system of privatized standardization based on public mandates and processes necessarily would not serve the value of complementarity between the privatized standardization process and public policies. The proposals for a way forward focus on an appropriate articulation and coordination of both public and private roles in standardization.

This review of the ISO 26000 journey concludes that ISO did not sufficiently develop and apply the necessary criteria to justify its decisions to proceed with private standardization in the field of SR or to define the scope of and processes for developing such a standard.<sup>257</sup> ISO's decisions to seek international standardization in the field of SR, and to use particular processes, both ad hoc and those established for technical standards, should be reevaluated within a framework of laws and other rules applicable to the actors involved, particularly ISO and its national member bodies. Novel paradigms emerge in examining whether the decision to seek international standardization in the field of SR, especially for all organizations, was justifiable in its aim and purpose, and whether the rules applied to “convene” public actors to debate and renegotiate public policy outcomes in the development of a private international standard were appropriate in the particular context.

One possible solution would be the operation of a presumption for public preemption of subjects relating to public policy. Upon initial review of the need for a private standard by those interested in developing one, an exercise in due diligence would seek to ensure that the negative duty not to harm publicly established common standards would be respected. Further questions about what type of showing would be sufficient to overcome the presumption, at both international and national levels of standardizing activity, would need to be settled, perhaps by resorting to the international institutions concerned. A standardized international-level mechanism for consultation with states, collectively and through international organizations concerned, might achieve predictability and transparency currently lacking in the ad hoc relationship agreements between ISO and various international institutions.<sup>258</sup> In addition, the approach of complementarity between public and private actors embedded in the TBT Agreement should lead to consideration of what further arrangements could ensure that private standardization

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257. For the process used by ISO to review the need for developing ISO 26000, see *supra* notes 35–45 and accompanying text.

258. See the discussion of the MoU variances, *supra* Part III.B.3. For a list of organizations cooperating with ISO, including international organizations, see *Organizations in Cooperation with ISO*, ISO, [http://www.iso.org/iso/about/organizations\\_in\\_liaison.htm](http://www.iso.org/iso/about/organizations_in_liaison.htm) (last visited Feb. 5, 2012). For further discussion of the preemption approach, see *infra* Conclusion and Next Steps.

initiatives outside the scope of the TBT Agreement would add value rather than overlap or conflict with public consensus on matters of public policy.

Ironically, ISO 26000 itself acknowledges that all actors, private as well as public, have duties to each other and to society; this general principle motivates both the standard's scope and originating purpose.<sup>259</sup> In justifying its decision to develop a new standard in the field of SR of all organizations, ISO contended that there was an urgent need to address the "market confusion that may be caused by the steadily increasing number of SR initiatives."<sup>260</sup> However, its further conclusions that such confusion would be remedied by an SR standard applicable to all organizations<sup>261</sup> and that such a standard would facilitate international trade and business, left unanswered the question whether private international standardization is appropriate where a wide number of common rules are already applicable at the international level. Overlap and duplication between public and private efforts, which are to be avoided under the TBT Agreement framework for coordination, were significantly visible even at the start of work on ISO 26000.<sup>262</sup> Indeed, the NWIP gave undue emphasis to the fact that a suggestion to avoid legal terrain in the development of the new standard was not accepted by the Advisory Group as a whole.<sup>263</sup> Beyond a general reference to "market confusion that may be caused by the steadily increasing number of SR initiatives," the ISO justification for pursuing an SR standard did not specify what sort of market need justified standardization in situations where public

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259. ISO 26000 itself 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 the health and the welfare of society . . ." *WGSR DIS*, *supra* note 134, § 2.1.18 (internal citations omitted) (in pertinent part, placement and wording unchanged in adopted standard). While there is no consensus on the meaning and function of "fundamental" or "general" principles, it is generally agreed that certain basic principles underlying international law serve as motivating influences that, in legal terms, guide the course of future normative development. *See generally*, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 15–31 (4th ed. 1990); BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 6–21 (Cambridge Univ. Press 2006) (1953); JEAN PICTET, *HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS* 28–30 (1975); OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 49–61 (1991); *see also* Statute of the International Court of Justice art. 38(1)(c), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (describing "general principles of law recognized by civilized nations" as a source of international law).

260. *NWIP*, *supra* note 35.

261. *Id.* Annex A, § 3. *See also supra* note 34 and accompanying text.

262. *See supra* Part III.C.

263. *NWIP*, *supra* note 35, Annex B, §§ a, c. In this section on purpose and justification for the proposed standard, the ISO Secretariat reviewed the recommendations of the Advisory Group on preconditions as well as scope of work and type of deliverables. In addressing issues that might affect the feasibility of the standardization activity as identified by the Advisory Group in its report, the NWIP had excessively spotlighted the WGSR's observation that the "indication that ISO should address what is non-legal (leaving the legal issues to inter-governmental organizations) may not be helpful." *Id.* Annex B, § f. *See supra* text accompanying notes 41–42.

authoritative instruments have legislated common international standards, leaving particular elements to individual country governments to regulate.<sup>264</sup> The ISO Principles, which were adopted several years after the decision to develop an SR standard, noted the need for standards to provide “valuable support to the implementation of public policy.”<sup>265</sup> In this light, the development of ISO 26000 should have been designed as complementary to, rather than competitive with, the elaboration of public policy.

Along with the question of the purpose of private standardization in a public policy field is the question of process, whose importance grows in direct proportion to the degree of incursion by the private standardizing body into public policy and legal territory. The issue of the lack of representativity of the group creating the standard would not necessarily have arisen if expertise in technical affairs, rather than a democratic social policy setting, had been the primary input to the standardization process.<sup>266</sup> Although, in principle, the stakeholder categories applied by the NSBs represented an effort to achieve a national consensus on the developing standard in line with the commitments of the TBT Agreement, in practice the representativity of the process was severely challenged by those in the process who believed that selection based on stakeholder categories could not produce legitimacy.<sup>267</sup> The justification for such a challenge to the ISO 26000 process toward “private governance” derives from the established principle of popular participation, which has been recognized as a political right relevant in the process of economic and social development.<sup>268</sup> The election and accreditation process inherent to democratic government selection, and to authentication of representatives in delegations to international institutional decision making,<sup>269</sup> contrasts dramatically with the democratic deficit of the

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264. *NWIP*, *supra* note 35, Annex B, § d.

265. ISO PRINCIPLES, *supra* note 103, at 1.

266. *See generally supra* Part III.A.

267. *See* TBT Agreement, *supra* note 140, Annex 3, ¶ H.

268. *See, e.g.*, G.A. Res. 40/99, *pmb.*, U.N. Doc. A/RES/40/99 (Dec. 13, 1985) (recognizing that “popular participation . . . constitutes an important factor in socio-economic development and in the full realization of all human rights”); World Summit for Social Development, Copenhagen, Den., Mar. 6–12, 1995, *Copenhagen Declaration on Social Development and Programme of Action*, Annex 1, § 71(h), U.N. Doc. A/CONF.166/9 (Apr. 19, 1995); *see also* Catherine E. Rudder, *Private Governance as Public Policy: A Paradigmatic Shift*, 70 J. POL. 899, 900 (2008).

269. The interest shown by ISO in ILO’s accreditation process for its nongovernmental representatives was genuine but could not change the fundamental procedure on which ISO relied: selection by its member bodies without supervision or control in a central fashion as ILO does in complying with its own constitutional requirements for accreditation of governmental selection of nongovernmental delegates to the International Labour Conference. *Compare supra* note 56 and accompanying text (stating that ISO members’ selection of experts for standards development was subject to ISO guidance but ultimately within their own discretion), *with* ILO, CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANISATION art. 3, ¶ 1 (2010) (stating that ILO Member States have legal responsibility to appoint four-member delegations, two governmental delegates and two delegates representative of employers and workers of the country), *and* ILO, STANDING ORDERS OF THE INTERNATIONAL LABOUR

private standards procedure in relation to public policy making. As a consequence of this democratic deficit, the ISO rules relating to consensus (a core principle that is, on its face, neutral when technical, “objective” knowledge may be useful) fall short when applied to a nonrepresentative composition under rules and structures created by appointment rather than selection by representative bodies.<sup>270</sup>

The development of ISO 26000 also poses the question of who bears responsibility for both the standard itself and its effects. It is possible, as was the case for ISO 26000, that the content of the standard, at the exact moment of publication, may be deemed acceptable by many governments and IGOs in relation to the corresponding aims recognized in international authoritative instruments. However, because international law and public policy continually evolve, and are applied by actors holding representative authority, the normative parity in content between the two spheres may erode rapidly. As normative parity erodes, the value of the ISO standard is depleted because it depends on public norms. The ISO procedures foresee the possibility of a periodic review and revision of ISO 26000,<sup>271</sup> yet this would again place needed public resources at the convening “authority” of a private actor. In the interim, the conflicts that erupt between the two spheres could lead to confusion in applying local laws and regulations and unnecessary loss of economies in public enforcement.

The impact of the standard on society creates an additional question of the integrity of the result in relation to its primary goal. Under the TBT Agreement framework, applied directly or by analogy, ISO and other standards “can properly support and be used by public authorities” in the context of commitments made under the TBT Code of Good Practice that standards would not serve as unnecessary obstacles to international trade.<sup>272</sup> In the ISO 26000 development process, it became clear that not all governments agreed with one another on the policy positions or the relationship between international and national law, both of which were being renegotiated in a private forum.<sup>273</sup> They referenced the need to maintain the balance on policy autonomy struck in the TBT and Marrakesh Agreements in general, as well as the

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CONFERENCE art. 5 (2010) (noting that credentials are verified by a Credentials Committee and are subject to objections, complaints, and monitoring procedures established by the ILO’s General Conference). The ILO Constitution and Standing Orders can be found at <http://www.ilo.org/public/english/bureau/leg/download/constitution.pdf>.

270. ISO/IEC DIRECTIVES, *supra* note 77, foreword, §§ 1.1(b), 1.2.2, 2.5.5–6; ISO PROCEDURES SUPPLEMENT, *supra* note 80, §§ 1.8.1, 1.8.3.

271. ISO PROCEDURES SUPPLEMENT, *supra* note 80, § 2.9.3.2.

272. ISO PRINCIPLES, *supra* note 103, at 1. *See supra* note 193 and accompanying text.

273. These concerns resulted in the discord in the DIS vote. *See Preliminary Voting Result*, *supra* note 139. For an excellent examination of the various objections of the Arab states, Canada, China, India, and the United States, only some of which were resolved, see Ward, *supra* note 137.

GATT,<sup>274</sup> which covered some of the ground being retitled in the substantive core subjects declared to be part of the expectations of socially responsible organizational behavior. In addition, by introducing the concept of “international norms of behavior,”<sup>275</sup> ISO 26000 left a wide margin of discretion to private actors in situations where national law conflicted or failed to give effect to international law. It declared that “an organization should respect international norms of behavior, while adhering to the principle of respect for the rule of law.”<sup>276</sup> The freedom left to private actors to interpret appropriately such a provision could prove problematic for compliance with national law, particularly in dualist systems that do not automatically give effect to international law. Indeed, the compromise wording in ISO 26000 begs the fundamental question that led to the decision to develop ISO 26000 in the first place: diversity at the national level was seen to give rise to possibly conflicting orientations that needed to be urgently addressed;<sup>277</sup> nonetheless, the issues defy easy international standardization.

The difficulty presented by the ongoing effects of such a standard is exemplified by the creation and dissolution of the “SR community,” the fundamental social unit convened to develop ISO 26000.<sup>278</sup> The gathering of “stakeholders” and “experts”—mixed as their status became—assimilated a temporary society or community pronouncing expectations related to socially agreed norms. The disbanding of the appointed “community” that created the standard demonstrated that, unlike the ongoing social and legislative structures in the real world, or even in the traditional ISO world of member bodies and technical experts, there was actually no real and lasting community created to maintain the standard adopted or to presumably express the values of society at large.<sup>279</sup> To the extent that implementing ISO 26000 is now left to the NSBs in their promotional and educational roles, it is for national governments to supervise and control these bodies in the parallel processes set in motion based on the terms to

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274. For policy autonomy, see, for example, TBT Agreement, *supra* note 140, art. 2.2; Marrakesh Agreement Establishing the World Trade Organization pmbi., Apr. 15, 1994, 1867 U.N.T.S. 154; GATT, *supra* note 192, art. XX.

275. The definition of “international norms of behavior” consisted of “expectations of socially responsible organizational behavior derived from customary international law, generally accepted principles of international law, or intergovernmental agreements that are universally or nearly universally recognized.” *WGSR DIS*, *supra* note 134, § 2.1.10 (defining international norms of behavior; the placement and wording unchanged in adopted standard).

276. *ISO 26000*, *supra* note 2, cl. 4.7.

277. The expectations of ISO 26000’s benefits were set out in the NWIP. *See supra* notes 35–39, 108, and accompanying text.

278. In contrast, in democratic public processes of lawmaking, the community and society hold a primary role in determining what is of social value and what is of public interest. *See supra* Part III.D.

279. Resolutions at the last meeting of the WGSR reflected hopes that NSBs would maintain committees of experts at the national level based on the recommended multistakeholder composition and balance, and especially do so through the first revision of the standard (a five-year target). *See 8th Meeting of the WGSR*, *supra* note 69, Res. 8, 10.

which these governments had not necessarily agreed in the first place. Thus, the added value of the result produced is not evident, and the risks attendant in its impact may justifiably cause concern and prompt regulatory responses at national and international levels.

CONCLUSION AND NEXT STEPS:  
COORDINATION AND A PROTOCOL OF GOOD PRACTICE FOR  
STANDARDIZATION IN FIELDS RELATED TO PUBLIC POLICY

The shortcomings presented by the development of ISO 26000 do not mean that private international standardization in support of public policy and international legal norms cannot make a positive contribution. Rather, the evidence suggests that such initiatives, on the one hand, and public objectives, on the other hand, will not automatically or even easily converge. Perhaps some better form of complementarity could be envisaged to find a common goal to be achieved in the interaction between the private standards community and the public international community. This is the context of the TBT Agreement, where the two spheres share a desire to facilitate international trade and to avoid unnecessary trade restrictions. Just as the TBT Agreement and its TBT Code of Good Practice require commitments to be taken by the private standardization actors within a greater framework of international trade agreements, similar commitments should be required of those actors within the framework of international social and human rights law. The elements of such a framework derive from the fundamental international legal principles supporting the rules of nondiscrimination, human rights, political participation, development, and social progress. In this regard, a Protocol of Good Practice could provide guidance for private standardization in fields relating to public policy promoting a stricter self-discipline by private standardization bodies in understanding when their actions in such fields infringe on the rights and freedoms of others or do not serve the general welfare.

A first step in developing concrete guidelines would be to recognize a principle of coordination between public and private spheres that would give preemptive effect to public law and policy, particularly international public standards. This would be in some senses a mirror image of the principal commitment of the TBT Agreement that public actors do not proceed with standard setting when privately developed technical regulations exist or will soon exist.<sup>280</sup> The coordination principle would operate as a presumption or evidentiary burden on private standardization bodies to guide the justification of their decisions for standardization in certain fields where public policy and legal action, particularly international public norms, are already well established or imminent. This new coordination mechanism would complement the existing basis for deference to private standardization bod-

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280. TBT Agreement, *supra* note 140, art. 2.4.

ies in technical fields under the TBT Agreement<sup>281</sup> by transposing the deference to public normative action in cases of standardization in public policy fields, unless proven otherwise by preestablished criteria, including those relevant to effectiveness and fairness. Such preestablished criteria might be developed to determine which fields are already preempted by public regulation and, in contrast, which fields (or relevant parts of fields) could be subject to complementary action through international standardization, in the form of subsidiary guidance, systems guidance, or technical or scientific applications relevant to established fixed norms.<sup>282</sup>

The coordination presumption could operate not only at the initial stage of selection of a field for international standardization, but also in the development and subsequent operation of any such standard where justified. In the development phase of a standard, its application would help to define the appropriate scope of an exercise so that, where a public actor raises concerns of mandate and content or procedure, deference would be given to the concern unless otherwise justified by application of criteria to be verified by an independent authority. Similarly, to encourage coherence in the operation of such a standard, due deference would be given to the authority mandated to interpret or apply a provision concerning the subject matter. The overall effect could avoid draining public resources by using those resources for processes that require public actors to appeal to private actors to act consistently with the public mandate while, at the same time, encouraging appropriate and effective multistakeholder initiatives to complement and build on public regulatory processes where helpful.

Moving in the direction of coordination would mean at least that public actors are not expected to fit into private structures where the main private standardization inquiry concerns publicly established standards. Means for encouraging a properly coordinated approach to governance would require expanding existing international commitments that defer to private international standards based on technical expertise, such as those in the TBT Code of Good Practice. A further Protocol of Good Practice, for example, could be developed to guide standardization bodies to accept international public norms in their approach to standardization in fields relating to public policy.<sup>283</sup> To cover the full breadth of ISO activities, such a Protocol would

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281. *Id.*

282. The symbiosis between public law and private standardization is exemplified by the creation of an interoperable biometric standard for the Seafarers' Identity Documents Convention (Revised), 2003 (No. 185), made possible through technical assistance from ISO requested by ILO. See ILO, *Report of the Director-General, Third Supplementary Report: Follow-up to the Seafarers' Identity Documents Convention (Revised), 2003 (No. 185)*, ILO Doc. GB.306/17/3 (Nov. 2009).

283. The exercise involves adapting the TBT Code of Good Practice approach that seeks to ensure that existing or imminent international private standards in the field of technical regulation, whenever relevant, are used as a basis in developing any new standards and that duplication and overlap with such relevant standards are avoided. See TBT Agreement, *supra* note 140, Annex 3, §§ F, H. Further consideration could be given to building implementation methods through reporting, notice and comment, and consultation procedures that would



necessarily extend beyond the scope of the existing TBT framework, which focuses only on product characteristics or their related PPMs, but not services.<sup>284</sup>

In a soft law approach, a model law or interpretative guidelines on the role of private standardization in public policy areas could be developed for use by states and their standards bodies, and by ISO and other private standardization organizations, as well as by the United Nations and other public organizations. Such a structured interaction based on existing representative systems, though not perfect, would support a model in which the conveyor of policy and lawmaking in the public interest remains with the public body and invites the standardization body to assist in the necessary technical applications.

The above types of approaches should leave intact the current system that covers the vast majority of private standardization activity in which public actors and ultimately the public good benefit from necessary technical expertise. The standards approved by recognized private bodies on the basis of such expertise, which are already the subject of the TBT Agreement and its annexed Code of Good Practice, do not require the lasting legitimacy that comes from public representative and participatory structures and processes.<sup>285</sup> By preserving technical expertise as a valued and unique basis for private action, standardization bodies may avoid competing in fields of public policy with public authority based on authentic accreditation that generates public international standards. When public standards are put into question and even renegotiated in private standardization processes, the result risks undermining the effectiveness of action in both the public and private spheres.

The strength of ISO lies in its worldwide network of NSBs that leverage industry's global market. The strength of public international organizations rests in their representative authority and processes. Governments in turn have a responsibility to represent the democratic will of their people, a duty that can be effectively only discharged in dialogue and coordination with the private actors and organizations of the people. The challenge ahead is to build an approach that will effectively coordinate the comparative advantages of both public and private actors at international and national levels. Effectiveness will be measured in the end by the capacity to achieve together the elimination of unnecessary barriers to trade and to promote development, social progress, and human rights for all.

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permit the necessary interaction between private standardizing bodies and public bodies concerned. Cf. *id.* §§ J, L–N.

284. *Id.* art. 1.3, Annex 1, ¶¶ 1–2 (noting that ISO defines the terms to “cover products, processes and services,” thus creating a broader scope than that used for the same terms in the TBT Agreement).

285. See the discussion on representativity and procedures, *supra* Part III.A–B.