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ISO 26000: Bridging the Public/Private Divide in Transnational Business Governance Interactions

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Kernaghan Webb

ISO 26000: Bridging the Public/Private Divide in Transnational Business Governance Interactions

Abstract:

This paper explores the proposition that the ISO 26000 social responsibility guidance standard represents an innovative form of global social responsibility (SR) rule instrument that performs five key distinctive bridging functions in addressing public and private transnational business governance interactions: (1) top down transpositions of key concepts from inter-governmental instruments directed at first instance at states into a non-state global SR rule instrument applying directly to transnational corporations (TNCs) and other organizations; (2) bottom up transpositions of key concepts from non-state SR instruments of narrow focus to apply more broadly to all SR activities; (3) innovations in the standards development process, to bridge and bring together a diverse range of key public sector, private sector and civil society actors (including SR instrument competitors), thus forming a key basis for its characterization as an influential statement of the global community concerning the appropriate behaviour of TNCs and other organizations; (4) design of the instrument as a framework normative document intended for use by public sector, private sector and civil society actors, compatible and aligned with other key global SR instruments; and (5) characterization of ISO 26000 as emerging global SR custom, to be applied by domestic governments, courts, and others, to address behaviour of TNCs and other organizations.

Key words: transnational governance, transnational corporations, social responsibility, law, standards, custom, norms, institutionalization, legitimacy

ISO 26000: Bridging the Public/Private Divide in Transnational Business Governance Interactions

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The paper represents the views of the author and not those of any other organization to which he may be affiliated.

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1.0 Introduction

The position that I am exploring in this paper is that, while the ISO 26000 Social Responsibility Guidance International Standard is an imperfect “work in progress” in some ways, its publication in November, 2010 marked an important development in the emerging transnational business governance rule architecture.¹ The publication of ISO 26000 is described here as representing the introduction of a new form of rule instrument² performing five distinctive bridging functions between and among public and private (non-state) transnational norms and institutions:

- (1) ISO 26000 distills key concepts and obligations that were originally embodied in public intergovernmental instruments (e.g., treaties) – concepts and obligations that were initially directed at first instance primarily at states -- and transposes them so that they apply directly to transnational corporations (TNCs) and other organizations. This is referred to here as a “*top down*” *transpositional* bridging function of ISO 26000;
- (2) ISO 26000 also *transposes in a “bottom up” way* some key concepts originally formulated in non-state transnational instruments of narrow, single topic application (such as the “plan do check act” implementation approach embodied in ISO 9000 quality and ISO 14000 environmental management standards) so that those concepts apply to the more broad comprehensive social responsibility context that forms the scope of ISO 26000;
- (3) complementary to the standard’s top down and bottom up transposition bridging function manifest in the wording of the standard, the inclusive ISO 26000 standard development process performed an important inter-actor *procedural* bridging function. The process brought together experts from inter-governmental

¹ In fact, while ISO 26000 applies to business organizations around the world, and is therefore a component of the transnational business governance, the standard also applies to all other types of organizations, including government organizations, although it is not intended to replace, alter or in any way change the obligations of the state. Its distinctive status is discussed further below.

² For the purposes of this paper, “rule instruments” refers to stipulations of objective criteria that are designed to influence or control behaviour and that allow for evaluation of whether the behaviour or conduct of an entity or an individual conforms with the criteria. In keeping with this definition, laws, principles, standards, guidelines, compacts and voluntary codes all qualify as examples of rule instruments, although the status and effect of the rule instrument can vary significantly depending on its author, form, and other characteristics. This rule instrument definition is derived from: K. Webb, “Sustainable Governance: (2005) “Sustainable Governance in the 21st Century: Moving Beyond Instrument Choice,” in P. Eliadis, M. Hall and M. Howlett, eds., *Designing Government: From Instruments to Governance* (Montreal: McGill-Queen’s University Press, pp. 242 – 280).

organizations, governments, peak industry and labour organizations, consumer and other non-governmental organizations, standards bodies, and others, from developed and developing countries, to form a global working group comprising 450 experts and 210 observers from 99 ISO member countries and another 42 liaison organizations, supported by a network of multi-stakeholder national mirror committees from the participating federation of ISO national member bodies. This process created a venue for a rich, lengthy and in depth social responsibility (SR) “norm conversation”³ among diverse public and non-state parties to take place. The participation in the ISO 26000 working group of experts from competing SR instrument developers⁴ is described here as representing a formalized and structured form of co-opetition.⁵ The characterization of ISO 26000 as an influential statement of the global community’s expectations concerning the social responsibility obligations of TNCs and other organizations, and a credible transposition of concepts and obligations found in intergovernmental and non-state SR instruments, owes much to the innovative procedural inter-actor bridging function performed by the ISO 26000 standards development approach;

- (4) ultimately, ISO 26000 is designed to act as a *framework bridging SR rule instrument* in the emerging global SR instrument architecture, capable of being drawn on by public sector, private sector and civil society actors in their transnational social responsibility instruments and activities. The framework nature of ISO 26000, open to use by actors from all spheres, through their own SR instruments, represents a functional form of transnational governance bridging performed by the standard; and
- (5) the ISO 26000 standard is characterized here as a novel construction of *global SR custom*, with global custom being described here as a codification of the expectations of the global community concerning the behaviour of TNCs and others. I suggest that the global SR custom embodied in the terms of ISO 26000 can be drawn on by domestic courts and legislatures and others in determinations of acceptable and unacceptable conduct of TNCs and other organizations. As such, ISO 26000 as global custom is a form of instrument that is capable of bridging the divide

³ The concept of private rule instruments, codes, and standards acting as the basis for “norm conversations” with other societal actors is discussed in K. Webb (2004), “Understanding the Voluntary Codes Phenomenon,” in K. Webb, ed., *Voluntary Codes: Private Governance, the Public Interest, and Innovation* (Ottawa: Carleton University Research Unit for Innovation, Science and Environment). See below for further discussion of ISO 26000 as a forum for norm conversations.

⁴ This point is discussed in greater detail below, and examples of participants in the ISO 26000 process who are proponents of particular existing SR instruments are provided.

⁵ The concept of co-opetition is discussed in greater detail later in the paper, drawing on A. Brandenburg and B. Nalebuff (1996), *Co-opetition* (New York: Doubleday); and D. Esty and D. Geradin (2000), “Regulatory Co-opetition,” *J. of Int’l Economic Law*, Vol.3, No 2, pp. 235-255.

between a non-state global standard and conventional domestic legal instruments and processes, potentially particularly valuable in addressing the behaviour of organizations that has some transnational dimension.

The paper is organized as follows. First, I describe the distinctive characteristics of ISO 26000 as a global SR instrument as it pertains to its bridging role. Next, I explore how ISO 26000 can be characterized as a novel construction of global SR custom, examining the meaning of custom, its connection to domestic legal processes, and the implications for TNCs, governments, courts and others. I then position ISO 26000 within the broader emerging global SR transnational governance architecture, and provide conclusions.

2.0 Distinctive Characteristics of ISO 26000

While there has been a proliferation of SR-related rule instruments at the global level in the past 20 years,⁶ due to the distinctive features of ISO 26000 described in this paper, I characterize the standard as a significant breakthrough innovation⁷ in the emerging global SR rule architecture.

These distinctive characteristics have an important bearing on the perceived legitimacy of ISO 26000 as a statement of what constitutes acceptable and unacceptable SR conduct by TNCs and other organizations. These characteristics also form a basis for the position I am putting forward here that ISO 26000 is a unique bridging instrument, in terms of public-private interactions between transnational business regulatory instruments and official legal systems. For these reasons, before turning to an examination of the distinctive characteristics of ISO 26000, I will briefly review the legitimacy and authority literature concerning non-state transnational business regulatory instruments such as ISO 26000.

Legitimacy and authority in the context of non-state transnational rule making has been said to refer to a generalized perception or assumption that the actions of a rule maker and its rule instrument are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.⁸ According to commentators, a

⁶ See examples below.

⁷ The concept of “breakthrough innovation,” when applied to rule instruments, refers to rules that are developed and implemented by entities and through processes that allow a broader cross-section of stakeholders to meaningfully participate than is possible with conventional rule approaches (i.e., laws and treaties). The concept of non-state rule instruments as breakthrough innovations is discussed in K. Webb (2004), “Understanding the Voluntary Codes Phenomenon,” in K. Webb, ed., *Voluntary Codes: Private Governance, the Public Interest, and Innovation* (Ottawa: Carleton University Research Unit for Innovation, Science and Environment).

⁸ This paper draws on the discussion of legitimacy and private authority literature made by J. Black (2008), “Constructing and contesting legitimacy and accountability in polycentric regulatory regimes,” *J. of Regulation and Governance*. Vol.2, 137–164; M. Bostrom and K. Tamm Hallstrom, “The Fragile Authority of Multi-Stakeholder Standard Setting,” Paper discussed at SGIR Conference in Stockholm, 9 – 11, 2010; B. Cashore, “Legitimacy and the

transnational rule developer is considered legitimate and to have authority when it is perceived as having a right to develop those rules both by those it seeks to affect and those on behalf of whom it purports to create the rule.⁹ Commentators suggest that there are a variety of types of legitimacy that can be granted by a non-state rule maker's stakeholders: *pragmatic legitimacy*, which rests on the self-interested perceptions of a stakeholder that the rule maker will pursue its interests, directly or indirectly; *moral legitimacy*, which reflects perceptions of a stakeholder that the rule maker's goals and/or procedures are morally appropriate (e.g., that the rule maker is accepted as having the requisite capacity and influence to carry out the development and implementation of the rule in a particular situation, and that the procedures the rule maker uses are fair); and *cognitive legitimacy*, which may flow from perceptions of a stakeholder that the rule maker's undertaking of the development of the rule and the rule itself are necessary or inevitable.

In a private transnational rule making context, legitimacy and authority is not determined solely by the actions of the rule developer: the views and conduct of those who interact with the rule developer are also important. Thus, there is a dialectic "to and fro" norm conversation taking place between the rule developer and those it interacts with, and among those who participate in its rule making process, that together, ultimately contributes to the perceived legitimacy and authority of the rule developer and the rule instrument. The rule developer is in a position to confer legitimacy on those who participate in its processes (e.g., by allowing them to participate). And at the same time, those parties who interact with the rule developer tacitly or explicitly confer legitimacy on the rule developer: their participation in the rule development process can be considered as signaling their belief that the rule developer is an appropriate entity to articulate a rule instrument containing normative expectations on a particular subject, and to thereby influence behaviour of the entities targeted by the rule instrument.

It perhaps goes without saying that private rule development processes that involve widely divergent participants, each with their own agendas, typically involve ongoing struggles or negotiations between the rule developer and those who participate in or otherwise support the process, and among the participants in the process. While inter-governmental rule makers have a pre-existing basis of legitimacy and authority to develop rules by virtue of their position as public authorities, the situation is different for private rule makers, who without such a pre-existing "public" foundation, instead need to construct, maintain, and "earn" their claim to legitimacy and authority to develop a particular rule on an ongoing basis. The legitimacy and authority of private rule makers and their rule instruments is continuously open to challenge and never assured. The concepts of legitimacy and authority and their application to ISO as a rule developer and ISO 26000 as a rule

Privatization of Environmental Governance: How Non State Market-Driven (NSMD) Governance Systems (Certification Eco-labelling Programs) Gain Rule Making Authority," *Governance: An International Journal of Policy, Administration and Institutions* 15:4 (October 2002), pp. 503–529; S. Bernstein and B. Cashore, "Globalization, Four Paths of Internationalization and Domestic Policy Change: The Case of Eco-forestry Policy Change in British Columbia," *Canadian Journal of Political Science* 33 (2000) pp. 67–99; and V. Haufler (2001), *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (Washington: Carnegie). References to the sources relied on by the above authors are omitted here.

⁹ Ibid.

instrument are interwoven into the examination below on the distinctive characteristics of ISO 26000.

2.1 The Global Prominence of ISO as a Standards Developer

The fact that ISO 26000 emanates from the International Organization for Standardization (ISO), described as “the world’s largest developer and publisher of International Standards,”¹⁰ responsible for publication of more than 18,500 international standards,¹¹ gives the standard a high profile, stature, and pre-existing point of entry, in the business world,¹² and contributes to its characterization here as an influential articulation of the global community’s SR expectations concerning the behaviour of TNCs and other organizations, and an accurate statement of emerging global SR custom. As emanations of a non-state entity, the standards that ISO develops (including ISO 26000) are by definition voluntary (i.e., ISO standards cannot be imposed as with command and control regulations), and by definition ISO standards are *neither* inter-governmental rule instruments and nor are they law in the conventional sense of the word (i.e., state-based, requiring compliance, backed up by legal edict).

ISO is the peak, coordinating entity for the national standards institutes of 162 countries¹³ - referred to in the academic literature as a “meta-organization”, or an organization of organizations¹⁴ -- and through these national standards institutes, ISO has developed significant connections to both governments and industry. The following statement from the ISO website describes the layer of government-industry connections in countries around the world that comprises an important part of the foundation of ISO:

ISO is a non-governmental organization that forms a bridge between the public and private sectors. On the one hand, many of its member institutes are part of the governmental structure of their countries, or are mandated by their government. On the other hand, other members have their roots uniquely in the private sector, having been set up by national partnerships of industry associations.¹⁵

In essence, underlying ISO at the international level is a national infrastructure spanning virtually all developed and developing countries, with significant government and industry linkages through the national standards member institutes which are the basis of ISO. While ISO is a non-state rule developer, it has a unique “public-private” hybrid foundation to develop international standards with the direction and approval of its national member

¹⁰ Per ISO, “About ISO,” at <http://www.iso.org/iso/about.htm>

¹¹ Per ISO, “The scope of ISO’s work,” at: http://www.iso.org/iso/about/discover-iso_the-scope-of-isos-work.htm

¹² ISO standards are available for use by all types of organizations, but in the interests of brevity and since the primary users are businesses, references are made here to the business community.

¹³ Per ISO, “About ISO,” at <http://www.iso.org/iso/about.htm>

¹⁴ Per: G. Ahrne and N. Brunsson (2008) *Meta-Organizations* (Cheltenham: Edward Elgar).

¹⁵ Ibid.

institutes. Hence, the decision of national member standards institutes to give ISO the authority to initiate development of ISO 26000, through an international working group, and the requirement that national standards members ultimately approve the standards such as ISO 26000 that are developed by ISO working groups, suggests that from an SR institutionalization standpoint, there exists a broad base of public-private support for the standard in countries around the world. It also is an indication that there is a pre-existing global and national infrastructure in place around the world for subsequent diffusion of ISO 26000, such as through the development of national SR standards. This has, in fact, happened, and instances of this are discussed below.

One of the reasons why ISO has such a high global profile as a global rule instrument maker stems from the popularity of its ISO 9000 quality management series of standards and ISO 14000 environmental management series of standards. More than one million operations around the world have been certified (by third parties) as meeting the ISO quality management system standard (ISO 9001),¹⁶ and close to one quarter million have been certified as in conformity with the ISO environmental management system standard (ISO 14001).¹⁷

ISO 26000 is designed to be compatible with existing ISO standards including ISO 9001 and ISO 14001 (although ISO 26000 is not itself a management system standard capable of certification). Thus, TNCs and other organizations that are currently using ISO 9001 and ISO 14001 standards may be well positioned to apply ISO 26000, since the approach of ISO 26000 is aligned with ISO 9001 and ISO 14001. In short, ISO 26000, as a follow-on ISO standard to the ISO 9000 and ISO 14000 series, has a pre-existing platform at a conceptual/intellectual level, and at the level of marketplace recognition and acceptance (legitimacy and authority) by organizations around the world. The incorporation in ISO 26000 of the basic “plan do check act” approach found in the ISO 9000 and ISO 14000 series of standards¹⁸ is an example of how ISO has transposed in a bottom up fashion key concepts from private standards of narrow application (quality management and environmental management) to apply to the broad SR subject matter that is the focus of ISO 26000.

In terms of the profile of ISO and its standards in the business community, it is instructive to compare usage of its standards to those of other SR instruments that emanate from entities outside of ISO. There are about 5300 business participants in the UN Global Compact,¹⁹ 2300 facilities have been reported to be certified to the SA 8000 standard,²⁰ and

¹⁶ Per: ISO, “ISO 9001 certifications top one million mark, food safety and information security continue meteoric increase,” at <http://www.iso.org/iso/pressrelease.htm?refid=Ref1363>

¹⁷ Per ISO, “New ISO/ITC handbook/CD package puts ISO 14001 within easier reach of SMEs“, at: <http://www.iso.org/iso/pressrelease.htm?refid=Ref1389>

¹⁸ See, e.g., F. Quairel-Lanoizee (2011), “ISO 26000: une convention de qualite ou chronique d’une norme ‘dans les normes’” in M. F. Capron, F. Quairel-Lanoizee, and M-F Turcotte, ed., ISO 26000: une Norme “hors norme” (Paris: Economica, 2011), pp. 113 – 130.

¹⁹ Per “UN Global Compact Participants,” at <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html>

²⁰ Per: “Social Accountability International – Human Rights at Work”, at <http://www.sa-intl.org/>

around 1400 corporate responsibility reports issued in 2009 are reported to have followed the GRI reporting guidelines.²¹ I am suggesting that it is not by accident that AA 1000, OHSAS 18001, SA 8000 and IASE 3000 – standards on specific topics related to SR that have emanated from outside ISO -- have all adopted “1000”-type nomenclature for their standards: the expression “imitation is the most sincere form of flattery” would appear to apply in this respect (and the actions of non-ISO entities to so name their standards can be considered an example of isomorphic institutional behaviour²²).

Because of the high profile of ISO and its ISO 9000 and ISO 14000 series within the business community, the decision by ISO to develop an SR standard represents a significant opportunity to “mainstream” (or diffuse) the concept of social responsibility (and hence to institutionalize it) to a wide section of businesses and other organizations that have not heretofore been reached through the specialized SR rule instruments of other entities. The fact that experts from AccountAbility (developers of AA 1000), Global Reporting Initiative (GRI), the UN Global Compact (UNGC), Social Accountability International (SA 8000), the Organisation for Economic Cooperation and Development (OECD, responsible for the OECD Multinational Enterprise Guidelines), the International Labour Organization (ILO, responsible for the ILO Tripartite Declaration) and other international SR rule proponents participated in the ISO 26000 working group can be seen as recognition by these other SR rule developers of the bridging (and hence “mainstreaming”) potential of ISO 26000.

Building on the above discussion, a final point about the prominence of ISO as a global rule maker, and the significance of this for an ISO standard on SR, revolves around ISO’s demonstrated ability to attract key participants to its development process. One of the most significant and paradigm shifting events underlying the development of ISO 26000 was the intensive participation of inter-governmental entities in the ISO 26000 working group (more is said about the process of development below). From a legitimacy and authority standpoint, the participation of these entities performed an important legitimacy- and authority-conferring function on ISO. The involvement of the inter-governmental entities, as well as a wide number of governments from developed and developing countries, can be characterized as approval by these entities of the legitimacy of ISO to develop substantive obligations pertaining to social responsibility – new territory for a non-state rule maker that until that time had focused on more technical and process oriented standards for which it had developed its reputation.

I am suggesting here that the involvement of the UN Global Compact, the ILO, other UN entities,²³ and the OECD, as well as by developed and developing country governments,

²¹ Per: R. Sullivan (2011), *Valuing Corporate Responsibility: How do Investors Really Use Corporate Responsibility Information?* (Sheffield, UK: Greenleaf, 2011).

²² Per: P. DiMaggio and W. Powell (1983), “The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields,” *American Sociological Review*, Vol. 48, No. 2 (Apr., 1983), pp. 147-160.

²³ Other inter-governmental entities participating in the ISO 26000 process included: United Nations Environmental Programme (UNEP), the United Nations Division for Sustainable Development (UNSD), the United Nations

signalled recognition by these entities of the appropriateness and value of ISO developing SR standards directed at TNCs, as well as recognition by them of some of the limits of inter-governmental rule instruments as a way of addressing the conduct of TNCs (otherwise, they would not bother participating in an ISO standard on the subject).²⁴

Having said this, I wish to stress that inter-governmental entities on their own are well positioned to develop highly effective and influential SR rule instruments directed at TNCs. Indeed, the UNGC, the ILO Tripartite Guidelines, the OECD Multinational Enterprise Guidelines and the UN Guiding Principles on Business and Human Rights are all good examples of the capabilities of inter-governmental entities to develop SR instruments directed at TNCs. However, I am suggesting that through the participation of their experts in the ISO 26000 working group, the above-noted inter-governmental entities have in effect tacitly recognized that there are limits to their ability to develop SR rule instruments that reach businesses around the world, and that non-state-based entities such as ISO may have particular capabilities in terms of their ability to influence the behaviour of TNCs and others. Similarly, there are significant limits to what can be accomplished by rule instruments developed by non-state based entities such as ISO (for example, non-state SR instruments are voluntary and cannot be characterized as law, unlike ratified and implemented international treaties).²⁵

The author has not been able to find an example of such wide, diverse and intensive participation of inter-governmental and governmental entities in a global non-state rule-making process that compares with the involvement of these entities in ISO 26000. The participation of inter-governmental entities such as the UNGC, ILO, UNEP, UNCTAD, UNIDO, WHO and the OECD is interpreted as recognition by these inter-governmental entities that they “needed to participate” in ISO’s working group to develop a global SR standard. It is submitted that a similar calculus explains the significant participation of governments, peak industry associations, labour, consumer and other NGOs, and private standards bodies. If they didn’t, they would miss an opportunity to be part of an instrument that would have an influential effect on the behaviour of TNCs and others. By so participating, all of these entities conferred pragmatic, moral, and cognitive legitimacy and authority on ISO as a standards developer, and on ISO 26000 as a standard that reflects the global community’s views on what constitutes acceptable SR conduct. The behaviour of ISO, in creating a multi-stakeholder advisory group prior to beginning work on ISO 26000, in developing six categories of stakeholder participants, and making all drafts of the standard and comments on the standard publicly accessible (discussed in greater detail below),

Conference on Trade and Development (UNCTAD), the United Nations Industrial Development Organization (UNIDO); and the World Health Organization (WHO).

²⁴ E.g., the UN has in the past attempted without success to develop two SR-oriented rule instruments: the draft UN Code of Conduct for Transnational Corporations²⁴ which was never completed, and the project to develop the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, which was also abandoned, although the latter can be interpreted as leading to the UN Guiding Principles on Business and Human Rights.

²⁵ Elsewhere, the author has developed the concept of sustainable governance, which starts from the premise that each public sector, private sector, and civil society instrument and process has unique strengths and weaknesses, and that the challenge in the 21st century is to develop systematic approaches which draws on the combined capabilities of all. See Webb (2005), *Sustainable Governance*, op cit..

suggests ISO was well aware that an SR standard represented another step in its evolution from an entity focused on standardization on technical issues such as product standards, to quality and environmental management, to now a standard that addresses environmental, economic and social issues.

2.2 The Distinctive Nature of the ISO 26000 Standards Development Process

As noted earlier, ISO 26000 was developed by an ISO working group consisting of 450 experts and 210 observers from 99 ISO member countries and another 42 liaison organizations – described by ISO as “the largest and the most broadly based in terms of stakeholder representation of any single group formed to develop an ISO standard.”²⁶ Following recommendations made by a multi-stakeholder advisory group established in advance of the decision by ISO to proceed with a standard on SR,²⁷ and in recognition of the need to put in place a process capable of reflecting the diversity of interests associated with social responsibility, the working group membership was organized into six categories: government (including inter-governmental members), industry, labour, consumers, non-governmental organizations, and an “other” category that included representatives of standards developers, consultants, and academics.²⁸ In addition, the process was designed to ensure balanced participation from developed and developing countries, through a twinning of leadership (one developed and developing country leader) and through use of a trust fund to ensure participation by experts that might otherwise not be able to participate.²⁹

ISO 26000 was developed through a two-level deliberative consensus process. First, the standard was agreed to by consensus of the working group members. For the purposes of ISO, consensus is defined as: “general agreement, characterized by the absence of sustained opposition to substantial issues by any important part of the concerned interests and by a process that involves seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments.”³⁰ The comments of experts at each stage of development of the standard were published, and made publicly accessible.³¹

²⁶ Per: ISO, “ISO 26000 – Social Responsibility”, at

http://www.iso.org/iso/iso_catalogue/management_and_leadership_standards/social_responsibility/sr_iso26000_overview.htm

²⁷ ISO resolution 35/2004. For a history of the process leading to development of the standard, see: ISO WG SR, “Background”, at

http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/07_gen_info/backg.html

²⁸ Per ISO, “Stakeholder consensus enables ISO 26000 on social responsibility to move up in development status,” at <http://www.iso.org/iso/pressrelease.htm?refid=Ref1158>

²⁹ Per ISO WG SR, “Trust Fund,” at

http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/07_gen_info/trustfund.html

³⁰ Per ISO/IEC Guide 2, as described in ISO, “How ISO develops standards,” at:

http://www.iso.org/iso/about/how_iso_develops_standards.htm

³¹ All comments and all other documents associated with the development of the standard are available at:

<http://isotc.iso.org/livelink/livelink?func=ll&objId=3935837&objAction=browse&sort=name>

At the second level, for a document to be accepted as an ISO International Standard, it must be approved by at least two-thirds of the ISO national members that participated in its development and not be disapproved by more than a quarter of all ISO members who vote on it.³² In the case of ISO 26000, the standard was approved by 93% of participating member national standards bodies.³³ The process of development played an important role in building the process legitimacy and authority of ISO to articulate an SR rule instrument.³⁴

From the standpoint of development of global SR custom, the publicly accessible and transparent ISO consensus deliberative participatory process is of considerable significance, and is distinguishable from the process of development of many of the other SR rule instruments that have been promulgated by other rule development entities. Through use of the participative, deliberative, consensus process adopted by ISO, with assistance to experts being provided for those at a financial disadvantage, the ability of any one actor to dominate is to some extent mitigated.³⁵

In contrast, where a rule instrument is developed through a non-consensus consultation process by a single entity that “hears” the views of others, that entity has considerable discretion as to the substance, form and precise wording of the instrument, and there are less built-in checks and balances against any interest having undue influence, because the terms of the instrument are not negotiated in a transparent way by all participants. Moreover, I would suggest that a consultation process (as opposed to a consensus deliberative participatory process) may not create the sort of “buy-in” from participants, in the sense that their approval is not formally required, and hence, while a rule instrument developed by an entity through a consultation process may have “input” legitimacy and authority (e.g., the legitimacy and authority that flows from the reputation, status, and profile of the rule developer itself, and the extent of consultations), a rule instrument developed through a consultation process does not have the sort of moral legitimacy created by a consensus deliberative participatory process of the type used to develop ISO 26000.

While ISO is a non-state rule developer, not an inter-governmental entity, and therefore lacks the basis of authority associated with public entities to develop global SR rule instruments, it is submitted that the ISO 26000 development process may represent an

³² Per ISO/IEC Guide 2, as described in ISO, “How ISO develops standards,” op cit..

³³ Per: ISO, ISO/TMB/WG SR N 196, Ballot Information, at: http://www.iso.org/iso/isofdis_26000-ballot_result.pdf

³⁴ For an exploration of the ISO 26000 negotiation process, see Helms, W., C. Oliver and K. Webb, (2012) “Antecedents of Settlement on a New Institutional Practice: Negotiation of the ISO 26000 Standard on Social Responsibility,” *Academy of Management Journal*, Vol. 55, No.5 Oct. 2012.

³⁵ Like any rule development process (including that associated with the development of laws), a particularly influential, sophisticated and well funded participant is undeniably in a better position to advocate on their behalf than a less influential sophisticated and well funded participant, and the ISO 26000 process is no exception. Thus, no attempt is made here to suggest that ISO 26000 process represents an ideal. Rather, it is a work in progress, and at the present time, represents one of the most advanced “works in progress” in terms of private SR rule making. For analysis of the “fragility” of multi-stakeholder rule instrument processes (including ISO 26000), see: M. Bostrom and K. Tamm Hallstrom (2010), “The Fragile Authority of Multi-Stakeholder Standard Setting,” Paper discussed at SGIR Conference in Stockholm, 9 – 11, 2010.

example of what Meidinger calls a “novel form of democracy” that anticipates “emergent public values” and “institutionalizes broad participation, rigorous deliberative processes, responsiveness to state law, incorporation of widely accepted norms...to achieve ...widespread public acceptance.”³⁶

The fact that ISO 26000 was developed with the significant participation of key inter-governmental entities, governments, peak industry bodies, other standards entities, labour, as well as consumer, environmental, and other non-governmental organizations, from developed and developing countries, through an open, structured, transparent consensus-based process, provides a basis for the assertion that the content has widespread agreement among these parties. Hence, the “expectations” enshrined in its terms are not simply the product of any one stakeholder, nor of only developed or only developing country interests. Rather, ISO 26000 represents a real attempt to arrive at a global consensus among diverse parties concerning what is expected of organizations of all types, no matter where they operate.

As a process for standards development, the above described ISO 26000 process broke new ground for ISO in terms of its attempt to ensure participation from a diversity of interests, from both the developed and developing world, and its use of a publicly accessible website including all comments and documents generated through the process. To this point, no other ISO standard has used a similar process of development. This having been said, while the ISO 26000 standards development was innovative, it was far from perfect. For example, ISO was to some extent at the mercy of the national standards bodies in terms of the experts that they appointed to participate in the working group, and in terms of the constitution of their mirror committees. In addition, the ISO 260000 development process did not attract the participation of major human rights organizations, and the numbers of labour experts was comparatively small. Finally, although ongoing efforts were made throughout the development process to translate the standard into a variety of languages by task groups of experts, the working group process itself was conducted in English, giving an advantage to English speaking experts. Thus, while the ISO 26000 standards development process can be characterized as an important development in terms of its attempt to ensure an inclusive, diverse, accessible, and transparent consensus process for global SR rule development, there remains much room for improvement.

The ISO 26000 standards development process represents an attempt by ISO to convert its international profile and underlying public-private infrastructure through its national member institutes as a technical and process oriented standards maker into support for its legitimacy and authority as a global SR rule maker. The pragmatic, moral and cognitive legitimacy and authority flowing from its deliberative, consensus-based participatory process, with the participation of peak inter-governmental, government, industry, labour,

³⁶ E. Meidinger (2008), “Competitive Supragovernmental Regulation: How Could it be Democratic?” Chicago Journal of International law Vol 8. No.2 pp. 513 – 544.

consumer, NGO, standards developers, and others is here seen as conferring legitimacy and authority to the ISO 26000 rule development process and the standard itself.

2.3 The Use of Explicit Inter-Organizational Agreements and the Involvement of SR Instrument Competitors in the ISO 26000 Process

Underlying the development of ISO 26000 were memoranda of understanding (MOUs) between ISO and the three key inter-governmental entities responsible for the development of SR rule instruments that directly target TNCs: the UN Global Compact, the International Labour Organization through its Tripartite Declaration, and the Organization of Economic Cooperation and Development, through its OECD MNE Guidelines. These MOUs can be interpreted as recognition by ISO of the special status of these inter-governmental entities that have developed SR rule instruments, and the desire by ISO to have legitimacy and authority-conferring action from these entities to ISO. While the three inter-governmental SR rule instrument entities did have certain process-oriented privileges in terms of participation in the working group, the MOUs did not entitle any of the three inter-governmental entities to any ability to veto (i.e., to stop or prevent) the passage of the standard if the standard did not meet the expectations of any of the three inter-governmental entities. Thus, for example, while pursuant to the ISO-ILO MOU, drafts of the standard were not to be circulated for vote or comment before seeking prior full and formal backing by the ILO as to all elements relating to issues involving ILO's mandate, in the event that such backing was not forthcoming, all that ISO was required to do was communicate ILO's comments to all parties.³⁷ In the event, ILO did support the ISO 26000 standard.

In addition to the participation of the three inter-governmental entities with SR rule instruments, a wide range of other non-state international SR instrument developers also directly participated as Liaison Organizations in the ISO working group, including:

- AccountAbility, the entity that has developed AA 1000;
- the Global Reporting Initiative, that has developed the Global Reporting guidelines;
- the ISEAL Alliance (International Social and Environmental Accreditation and Labelling), a collective entity representing a range of social responsibility standards;
- Social Accountability International, the ISEAL member that has developed SA 8000;
- Consumers International, coordinator of the Transatlantic Consumer Dialogue and developer of global consumer policy frameworks;
- the Fair Labor Association (FLA) that has developed the FLA standards for apparel and other products;
- the International Council of Mines and Metals, that has developed the sustainable development framework for the mining sector;

³⁷ The ISO-ILO MOU is accessible at:

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

- the International Petroleum Industry Environmental Conservation Association and the International Association of Oil and Gas Producers (OPG) that together with the American Petroleum Association has developed oil and gas industry guidance on voluntary sustainability reporting; and
- Transparency International, the entity that has developed the Transparency International Business Principles for Countering Bribes.

In addition to the mutual legitimacy and authority-enhancing nature of their participation, the fact that such a range of leading international SR instrument developers participated in the development of ISO 26000 suggests a conscious effort among these entities to move in this instance from SR rule instrument competition to a form of co-opetition, with ISO 26000 creating a “common ground” framework instrument, intended to be and considered to be compatible with the SR rule instruments of the other SR rule instrument developers. In this way, I interpret ISO 26000 as providing a more or less neutral bridging forum for erstwhile competitive SR rule developers, and ultimately for bridging among these participants with respect to the content of ISO 26000.

The concept of co-opetition was originally articulated in a purely business context, and revolved around the proposition that the optimal strategy for a business is often a mix of competitive and cooperative actions.³⁸ Since then, commentators have employed the concept to the regulatory context (regulatory co-opetition).³⁹ As applied in this paper, co-opetition is meant to suggest that SR rule instrument developers that are in other respects in competition with each other, may for strategic reasons recognize an opportunity for collaboration for their mutual benefit. I interpret the involvement of these experts from SR instrument competitor organizations in the ISO 26000 working group as reflecting three strategic reasons for participation:

- (1) to ensure alignment between their SR rule instruments and the ISO 26000 standard. By participating, they had an opportunity to influence the wording of the standard so that it did not conflict with the wording of their own SR rule instruments;
- (2) to further the objectives of their SR rule instruments through the terms of the ISO 26000 process. For example, emphasis on the importance of reporting in ISO 26000 furthered the objectives of the Global Reporting Initiative; and
- (3) to benefit from the legitimacy and authority-enhancing benefits associated with participation in ISO 26000. The ability of competing SR instrument developers to participate in the ISO 26000 process, and for many of these instruments to be referenced in the Annex to the ISO 26000 standard, constitutes a form of legitimacy enhancing activity by ISO vis-à-vis these SR instrument developers.

³⁸ A. Brandenburg and B. Nalebuff (1996), *Co-opetition* (New York: Doubleday).

³⁹ D. Esty, D. and D. Geradin (2000), “Regulatory Co-opetition,” *J. of Int’l Economic Law*, Vol.3, No 2, pp. 235-255.

Early results flowing from this cooperation have included a UNGC publication describing the synergies between UNGC and ISO 26000, and a similar publication from GRI. Comparing the UNGC to ISO 26000, it is noteworthy to observe how ISO 26000 adds considerable detail to concepts found in the ten rather general principles found in the UNGC. Similarly, ISO 26000 has considerable detail concerning the concept of due diligence that is central to but not fully developed in the UN SR Guiding Principles on Business and Human Rights, including application of the concept beyond the human rights context. In addition, ISO 26000 has an expansive discussion of “sphere of influence,” compared to the limited attention to this concept in the UN SR Guiding Principles on Business and Human Rights.⁴⁰

In an earlier article, the author observed how voluntary rule instruments facilitate a useful form of “norm conversation” to take place among interested parties on subjects of mutual interest.⁴¹ The ISO 26000 deliberative process, and the direct participation of inter-governmental and non-state SR rule instrument developers in that process, as well as a wide variety of other interested parties, and the public accessibility of the comments made by all parties on successive versions of the standard as it was developed, represents a particularly sophisticated and formalized example of a global SR “norm conversation” that structured the terms of the co-opetition. The claim that ISO 26000 represents an accurate and authoritative statement of global SR custom stems in part from this structured process, allowing erstwhile SR instrument competitors to come together and find common ground.

In the introduction of this article I suggested that ISO 26000 has unique status as a global SR *framework rule instrument* in the global SR rule architecture. What I mean by this is that ISO 26000 performs a key linkage function on a number of different levels and to a number of different other entities, with the process of development, and the involvement of key inter-governmental and non-state SR rule developers and others playing an integral role in it performing this bridging function and its characterization as a framework rule instrument. This is reflected in the myriad ways that ISO 26000 refers to the instruments and activities of other entities operating in the SR area (discussed below), but also in the subsequent references to and adoptions of ISO 26000 by inter-governmental entities,⁴² governments,⁴³TNCs,⁴⁴ NGOs,⁴⁵ and others.⁴⁶

⁴⁰ As discussed in S. Wood (2011), “The Meaning of ‘Sphere of Influence’ in ISO 26000,” in I. Henriques, ed., ISO 26000 in Practice (forthcoming).

⁴¹ K. Webb (2004), “Understanding the Voluntary Codes Phenomenon,” op cit.

⁴² E.g., see ISO (2011), “European Commission backs ISO 26000” , accessible at: <http://www.iso.org/iso/pressrelease.htm?refid=Ref1490>

⁴³ E.g., the government of Chile is developing a procurement policy that specifically references use of ISO 26000: per conversation of the author with Dante Pesce, former Chilean ISO Working Group expert, January, 2012.

⁴⁴ E.g., Nippon Keidanren revised its Charter of Corporate behavior and its Implementation Guide in order to make them totally compatible with ISO 26000. See: http://www.keidanren.or.jp/english/policy/csr/tebiki6_request.html

⁴⁵ E.g., it has been reported that a Korean NGO has criticized Hyundai and Samsung as having practices that are not aligned with ISO 26000. See: <http://bit.ly/xRnSrC> and <http://bit.ly/xq8yJB>

⁴⁶ E.g., see the Danish social responsibility management certification standard based on ISO 26000, as discussed below.

2.4 The Comprehensive Scope of ISO 26000

The fact that the ISO 26000 standard addresses organizational, human rights, worker, environmental, consumer, community and fair operating practices in one rule instrument (i.e., it does not address these issues singularly, without considering inter-relations with other issues, as with international SR rule instruments addressing only human rights issues or only labour rights issues, or only environmental issues), represents a form of conceptual and substantive bridging of subjects, creating a common point of departure on all of these issues for all organizations. In the ISO 26000 standards development process, the interactions between and among experts who normally only addressed particular subjects (e.g., labour subjects) as they were compelled to consider the implications of their views on other subjects (e.g., the environment, consumers and communities) were particularly noteworthy, breaking new ground in developing a comprehensive definition of social responsibility, and in fleshing out the component parts. The resulting normative approach stimulated awareness by the experts of the inter-relation among the diverse subject matters that together comprise SR. The standard also emphasizes the need for organizations to integrate SR throughout the organization and its relationships, and the inappropriateness of cherry picking (i.e., selective application of only a particular dimension, such as labour, or environment, or consumer dimensions). This represents another form of conceptual bridging, in contrast to “single issue” or “single sector” SR instruments, which fail to provide or address an overarching SR normative approach.

2.5 The Combination of Substantive Norm and Process Elements in ISO 26000

The fact that ISO 26000 addresses both substantive norm (outcome or performance) and procedural (operationalization) aspects of SR gives organizations one rule instrument that provides guidance on both fronts, in an integrated manner, in contrast to other instruments that focus on either normative or procedural elements. The substantive norm dimensions of ISO 26000 represent a significant effort by the working group experts to transpose key normative concepts originally found in inter-governmental instruments directed primarily at states so that those concepts apply directly to TNCs and other organizations. In particular, the chapters of ISO 26000 pertaining to human rights, labour, and the environment are replete with references to inter-governmental instruments. This dimension of ISO 26000 represents the “top down” transpositional element of the standard referred to earlier. Referencing these inter-governmental instruments can be seen as bolstering the substantive legitimacy of ISO 26000. The parts of the ISO 26000 standard that address procedural and implementation dimensions of SR of TNCs and other organizations reflect ideas originally found in non-state SR instruments. Commentators have noted that ISO 26000 follows the plan-do-check-act management system process implementation approach common to ISO 9000 quality management and ISO 14000

environmental management standards.⁴⁷ This is an example of “bottom up” transposition taking place within ISO 26000, taking concepts originally applied in limited context of quality management and environmental management from non-state subject specific instruments, and applying them broadly to the more comprehensive SR subject matter of ISO 26000. The same can be said with respect to the emphasis on the procedural elements of reporting, transparency and accountability in ISO 26000, building on and transposing the work on reporting found in the Global Reporting Initiative.

Demonstrating the compatibility between ISO 26000 and certifiable management systems standards, the national standards body for Denmark has now developed DS 49001 (a certifiable SR management system standard) and DS 49004 (guidance on same), which draws substantially on ISO 26000.⁴⁸ National standards bodies, through their proper national deliberative stakeholder processes, have the authority to develop such standards for their jurisdictions and the fact that they can base national standards on ISO 26000 ensures international alignment among such national standards. Here we see a transposition of the content of ISO 26000 to a national standard, and a bridging from an international standard to a national standard. It will be interesting to see whether an SR international management certification system version of ISO 26000 will emerge in the future. This appears to be happening through a grouping of standards bodies referred to as IQ-Net SR-10.⁴⁹ This appears to be following a path similar to that forged by OHSAS 18001, a non-ISO international occupational health and safety management system standard created by national standards bodies (and others) in several countries who grouped together outside of ISO to develop OHSAS 18001 after ISO decided against developing an ISO occupational health and safety management systems certification standard.⁵⁰

2.6 The Application of ISO 26000 to All Types of Organizations

The fact that ISO 26000 applies to all organizations, not just for-profit corporations, flows from the fact that *all* ISO standards are designed to apply to all types of organizations. Thus, for example, the ISO 9000 quality management standards are *not* simply ISO 9000 *corporate* quality management standards, and the ISO 14000 environmental management standards are *not* simply ISO 14000 *corporate* environmental management standards: non-profit organizations and public sector organizations can and have had their operations

⁴⁷ See, e.g., F. Quairel-Lanoizee, F. (2011), “ISO 26000: une convention de qualite ou chronique d’une norme ‘dans les normes’” in M. Capron, F. Quairel-Lanoizee, and M-F Turcotte, ed., ISO 26000: une Norme “hors norme” (Paris: Economica, 2011), pp. 113 – 130.

⁴⁸ Per: K. Christiansen, Dansk Standard (2011), Developing and Applying ISO 26000 (powerpoint). On file with the author. Christiansen notes that several other national standards institutes have also developed SR management system certification standards (e.g., Mexico, Brazil, Portugal) and several other national standards institutes are apparently developing similar standards. See also the Australian National Standards Institute social responsibility management system certification standard, ONR 192500:2011.

⁴⁹ See: <http://www.iqnet-ltd.com/index.php?liv1=9&liv2=67>

⁵⁰ See OHSAS store, “History of OHSAS 18001?” at: <http://18000store.com/ohsas-18000-history.aspx> and Underwriters Laboratories, “OHSAS 18001: 2007”, at: <http://www.ul.com/asiaonthemark/as-en/2007-Issue24/page7.htm>

certified to ISO 9001 and ISO 14001 standards.⁵¹ Thus, the dropping of “corporate” from the title of the ISO 26000 standard so that it is just “social responsibility”, and the application of social responsibility concepts to all organizations, was done in order to adhere to ISO rules that the standards it develops apply to all organizations, not due to successful lobbying by business interests who wished to “water down” the CSR concept. That ISO 26000 applies to all forms of organization represents another form of bridging – at the substantive level, so that the concept and components of social responsibility are seen to apply to all forms of organization, not just for-profit corporations.

The implications of the application of social responsibility in ISO 26000 to all types of organizations represents a potentially interesting development. It means, for example, that the expectations of behaviour articulated in ISO 26000 apply to NGOs and para-statal organizations (e.g., state-owned resource extraction companies) and unions. They, like TNCs, are expected by the global community to be transparent and ethical in their decisions and actions, to consult with the full range of stakeholders who are impacted by their activities, to address the full range of social responsibility subjects articulated in ISO 26000, and to comply with all laws and SR relevant international norms of behavior, as per the terms of ISO 26000.⁵²

3.0 ISO 26000 as a Statement of Emerging Global SR Custom⁵³

The suggestion made here is that ISO 26000 represents a sophisticated statement of emerging global SR “custom.” A wide range of commentators have acknowledged the significance of the concept of custom as a basis for social responsibility. Economist Milton Friedman noted that:

...the responsibility [of managers] is to conduct the business in accordance with [the owner’s] desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law *and*

⁵¹ . For example, MedAir, a Swiss-based humanitarian NGO, has been certified to ISO 90001. Per: D. Verboom (2002), “Medair believed to be first humanitarian aid organization worldwide to achieve ISO 9001:2000” ISO Management Systems September-October 2002, pp. 30 – 36. This having been said, the concepts and approach of ISO management standards may reflect or presume a corporate managerial structure and degree of formality that may be inconsistent with many small organizations.

⁵² In the creation of the International Non-Governmental Organization (INGO) Accountability Charter and its adherence by a range of INGOs, we see early evidence of recognition from the NGO sector of its need to meet similar SR expectations to those applied to for-profit corporations. See: See: <http://www.ingoaccountabilitycharter.org/>

⁵³ For a more comprehensive exploration of this topic, see K. Webb, “Custom and International Corporate Social Responsibility Standards: The Evolving Story” paper presented at the Law and Society Association Annual Conference (Hawaii, June 2012).

those embodied in custom."⁵⁴ (emphasis added)

John Ruggie, the UN Special Representative who spearheaded the development of the UN Guiding Principles on Business and Human Rights, has stated that:

...markets work optimally if embedded within rules, *customs* and institutions.⁵⁵ (emphasis added)

In a Harvard Business Review article on "The Virtue Matrix: Calculating the Return on Corporate Responsibility," Professor Roger Martin states that:

...[t]he "common law" of responsible corporate behavior, the civil foundation is an accumulation of *customs*, norms, laws, and regulations.⁵⁶ (emphasis added)

Business ethics professors G. Svensson and G. Wood note that:

...[t]he roots of the term "ethics" emanate from the ancient Greek word "ethikos" meaning "the authority of *custom* and tradition."⁵⁷ (emphasis added)

What emerges from these various observations is the centrality of the concept of custom to the proper conduct of organizations, from an ethical, legal, and market standpoint, with custom being generally viewed as a concept that is distinct and separate from but intimately related to markets, ethics and law. In a sense, the above noted comments on custom suggest that it is the bedrock upon which ethics, law, and markets are based. Thus, a failure to respect custom can have consequences in ethics, law, and in the market. Custom by itself is not a difficult concept to understand. Put very simply, custom refers to a codification of *community or societal expectations*. In the context of ISO 26000 it is the customs, or expectations associated with organizations operating in the global context that is the focus of attention.

While in the past, the contextual setting in which discussion of custom might occur is likely to have been focused on localized behaviour in a particular community, today, in a globalized world -- where TNCS and other organizations have operations in multiple parts of the world, where their operations have broad impacts, and where these operations are the subject of scrutiny by the global community -- the importance of global custom has emerged as vitally important. Custom as understood in the context of global social responsibility does not require as a precondition for its existence a lengthy pre-existing

⁵⁴ M. Friedman (1970), "The Social Responsibility of Business is to Increase its Profits," New York Times Magazine, September 13, 1970.

⁵⁵ J. Ruggie, UN SR (2008), Protect, Respect and Remedy: a Framework for Business and Human Rights A/HRC/8/5 7 April 2008, accessible at: www2.ohchr.org/english/bodies/hrcouncil/docs/.../A-HRC-8-5.doc

⁵⁶ R. Martin (2002), "The Virtue Matrix: Calculating the Return on Corporate Responsibility," Harvard Business Review, pp. 73 – 75.

⁵⁷ G. Svensson, and G. Wood, (2003) "The dynamics of business ethics: a function of time and culture – cases and models", Management Decision, Vol. 41 Iss: 4, pp.350 – 361.

duration of practice, so much as general recognition of its existence.⁵⁸ The suggestion made here is that ISO 26000 represents a pre-eminent and authoritative statement of global custom on social responsibility issues, in view of the profile of ISO and the transparent and structured consensus-based process in which it was constructed, and the diversity of peak entities from developed and developing countries involved in its construction.

With this background, we are now in a position to examine the legal and extra-legal dimensions and applications of ISO 26000 as global SR custom.

3.1 Legal Dimensions and Applications of ISO 26000 as Global SR Custom

At the outset, it is important to distinguish between the concept of custom as used here and *customary international law* as understood in public law. Drawing on the Statute of the International Court of Justice,⁵⁹ the focus of customary international law as understood in public international law is on *state practices*. In contrast, the focus of attention in ISO 26000 is on *the practices of TNCs and other organizations*. Thus, in and of itself, ISO 26000 was never designed to be a statement of customary international law, as it is not directed at first instance at states, and it is not a codification of the expectations concerning the conduct of states.

Moreover, because the ISO 26000 as a guidance standard is written in “should,” not “shall” language, it cannot of itself create legal obligations. Legal commentators have noted the challenges associated with imputing legal obligations from “should” language in *inter-governmental instruments*,⁶⁰ so it should be self-evident that a “should” standard emanating *from a non-state standards body* cannot of itself create international law binding on states. For this reason the suggestion that ISO 26000 could form a legally binding international standards obligation under the World Trade Organization Technical Barriers to Trade agreement, for which states must abide (or be compelled to justify why they do not follow it), as would be the case with an international standard written in “shall” language, is a non-starter.⁶¹

Nevertheless, I suggest that ISO 26000 is likely to have legal significance because

⁵⁸ While legal definitions are not determinative when discussing custom as a concept that is distinct from law, and an immanent foundation for law, it is interesting to note that the International Court of Justice made a similar comment with respect to international customary law in the North Sea Continental Shelf Cases (ICJ Rep. 1969, p. 43).

⁵⁹ Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055, T.S. No. 993.

⁶⁰ For example, A. Clapham, in *The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement* (Draft, February 2010: <http://ssrn.com/abstract=1569636>, notes that the legal convention is that ‘should’ implies a less binding and less immediate obligation than ‘shall’. (p. x).

⁶¹ For a more in-depth exploration of the WTO legal implications of non-state standards, see Webb, K. and A. Morrison, “Voluntary Codes and the Law: Untangling the ‘Tangled Web,’” in K. Webb, ed., *Voluntary Codes: Private Governance, the Public Interest and Innovation*, op cit.

governments at the domestic level will choose to draw on it, judges at the domestic level will choose to draw on it, and business and other organizations will choose to treat it as evidence of accepted practice for which they will be held legally accountable (examples provided below). As such, ISO 26000 as global custom is a form of instrument that is capable of bridging the divide between a non-state global standard and conventional domestic legal instruments and processes, particularly valuable in addressing the behaviour of TNCs where that behaviour has impacts and connections to multiple jurisdictions.

A key point to emphasize when referring to the use of ISO 26000 by governments, courts, and organizations, is the fact that *there is no legal compulsion* for any of these entities to draw on the terms of ISO 26000. Thus, each of legislators, courts and organizations *has the discretion* to draw on ISO 26000, if they conclude through their proper deliberative processes that there is value in so drawing on ISO 26000. The legitimacy enhancing characteristics of ISO 26000 described earlier (i.e., the involvement of key inter-governmental entities, governments, peak industry and labour organizations, and others, and the transparent, publicly accessible deliberative consensus standards development process) can be of value to governments, courts, and others, since they provide a justification for why a particular government, judicial or other decision-maker might draw on ISO 26000 instead of other articulations of expected behaviour.

ISO 26000 as custom bears some resemblance to private law conceptions of custom, where commentators have noted that organizations who play a “spokesman function” can codify the immanent legal order.⁶² The suggestion made here is that ISO is well positioned to perform this spokesman function, given its recognized role as an international standards body articulating standards to be applied by private sector organizations, and particularly because of its transparent, consensus based standards development process, with diverse “peak entity” participants.

Some examples will serve to illustrate how a standard emanating from a non-state entity can be and has been considered as a compelling statement of the expectations on businesses and thereby have legal significance, in the eyes of governments, courts and organizations. First, with respect to governments drawing on a non-state standard as a basis for law, in Canada, the federal government, through Parliament, its legislative organ, chose to convert a voluntary “should” standard emanating from a non-state standards body (the Canadian Standards Association model privacy code) into a federal law.⁶³ Note that the CSA model privacy code was developed through a voluntary, structured, multi-stakeholder process, similar to (although not as grandiose as) the process leading to the development of ISO 26000. What is important to emphasize is that, prior to the Canadian Parliament choosing to adopt the “should” language of the CSA standard into a “shall”

⁶² See, e.g., J. Dalhuisen, (2008) “Custom and its Revival in Transnational Private Law,” 18 *Due J. of Comp. & Int’l L.* 339, at p. 359. Note that while Dalhuisen speaks of industry associations as performing the spokesman function, the position taken here is that ISO is a more legitimate global spokesmen, given the involvement of not only peak industry association, but also others.

⁶³ This example is taken from Webb, K., and A. Morrison (2004) “Voluntary Codes and the Law: Examining the ‘Tangled Web,’” in K. Webb, *Voluntary Codes: Private Governance, the Public Interest and Innovation*, op cit.

language law, the standard was not “law.” The fact that Parliament chose to do so presumably reflects the fact that Parliament concluded that it was a persuasive indication of the expectations of Canadians that businesses and other organizations should meet concerning personal information protection, and as such, their conclusion that the standard formed a proper basis for a law. It was the prerogative of Parliament to reach this conclusion and to so draw on the standard.

Second, with respect to judiciaries drawing on non-state standards, courts in considering what constitutes an appropriate standard of “reasonable care” and “due diligence” concerning a particular industry player in negligence lawsuits have drawn on non-state standards as evidence of what constitutes acceptable or unacceptable conduct.⁶⁴ Courts have held industry entities liable pursuant to private standards *even though the standards development entities may not have intended that the standards be the basis for liability*.⁶⁵ The decision to draw on the standard rests with the judges of the court in question, not with the makers of the standard. It is important to note that courts, as organs of the state, have the discretion to draw on such standards, but are not required by law to do so. Thus, “[w]hile adherence or non-adherence to voluntary standards can provide vital evidence in negligence cases, it does not alone determine the result.”⁶⁶

Third, with respect to organizations altering their behaviour in the belief that a non-state standard might be considered as a basis for legal liability, an example from Canada is illustrative of this effect. In Canada, the introduction of a non-state CSA standard on playground safety produced a flurry of playground closures across Canada, in apparent anticipation that the standard would be considered by the courts as evidence of the standard of care that would be imposed on them.⁶⁷ This shows recognition by members of the community of the influence of a non-state standard in articulating the basis for legal liability.

The position taken here is that ISO 26000 will likely be drawn on by governments, courts, and organizations in a manner similar to the way non-state standards were considered and used in the examples referred to above. That they would do so would flow from their independently reached conclusions that the standard represents a compelling, accurate statement of the global community concerning the appropriate conduct of organizations

⁶⁴ See, for example, discussion of *Visp Construction v. Scepter Manufacturing Co.* (1991) 45 Const. L. Rep. 170, in Webb, K., “Voluntary Codes and the Law...”, *op cit.*. Note that while discussion here focuses on common law conceptions of negligence, for civil law jurisdictions, the notion of non-contractual fault-based delicts operates in a similar manner to common law negligence actions. See, e.g., N. Vezina (2008), “Civil Liability (Part One): Preliminary Notions, Duality of Regimes and Factual Basis of Liability” in A. Grenon and L. Belander-Hardy, eds., *Elements of Quebec Civil Law – A Comparison with the Common Law of Canada* (Cowansville, Québec: Éditions Yvon Blais, 2008), pp. 325-383.

⁶⁵ See, e.g., *King v. National Spa & Pool Institute, Inc.* 570 So. 2d 612 (Ala. 1990) and *Meneely v. National Spa Pool Institute*, 5 P.3d 49 (Wash. Ct. App. 2000), discussed in Webb, K., “Voluntary Codes and the Law...”, *op cit.*

⁶⁶ Per Webb, K., “Voluntary Codes and the Law...”, *op cit.*

⁶⁷ Per K. Webb, “Voluntary Codes and the Law...”, *op cit.*

operating in the global sphere vis-à-vis their impacts and activities as they affect individuals, communities, and others. The fact that the standard was developed with significant participation from both developed and developing countries, as well as key inter-governmental entities, governments, peak industry bodies, labour, consumers, and environmental and other NGOs, potentially gives the standard relevance no matter which jurisdiction chooses to draw on its terms.

An illustration of how ISO 26000 might be used comes from a recent analysis by the author⁶⁸ of how a Canadian mining company with a subsidiary in a developing country, in response to Canadian shareholder pressure, and perceived developing country community displeasure, conducted a human rights assessment at that developing country mining operation, that in turn led to their development of a human rights policy and the creation of an ongoing roundtable process involving the company and local communities. Noteworthy here is how the particular subsidiary mining operation was located in a developing country, that it was the subject of international scrutiny and the combined pressure of Canadian and local communities, and how the response of the company was entirely in keeping with the expectations contained in ISO 26000 (e.g., greater transparency and accountability, responding to input from stakeholders concerning impacts, development of a human rights policy, and ultimately, the development of a new process of engagement involving the key affected actors which should go some way to ensuring the informed approval of the local community on a going forward basis). While a lawsuit was not involved, it is not difficult to imagine how a court in this jurisdiction could draw on ISO 26000 in assessments of whether the company met requirements concerning fiduciary obligations of directors, materiality, reasonable care, and due diligence. Moreover, it is not difficult to imagine how legislators might draw on the expectations contained in ISO 26000 in crafting new legislation concerning the obligations imposed on a sector vis-à-vis individuals, communities, the environment, and others.

3.2 Extra-Legal Dimensions and Applications of ISO 26000 as Global SR Custom

As an influential statement of global SR custom, emanating from the world's leading non-state standards organization, ISO 26000 has considerable value and potential for use outside of the legal realm. While states have the ability to severely constrain application of treaties through the simple act of failing to ratify and implement the treaty, an ISO standard can be applied by organizations in those same jurisdictions, to the benefit of their stakeholders in that jurisdiction. Marshall McLuhan has stated that "we shape our tools and thereafter our tools shape us."⁶⁹ Laws are tools (or technologies), and for the global community to limit itself to legal instruments as a means of societal shaping is to artificially constrain the creativity of the global community in its ability to fashion different tools to influence, shape and structure the behaviour of organizations. The limited conceptions of complicity in law should not prevent the global community from indicating a broader

⁶⁸ Per K. Webb (2012), "Multi-level Corporate Responsibility and the Mining Sector: Learning from the Canadian Experience in Latin America," *Business and Politics Journal*, October 2012 (forthcoming).

⁶⁹ M. McLuhan (1964), *Understanding Media : The Extensions of Man* (Massachusetts: MIT).

expectation concerning what constitutes complicity in terms of organizations, and ISO 26000 does this. Disputes among commentators about the concept of “sphere of influence” should not prevent the global community from indicating its support for a broad conception of the need for organizations to exercise their influence to improve situations (e.g., to work with communities, governments and other firms to address the issue of corruption), and ISO 26000 does this.

One area where ISO 26000 is likely to be used is by SR-oriented investment managers, as they attempt to assess appropriate and inappropriate investment propositions.⁷⁰ Another is the possible incorporation of ISO 26000 expectations by other intergovernmental entities. For example, ISO 26000 is one of three documents being recommended by the European Commission (EC) as guidance for European enterprises to fulfill their commitment to social responsibility, over the period 2011 to 2014 (the other two documents being the United Nations Global Compact and the OECD MNE Guidelines).⁷¹ In short, ISO 26000 will likely have uses and applications in a variety of contexts, by a variety of actors.

4.0 Positioning ISO 26000 Among Other Key Global SR Instruments

With this background, we are now in a better position to understand the distinctive position of ISO 26000 when compared with other key global SR rule instruments. In comparison with the UN Guiding Principles on Business and Human Rights, ISO 26000 is consistent with the human rights approach of the Principles, but applies key concepts such as due diligence to the full spectrum of SR subjects, not just to human rights. Throughout the development of ISO 26000 there was considerable interaction (bridging) between staff of the UN Human Rights Council, and UN’s special representative himself, and ISO 26000 Working Group experts, as the terminology and concepts of both instruments were worked out.

The OECD Multinational Enterprise Guidelines and ISO 26000 represent the two most comprehensive SR instruments, in terms of subject matters addressed. The OECD participated directly in the ISO 26000 development process (representing another illustration of inter-organizational bridging). In its 2011 revision, the OECD MNE Guidelines now incorporate the due diligence concept to apply broadly to all subject matters, similar to the approach taken in ISO 26000. This can be characterized as an example of ISO 26000 acting as a framework instrument, with terms drawn on by other SR

⁷⁰ For example, as John Ruggie has noted, the Norwegian Government pension fund excludes and has divested from companies, including Wal-Mart, for complicity in human rights violations. Council on Ethics for the Government Pension Fund, annual reports 2006 and 2007, available at http://www.regjeringen.no/en/sub/Styrer-rad-utvalg/ethics_council/annual-reports.html?id=458699

⁷¹ See: R. Frost (2011), “European Commission backs ISO 26000,” accessible at: http://www.iso.org/iso/home/news_index/news_archive/news.htm?refid=Ref1490

instrument developers. However, whereas the OECD MNE Guidelines apply to multinational enterprises headquartered in OECD countries (and a small number of other countries that have agreed to apply the OECD MNE Guidelines), ISO 26000 applies to TNCs everywhere. In addition, ISO 26000 applies to all types of organizations, not just TNCs. In this sense, ISO 26000 carries forward a similar set of normative expectations to the OECD MNE Guidelines, but does so to a broader set of organizations without the territorial limitations associated with the OECD Guidelines.

In the preface to the Annual Report on the OECD Guidelines for Multinational Enterprises 2011: A New Agenda for the Future, John Ruggie, the UN Special Representative responsible for the development of the UN Guiding Principles on Business and Human Rights, and another author notes the convergence and alignment of the UN Guiding Principles on Business and Human Rights, the OECD MNE Guidelines, ISO 26000 and the IFC Performance Standards.⁷² Here we see recognition of the sort of inter-organizational bridging and substantive alignment that is directly encouraged in the ISO 26000 standards development process.

ISO 26000 aligns well with the UN Global Compact, with ISO 26000 fleshing out to a considerable extent the ten basic principles of the UNGC. As another example of inter-organizational bridging, the UNGC participated directly in the ISO 26000 process, and acted as a key liaison for several other UN entities, including the UN Human Rights Council and the UN Environmental Programme.

In its emphasis on transparency, accountability and reporting, ISO 26000 also aligns well with the Global Reporting Initiative, who participated directly in the ISO 26000 process (inter-organization bridging, and bottom up transposing of concepts).

ISO 26000 is also well aligned with ILO's labour instruments, reflecting the participation of ILO in the ISO 26000 process, as well as the participation of influential international labour representatives. The participation of ILO in the ISO 26000 development process represented another example of inter-organizational bridging and a basis for top down transposition of inter-governmental treaties and other instruments into a non-state SR instrument.

ISO 26000 reflects the same plan-do-check-act procedural approach of ISO 9000 and ISO 14000, a form of bottom up transpositional bridging. While ISO 26000 is not a management system standard capable of certification, it has formed the basis for national management systems certification standards, showing the capability of ISO 26000 to act as a framework instrument linking one instrument to another. Finally, in comparison with the other key SR instruments described here, ISO 26000 is the only SR instrument that was developed through a global consensus deliberative process involving six stakeholder categories from developed and developing countries.

⁷² OECD (2011). Annual Report on the OECD Guidelines for Multinational Enterprises 2011: A New Agenda for the Future, accessible at:

http://www.oecd.org/document/35/0,3746,en_2649_37461_49049699_1_1_1_37461,00.html

Taken together, reflecting the considerable efforts of all participating parties, ISO 26000 aligns with all the other key global SR instruments referred to here. For this reason, ISO 26000 is described here as a framework instrument, forming a bridge among all of them. In addition, and in contrast to several of the instruments described above, ISO has global coverage, is comprehensive in terms of subject matters covered, and applies to all types of organizations.

5. Conclusions

In this paper I have explored the proposition that the ISO 26000 social responsibility guidance standard represents an innovative form of global social responsibility (SR) rule instrument that performs five key distinctive bridging functions in addressing public and private transnational business governance interactions: (1) top down transpositions of key concepts from inter-governmental instruments directed at first instance at states into a non-state global SR rule instrument applying directly to transnational corporations (TNCs) and other organizations; (2) bottom up transpositions of key concepts from non-state SR instruments of narrow focus to apply more broadly to all SR activities; (3) innovations in the standards development process, to bridge and bring together a diverse range of key public sector, private sector and civil society actors (including SR instrument competitors), thus forming a key basis for its characterization as an influential statement of the global community concerning the appropriate behaviour of TNCs and other organizations; (4) design of the instrument as a framework normative document intended for use by public sector, private sector and civil society actors, compatible and aligned with other key global SR instruments; and (5) characterization of ISO 26000 as emerging global SR custom, to be applied by domestic governments, courts, and others, to address behaviour of TNCs and other organizations.

It is difficult to predict at this stage the precise impact that ISO 26000 will have on the practices of TNCs inter-governmental organizations, governments, competitor SR instrument developers, and other organizations, and the influence the standard will have on the terms and approach taken in other SR rule instruments. What is clear is that a new approach to development of global social responsibility rule instruments has been attempted by ISO, and that it breaks new ground in terms of bringing disparate actors and subjects together to articulate global expectations concerning SR behaviour. The unprecedented, intensive and diverse involvement of inter-governmental organizations in the ISO 26000 process is seen here as particularly significant, since it seems to reflect recognition of the need for and willingness of these inter-governmental organizations to move beyond their own rule development processes to effectively articulate and implement SR expectations at the global level. It also represents a new direction for ISO, intended to extend their reach beyond the technical, process oriented standards to address substantive behaviour with a significant public policy element. The innovative procedure

for development of ISO 26000, with its attempt to be inclusive of various types of participants, from developed and developing countries, represents a work in progress, far from perfect in its current form, but a solid foundation for further development in subsequent iterations of ISO 26000 and other non-state rule instruments with significant public policy implications.