ISTITUTO DI RICERCHE
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GLOBAL ADMINISTRATIVE LAW
WORKING PAPERS

The ISO 26000 Process as a Model for Public-Private Cooperation in a Fragmented Transnational Regulatory Space

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IRPA Working Paper – GAL Series No. 5/2013

Copy editor: Martina de Lucia

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00199, Rome, Italy
www.irpa.eu

IRPA Working Papers - ISSN 2280-868X

Cite as:
R. Schmidt, "The ISO 26000 Process as a Model for Public-Private Cooperation in a Fragmented Transnational Regulatory Space", IRPA Working Paper GAL Series n. 5/2013 (www.irpa.eu).

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The ISO 26000 Process as a Model for Public-Private Cooperation in a Fragmented Transnational Regulatory Space

Rebecca Schmidt[*]

Abstract

The following paper looks at transnational regulatory cooperation between public international organizations and private regulatory entities. The argument advanced is that regulators cooperate because in the undefined global space with an unclear and often inexistent hierarchical framework it is necessary to convey sufficient authority to achieve compliance with a regulatory agenda. In order to acquire or maintain such authority regulators need to be perceived as legitimate, and their regulation as effective. The theoretical framework will be illustrated by a case study – the ISO 26000 standard setting process – which provides an example of public private cooperation in a decentralized transnational setting. When deciding to create a standard for social responsibility the International Standardization Organization concluded cooperation agreements with the International Labour Organization (ILO), the Organization of Economic Cooperation and Development (OECD) and the UN Global Compact. These public organizations were granted particular participatory rights in the process, which exceeded those of the numerous other stakeholders involved. The goal pursued by this cooperation was seen as important to augment regulatory authority of the regime through policy coherence. This was to be achieved by increasing the number of voices conveying a consistent message to global business regarding its obligations of social responsibility.

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1. Introduction

One can observe dissolution of the public-private divide at the international level. The clear borders once established[1] are breaking up and are being replaced by various forms of interaction and cooperation. In a number of regulatory fields transnational regulatory cooperation agreements are being concluded, interlinking the governance activities of traditional international organizations with those of private, or hybrid actors of various forms.

The emergence of cooperation between international organizations and private regulators via agreements has to be analyzed in a context characterized by at least two decades of considerable economic, social and cultural globalization.[2] The interconnection between markets and societies, the spread and expansion of businesses and trade around the globe, as well as the functional differentiation of society[3] present traditional regulators with challenges they could not address in isolation. On the one side can be seen the rise of different public actors exercising governance activities with global or at least cross-border effects. Kingsbury, Krisch and Steward distinguish between five types of "global administrative" regulators; international organizations, networks of national officials, national regulators that exercise regulation created by treaty networks or other regimes, hybrid arrangements and finally private institutions that were enshrined with regulatory functions.[4] On the other side one could observe a rise of private regulation, exercised by both economic, as well as civil society actors.[5] The principle reaction of economic actors to the lack of regulation of transnational markets was self regulation, which increasingly created third party effects. Civil society actors stepped in when they perceived that the vacuum created by the absence of public regulation left public goods in their realm of interest unprotected. What we find now is a pluralist landscape of different types of regulators performing a variety of activities in different geographical and thematic areas.[6]

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1 H. Muir Watt, "Private Law Beyond the Schism", 2 (3) *Transnational Legal Theory* (2011), p. 347.

2 B. de Sousa Santos, "The Processes of Globalization", *Eurozine* (2002), p. 2.

3 P. F. Kjaer, "Post-Hegelian Networks, Comments on the Chapter by Simon Deaking", in M. Amstutz and G. Teubner, *Networks: Legal Issues of Multilateral Co-Operation* (Hart Publishing, 2009) p. 82.

4 B. Kingsbury, N. Krisch and R. B. Stewart, "The Emergence of Global Administrative Law", 68 *Law and Contemporary Problems* (2005), p. 20 *et seq*.

5 F. Cafaggi, "New Foundations of Transnational Private Regulation", 38 *Journal of Law and Society* (2011), p. 20, R.B. Hall & T. J. Biersteker, "The Emergence of Private Authority" in R. B. Hall and T. J. Biersteker (eds), *The Emergence of Private Authority in Global Governance* (CUP, 2002), p. 3, and *see* other contributions in the same volume.

6 *See, e.g.*, P. S. Berman, "Global Legal Pluralism", 80 *Southern California Law Review* (2007), p. 1155.

Abbott and Snidal[7] bring forward the argument that the development of governance activities at the global level can be compared with new regulation at the national level (as addressed by Ayers and Braithwaite[8] and others). A combination of public and private regulation (self regulation etc.) and of soft and hard instruments can be observed. Their claim is that in this scenario the public (states and international organizations) should have a steering function. This is not however the case at present.

This paper starts from the premises outlined above and suggests considering formal transnational regulatory cooperation as one means of managing the different regulatory spaces that have been created. The argument made here is that regulators cooperate because in the undefined global space, with an unclear and often inexistent hierarchical framework, they need to convey sufficient authority to achieve compliance with their regulatory agenda. In order to acquire or maintain such authority regulators need to be perceived as legitimate, and their regulation as effective, by their addressees.[9] Cooperation can open new avenues for participation and deliberation and also for the exchange of necessary competences in a regulatory process.

The following sections develop the assumptions outlined above. Thus, in the first part I will provide a short summary of the underlying understanding of authority in a transnational context employed in this paper (2). This will be followed by an analysis of the relevance of cooperation as a means of developing and fostering regulatory authority. This will be done from the particular perspective of the ISO 26000 standard setting process (3). In a final step the paper will draw a link between both analytical levels by going back to Abbott and Snidal's claim that the public should have a steering role in this process. It is argued that the legitimacy of this claim can only be assessed if we understand and connect the underlying legal and technical processes to the allocation of authority in the transnational space (4).

2. Understanding Authority in the Transnational Realm

The first step in assessing authority is to clarify the scope of the analysis. The focus here lies on 'transnational regulators' including public international organizations, and less formal actors such as regulatory networks, as well as private entities which engage in rule and standard creation with a transnational reach. Throughout the following paragraphs I will provide a brief summary of the understanding of authority on which this paper will be based (2.1). Subsequently, I will introduce a number of

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7 "Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit", 42 *Vanderbilt Journal of Transnational Law* (2009), p. 501.

8 *Responsive Regulation: Transcending the Deregulation Debate*, (OUP, Oxford, 1992).

9 *See* Hall and Biersteker, *The Emergence of Private Authority* (Cambridge University Press, 2002), p. 4.

factors and elements which I have identified as *de facto* influences on regulators' transnational authority (2.2).

2.1 *A Short Definition of Authority in a Transnational Context*

How can authority be conceptualized in a transnational context. Weber, who speaks of "domination" when referring to the concept, defines it as "the probability that certain specific commands (or all commands) will be obeyed by a given group of persons".[10] Yet, as already indicated above, the transnational sphere lacks an overarching hierarchical framework. There is no world government. Most regulators are founded and relate back either to a treaty (in the case of international organizations), to private contracts or to some kind of even less formal understanding. Furthermore, organizations, public or private, are usually active in a particular issue area, but do not possess authority over a territorial domain. Thus, when talking about authority in the transnational realm, more traditional understandings, often developed in a national context[11] have to be adapted.

First, any adapted notion of authority has to include the phenomena of internationalization. International relation scholars traditionally argued that the international space is of an anarchic nature, lacking the basic prerequisites of authority such as "the monopoly of the legitimate use of physical force within a given territory".[12] In this context states "[were] both the source, and the exclusive location, of legitimate, public authority".[13] This very state-centric view has however been challenged at various stages and authority is no longer exclusively conceptualized as an extension of state authority. It is commonly accepted that other actors, such as international organizations can also exercise authority.[14] Venzke provides an account on how to comprehend authority of international organizations when engaging into rulemaking. Unlike the more traditional understandings linking authority back to state consent, he points to the possibility that a treaty can "turn into a[n independent] relationship of authority" This, according to him, happens in two steps: First

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[10] M. Weber, *Economy and Society - An Outline of Interpretive Sociology* (University of California Press, 1978) p. 214.

[11] *Ibid.*

[12] M. Weber, "Politics as a Vocation", in H. H. Gerth and C Wright Mills (eds) *From Max Weber: Essays in Sociology* (Routledge & Kegan Paul, 1948) p. 77. Quote taken from Hall and Biersteker, "The Emergence of Private Authority", p 3.

[13] Hall and Biersteker, *The Emergence of Private Authority* (Cambridge University Press, 2002), p. 3.

[14] A. von Bogdandy, P. Dann and M. Goldmann, "Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities", 9 *German Journal of International Law* (2008), p. 1375; I. Venzke, "International Bureaucracies from a Political Science Perspective – Agency, Authority and International Institutional Law", 9 *German Journal of International Law* (2008), p. 1401.

contracting parties create institutions and "vest third parties with semantic authority". He describes this as the "moment of consent".[15] In a second step those third parties then "shift and shape the contents of contracting parties' commitments, to coat them with new layers of meaning […]".[16]

Secondly (and of particular relevance for the current paper), private actors have to be integrated into a conception of transnational authority. As indicated above, the debate of authority in political and legal theory has long been dominated by a rather fierce public-private divide. The idea of consent as a necessary prerequisite for authority almost automatically created a dichotomy between the private, said to represent the individual, free markets and economic exchange, and the public, consisting of "state authority and legitimate compulsion".[17] Cutler, however argues that members of society are not a consent-based social unity established on equality. The private sphere is not "a consensual realm of civic and economic freedoms" which is "distinct from the political and potentially coercive realm of the state".[18] In particular in a globalized context, boundaries between public and private are constantly shifting. States are pursuing political programs, which transfer powers to private actors. Changes in communication methods and market structures have lead to an explosion of new forms of private interaction and caused non-state actors to acquire "power in the international political economy".[19]

Acknowledging these developments I will now try to arrive at an understanding of authority that integrates both public (international) as well as private authority. The first step in arriving there is to introduce a mechanism that will go back at the distinction of authority from the pure exercise of power. One suggestion on how such boundary between authority and power can be drawn is given by Hannah Arendt who contends that:

> The difference between tyranny and authoritarian government has always been that the tyrant rules in accordance with his own will and interest, whereas even the most draconic authoritarian government is bound by laws. …. The source of authority in authoritarian government is always a force external and superior to its own power; it is always this source, this external force which transcends the political realm, from

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15 Venzke, "Between Power and Persuasion", p. 3.

16 *Ibid*.

17 C. Cutler, *Private Authority and Global Authority, Transnational Merchant Law in the Global Political Economy* (CUP, 2003) p. 67.

18 Cutler, *Private Authority and Global Authority*, p. 68; *see* furthermore, Hall and Biersteker, "The Emergence of Private Authority", p. 5.

19 Hall and Biersteker, *The Emergence of Private Authority*, p. 6, making reference to S. Strange, "Territory, State, Authority, and Economy: A New Realist Ontology of Global Political Economy", in R W Cox (ed.) *The New Realisms: Perspectives on Multilateralism and World Trade Order* (UN University Press, 1997), p. 9; and I. Hurd, "Legitimacy and Authority in International Politics", 53 *International Organization* (1999), p. 381.

> which the authorities derive their "authority," that is, their legitimacy, and against which their power can be checked.[20]

The element introduced here is thus an overarching framework, which poses a limit to the arbitrary exercise of powers. Andrei Marmor opts for a similar concept. For him any authority first and foremost rests on practical authority. Practical authority consists of normative power, which is granted or constituted by norms that are essentially institutional (in the sense that "they form part of some social practice or institution").[21] Practices or institutions can be joined on voluntary or involuntary basis. There is a sliding scale between the two contraries and, moreover, voluntariness appears in different forms, such as the option to opt-in or the option to opt-out.

Therefore, for the purpose of this paper, authority should be understood as follows: In a transnational context authority, either of private or public origin, requires some kind of framework setting the boundaries within which power may be exercised. This framework is defined by norms which are part of social practices or institutions.[22] In voluntary frameworks consent from those over whom authority is exercised is required. Importantly, consent-giving should not only be conceived as a onetime event but as a dynamic process. Even though certain institutions build on one original moment of consent, others have to recurrently constraint addressees and gain consent by future ones.

2.2. Architecture, Legitimacy and Effectiveness – Factors which Determine Authority in the Transnational Space

The above section provided a very general account of authority. Authority does not however stand as an abstract concept but has to be understood as a context-dependent notion. In the following I will look at factors which impact how organizations build and maintain their authority and which constitute possible incentives for cooperation. For this I will first look at the architecture of the regulatory framework in which organizations act (2.2.1). I will then turn to two elements often said to be either an attribute of, or at least a necessary prerequisite for, authority to develop. These are legitimacy (2.2.2) and effectiveness (2.2.3). It is important to highlight at this early stage that all three factors are highly interdependent and partly overlapping.

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[20] H. Arendt, *Between Past and Future* (Penguin Books, 1977) p. 97.

[21] A. Marmor, "An Institutional Conception of Authority", 39 (3) *Philosophy & Public Affairs* (2011), 238 p. 241. Institutional practices are, generally put, more advanced than social ones. This implies that they often consist of secondary rules (in a Hartian sense), which determine how rules can be created or modified. Furthermore, Marmor says that institutionalized practices have sanction mechanisms. Social practices lack those elements. They are of informal nature and sanctioning takes place through social pressure.

[22] *Cf.* Marmor, "An Institutional Conception of Authority", p. 241.

2.2.1. Architecture

The architecture of the transnational space is of importance because it sets the framework in which authority can emerge and be constrained. I have already stated above that the transnational space is characterized by the absence of a (universal) hierarchy and by fragmentation. I would like to expand on these notions by drawing attention to some particular characteristics of this sphere.

The first concerns the division of the transnational space not (only) by territorial borders, but by sector or issue areas.[23] Organizations act in one or several distinct regulatory fields, subject to (sometimes constant) change. Authority in this global, non-hierarchical context is not top-down. Each actor engaging in transnational regulation has to establish and retain its authority from below, through its addressees, or through interaction with other regulators.

A second distinction can be made within the different issue areas between market-based and non-market-based, or decentralized and centralized structures. The former are characterized by fragmentation, the latter by internal hierarchy.[24] A market or decentralized scenario occurs when a multitude of public or private standard-setters are engaged in the area and have developed instruments fully or partly independent of each other. At least initially, these instruments often stand in conflict and competition pursuing each the goal that "one set of rules achieves market dominance and thus becomes the single global standard".[25] However, this is an optimistic outcome, only likely to prevail in scenarios where a single standard is needed. In other cases it may very well arise that competition leads to a race to the bottom or the failure of any instrument to be the object of a broad up-take.[26]

In a non-market-based or centralized scenario "a single institution is already internationally recognized as the predominant forum for writing rules in the issue

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23 *See* Hall and Biersteker, *The Emergence of Private Authority*, p. 4.

24 T. Büthe and W. Mattli, *The New Global Rulers, The Privatization of Regulation in the World Economy* (Princeton University Press, 2011) p. 18 *et seq*. introduce this distinction in order to conceptualize rule making in global markets. A similar distinction is that of Abbott and Snidal (Strengthening International Regulation through Transnational New Governance) who speak of centralized and decentralized governance. They, however, ascribe centralized governance to 'old' state based governance, in contrast to "new" transnational decentralized governance. The description is fairly accurate when, as with Abbott and Snidal, it describes the transnational realm as a whole. Yet, strong centralization can be found in different issue areas.

25 *Ibid*.

26 David Vogel and Robert Kagan (eds.), *Dynamics of Regulatory Change: How Globalization Affects National Regulatory Policies* (University of California Press, 2004), p. 2 describing the national context.

area, any particular standard that it develops becomes the global standard not through market selection but by virtue of having been promulgated by this focal institution".[27]

How does this picture influence the authority of transnational regulators? In the first case, any actor engaging in transnational rule making does not *prima facie* possess the necessary authority. As Büthe and Mattli state whether a certain set of rules will prevail depends on market selection, or more accurately on the up-take by the targeted addressees. This again depends on the actor's ability to build and maintain the bigger market share, which necessitates "a mix of political and commercial strategies".[28] Regulators in this context first and foremost provide regulatory options, which their addressees can opt for or not. Thus regulators need to take measures to increase their market share and to make sound strategic decisions.

The situation is different in a non-market scenario. Here one regulator dominates the particular issue area. Any rules it creates will in most cases automatically be considered as the "global [or regional] standard"[29] for the issue area. However, this does not mean that regulators in a non-market scenario possess automatic, unlimited and unquestioned authority. Problems can arise for instance when regulation brings along distributional inequalities among addressees. Disaccord can also emerge if there is the feeling that the regulator is no longer adequately addressing all prevailing aspects in the issue area. Furthermore, conflicts may arise between different stakeholder groups within an organization.[30] This creates the risk that the organization will split apart or be partly hamstrung.

2.2.2. Legitimacy

The link between legitimacy and authority has been frequently established by political theorists[31] and many have made legitimacy a prerequisite of authority. Legitimacy is claimed to be the decisive criteria for distinguishing authority from the mere exercise of power. Accordingly, authority should only be considered legitimate if "certain normatively important conditions are fulfilled", or are at least believed to be fulfilled.[32]

More recently, however, an argument has been made for a separation of the two concepts.[33] A Marmor states in this context that:

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27 Büthe and Mattli, *The New Global Rulers*, p. 18 *et seq.*

28 *Ibid.* p. 37.

29 *Ibid.*

30 *Ibid*. p. 35.

31 T. Christiano, *Authority*, Stanford Encyclopedia of Philosophy (rev. version, 2012), p. 11.

32 *See* generally for an overview over the different strands in literature: T. Christiano, *Authority*, Stanford Encyclopedia of Philosophy, p. 11; M. Weber, *Economy and Society*, p. 213; C. Cutler, *Private Power and Global Authority*, p. 66, and Hall and Biersteker, *The Emergence of Private Authority*, p. 4.

33 A. Marmor, "An Institutional Conception of Authority", p.238.

> To determine whether an authority is legitimate or not, we need a normative account for sure, but not about authorities in general; we need a normative theory about legitimacy of social practices and institutions, what makes them good and just and worthy of our support.

Disentangling legitimacy from authority and evaluating both concepts in separate steps does not however imply that authority is entirely independent of legitimacy. Legitimacy is simply not an automatic precondition for an institution to have authority but legitimacy does influence authority. Particularly in the transnational realm, challenges against legitimacy have a high potential to also negatively affect authority. This is first and foremost the case if it is exercised in a more voluntary framework with frequent references to consent and possibilities of opting out. Assessing legitimacy in this context is a rather complex task. There is not a general definition or method for evaluating legitimacy throughout its various fields. In fact, the way legitimacy is perceived depends very much on the particular regime, the organization or the specific regulator.

Generally, the increase of governance activities in particular areas causes a shift in the legitimacy debate. Whereas classic international law was usually discussed under a normative notion of legitimacy, newer forms of governance activities also demand a consideration of sociological conceptions of legitimacy.[34] I will therefore opt for a wider definition of legitimacy that also includes sociological notions, such as pragmatic, moral and cognitive legitimacy.[35] Pragmatic legitimacy is based on the interests of an organization's most immediate audience, moral legitimacy on normative approval, and finally cognitive legitimacy is based on comprehensibility and "taken-for-grantedness". In this scenario legitimacy evolves out of "mere acceptance of the organization as necessary or inevitable based on some taken-for-granted cultural account".[36] There is a particular distinction between normative legitimacy on the one hand and cognitive and pragmatic legitimacy on the other. J. Black defines it as the difference between "when an organization *should* be regarded as legitimate, rather than […] whether it is regarded as legitimate"[37] The former, moral-cognitive or normative, approaches usually lead to four different types of claims. These are constitutional claims, which "emphasize conformance with written norms"; justice claims, which refer to the values or goals pursued by the regulator; performance claims dealing with the outcomes of regulation; and finally democratic

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[34] J. Black, "Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes", 2 *Regulation & Governance* (2008), p. 137, 145 where she argues that: "Where regulatory regimes are largely non-legal and where, as in transnational regimes, infusing them with law is problematic, using only a legal concept of legitimacy will lead us to a dead end […]".

[35] M. C. Suchman, "Managing Legitimacy: Strategic and Institutional Approaches", 20 *The Academy of Management Review* (1995) p. 571, at p. 578 ff.

[36] *Ibid*. p. 578 ff; quote at p. 582.

[37] Black, "Constructing and Contesting Legitimacy", at p.145, italics in original.

claims associated with the "extent to which the organization or regime is congruent with a particular model of democratic governance […]".[38] In the following case study I will focus on all three aspects of legitimacy.

2.2.3. Effectiveness

Effectiveness simply understood as "the degree to which something is successful in producing a desired result"[39] is a prerequisite of authority. In fact, a number of authors consider the mere ability of an entity to effectively rule alone as sufficient to regard it as possessing justified authority.[40] Thus, it comes as no surprise that R. B. Friedman, when outlining common conceptions of authority, distinguishes between *de jure* and *de facto* authority. *De facto* authority "indicate[s] that that person is quite capable of eliciting a distinctive kind of obedience, allegiance, or belief, involving […] deference or respect or trust".[41] Further he states that "to say that a person has authority in the *de jure* sense of the right to rule does not imply that his will is necessarily effective".[42] In decentralized and fragmented spaces, however, where authority emerges out of a dynamic process with a higher degree of voluntariness regulators or potential regulators do not necessarily possess this *de jure* authority from the outset. They have to gain and maintain it by, among other ways, demonstrating their ability to effectively regulate. The question then arises as to what is necessary for this authority to exist. Abbot and Snidal in "The Governance Triangle" examine the relationship between competences of different actor groups (industry, government, NGO) and the requirements at different steps of the regulatory process.[43] For this purpose they build on a five-step regulatory process: agenda setting, negotiation, implementation, monitoring and enforcement. Different steps require different capacities from the regulators. Expertise, independence, representativeness, and operational capacity are particularly crucial throughout the regulatory process.[44]

Those competencies are of course not abstract terms but have several attributes. Expertise for example, is said to comprise of normative, business, political and auditing expertise. As such expertise can be relevant at each step of the regulatory

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38 *Ibid*. p. 145 f.

39 Oxford Dictionaries, available at <oxforddictionaries.com/>

40 *Cf*. T. Hobbes, Leviathan, A.P. Martinich and B. Battiste (eds) (Broadview, 2011) chapter XVII *para*.13; J. *Austin*, The Province of Jurisprudence Determined (Richard Taylor, 1832).

41 R. B. Friedman, "On the Concept of Authority in Political Philosophy", in J. Raz (ed.), *Authority* (Basil Blackwell, 1990), p. 61.

42 *Ibid*.

43 *See* K. W. Abbott and D. Snidal, "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State", in W. Mattli & N. Woods (eds), *The Politics of Global Regulation* (PUP, 2009), p. 44.

44 *Ibid.*, p. 64.

process. The character of independence also depends on the concrete context in which it takes place. One understanding of expertise can be neutrality in relationship to addresses but also in relation to other stakeholder groups with particular interests, such as lobbyists. Independence is of particular relevance in the agenda setting, monitoring and enforcement stages. Representativeness mainly refers to the representation of different stakeholder groups within a regulatory institution. There are several ways by which this can be ensured. One is to give different groups an effective voice within the organization. Another one is to implement procedures which assure participation and accountability vis-à-vis relevant stakeholders. Representativeness is needed at the agenda setting, the negotiation, as well as at the enforcement stages. The final competence is operational capacity. It includes legal and managerial authority, which are necessary, for example to be granted access to relevant sites and information. This capacity is of particular importance in the implementation phase and during monitoring and enforcement.[45]

3. Cooperation as a Means to Balance Authority Deficits – The Example of the ISO 26000 Process

The hypothesis tested here is that public-private cooperation functions as a means of gaining or securing regulatory authority in the transnational space. The following section will illustrate cooperation in the drafting process of the ISO 26000 on social responsibility, an example of public private cooperation in a market-based setting. This paper focuses on the International Standardization Organization (ISO), as a private standard setter, and the International Labour Organization (ILO), the Organization of Economic Cooperation and Development (OECD) and the UN Global Compact on the public side. The case study will start by outlining the very complex process the ISO had adopted for the creation of the 26000 standard. In a second step it will look at the individual rights and contributions of the public organizations.

3.1. *The ISO 26000 Standard Setting Process*

3.1.1. Initiative

The ISO 26000 standard setting process started out in 2001 with an initiative of the ISO Consumer Policy Committee. This was followed by the formation of a multi-stakeholder ISO Advisory Group by the Technical Management Board, which examined the various organizations and active programs in the area of social responsibility (SR) regulation and whether it was advisable for the ISO to also

[45] *Ibid.*

become active in the field.[46] The Group finally recommended the creation of a guidance standard on social responsibility under certain conditions. Those conditions were the recognition that a social responsibility standard is qualitatively different to previous ISO standards, the respect for existing authoritative public regulation in the field and the political nature of certain issues, proper involvement of the ILO and finally meaningful participation of interested parties.[47] In 2004 ISO held a multi-stakeholder conference which endorsed the idea of ISO becoming active in the area. In the aftermath, the Technical Management Board circulated a New Work Item Proposal[48] which was adopted by the ISO Members.[49] A working group on social responsibility (WG SR) was launched with a mandate to develop a SR standard.[50]

3.1.2. Actors Involved and Set Up

Due to the "very densely populated" regulatory field that ISO 26000 was entering, particular importance was placed on high degree of representativeness through stakeholder involvement. ISO therefore formed six stakeholder groups (industry, government, consumers, labour, NGOs, and a final group including service, support research and others) which were to represent different interests within the ISO/WG SR. In total 450 experts participated, joined by 210 observers from ISO Member Countries and 42 liaison organizations.[51] Another aspect that was supposed to increase representatives was the formation of so called "mirror committees" by national members. These committees were also divided into six different categories. Their task was to develop national positions which could then be transmitted into the standard setting process.[52] Finally, emphasis was laid on the involvement of representatives from developing countries.[53] This was financed through a donation system. Furthermore, certain managing positions, such as the chair of the WGSR followed the so-called "twining" principle, which meant the equal inclusion of representatives from developing and developed countries.[54]

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46 *See* Technical Management Board (TMB) approved Resolution 78/2002 establishing the Advisory Group on Social Responsibility.

47 *See* Recommendations to the Technical Management Board, ISO/TMB AG CSR N32.

48 *See* New Work Item Proposal Guidance on Social Responsibility, ISO/TMB N 26000, October 1st, 2004.

49 *See* Table of replies on the New Work Item Proposal Social Responsibility, ISO/TMB N 26000, ISO/TMB/WG SR N 7, February 25th, 2005.

50 *See* ISO 26000 Project Overview, p. 8.

51 ISO 26000 Project Overview, p. 9.

52 *See* J. Diller, "Private Standardization in Public International Lawmaking", 33 (3) *Michigan Journal of International Law* (2012), p. 492 *et seq*.

53 *Ibid*. p. 494.

54 *Ibid*. p. 495.

3.1.3. Drafting Process

The drafting process followed the general ISO standard setting framework with some modifications in order to meet the particular requirements of the 26000 process.[55] Usually the ISO standard setting process consists of five stages: the preparatory stage, the committee stage, the enquiry stage, the approval stage and finally the publication stage.[56] The main part of the drafting process usually takes place at the first stage within the Working Group(s) (WG) set up for this purpose. The drafting process in case of ISO 26000 was immensely complex, due to its goal of being as representative as possible, the necessity of not contradicting public law, combined with the ISO's usual practice of reaching decisions through consensus.[57] In the following paragraphs I will try to provide a concise overview over the different aspects of this complex process. This is necessary in order to properly understand the specificities attached to the involvement of the individual IOs in the process. I will first explain the structure of the working group, with its different sub-groups (a) and in a second step, in a more chronological order I will outline the different draft stages of the standard (b).

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55 *See* ISO/IEC Directives, Part 1; the application of the operating procedures was established in Resolution 21 during the first meeting of the working group. *See* Resolutions from the first meeting of ISO/TMB/WG SR, Salvador, Brazil, 2005-03-07 – 11, ISO/TMB/WG SR N 15, March 17th, 2005.

56 *See* above.

57 *See* Resolution 22 as reprinted in Resolutions from the first meeting of ISO/TMB/WG SR, Salvador, Brazil, 2005-03-07 – 11, ISO/TMB/WG SR N 15, March 17th, 2005; Diller, "Private Standardization in Public International Lawmaking", p. 505 *et seq*.

a) The Organizational Structure of the Working Group Social Responsibility (WGSR)

Responsibility for the overall management of the WG lay with a chairman. Due to the twinning principle the chairs were distributed to Sweden and Brazil who also established the Secretariat of the Working Group. The chairs were supported by the so-called Chairmen Advisory Group (CAG) an institution within the working group, which mainly fulfilled advisory functions.

The centre of the WGSR consisted of the so-called task groups (TGs) – twelve in total. Those were allocated specific tasks in the standard drafting process and were comprised of experts in their respective fields. Each TG had a Convener and a Secretary nominated by the Group's members. TGs 3-6 were directly entrusted with the standard setting process.[58]

Within TG5, which was responsible for making out core SR issues, seven SR issues were identified: Organizational governance, environment, human rights, labour practices, fair operating practices, consumer issues and community involvement/society development.[59] Those issues were then distributed to four so-called ad hoc core issues groups or drafting teams.[60] In order to process the outputs of the different Groups and Teams in an integrated manner, an Integrated Drafting Task Force was created.[61]. At further stage the Editing Committee was responsible for the review and editing of the draft versions of the 26000 standard.[62]

Finally, additional ad hoc groups were established at different stages of the process and at different levels of the WG structure depending on the necessity for additional input or expertise.[63]

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[58] *See* Proposal for the Organizational Structure of and Terms of Reference for the ISO/TMB/WG Social Responsibility, ISO/TMB/WG SR N 3, January 20th, 2005, p. 4which states that TGs 3-7 have the tasks of '[d]rafting [the] designated clauses according to Design specification' and '[r]evise and review drafts based on comments received'. TG3 with the operational procedures, TG4 with scope, SR context & SR principles, TG5 with guidance on core SR subjects/issues, and TG6 for guidance for organizations on implementing SR.

[59] *See* Resolutions from the 4th meeting of ISO/TMB/WG SR, Sydney, Australia 2007-01-29 — 2007-02-02, ISO/TMB/WG SR N 107, February 2nd, 2007, Resolution 3.

[60] *See ibid*. Resolution 4.

[61] *See* Resolutions from the 5th Meeting of ISO/TMB/WG SR, Vienna, Austria, 2007-11-05—09, ISO/TMB/WG SR N 132, September 11th, 2007, Resolution 2. This institution consisted of the convenors and co-convenors of Standard Setting TGs, two experts from each stakeholder category (as far as possible following the twinning concept), one representative from the Editing Committee, one expert from ILO (in accordance with MoU), one expert from UNGC (in accordance with MoU), one representative of the ISO Central Secretariat, and finally two Secretaries, appointed by the WG SR Chairs.

[62] *See* Proposal for the Organizational Structure of and Terms of Reference for the ISO/TMB/WG Social Responsibility, ISO/TMB/WG SR N 3, January 20th, 2005, p. 5.

[63] *See* Resolutions from the Second Meeting of ISO/TMB/WG SR Resolution 3 & 4, and *see* Diller, Private Standardization in Public International Lawmaking, p. 506.

b) The Different Stages of the ISO 26000 Standard

After the decision to adopt the New Work Item Proposal and the creation of the WGSR, ISO officially commenced the drafting process of the ISO 26000 standard. This process consisted of two major elements: First, the different stages of the ISO 26000 draft, consisting of drafting phases followed by several commenting periods. The second element consisted of a number of meetings where more fundamental decisions concerning the directions of the WGSR were taken.[64] In total eight meetings took place over a period of five years.

The so-called design phase took place at the beginning of the development process[65] and lead to a Proposal for Design Specification. This was the first document that provided a full outline of the prospective content of ISO 26000.[66] Comments on the proposal received from stakeholders were addressed by an ad-hoc group established for this purpose.[67] Another ad-hoc group was then entrusted with writing a revised draft. The new proposal, adopted in September 2005[68] contained seven categories (scope, normative references, terms and definitions, SR context in which organizations operate, SR principles relevant to organizations, guidance on core SR subjects/issues, and guidance on implementation) as well as an Annex which provided guidance to the drafters.[69]

This preliminary period was followed by the drafting period within the respective task groups. From 2006 until 2008 four, respectively five working drafts were generated,[70] each of which was followed by a comment period. The structures of the different drafts were very much based on the design proposal but started to change significantly in the latter versions. Thus Draft Version 4.2 consisted of the following areas: Scope, terms and definitions, understanding social responsibility, principles of social responsibility, recognizing social responsibility and engaging stakeholders, guidance on social responsibility core subjects, guidance on implementing practices

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64 *See, e.g.* Draft Resolutions from the 7th meeting of ISO/TMB/WG SR, Quebec, Canada, 2009-05-18—22, ISO/TMB/WG SR N 170, May 23rd, 2007.

65 Diller, "Private Standardization in Public International Lawmaking", p. 505

66 ISO Guidance Standard on Social Responsibility – ISO 26000, Proposal for Design Specification, ISO/TMB/WG SR N 31

67 Diller, "Private Standardization in Public International Lawmaking", p. 506.

68 *Ibid*. *See* ISO Guidance Standard on Social Responsibility – ISO 26000 – Design Specification, ISO/TMB/WG SR N 49, September 30th, 2005.

69 ISO Guidance Standard on Social Responsibility – ISO 26000, ISO/TMB/WG SR N 49.

70 Guidance on Social Responsibility, ISO /TMB/WG SR N 55, March 28th, 2006; Guidance on Social Responsibility – Working Draft 2, ISO TMB /WG SR N 80, October 6th, 2006; Guidance on Social Responsibility – Working Draft 3, ISO TMB /WG SR N 113, July 23rd, 2007; Guidance on Social Responsibility – DRAFT ISO 26000 WD4.1, ISO/TMB/WG SR N 137, March 11th, 2008; Guidance on Social Responsibility - DRAFT ISO 26000 WD4.2, ISO/ TMB WG SR N 143, June 2nd, 2008.

of social responsibility[71] – a development since the design proposal is clearly visible here.

After the different working draft versions, ISO 26000 reached the stage of the so-called committee draft.[72] This is the stage where the draft leaves the working group and enters the committee level, where it will be circulated together with the comments it received among the ISO members represented within the Technical Committee (TC). Those can either vote in favor and thus make the draft advance to the next level; or demand the creation of a new version and for this to be put to vote again. At this level, as throughout the whole process, consensus was required[73] however it should be noted that "in case of doubt concerning consensus, approval by a two-thirds majority of the P-members of the technical committee or subcommittee voting may be deemed to be sufficient for the committee draft to be accepted for registration as an enquiry draft".[74] Hence support by two thirds of full ISO members represented in the TC was necessary and could also be obtained.[75]

Just like any other ISO standard, the ISO 26000, had to go through the final stages, namely the enquiry stage (as draft international standard (DIS))[76] and the approval stage (as final draft international standard (FDIS)). [77] At the enquiry stage the standard was forwarded by the Central Secretariat (the Secretary General) to all national bodies, which were given a period of three month to vote on the draft. Members were able and partly (in case of a negative vote) obliged to make technical or editorial comments. At the approval stage, all members were asked to vote again, but only those voting against it were to provide reasons for this. The ISO managed to significantly improve support for the standard between the two stages.[78] Reasons for a negative vote in the first case were manifold and concerned regional and cultural reservations, trade considerations, as well as the perception that the standard could go

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71 *See* Guidance on Social Responsibility - DRAFT ISO 26000 WD4.2, ISO/ TMB WG SR N 143, June 2nd, 2008.

72 Guidance on Social Responsibility – Committee Draft, ISO/TMB WG SR N 157, December 12th, 2008

73 *See para*. 2.5.6 ISO/IEC Directives.

74 *Ibid*.

75 *See* Result ISO/CD 26000, Guidance on Social Responsibility, ISO/TMB/WG SR N 160, March 25th, 2009. It is important to note, that the decisions made by the Members were to reflect also the opinions of the representatives of the six stakeholder groups.

76 *See* Guidance on Social Responsibility – Draft International Standard ISO/DIS 26000, ISO/TMB/WG SR N 172, September 2009.

77 This standard is not made public, as ISO sells its standards and the FDIS is very close to the final product.

78 *See* Diller, "Private Standardization in Public International Lawmaking", p. 509; the approval rate in the DIS was 56 votes in favor and 18 negative votes (*see* ISO DIS 26000, Result of Voting, ISO/TMB/WG SR N 175, February 2010); for the FDIS it was 66 votes in favor and 5 negative votes (*see* ISO/FDIS 26000 – Result of Voting, ISO/TMB/WG SR N 196, September 2010). Importantly, when calculating the percentage of the P-Members in favor, abstentions are not included. They are, however, when determining the percentage of the votes against the standards.

further as, in the end, it did.[79] Generally politicization can be observed at the step from the Technical Committee to the enquiry and approval stage. Additionally several members changed their support in the last stages.[80] Yet as stated in the end the standard achieved the necessary 2/3 majority and was adopted.

3.2. *Public Private Cooperation in the Course of ISO 26000*

The ISO concluded three Memoranda of Understanding with IGOs (or their sub-units) that were particularly active in the area of social responsibility; the OECD, the ILO and the Global Compact. All three agreements stipulated that ISO 26000 was to be consistent with the respective instruments of the IGOs.[81] The MoUs further regulated participation of the IGOs in the drafting process of ISO 26000, consisting of participation in the relevant working groups and the right to comment at all development stages of the standard.[82] In the following section I will look at the individual engagement of each organization in the standard setting process.

3.2.1. ILO's Involvement in the ISO 26000 Process

ILO instruments, such as labour conventions and recommendations receive significant attention and are cited frequently within ISO 26000.[83] Apart from these instruments, particularly ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977 last revised 2006), the Declaration on Fundamental Principles and Rights at Work (1998), the Social Justice Declaration (2008) are prone to thematic overlaps with the 26000 standard.

The ILO's engagement in the process started at a very early stage. The Advisory Group on Social Responsibility had already stressed the importance of the ILO and labour standards for the process. This was reflected in the condition, that the ISO should only proceed with the standard setting process if it "recognizes through a formal communication the ILO's unique mandate as the organization that defines, on a tripartite basis, international norms with respect to a broad range of social issues"[84]

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79 Diller, "Private Standardization in Public International Lawmaking", p. 509 *et seq*.

80 Interview with Kevin McKinley (ISO), February 25th, 2013. Examples for these changes and 'political' reservations are outlined by Diller, "Private Standardization in Public International Lawmaking" p. 509, who also refers to H Ward, "The ISO 26000 International Guidance Standard on Social Responsibility: Implications for Public Policy and Transnational Democracy", 12 *Theoretical Inquiries in Law* (2011), p. 699 *et seq*.

81 *See* Article 2.1 MoU between ISO and the GC; Article 2.1 MoU between ISO and the OECD; Article 2.1 MoU between ISO and the ILO.

82 *See* in particular, Article 2 and 4.1 MoU between ISO and the GC; Article, 2 and 4.1 MoU between ISO and the OECD, Article 2.1 and 6 MoU between ISO and the ILO.

83 *See* Guidance on Social Responsibility, ISO 26000:2010.

84 Recommendations to the ISO Technical Management Board, ISO/TMB AG CSR N32, April 2004, p. 1. *See* furthermore the Working Report on Social Responsibility, Prepared by the ISO

Upon this recommendation the TMB adopted Resolution 35/2004 where it confirmed that it "recognizes the instruments adopted by global inter-governmental organizations (such as the United Nations Universal Declaration of Human Rights, international labour conventions and other instruments adopted by ILO and relevant UN conventions)"[85] and further stated in the New Work Item Proposal that:

> it is necessary to consider the activities of other bodies that have developed or are developing SR standards, norms, guidelines and tools. United Nations (Global Compact) and other inter-governmental organizations, *e.g*., ILO, OECD, UNHCR and UNEP, would need to be included in the process, in view of the fact that they already have or are developing international standards.[86]

On March 4th, 2005 the ISO concluded a Memorandum of Understanding with ISO.[87] The WGSR, which only had its first meeting after the conclusion of the MoU, promptly adopted Resolution 29 that stipulated:

> The WG recognized 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 article 1.2, 2.1 through 2.4, 6.1 and 6.2 of the MoU.[88]

The MoU mentioned in the Resolution has a number of remarkable provisions that frame ILO's role in the ISO 26000 process.

First, the MoU outlines the relationship between the ILO standards and the ISO 26000 Guidelines. It opts for a certain hierarchy according to which ILO standards will prevail in case of conflict. Two provisions in particular provide for this hierarchy:

> 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

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Advisory Group on Social Responsibility, April 30th, 2004, which outlines the overlaps between the ILO Framework and a possible standard on social responsibility in more detail.

85 ISO/TMB Resolution 35/2004, which is reprinted in part in: New Work Item Proposal Guidance on Social Responsibility, ISO/TMB N 26000, October 1st, 2004.

86 New Work Item Proposal Guidance on Social Responsibility, ISO/TMB N 26000, October 1st, 2004.

87 *See* Memorandum of Understanding between the International Labour Organization and the International Organization for Standardization in the Field of Social Responsibility, ISO/TMB/WG SR N 18, March 4th, 2005.

88 Resolution 29, reprinted in Resolutions from the First Meeting of ISO/TMB/WG SR, Salvador Brazil 2005-03-07 – 11, ISO/TMB/WG SR N 15, March 17th, 2005, p. 7, quote taken from Diller, "Private Standardization in Public International Lawmaking", p. 500.

> 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 provision of those standards, […][89]

> That international labour standards adopted by the ILO will take priority in any case of conflict in the context of development, and of any promotion, support, evaluation and approval, or periodic review of any ISO International Standard in the field of SR, as well as in any case of conflict involving ILO issues with any private initiative with which ISO may collaborate in the context of this Standard.[90]

Moreover, in the process of standard creation "the provisions of ILO instruments [will] serve as the authoritative and definitive source of reference, and minimum base line for any elements which relate to international labour standards"[91]. Furthermore, ISO's activities should not interfere in labour issues "that should only be resolved through representative political or legal processes"[92].

Secondly, the MoU regulates the ILO's participation in the standard setting process. Regarding the working and task group level, before any proposed text is circulated for review within one of these groups, the ILO can decide in consultation with ISO whether ILO issues are concerned. If this is the case it can review and comment on the proposed text. Comments, if they are made, must be circulated with the text for review by the respective group.[93] A similar process is foreseen in the later stages of the standard setting process. According to the MoU:

> "[a]ny committee or enquiry draft or final draft International Standard (CD, DIS, FDIS) will be subject of a pre-circulation process seeking 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 of any such draft Standard […]"[94]

and further:

> In the event ILO does not provide the backing … ILO's comments on such draft Standard will be circulated, together with the draft Standard (CD, DIS, FDIS), to all statutory ISO members, to the D-liaison organizations in the SR Working Group and to the Technical Management Board prior to submission to a vote by any ISO body.[95]

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89 Article 2.1 MoU ILO/ISO.
90 Article 2.3 MoU ILO/ISO.
91 Article 6.1 MoU ILO/ISO.
92 Article 2.4 MoU ILO/ISO such processes would be identified through consultation between the parties.
93 Article 2.1.1 MoU ILO/ISO.
94 Article 2.1.2 MoU ILO/ISO.
95 Article 2.1.3 MoU ILO/ISO.

Thirdly, the MoU specifies ILO's involvement in the standard setting process. Article 5 states that:

> ISO will provide, within the Working Group on SR including all of its subgroups, and all other ISO bodies concerned with any ISO International Standard in the field of SR, for full participation by the ILO and, through the appropriate ISO mechanisms, by its tri-partite constituency, at ILO's request.[96]

The concrete arrangements of this participation are clarified throughout the MoU. As already outlined above Article 2 sets the out the comment procedure, by which the ILO can intervene on different stages of the standard setting process on labour matters. Furthermore, Article 6.2 foresees that the ILO will share its expertise regarding its own labour instruments and there will be regular consultations (Article 4) and exchange of information (Article 3) in relation to the MoU.

Finally, the MoU looks not only at the contributions the ILO can provide to the ISO 26000 but also provides stipulations that are concerned with the ISO's role in supporting labour standards. Article 2.2.1 therefore states that "ISO activities and/or publications […] will [f]acilitate greater awareness and wider observance of international labour standards […]"[97]. Even more interesting is Article 2.2.2, which asserts that the same activities/or publications should "complement the role of governments in ensuring compliance with international labour standards". Here one of the motivations pursued by the ILO in the process is clearly discernible, namely the increase in the effectiveness of the ISO's own instruments with the help of the private actor.

How were these provisions applied in the actual processes of ISO 26000? To answer this question the commenting practice is of particular interest, specifically whether the ILO had the almost veto-like impact regarding labour issues that the MoU suggested. The comments on draft versions of ISO 26000 and the subsequent implementation of them are of particular relevance. Starting with the second working draft, the ILO regularly submitted comments. At the beginning these were circulated separately from the other stakeholder's feedback. From the Committee Draft Stage on they were compiled with the other comments.[98] Implementation was difficult to follow at the first stages as the specific draft versions changed significantly due to the extensive work within the task groups. Therefore, the comments that ILO provided at that stage are better understood as suggestions for the next drafting period. This was particularly the case as the ILO was involved in several task groups, such as TG 1,[99]

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96 Article 5 MoU ILO/ISO.

97 Article 2.2.1 has to be read in combination with Article 2.2 MoU ILO/ISO.

98 For the comments provided by ILO to the different draft versions see under 'projects' in the archive of the ISO 26000 process, available at: http://isotc.iso.org/livelink/livelink?func=ll&objId=3974907&objAction=browse&viewType=1.

99 ISO/TBM Working Group on Social Responsibility – Task Group I, Funding and Stakeholder Engagement , ISO/TMB/WG SR/TG1 N 02, December 12th, 2005.

or the Integrated Drafting Task Force;[100] as well as TG 4[101] and TG 5[102] which were primarily charged with the drafting process. Towards the later stages, changes became more specific and the WGSR Secretariat stated clearly whether it would implement a comment or not.[103] Even though this was not always the case, the ILO finally backed the FDIS stating that it did not appear to conflict with international labour standards yet stressing the need for further post-publication cooperation.[104]

3.2.2. UN System – Global Compact

a) General Involvement

The Global Compact (GC) with its ten universally accepted principles, in the area of human rights, labour, environment and anti-corruption, targets global business activities.[105] It was therefore also included in the ISO 26000 process at an early stage (after the second working draft). Moreover, apart from representing its own regime, the GC was also entrusted with addressing the concerns of other UN Agencies.[106]

As in the case of the ILO, cooperation was fixed in a MoU.[107] Even though generally similar, there are some important differences between both agreements. The GC/ISO MoU stipulates that ISO 26000 "needs to be consistent with the United Nations Global Compact and its ten universal principles".[108] It furthermore foresees participation of the GC in the working group (and subgroups) responsible for ISO 26000.[109] The GC is also granted the right to submit comments to the different draft versions which will be circulated to the respective participants in the process at the same time as the draft version.[110] Finally, ISO also "[sought] the full and formal backing" of the GC for the FDIS,[111] and in case this was not provided, the GC's

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100 Minutes, Constitution of Integrated Drafting Task Force, IDTF, Annex A, ISO/TMB/WG SR, November, 15th, 2007.

101 ISO/TMB WG SR TG 4: List of experts and observers, March 14th, 2006.

102 Composition of ISO/TMB/WG SR TG 5 on 23rd May 2006, May 23rd, 2006.

103 *See* Comments Received on ISO/CD 26000 (WG SR N 157), ISO/TMB/WG SR N 161, March 25th, 2009.

104 Comments of the International Labour Office For Circulation with ISO/FDIS 26000:2010(E), ISO/TMB/WG SR N 194.

105 Overview of the UN Global Compact, available at: http://www.unglobalcompact.org/AboutTheGC/index.html.

106 Memorandum of Understanding between the United Nations Global Compact Office and the International Organization for Standardization (ISO), ISO/TMB/WG SR N 82, November 9th, 2006, Article 2.2.

107 MoU GC/ISO.

108 Article 2.1 and Article 1.1 MoU GC/ISO.

109 Article 4.1 MoU GC/ISO.

110 Article 2.3 MoU GC/ISO.

111 Article 2.4 MoU GC/ISO.

comments were to be circulated to all relevant actors, in particular ISO members.[112] However, it is peculiar that the wording in the case of the GC/ISO MoU does not contain the same strong language as the ILO/ISO MoU. This might be due to the "principle [soft law] character" of the GC's instrument, which makes it more difficult for it to be considered an "authoritative and definitive source of reference".[113] Furthermore, in the GC/ISO MoU there are no provisions which emphasize a particular role of ISO in the support of the GC's agenda. As a result the status of the GC was closer to that of a D-Liaison organization (the regular status under which third party organizations can participate in ISO Working Groups) than that of the ILO.[114]

Nonetheless, the GC was as actively involved as the ILO. It commented regularly on draft versions (even though its comments were always compiled with the feedback of other organizations).[115] Furthermore, it participated in different task groups such as TG 4,[116] TG 5[117] and the Integrated Drafting Task Force.[118]

b) Excursion – The Ruggie Process

Even though the Ruggie Process is not directly linked to the Global Compact the Special Representative's (SpR) role in the ISO 26000 process is nonetheless of importance and should be addressed separately. As already stated above, the UNGC became the umbrella organization for all UN Organizations originally participating in the process (apart from the ILO).[119] Yet, at a certain point in the process the SpR felt the need to intervene into the standard setting process, as he detected a development that had the potential to lead to a conflict with his own framework.[120] His main concern was the ISO's definition of the concept of the "sphere of influence", not only within the part dealing with human rights (which is also of concern to the Ruggie Process) but throughout ISO 26000 more generally. His criticism thus was that:

> The draft Guidance is internally inconsistent on this issue, and beyond the human rights section it is inconsistent with the UN framework. This will send mixed and confusing messages to companies seeking to understand their social responsibilities, and to stakeholders seeking to hold them to account.[121]

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112 Article 2.5 MoU GC/ISO.

113 *Cf.* MoU ILO/ISO

114 *See para*. 1.17.3.1 ISO/IEC Directives.

115 Diller, "Private Standardization in Public International Law Making", p. 501.

116 ISO/TMB WG SR TG 4: List of experts and observers, March 14th, 2006.

117 Composition of ISO/TMB/WG SR TG 5 on 23rd May 2006, May 23rd, 2006.

118 *See* Minutes, Constitution of Integrated Drafting Task Force, IDTF, Annex A, ISO/TMB/WG SR, November, 15th, 2007.

119 Ward, "The ISO 26000 International Guidance Standard on Social Responsibility", p. 691.

120 *See* Special Representative of the Secretary-General for Business and Human Rights, Prof. John G. Ruggie, Note on ISO 26,000 Guidance Draft Document.

121 *Ibid*. p. 2.

The ISO took the criticism very seriously which was mainly attributed to the authority Professor Ruggie possessed in his position as a Special Representative.[122] The Integrated Drafting Task Force proposed to clarify the concept of "sphere of influence" (the main point of Ruggie's critique) within the 26000 framework in order to avoid conflict with the UN Framework.[123] Despite these efforts the final document has been said to still contain a number of provisions which might not always be consistent with the Ruggie framework.[124]

3.2.3 OECD

The OECD, just as the ILO and the GC, has its own instrument in the area of social responsibility. The Guidelines for Multinational Enterprises constitute "recommendations addressed by governments to multinational enterprises operating in or from adhering countries"[125] Importantly they are also accompanied by an implementation mechanism through national contact points, which offer mediation and conciliation services in case an enterprise is confronted with allegations of having committed violations.

The MoU between OECD and ISO was concluded only in 2008, shortly before the Committee Draft was launched, thus at a later phase of the standard setting process.[126] Nonetheless, there had already been some involvement.[127] The MoU signed between the two organizations mirrors to a large extent the GC/ISO MoU. One small difference is the stipulation, similar that found in the ILO/ISO MoU, that the ISO is to "facilitate greater awareness and wider observance of the OECD Guidelines".[128] Article 4.2 furthermore provided an opportunity for the ISO to participate in OECD bodies concerned with the development of the MNE Guidelines. Even though the ISO was, in the end, not very engaged in this process,[129] the ISO process was said to have inspired some of the changes made to the Guidelines to the

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122 Ward, "The ISO 26000 International Guidance Standard on Social Responsibility", p. 696.

123 Copenhagen Discussion Document, Copenhagen Key Topics (CKTs), ISO/TMB/WG SR N 186, May 4th, 2010, p. 11 *et seq*.

124 For an extensive analysis of ISO 26000 in this respect *see* S. Wood, "The Meaning of the 'Sphere of Influence'" in BSI, *Understanding ISO 26000: A Practical Approach to Social Responsibility* (2011), p. 127 *et seq*.

125 OECD Guidelines for Multinational Enterprises, 2011 Edition, p. 3.

126 Memorandum of Understanding between the OECD and ISO in the Area of Social Responsibility, ISO/TMB/WG SR N 144, June 19th, 2008.

127 *E.g.* the OECD had already been part of TG 4 in 2006 *see* ISO/TMB WG SR TG 4: List of experts and observers, March 14th, 2006.

128 Article 2.7 MoU OECD/ISO.

129 Interview with Marie-France Houde (OECD), February 7th, 2013

extent that even hard-referencing of ISO 26000 was considered (but did not in the end materialize).[130]

The OECD began commenting on the second Working Draft,[131] and also provided comments to the Working Draft 3 and 4 and the Draft International Standard. There appeared to have been no backing of the FDIS.[132] Furthermore, the OECD was involved in WG 4 and 5 but not in the Integrated Drafting Task Force.[133]

4. Public Private Cooperation as a Means to Overcome Authority Deficits

In this section I will link the case study with the theoretical framework elaborated above and show how cooperation is engaged into with the intention to positively impact the authority of the individual organization itself and of the regulatory regime in its entirety. To do so I will first outline the motives of the different organizations mentioned above in engaging in the cooperative process (4.1). I will then look at how cooperation was intended to impact the organizations' regulatory authority, linking the findings of the case study back to the theoretical discussion in part one (4.2). Finally, I will make some comparative remarks, referring to Abbott and Snidal's concept of transnational new governance as outlined in the introduction. I will try to provide a first classification of the phenomenon of public-private cooperation and an outlook of its normative potential as a tool in transnational regulation in part (4.3).

4.1 *Rationale behind the Cooperation*

In this section I want to look at the organizations motives for engaging into public-private cooperation. Why did public organizations ultimately get engaged into the ISO 26000 process? What were the ISO's reasons for having them involved or for granting them a status exceeding that of other stakeholders?

To answer the first question I first want to draw attention to how international organizations appraise the ISO's general contribution to global social responsibility regulation. For instance, the ILO conceptualizes the area of social responsibility regulation as consisting of three levels. First, there are normative institutions such as

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130 Interview with Kevin McKinley (ISO), February 25th, 2013.

131 Comments received on ISO/WD 26000.2, Guidance on Social Responsibility, document WG SR N 80, ISO/TMB/WG SR N 83, December 18th, 2006.

132 Available at: http://isotc.iso.org/livelink/livelink?func=ll&objId=3974907&objAction=browse&viewType=1, and at: http://isotc.iso.org/livelink/livelink?func=ll&objId=3935837&objAction=browse&sort=name the comments on the FDIS can be found at the bottom of the page.

133 *See* ISO/TMB WG SR TG 4: List of experts and observers, March 14th, 2006 and Composition of ISO/TMB/WG SR TG 5 on 23rd May 2006, May 23rd, 2006.

the ILO or the OECD which set the framework. At the level below one finds governments, MNEs, and labour organizations. All of these entities, through their policies and agreements, impact on the third stage – consisting of companies and their practices. An important objective is to create policy coherence between the different regulators on the first two stages in order to transform business culture at the third stage. All normative institutions should convey a consistent message through which expectations on business will be clearly stipulated and actions and practices are influenced as a result. Thus, the law sets a framework and private policies (on MNE level or below) determine what happens within a particular corporate entity.[134] In the context of this framework ISO 26000 is considered as having a special status. To some degree it belongs to the normative framework (the drafting process was not industry driven but involved to a high degree also public actors) but, as a long standing technical standard setter, it also has particular links with industry. It can thereby open another channel through which the message of socially responsible business behavior is conveyed. Thus, consistency was an important motif: ISO 26000 should not compete with public policy but should contribute to sending out a coherent message to the business community.[135]

The ISO stressed that it engaged in cooperation in order to avoid creating conflict with publically established policies, as it had no authority to rewrite existing public instruments.[136] Its goal was to create a guidance consistent with established mechanism, that has the advantage of integrating different policies into one document.[137] Cooperation with public actors was thus aimed at creating this coherence. However, it was also aimed at accessing public entities expertise regarding social responsibility regulation in specific areas such as labour law.[138]

4.2 *Cooperation and Authority in the ISO 26000 Case*

As stated above, authority is not dependent on a fixed set of normative prerequisites, but on a combination of internal as well as external factors and dynamics. In the present case the framework in which the ISO 26000 process is embedded, is of a market-based, decentralized character – thus actors had and have to find ways of ensuring the adoption of their regulatory instruments.[139] Here the preferred strategy was not a competitive one, but one based on cooperation with the other actors involved in the field. There was a strong "the more the better" attitude, which was combined with the idea that specifically an industry-based actor such as the ISO

134 Interview with Emily Sims (ILO), February 25th, 2013.
135 *Ibid*.
136 Interview with Kevin McKinley (ISO), February 25th, 2013.
137 *Ibid.*; and Interview with Emily Sims (ILO), February 25th, 2013.
138 Interview with Kevin McKinley (ISO), February 25th, 2013.
139 Some instruments, such as ILO conventions might enjoy great up-take already.

could open new avenues for communicating the message of (corporate) social responsibility. These motives seem to suggest that there was first and foremost a need to increase the overall operational capacity of the regulatory regime, rather than the one of a single organization. Competition between regulatory bodies with contradictory contents would have delegitimized these efforts. In light of this one must understand the desire of IOs to create a consistent message across the different regulatory frameworks that address SR issues. Nonetheless, despite this "common goal approach" all involved IOs were eager to ensure that their own regulatory instruments were sufficiently considered in the private process.

The ISO also pursued a strategy of coherence. It clearly stated that it did not want to contradict or undermine public policy. Here, however, it seems that legitimacy concerns were the predominant motive. I have outlined above different conceptions of legitimacy and how they can impact an organization's authority, particularly in a transnational setting. Legitimacy can be managed – it can be gained, maintained and repaired.[140] As I have shown, the ISO expanded its scope of standard setting from purely technical standards, over management standards, to ISO 26000, which includes a high number of public policy elements. It needed to convince not only its own stakeholders (mainly industry based members, and enterprises to buy the standard) but also public actors and beneficiaries who would evaluate the standard on whether it meets their requirements. A standard that contradicted established public regulation in the area would most likely not have been considered legitimate. Thus cooperation was a means for the ISO to gain legitimacy as an actor in the field of social responsibility regulation. One can read the attempt to make the process as representative as possible in a similar light: It ensured both a broad endorsement of the standard and attainment of the final goal of creating an all-encompassing instrument.

On the other side of the coin, cooperation not only opens avenues for addressing legitimacy claims, it might also create new ones. This was clearly visible in the ISO-ILO cooperation. The ILO placed a high importance on certain provisions in the MoU ensuring that ISO standards would be consistent with ILO instruments and that, in case of conflict, the latter would prevail.[141] It therefore required a special status, exceeding those of other actors in the 26000 process. This status was due to its special position as an organization representing the interests of states (as well as the other two stakeholder groups – labour and industry) and because it was able to bring (partially) hard international law provisions to the table. Moreover, the ILO also needed to make sure that its participation would not tie itself to the ISO to a degree that its own responsibilities vis-à-vis its members would be violated. All of this was clearly stated in the MoU between the two organizations.[142]

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140 Suchman, "Managing Legitimacy", p. 578 *ff*.

141 See Article 2.1 and 2.3 MoU ILO/ISO.

142 See MoU ISO/ILO Article 9.1.

The ISO 26000 process is a good example of the increase in legitimacy claims that can be achieved through a cooperative approach. The various different actors brought the expectations of their own stakeholders to the table. These could not be ignored but had to be integrated into the process. The mirror committees, which ISO asked its member bodies to set-up in order to represent the respective national positions had a similar effect. In the end, the process became highly complex. It took an enormous amount of effort to integrate the very different demands originating from the diverse groups.

Regarding the effectiveness of transnational regulation I have listed, based on Abbott and Snidal's "Governance Triangle"[143], several capacities that must be found in the regulatory process. Those are expertise, independence, representativeness, and operational capacity.[144] As stated above these capacities are not distributed equally among different regulators, yet all are necessary in order to achieve effective regulation. I assumed that there are different distributions between public and private regulators. Private business actors are, for instance, supposed to have high operational capacity as well as business and technical expertise. International organizations are said to be representative and independent, and to possess specific expertise. The capacities of NGOs vary greatly according to their practice area and their own set up.[145] In the present case all four organizations faced certain deficits in their operational capacities that affected their authority. Whereas the ISO lacked legitimacy, and possibly expertise, the IOs had problems to ensure implementation of their policies within the business community. Both sides hoped to overcome those deficiencies through cooperation. Interestingly, the predominant strategy was to enhance the authority of the entire regulatory regime by conveying a consistent message to the business community. Yet, it has to be mentioned that cooperation might not always lead to the most effective standard setting process. Thus, the need to address particular legitimacy concerns might negatively affect the effectiveness of the process. Having to include a great number of different stakeholders with partly contradicting views might necessitate longer deliberation time and several working versions before agreement on a final standard can be reached. Thus, the ISO 26000 process had five different draft stages in total. They were preceded by a substantive preparation phase and complemented by various meetings to ensure that the various

143 See K. W. Abbott and D. Snidal, The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State, in W. Mattli & N. Woods, The Politics of Global Regulation, PUP, 2009, 44, at 64.

144 *See* K. W. Abbott and D. Snidal, The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State, in W. Mattli & N. Woods, The Politics of Global Regulation, PUP, 2009, 44, at 64.

145 *Cf. ibid*.

actors involved were sufficiently considered in the process. In total, the process took 9 years (from 2001 until 2010) and required vast resources.[146]

Finally, other stated goals did not materialize. ISO 26000 has been facing both criticism and problems revealing a number of deficiencies that were not balanced out by the cooperative process. One concerns the intrusion of the ISO into the public policy domain. J. Diller, for instance, criticizes the fact that the "ISO did not sufficiently develop and apply the necessary criteria to justify its decision to proceed in the field of SR or to define the scope of and processes for developing such a standard".[147] Despite the attempt to avoid conflict with established public rules, the ISO has not convinced all critics that it in fact did so. Another, maybe even more significant problem, is the weak up-take of the instrument. ISO 26000 was not as successful as expected. A reason for this could have been the decision to make it a non-certifiable guidance. As such, it might have less appeal to industry than other management standards that follow the more traditional ISO pattern. Thus, the calculation of the IOs to help in the creation of an instrument that is closer to industry usage and needs has not paid off to the level anticipated.

4.3 *Understanding Cooperation – Some Final Comparative Remarks*

In this final section I will address briefly normative implications that can be drawn from the above made observations. This is merely an overview and is not intended to be conclusive. At the beginning of this paper I referred to Abbott and Snidal, who introduced the idea of "transnational new governance"[148], as a way of capturing the emerging transnational regulatory system. Transnational new governance is characterized by high decentralization, dispersed expertise, voluntary codes and only limited state orchestration.[149] The problem is that the new governance model as established in the domestic context is "premised on state orchestration"[150]. In the transnational context IOs and (single) states face difficulties in living up to this ideal as regulatory competencies are dispersed and an institution which could engage into a central steering function is missing.[151]

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146 *See*, Social Responsibility, Dawn of a New Era, ISO Focus +, p 1, available at: http://www.iso.org/iso/home/standards/iso26000.htm.

147 Diller, "Private Standardization in Public International Lawmaking", p. 529.

148 This is based on earlier concepts developed for the national context, *see* I. Ayers and J. Braithewaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP, 1992); N. Gunningham and P. Grabosky, *Smart Regulation: Designing Environmental Policy* (Calderon 1998); C. F. Sabel and J. Zeitlin (eds) *Experimentalist governance in the European Union: Towards a New Architecture* (OUP, 2010).

149 Abbott and Snidal, "Strengthening International Regulation through Transnational New Governance", p. 541.

150 *Ibid*. p. 558.

151 *Ibid.*

To overcome the orchestration deficit Abbott and Snidal suggest a number of actions which states and IOs can take.[152] For IOs in particular these would be measures such as using private standards as requirements for procurement, creating public standards that can then be taken up by private regulators, encouraging states to implement standards, suggesting private standards for the implementation of international rules, providing a forum for different actors to convene, initiating desirable collaborative schemes and providing material support and knowledge or expertise.[153]

Some of the above suggestions have cooperative elements to them. I would nonetheless argue that regulatory cooperation goes beyond orchestration in an important way: It allows the public to be more directly engaged in the private processes (as can be observed in the detailed stipulations regarding participatory rights in the MoU). This means that there is a higher partnership level. The public is not (only) endorsing or supporting certain private standards but is actually participating in their creation.

Such an advanced engagement has a number of advantages as well as disadvantages. Direct involvement and having a strong voice in a process instead of just having an observer status or the possibility of adopting an instrument *ex post*, is surely beneficial. The public in this framework is much better able to shape the standard and to avoid inconsistencies with its own instruments thus achieving its goal of sending out a coherent message to the addressees of the regulation. In the present case this is well illustrated by the provisions of the MoU but also by the intervention of Professor Ruggie into the process.

Yet, such an engagement requires an increased involvement, and thus increased capacities and resources. This to a certain degree impedes with the potential of transnational new governance, namely to deal with the issue of sparse public resources. Furthermore, it also requires that the public actor submits itself to a certain extent to rules and procedures originating from the private. Therefore, it is crucial that the process is well planned from the outset and that rights and duties are sufficiently stipulated before engaging. This will ensure that any public resources that are deployed will also lead to the fulfillment of public goals.

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152 *Ibid*. p. 564 *et seq*.

153 *Ibid*. p. 570 *et seq*.