10-2020

International standards: Catalyst or barrier for innovative entrepreneurship in Singapore?

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OCCASIONAL PAPER

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14 October 2020

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CCCS RESEARCH GRANT 2018
"Barriers to Innovative Entrepreneurship in Singapore"

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Abstract

This research, under the Competition and Consumer Commission of Singapore inaugural Research Grant 2018, considers whether and how international standards, specifically those of the International Organization for Standardization (ISO), can function as a catalyst or barrier to innovative entrepreneurship in Singapore. It also interrogates how private (and quasi-public regulation) affect competition and whether such barriers are anti-competitive. In essence, while innovation and entrepreneurship are necessary, they may not be sufficient in ensuring that a product or service is competitive and able to access export markets.

The growing movement towards and the expectation of businesses engaging in responsible behaviour has led to more measures, public and private, to regulate businesses. These measures need not necessarily be legislative in nature but could include private means of regulation such as industry standards put in place by an industry association or standards such as those of the ISO. To this end, this research examines two ISO standards: ISO 26000:2010 (Guidance on Social Responsibility) and ISO 37001:2016 (Anti-Bribery Management Systems)

The questions examined in this study are:

1. Does private regulation, such as through ISO standards, affect the exportability in goods and services when they have to comply with such standards in order to access markets?

2. Is private regulation a potential barrier to innovative entrepreneurship in Singapore?
3. Specifically, how could ISO 26000:2010 (Guidance on Social Responsibility) and ISO 37001:2016 (Anti-Bribery Management Systems) affect Singapore-based companies?

The ISO standards can and does affect Singapore businesses in export markets should be closely studied for two reasons. First, Singapore businesses are very much reliant on export markets for their goods and services. Second, international standards are developing in areas that are not necessarily "technical" in the usual sense such as in social responsibility and anti-corruption. These standards focus on the *hows* of a good or a service rather than the *what* (viz what can the product do, and does it meet the mandated specifications and regulations for use). The former attribute is not often given adequate attention when compared with the development of a product's specifications and the delivery of a service. It would appear that international standards and private regulation are shifting towards what can be described as "next generation" specifications that often go beyond how well a good or service can perform, to the impact of producing a product or delivering a service. The push for environmental, social and governance (ESG) concerns by stakeholders is growing and companies ignore them to their peril. In addition, the Covid-19 pandemic has added to the imperative and urgency of corporate reinvention that will focus more on the next generation of specifications.

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International Standards: Catalyst or Barrier for Innovative Entrepreneurship in Singapore?

I Introduction

The growing movement towards and expectations of companies engaging in responsible behaviour in the conduct of their business has led to more measures, public or private, to regulate companies. These measures need not necessarily be legislative in nature but could include private means such as industry standards put in place by an industry association or standards such as those of ISO.

As a nation-state heavily reliant on trade and investments, Singapore has emphasised quality and standards right from the outset as a means of ensuring that its exports find receptive markets. Private regulation, such as through ISO standards, affect the exportability in goods and services when they have to comply with such standards in order to access markets. But the focus has been very much on technical standards with little attention paid to non-technical considerations such as whether the product or service was made without abuse of human rights, care of the environment, fair operating practices (such as without corruption and fair competition), consumer concerns (such as sustainability).

Private regulation is here to stay and is likely to grow in usage and importance.[1] Hence, the best approach is not to treat private regulation as a potential barrier to innovative entrepreneurship in Singapore but rather to use private regulation, especially in non-technical aspects, as a means of strengthening innovative entrepreneurship. In this regard, the ISO standards such as ISO 26000:2010 (Guidance on Social Responsibility) and ISO 37001:2016 (Anti-Bribery Management Systems) can significantly affect Singapore-based companies. These are areas where Singapore-based companies should have a competitive advantage given our reputation for trust but, worryingly, the domestic impetus has not been on securing sufficient competency and/or certification in the areas of social responsibility and anti-bribery systems.

[1] In this study, private regulation and ISO standards are used interchangeably.

How ISO standards can affect Singapore businesses in export markets should be closely studied for two reasons. First, as alluded to earlier, Singapore businesses are very much reliant on export markets for their goods and services. Second, international standards are developing in areas that are not necessarily "technical" in the usual sense such as in social responsibility and anti-corruption. These standards focus on the *hows* of a good or a service rather than the *what* (viz what can the product do and does it meet the mandated specifications and regulations for use). The former attribute is not often given adequate attention when compared with the development of a product's specifications and the delivery of a service.

International standards and private regulation are shifting towards what can be described as "next generation" specifications that often go beyond how well a good or service can perform, to the impact of producing a product or delivering a service. For instance, Deputy Prime Minister Heng Swee Keat spoke of the model of innovation in the US and the Netherlands expanding beyond the "'triple helix' model of innovation – where government, businesses and academia work together to build knowledge, test prototypes, and scale innovation" to "incorporate other dimensions such as societal responsibility and environmental protection". [2] The push for environmental, social and governance (ESG) concerns by stakeholders is also growing with vigour.[3] In addition, the Covid-19 pandemic has added to the imperative and urgency of corporate reinvention that will focus more on the next generation of specifications.[4]

The inexorable trend of a "value shift" and a "return to values" whereby companies are more likely to attain their financial and business targets if they can satisfy both the financial and social expectations of their stakeholders. This entails the melding of high ethical standards and outstanding financial results against the backdrop of societal expectations of higher standards of corporate conduct.[5] The extant literature has focused very much on regulation and how regulatory frameworks and their quality are crucial for the effective and

[2] See DPM Heng Swee Keat's parliamentary speech on the debate on President's Address, 31 August 2020; reproduced in *The Straits Times*, 1 September 2020, p. A20: "DPM Heng: S'pore must adapt to change but stay true to its values".

[3] On ESG concerns aiding higher value creation, see Witold Heinsz, Tim Koller, and Robin Nuttall, "Five ways that ESG creates value," McKinsey Quarterly (November 2019); available online at <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/five-ways-that-esg-creates-value>.

[4] Even before the Covid-19 pandemic, Big Oil had to envision a future and a business beyond petroleum given the push towards a low-carbon world.

[5] Lynn Sharp Paine, *Value Shift: Why Companies Must Merge Social and Financial Imperatives to Achieve Superior Performance* (New York: McGraw-Hill, 2003).

efficient functioning of markets, economic growth and consumer welfare. However, regulatory intervention may not always be optimal for society.

Regulation comes with economic and social costs, which must be factored into the overall analysis of whether a regulatory regime is fit for purpose. The literature is also relatively sparse on how private regulation, along the lines of ISO standards (guidance or technical), can affect export competitiveness of companies and economies and whether such regulation could constitute barriers to trade even in goods and services that are grounded in innovation. The rise of private regulation and international standards has elevated the impact of regulatory standards on market access, particularly their impact on an economy's export competitiveness. The policy implications of such a global trend are evident and highlight the trends and developments as well as risks and opportunities for Singapore where foreign trade is almost four times the size of the domestic economy.

The imperative of looking at barriers to innovative entrepreneurship must also be holistic and embrace considerations of how a product and service is sourced and produced. This research contributes to existing literature and knowledge by demonstrating what the evolving regulatory barriers to market access are and how can they be managed. It might be tempting to view such regulatory barriers as impinging on competition and consumer protection. However, they are more than that since such measures are conceived as promoting fair competition ("a race to the top" rather than "a race to the bottom") and ensuring that consumers are protected from businesses that seek to do business through unscrupulous, unethical ways. All of this reflects how innovative entrepreneurship has to engage innovative governance in global markets, particularly in societies concerned with such issues. Such societies are also the market for innovative and entrepreneurial goods and services.

Further, this research seeks to draw attention to over the horizon issues regarding market access and how non-tariff market considerations should be afforded greater attention. The United Nations Sustainable Development Goal (SDG) #17 calls for the strengthening of global partnership for sustainable development, including increasing exports of developing countries and enhancing market access for exports from least-developed countries. Hence, the growing use of international standards is seen as a constructive response to avoid particularistic domestic standard-setting that is often criticised for being anti-competitive. However, the trend towards international standard-setting belies the reality that private standard-setting and private regulatory standards are already a potent force in shaping national and international standards.

The importance of standards-setting and adoption impacts many dimensions of business such as catalysing good regulatory practice, promoting exports and international trade.

In this regard, partnerships are often essential in opening market access. For instance, the World Bank partners the ISO to provide clients access to ISO's technical expertise. The World Bank also believes that private-sector collaboration is central to the standards agenda. There is a shift underway in how development partners design and implement activities to help a developing country's firms use standards to participate in trade. This public-private partnership is now seen less as an option but an essential. ISO's Action Plan for 2016-2020 mapped out how ISO aims to contribute to improving developing countries' economic growth and access to world markets and helping to achieve sustainable development.[6]

Singapore-based companies are often more known for product innovation. This is a good position to be in but to remain static will not work for export competitiveness. They also have a reputation for incorruptibility and social responsibility. These are important attributes but there is also the need to better appreciate how markets are changing in terms of regulatory approaches, especially in these two areas. An innovative product or service may not be able to penetrate certain markets if it is not in conformity with certain non-technical requirements of the jurisdiction in question. These requirements may not only be about safety, product disclosure and the like, but increasingly involve concerns such as social responsibility, corruption, labour rights, and national/international standards generally. Sustainability concerns are probably one area where innovation is understood as the synergistic blend of (a) a better product and (b) an acute recognition and sensitised response to the concerns of sustainability.[7]

Further, this research advances our understanding in another direction by noting that the norms generated by private standards can impact upon the development of national and international standards. In this regard, more effort towards meeting ISO standards can be a boon for innovative entrepreneurship. Conversely, an ignorance of or even neglect of international standards will affect the competitiveness of goods and services in the export markets. Private regulatory frameworks are adjusting and adapting quickly to the changing landscape in the area of corporate responsibility and corruption control. This research focuses on the potential impact of the ISO standards on the exportability of goods and services and the barriers to innovative entrepreneurship but it does not set out to empirically prove a causal

[6] See, further, International Organization for Standardization Organization (ISO), *ISO Action Plan for Developing Countries 2016-2020* (Geneva: ISO, 2016).

[7] This is potentially one area—integrating industrial policy and sustainability—where Singapore can thrive and be at the forefront. See also Hakan Lucius, "Sustainability Challenges Shaping Competitive Advantages in Technology and Innovation," in M. Yulek (ed.), *Industrial Policy and Sustainable Growth, Sustainable Development* (Singapore: Springer Nature, 2018), pp. 69-84.

relationship. Instead, as indicated in above, the research seeks to consider what the impact of two ISO standards could be and how companies can be better prepared for the changing business landscape.

This research paper is organised as follows: In Part II, how innovation and entrepreneurship is understood in this research is described. Innovation and entrepreneurship, or "innovative entrepreneurship", is treated as one phenomenon. Indeed, innovative entrepreneurship is best regarded as a mind-set, a state of mind. One important manifestation of innovative entrepreneurship is that of paying close attention to business-related phenomenon beyond the horizon such as regulatory regimes, international standards, and issues of how our products, processes and services are made so that they are not technically innovative but also "socially innovative" in how they respond dynamically to the changing landscape whether in the regulatory realm or in how society regards the ethical and values dimension in the making of a product or service. Part III outlines some of the relevant literature on the topics that this study traverses.[8] Part IV proceeds to discuss standards and how they affect exportability of products and services. Part V considers the conception of standards as soft law. The intrinsic value of standards, even if they are not of universal application yet, lies in the signalling effect that the norms contained in the standards can rapidly become widely understood, accepted, and practised. In Part VI, the "next generation" ISO standards viz ISO 26000 and ISO 37001 are considered and how they can operate as a catalyst as much as a barrier to innovative entrepreneurship, which can be simply understood as export competitiveness. Part VII highlights that the uptick in focus on standards, especially "next generation" types that go beyond technical specifications to emphasise management systems, point to the larger trend towards a broader conception of the licence to operate for firms. This is a development that bears watching as this results in not only the product or service being subjected to scrutiny but also how the firm does its business. Part VIII concludes.

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[8] This is not an exhaustive literature review but rather a broad-brush treatment of the key developments.

II Innovation and Entrepreneurship: Two Faces of the Same Coin?

Innovation is at the heart of economic change, more so for Singapore which aspires to be a leading knowledge-based economy. In Schumpeter's words, "radical" innovations shape big changes in the world, whereas "incremental" innovations fill in the process of change continuously. Schumpeter proposed a list of various types of innovations:

- introduction of a new product or a qualitative change in an existing product;
- process innovation new to an industry;
- the opening of a new market;
- development of new sources of supply for raw materials or other inputs;
- changes in industrial organisation.[9]

Innovation and entrepreneurship are much bandied words within Singapore's economic landscape and discourse on export prowess. They speak to the importance of innovation and entrepreneurship in contributing to Singapore's economic development. Singapore has consistently been ranked as one of the most innovative countries.[10] However, closer analysis of the *Global Innovation Index* findings suggests that Singapore's returns on investment in innovation is relatively poor. Singapore is ranked first for innovation inputs but only fifteenth for innovation outputs. This means that Singapore is not effectively translating costly innovation investments into more and higher-quality outputs. In other words, Singapore produces less innovation outputs relative to its level of innovation investments.[11] Singapore has also consistently been ranked as one of the most competitive countries.[12]

As such, much of the discourse has been about influencing the speed and the direction of innovation and entrepreneurship. To be sure, both terms have been overused such that the lack of conceptual clarity as to what they are and mean could result in different conceptions of what these human endeavours are about. While this research is not centred on innovation and entrepreneurship, this section underscores "innovative entrepreneurship" as a mindset.[13] Not

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[9] See Joseph A Schumpeter, *The Theory of Economic Development* (Cambridge, MA: Harvard University Press, 1934). See also Schumpeter's *Capitalism, Socialism and Democracy* (New York: Harper and Row, 1942).

[10] See *Global Innovation Index* (GII) at <https://www.globalinnovationindex.org/home>. Singapore was ranked 8th In 2020 and 2019 globally, 5th (2018), and 7th (2017).

[11] See further the analysis on Singapore's performance in the GII 2020 at <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_gii_2020/sg.pdf>.

[12] See, for example, the World Economic Forum's *Global Competitiveness Report* where Singapore was ranked 1st in 2019, 2nd in 2018, and 3rd in 2017. Singapore also topped the IMD's World Competitiveness 2020.

[13] Innovation needs more than a strong infrastructure, ready resources; a mind-set geared towards innovation is crucial. On the software needed for a culture of growth, see Joel Mokyr, *A Culture of Growth: The Origins of the Modern Economy* (Princeton, NJ: Princeton University Press, 2016) (that culture—the beliefs, values, and preferences in society that are capable of changing behaviour—was a deciding factor in societal transformations

only does it blend innovation and entrepreneurship but it is posits that innovation and entrepreneurship should be larger than the sum of its component parts.

In this study, innovative entrepreneurship is largely about taking an innovative and entrepreneurial approach to regulation, which can be treated as a potential barrier to trade. That is, instead of being straitjacketed by regulation, increasingly in the form of standards requirements, the study proposes that international standards can be a catalyst to export competitiveness. There is no doubting innovation is an extremely powerful force for positive change, driven by the trait of insurgency rather than that of incumbency. But *how* innovation and entrepreneurship is practised matters as much as, if not more than, practising innovation and entrepreneurship.

Innovation is at once a constituent of and a consequence of social and economic modernity. This line of thinking can be identified with Nobel economics laureate Edmund Phelps. For Phelps, innovation is not just about developing commercial applications from "exogenous" scientific discoveries but intrinsically about the "endogenous" consequence of innovators and entrepreneurs seeking better ways of doing things. In turn, this process of seeking change is influenced by culture, values, and institutions, with modernist values and attitudes most conducive to innovation.[14] To reiterate a point made earlier, Deputy Prime Minister Heng Swee Keat has spoken of a model of innovation that "incorporate[s] other dimensions such as societal responsibility and environmental protection".[15]

The innovative entrepreneur is not so much a rent-seeker as an innovator sense-making the changing regulatory landscape and determining where the opportunities lie and where the threats are. The innovative entrepreneur knows he/she has a superior product or service to offer to the market but is also aware that regulatory measures may detrimentally affect the market access of the product or service. Rather than engage in regulatory arbitrage,[16] the innovative entrepreneur uses the demanding regulatory landscape to develop products and services that meet the enhanced requirements. More than that, in being able to detect the salient but broader

specific to early modern Europe and the European Enlightenment laid the foundations for the scientific advances and pioneering inventions that would instigate explosive technological and economic development).

[14] See Martin Sandbu's book review in *The Financial Times*, 31 August 2020, of Edmund Phelps *et al*, *Dynamism: The Values That Drive Innovation, Job Satisfaction, and Economic Growth* (Cambridge, MA: Harvard University Press, 2020). In his 2013 work, *Mass Flourishing*, Phelps describes "modern values" such as individualism, vitalism, and self-expression driving the desire of individuals to shape their lives. Thus, innovation (and its drivers) is, at its core, about social significance.

[15] See his parliamentary speech on the debate on President's Address, 31 August 2020.

[16] In this study, regulatory arbitrage is understood as a firm structuring its activities such that it reduces the impact of regulation without a corresponding reduction in the underlying risk. It is playing one set of rules against another and often leads to the risk persisting, if not, enlarged.

shifts in the business and regulatory environment, the innovative entrepreneur is able to tap into the first-mover advantage through calibrating a sustainable response to a different or putative regulatory environment. This is often about innovating their products and services to meet these demands, rather than deploying new technologies in a predictable fashion but which do not address the evolving regulatory framework. It is, in other words, about using innovation to seize that window of regulatory opportunity. New innovations often spark resistance, what more a different approach to seeing the business and regulatory environment.

To be clear, this approach refrains from regulatory arbitrage but instead seeks to meet or surpass regulatory requirements. The latter comports to what Nobel economics laureate Merton Miller noted in 1986 of financial regulation: "The major impulses to successful innovations over the past 20 years have come, I am saddened to have to say, from regulation and taxes".[17] This is not innovative entrepreneurship as it is merely using innovation instrumentally rather than as an opportunity to create something innovatively that addresses the real concerns or problems. Put it another way, innovative entrepreneurship is about using innovation and/or thinking innovatively to surpass the regulatory requirements by creating a better product or service that makes it more competitive.

In this research, innovation refers to the process of designing, producing, and selling new products, processes, and services by business entities. This need not require inventing new products and services and can include combining existing products and services to meet a specific market demand or preference.[18] Thus, improved products or processes would fall within this understanding of innovation. The commercialisation dimension is important in this conception of innovation. Until a product, process, or service is commercialised, it is very much an idea, never mind how compelling it is.[19] It is now common to distinguish between innovation as an outcome (an innovation) and the activities by which innovations come about (innovation activities). In this research, the focus is on the latter. It is submitted that paying

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[17] Merton H. Miller, "Financial innovation: The last twenty years and the next," *Journal of Financial and Quantitative Analysis*, vol. 21(4) (1986), pp. 459-471.

[18] See, generally, Matt Ridley, *How Innovation Works: And Why It Flourishes in Freedom* (London: Fourth Estate, 2020). Ridley helpfully distinguishes between invention and innovation. Johannes Gutenberg invented the printing press, but Martin Luther was the innovator – specifically, in using the printing press to the printed word more accessible to the masses when it was previously a privilege of and power for the ecclesiastical elite. "Like Jeff Bezos at Amazon or Mark Zuckerberg at Facebook, he [Martin Luther] had realised the potential of a new technology on a huge scale," writes Ridley.

[19] The OECD Oslo Manual, regarded as the go to reference for matters on innovation within the OECD and the EU, defines innovation as "a new or improved product or process (or combination thereof) that differs significantly from the unit's previous product or processes that has been available to potential users (product) or brought into use by the unit (process)". Of course, innovation can and does take place in any sector of the economy, including government services as regulation, health or education. This research is focused on innovations in the business enterprise sector.

attention to the activities and the eco-system at large would better facilitate or enable *purposeful* or *consequential* innovation to arise. It is apt to quote from the OECD:

> Thus innovation policy has only recently emerged as an amalgam of science and technology policy and industrial policy. Its appearance signals a growing recognition that knowledge in all its forms plays a crucial role in economic progress, that innovation is at the heart of this "knowledge-based economy", and also that innovation is a more complex and systemic phenomenon than was previously thought. Systems approaches to innovation shift the focus of policy towards an emphasis on the interplays between institutions, looking at interactive processes both in the creation of knowledge and in its diffusion and application. The term "National Innovation System" has been coined for this set of institutions and flows of knowledge".[20]

There is no doubt that innovation is at the heart of a firm's and a country's competitive positioning. Firms and countries innovate to defend their competitive position and to seek competitive advantage. A firm (and a country) often takes a reactive approach and innovate to prevent losing market share to an innovative competitor. Or it may opt to take a proactive approach to gain a strategic market position relative to its competitors, for example by developing and then trying to enforce higher technical standards for the products it produces.

Put simply, a strategic approach to innovation and entrepreneurship is both a need and an imperative. A more determined and organised understanding of how quality assurance, minimum standard-setting, compliance with regulatory requirements as a necessary background to innovation activity, will require firms to make decisions about the types of markets they seek to enter, or seek to create, and the types of innovations they will attempt there. With the rise of private regulation, international standards, and ESG indicators, there is the patent need to pay more attention to a wider conception, understanding, and application of innovation. It is also a reminder that the evolving nature of standards, if not given due attention, can result even in innovative products and services becoming uncompetitive. Treating meeting international standards as integral to innovation activities and the eco-system and how the quest to develop products, processes and services that meet or even better international non-technical standards should be seen as another facet of innovation and of entrepreneurship.

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[20] Para 8; available online at https://www.oecd.org/science/inno/2367614.pdf. The notion of a national innovation system is premised on understanding innovation in the context of the external institutions, government policies, competitors, suppliers, customers, value systems, and social and cultural practices that affect the systemic responses and adaptations vis-à-vis innovation.

As this research is not about innovation or entrepreneurship *per se*, it proceeds on the basis of entrepreneurship as a person or a firm undertaking a business enterprise risk in pursuit of an opportunity beyond resources controlled.[21,22] What is significant in this understanding of entrepreneurship and how it relates to innovation is of entrepreneurship as a mind-set.[23] The issue then becomes one of sustainable innovation; or to put it another way, is profit driving innovation or is innovation driving profit? My view is that there is a world of difference in the distinction.

Innovative entrepreneurship must define the "growth mindset" of the business community in Singapore.[24] This approach enables Singapore to capitalise most effectively the innovation policy terrain to her best national advantage. One important manifestation of innovative entrepreneurship is that of paying close attention to business-related phenomenon beyond the horizon such as regulatory regimes, international standards, and issues of how our products, processes and services are made so that they are not technically innovative but also innovative in how they respond dynamically to the changing landscape whether in the regulatory realm or in how society regards the ethical and values dimension in the making of a product or service.

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[21] Adapted from Howard H. Stevenson and David E. Gumpert, "The Heart of Entrepreneurship," *Harvard Business Review*, vol. 63(2) (March/April 1985), pp. 84-95; available online at <https://hbr.org/1985/03/the-heart-of-entrepreneurship>. The contrast between the strategic orientation of the entrepreneur and the administrator can be described as follows:

- Administrator: What resources do I control? How can I reduce risk?
- Entrepreneur: What opportunities can I capitalise on? What resources do I need to do so?

The etymology of entrepreneur is from the French word "entreprendre" meaning "to undertake".

[22] "In other words, the entrepreneur is someone who spots an opportunity and decides to pursue it regardless of the resources currently at their disposal. They see what could be and find a way to make it happen, even if they don't have everything on hand to do so right now. It's a leap—a risk—but someone has to take such leaps if we want to develop innovative new products, build better organizations, and keep our companies and the larger economy strong and healthy." Quote taken from Joel Trammell in his post at <https://www.khorus.com/blog/the-best-definition-of-entrepreneurship-ive-heard-so-far/>.

[23] This, by no means, discounts the importance of profit. Indeed, profit is often the driver. The late Peter Drucker, who is well known as the father of modern management, had enriched the definition by emphasising "change" and "opportunity". He defines the entrepreneur as "someone who always searches for change, responds to it, and exploits it as an opportunity."

[24] "Growth mindset" is, of course, taken from Carol Dweck's research on "growth" versus "fixed" mindsets among individuals and within organizations. To briefly sum up Dweck's findings: Individuals who believe their talents can be developed (through hard work, good strategies, and input from others) have a growth mindset. They tend to achieve more than those with a more fixed mindset (those who believe their talents are innate gifts). This is because they worry less about looking smart and they put more energy into learning. When entire companies embrace a growth mindset, their employees report feeling far more empowered and committed; they also receive far greater organizational support for collaboration and innovation. In contrast, people at primarily fixed-mindset companies report more of only one thing: cheating and deception among employees, presumably to gain an advantage in the talent race. See <https://hbr.org/2016/01/what-having-a-growth-mindset-actually-means>.

III The Rise and Rise of Private Regulation and of Standards

Regulation, in Karl Polanyi's words, is an "adjunct to the market", a recognition that the market is embedded in society.[25] In the scholarly literature in the past decade, a fair amount has been written on the rapidly expanding network of private regulation regimes and the creation of a new mode of international governance.[26] In theory, such private regulation may complement public regulation, including crystallising legal norms. Yet, the literature also highlights that, in practice, the gains of private regulation may come at the expense of public norms. This concern is less when it comes to international standards, such as ISO standards, which are developed in an extensive process of consultation among public and private sector stakeholders.[27]Other concerns relate to how alternatives to public and democratic governance may inevitably elevate market values and actors to governing status. However, the case for private/quasi-public regulation through ISO standards cannot be ignored because of the real and potentially robust role that the law plays in transforming such private standards to national and international standards.

The extant literature has focused very much on regulation and how regulatory frameworks and their quality are crucial for the effective and efficient functioning of markets, economic growth and consumer welfare. However, regulatory intervention may not always be optimal for society. The literature is still relatively sparse on how private regulation, along the lines of ISO standards (guidance or technical), can affect export competitiveness of companies and economies and whether such regulation could constitute barriers to trade even in goods and services that are grounded in innovation.

In a world where global standards increasingly determine access to world markets, understanding how those standards are set, enforced, and their evolution is of vital concern to citizens, governments, and firms. The relation between domestic interests and global rule-making is an area that Singapore must pay more attention to. Singapore cannot afford to

[25] Karl Polanyi, *The Great Transformation* (Boston, MA: Beacon Press, 1985 [1944]).

[26] A good sample of works include Tim Büthe and Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton, NJ: Princeton University Press, 2011); Kenneth W. Abbott, and Duncan Snidal, "Hard and Soft Law in International Governance," in Judith L. Goldstein *et al*, *Legalization and World Politics* (Cambridge, Massachusetts: MIT Press, 2001); Rodney Bruce Hall and Thomas J. Biersteker (eds.), *The Emergence of Private Authority in Global Governance* (Cambridge & New York: Cambridge University Press, 2002); Mattli, Walter and Ngaire Wood (eds.), *The Politics of Global Regulation* (Princeton, NJ: Princeton University Press, 2009).

[27] For the process in ISO, see <https://www.iso.org/developing-standards.html#:~:text=ISO%20standards%20are%20developed%20by,scope%2C%20key%20definitions%20and%20content.>.

compete on costs but she can certainly focus on quality of its goods and services, including the brand of trust and standards. Indeed, the Singapore government has recognised quality and standards as a necessary competitive advantage.[28] But the issue remains to what extent Singapore firms are seriously taking the clarion call to focus on export competitiveness not just from the perspective of innovation but to ensure that innovation is also accompanied by meeting or even surpassing international standards and norms on a gamut of issues ranging from labour rights, environmental sustainability, supply chain issues, including corruption.

These issues can broadly be placed under the umbrella category of "sustainability challenges" or "consumer welfare". They speak to the need for products and services to not solely focus on endogenous attributes like price, technology, and reliability but to exogenous attributes like how ethical the supply chain of the product or service is and how the firm goes about doing its business and dealing with issues like corrupt practices, unfair competition. Like many others, Lucius argues that the time has come to integrate sustainability into a firm's core business strategy. He adds that this will be a "determining factor" for future competitive advantage.[29]

It is time to regard innovation as having to embrace sustainability and consumer welfare challenges. The Covid-19 global pandemic has accentuated and accelerated concerns over such issues, and we can expect these concerns to manifest themselves in the so-called post-Covid world in various regulatory forms whether through international conventions, domestic laws, international standards, and the like.

This literature review is but a snap-shot of the literature examined. It seeks to present an overview of the lay of the land; it does drill down into the minutiae of the scholarship. Instead, it seeks to highlight the complexity of the terrain that pertains to innovation and competitiveness from the particular vantage point of international standards.

In his article, "Corporations as private governments in the shadow of the state: the boundaries of autonomy," Tomasic explores the boundaries of corporate autonomy in the shadow of the state.[30] He argues that with the push towards global harmonisation, traditional distinctions between government-owned companies being usually subject to "insider" control,

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[28] Chan Chun Sing, Speech by the Minister for Trade and Industry at the Quality & Standards Conference, 26 July 2018. See also "Singapore must get fundamentals right to stay, competitive," *The Straits Times*, 30 May 2019, p. C4 (Minister Chan noted that Singapore could not compete on cost or size. It has to "leverage the brand of trust and standards that we have become known for, and continue to be a safe harbor for partnerships and collaboration").

[29] Hakan, Lucius, "Sustainability challenges shaping competitive advantages in technology and innovation," in M. Yulek (ed.), *Industrial Policy and Sustainable Growth* (Singapore: Springer, 2018).

[30] Roman Tomasic, "Corporations as private governments in the shadow of the state: The boundaries of autonomy," *Australian Journal of Corporate Law*, vol. 29(3) (2014), pp. 275-294.

and large privately-owned companies being subject to either "insider" or "outsider" controls, have become less useful. Increasingly, corporations move beyond the direct oversight of the State and its regulatory agencies. Privately-owned corporations have long been able to operate with minimal external supervision and control, but publicly-owned entities have not enjoyed the same level of freedom from state control. Although private companies are not free of state regulation and control, they do have many of the features and freedoms of private governments. This includes being able to work with like-minded firms to set industry standards as a form of private regulation. Tomasic's emphasis on firms as private governments is intriguing for his recognition that firms can operate like private governments. In my view, this has been well-demonstrated in recent years with the likes of Facebook, Instagram, Twitter, and other social media platforms.[31] They show that they can introduce "community standards" for their platforms and also decide whether a user has abided those standards. In many respects, these firms "legislate" and "adjudicate".

Hence, Bakan cautions against the hubris of the private regulation movement: A world where "public power promotes private interests, while public interest depends on private power for protection".[32] Instead, he advocates the "real and robust role" law plays in enabling and protecting firms. The reality is that private regulation is on the rise but Bakan's central argument is that there is a central role for law if the public interest is to be adequately protected. International standards may also incorporate the public interest.

In their book, *The New Global Rulers: The Privatization of Regulation in the World Economy*, Büthe and Mattli consider the structural and institutional power dynamics at play that robustly shape the agenda within international standards-setting bodies through detailed empirical analyses of standards and regulations based on multi-country, multi-industry business surveys.[33] They observe the rise of global private governance, noting that governments have delegated extensive regulatory authority to international private-sector organizations in the last two to three decades. This internationalisation and privatisation of rule-making has been motivated not only by the economic benefits of common rules for global markets, but also by the realisation that government regulators often lack the expertise and resources to deal with increasingly complex and urgent regulatory tasks. Who writes the rules

[31] A popular study is Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (London: Profile Books, 2019).
[32] Joel Bakan, "The invisible hand of law: Private regulation and the rule of law," *Cornell International Law Journal*, vol. 48 (2015), pp. 279-300.
[33] Tim Büthe and Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton, NJ: Princeton University Press, 2011).

in international private organizations matter immensely, and there are winners and losers alike in this private standard-setting realm.

To support their arguments, Büthe and Mattli examine three powerful global private regulators: The International Accounting Standards Board (IASB), which develops financial reporting rules used by corporations in more than a hundred countries. Similarly, the International Organization for Standardization (ISO) and the International Electrotechnical Commission account for 85 percent of all international product standards. Büthe and Mattli offer a framework for understanding global private regulation. They find that domestic institutions remain crucial even as global rule-making is increasingly by technical. This is often facilitated by the ability of domestic standard-setters to provide timely information and speak with a single voice, rather than the economic power of states, in influencing global private governance. In turn, these bodies do influence domestic policy contests to varying extent using transnational norms and peer pressure. The extent to which they succeed at the global and domestic settings depend very much on the legitimacy of such bodies and the work they do in demonstrating that the standards are fair, transparent, and robust.

With climate change concerns increasing, more countries are signing agreements to improve the overall standard of sustainable natural resource management practices. These concerns over anthropogenic changes to the environment and climate change spiralling beyond control, sustainability—broadly conceived—has taken on greater importance across countries, industries, and supply chains.[34] Borsky, Leiter and Pfaffermayr examine the impact of sustainability in production on international trade, specifically the effect of the International Tropical Timber Agreement (ITTA) on tropical timber trade.[35] Through the use of mathematical modelling, they find that a sustainable product quality matters and plays a vital role in forming international trade patterns of tropical timber. The consumers' environmental preference as well as the producers' capability to supply sustainable product quality show that the total trade effects are clearly positive for ITTA signatories. They show that exporters as well as importers can considerably increase their value of tropical timber trade flows by either increasing their sustainable tropical timber production or by committing themselves to consume more sustainably produced tropical timber. Even taking indirect price effects into

[34] James Harrison *et al*, "Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters," *Journal of Common Market Studies*, vol. 57(2) (2019), pp. 260-277

[35] Stefan Borsky, Andrea Leiter, and Michael Pfaffermayr, "Product quality and sustainability: The effect of international environmental agreements on bilateral trade," *The World Economy*, vol. 41(11) (2018), pp. 3098-3129.

account, ITTA-exporting countries are able to increase their export values by about 6 percent. As for ITTA importers, their trade values in tropical timber increase by around 4 percent.

Borsky, Leiter and Pfaffermayr also argue that the increase in the value of tropical timber trade flows implies that the ITTA is an effective environmental policy, which leads to lower harvest rates in tropical timber and the timber also traded at higher prices. The authors note that the EU Timber Regulation prohibits the placing of illegally harvested timber and timber products on the EU market. As such, they conclude that "Countries importing or operating in the EU must exercise a high degree of due diligence and transparency in their production processes… such programmes may indeed be successful in supporting trade flows in high quality and sustainably produced tropical timber products". A better understanding of how environmental policies can affect the production processes and their valuation by the consumers is crucial. Borsky, Leiter and Pfaffermayr suggest that product standard agreements have a tangible impact on international trade. Importers and exporters and consumers alike have a common interest in being able to trade in and use timber that is sustainably produced. The regulatory regime has secured the necessary buy-in from key stakeholders and so compliance is seen as a mutually-beneficial action.

Similarly, Ioannou and Serafeim explore the extent of adopting sustainability practices over time and the implications for firm performance.[36] They find that for almost all industries, sustainability practices converge within an industry over time. This convergence of common practices (understood as "a set of sustainability practices on which companies converge within an industry") across industries is associated with the adoption of sustainability by the industry's market leaders and the relative importance of environmental and social issues compared to governance issues. On the other hand, "strategic" sustainability practices refer to a set of sustainability practices on which companies do not converge within an industry. Their research show that the adoption of strategic sustainability practices is significantly and positively associated with both return on capital and expectations of future performance as reflected in price to book valuation multiples.

Moreover, the adoption of common sustainability practices is reliably correlated only with expectations of future performance. There is a role for sustainability as a long-term corporate strategy but it will have to be nuanced. Ioannou and Serafeim argue for the need to

[36] Ioannis Ioannou and George Serafeim, "Corporate Sustainability: A Strategy?" Harvard Business School Working Paper 19-065; available online at <https://www.hbs.edu/faculty/Publication%20Files/19-065_16deb9d6-4461-4d2f-8bbe-2c74b5beffb8.pdf>.

and the importance of distinguishing across different types of sustainability practices rather than treating sustainability as a monolithic theoretical construct. This raises the important question of firms having to focus on *how* sustainability practices can help them establish a competitive advantage over time. The authors note that there is the need to explore why some sustainability practices may be more likely to develop into common sustainability practices over time and what is the role of decision making by companies in this process. There is also the question of under what conditions do originally strategic practices become common over time and under what conditions do strategic practices persist as strategic. In the former setting, this could point to firms engaging in imitation or recognising the diffusion of appropriate practices. In both of these cases, it would appear that decisions taken by individual firms affect the dynamic processes and result in potentially differential impacts on corporate performance. But more research is needed on this front.

The rise of standardization as a mode of ensuring minimum standards will only grow in importance. Minimum health and safety standards for goods being imported to a country has been a longstanding practice and accepted regulatory requirement. Increasingly, this has been extended to concerns of social and environmental sustainability. Shaffer shows that the retooling of international economic law can: (1) help combat harmful tax competition, avoidance, and evasion; (2) aid domestic social security and job retraining; (3) support labor protection; (4) deter social dumping; and (5) enable industrial policy experimentation for development.[37] Often, international standards are often more ambitious—more demanding—than national standards. As such, standards can function as a form of pressure, and persuasion mechanisms can lead to norm change and norm compliance by relevant actors. While the literature is abundant on corporate social responsibility (CSR), there is less recognition that it can function as a regulatory review. The literature points to how a nascent business concept can evolve to become a governance and regulatory tool. Indeed, its utility has rendered it becoming the first ISO guidance standard (as opposed to a technical standard).

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[37] Gregory Shaffer, "Retooling Trade Agreements for Social Inclusion," *Illinois Law Review* (2019), pp. 1-45.

IV Standards as a Way of Life[38]

Singapore is no stranger to quality and standards (Q & S). The Singapore Standards Council (SSC) was established in 1966. By 2016, the fiftieth year of its existence, more than 200 standard committees, technical and working groups have been formed. More than 1,300 Singapore Standards (SS) have also been published while about 8,000 management systems certifications have been enabled.[39] What is sometimes not appreciated enough is that quality and standards speak to trust of a product, process, or service that carries the Singapore branding. On their own, standards are voluntary. Firms decide whether their products, processes, and services should be certified as conforming to specified standards. There is no requirement for the public to comply with standards. However, it is not inconceivable that a Singapore legislation may make specified standards legal requirements. If so, the standards can become mandatory and have legal effect.

A nation-state's export prowess is not determined by the total volume of exports, important as a measure no doubt, but also by the goods and services meeting international requirements and possessing consistency and certainty in their quality. There is no doubting that quality and standards will only grow in importance even in a post-Covid world. In fact, it is precisely because of the protectionist sentiments that are manifesting themselves globally, that exports cannot no longer compete on price alone but rather on the quality and the standard of the goods or services.

Put it another way, quality and standard is an indicator of how a good or service is made and/or delivered. Not only is it a value proposition statement, it is very much a *values* statement as well. Consider, for example, the growing concern with corruption in the supply chain for a good or service, a firm that has the ISO 37001 certification is able to demonstrate that corruption concerns are properly dealt with by the firm, providing that all-important quality assurance that a product or service is not tainted by the firm engaging in or tolerating corrupt practices. The values statement of an ISO 37001-certified firm, *prima facie*, is about the firm having a strong stance against corruption and reflects the firm's values and principles in doing business and how it relates to its stakeholders.

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[38] This Part has benefited significantly from a briefing and an exchange of ideas with officers from Enterprise Singapore on 9 March 2020. I am grateful to Ms Choy Sauw Kook, Director-General (Quality & Excellence), Mr Cheong Tak Leong, Director (Standards), Ms Sabrina Anthony, Deputy Director (Standards (ISO & Trade)), and Ms Nicole Tan, Development Partner (Standards (IEC & Manufacturing). Ms Choy is also ISO's Vice-President for Technical Management.

[39] Information obtained from the commemorative publication, *50 Years of Quality & Standards* (Singapore: SPRING Singapore, 2016).

Standards are very much, at its heart, about innovative entrepreneurship. While it is common to conceive of innovation (and what is innovative) as being grounded in research and development, the innovation can also lie in how an issue that is tied with the making of a product or service is tackled. Using corruption in the supply chain as an example again, it is not about merely complying with the laws of the relevant jurisdiction(s) but very much about the process of doing business to ensure that the firm is not entrapped by the snares of corrupt activities and persons. In other words, it is not simply about not paying or accepting bribe payments but going about the business and dealing with the corrupt situations in an innovative way that not only comports with the requirements of the law but also reinforces the values of the firm vis-à-vis corruption.

Currently, Enterprise Singapore (ESG), a statutory board, functions as the national standards and accreditation body (or the National Standards Body). Section 5(e) of the Enterprise Singapore Board Act provides that one function of the ESG is "to serve as the national productivity, innovation, standards and accreditation body, which seeks to raise total factor productivity and improve Singapore's competitiveness".[40] Specifically, the Act also provides that in relation to standards, certification and accreditation, the ESG is empowered:[41]

> (i) to assess materials, products, processes or persons for the purposes of certification, accreditation or conformity assessment;
>
> (ii) to accredit, appoint, authorise or recognise any person that performs testing and certification, or conformity assessment, and to regulate the practice of such persons;
>
> (iii) to establish and publish, by notification in the *Gazette*, the Singapore Standard in relation to any product or process;
>
> (iv) to specify, by notification in the *Gazette*, accreditation marks and certification marks of the Board and control the use of such accreditation marks or certification marks;
>
> (v) to administer the national standardisation programme and to facilitate the participation of Singapore in international standardisation activities.

[40] Act 10 of 2018.
[41] Section 6(2)(i), Enterprise Singapore Board Act.

"Singapore Standard" refers to a standard established by the ESG under section 6(2)(i)(iii), with "standard" defined in the legislation as "definition, classification, description, requirement, specification, guideline or characteristic, by reference to which a product or process is assessed to be fit for its purpose".[42] As the NSB, the ESG is tasked with developing standards for specific sectors or subject areas and to adopt international standards. But this process is a collaborative effort by which ESG establishes a National Technical Committee (NTC). The NTC may create subcommittees and/or working groups to assist in the work taking into account the size or complexity of the topic. In this process of collaboration, it is vital for the NSB and NTC to ensure the representation of relevant stakeholders from the private and public sectors.

What is a Standard?

Tabulated below are some of the common standards in Singapore and globally:

Prefix	Standards	Remarks
SS	Singapore Standards	Domestic standards that have taken into consideration the Singapore environment, infrastructure and regulatory requirements, produced by ESG
SS CP	Singapore Standards (Code of Practice)	Locally adopted set of written regulations issued by ESG that explains how people working in a particular profession should behave.
BS	British Standards	The BSI is the UK's National Standards Body (NSB) and represents UK's economic and social interests across all European and international standards organizations and in the development of business information solutions for British organizations of all sizes and sectors.
IEEE	IEEE Xplore Standards	Industry standards for a broad range of technologies that drive the functionality, capabilities, and interoperability of a wide range of products and services.

[42] Section 2, Enterprise Singapore Board Act.

ASHRAE	ASHRAE Standards	Industry standards for the design and maintenance of indoor environments concerned with refrigeration processes, ventilation system design and acceptable Internal Air Quality.
ASTM	ASTM Standards	International standards covering a broad range of engineering disciplines, including aerospace, biomedical, chemical, civil, environmental, geological, health and safety, industrial, materials science, mechanical, nuclear, petroleum etc.
IEC	HIS Standards Expert IEC	International Standards for all electrical, electronic and related technologies.

For the International Organization for Standardization (ISO), which is the largest developer of international standards, a standard is a "a document that provides requirements, specifications, guidelines or characteristics that can be used consistently to ensure that materials, products, processes and services are fit for their purpose". The benefits of product, process, or service attaining a relevant recognised international standard are well known and can be briefly stated as (a) reducing costs by minimising waste and errors, (b) ensuring products and services are safe, reliable and of good quality, (c) allowing business sustainability through consistence and ease of interoperability. The ISO claims that there are ten distinct benefits to standards:[43]

- improves the quality of a firm's goods and services
- drives growth, cut costs and increase profits
- gives business a competitive edge
- opens up export markets for a firm's goods and services
- opens doors to new customers and strengthens existing business
- helps to compete with bigger enterprises
- enhances a firm's credibility and secure customer confidence
- sharpens a firm's business processes and increase efficiency
- strengthens a firm's marketing pitch
- helps in compliance with regulations.

[43] See further: *10 Good Things - ISO for SMEs* (Geneva: ISO, 2014); available online at <https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100283.pdf>.

ISO goes as far as asserting that "standards help break down barriers to international trade, which facilitates global exchange and promotes sustainable growth".[44]

In addition to the above benefits of standards, the cumulative effect is one of boosting confidence of stakeholders in a product or service. Where there are a multitude of products and services, standards provide that vital quality assurance that the products and services are safe, reliable and fit-for-purpose. Standards can and do differentiate. As standards generally seek to raise the quality of a product or service, standards can become the driver of innovation. Assuming a product is seeking standards certification but falls short of the requirements, this can and should spur more research and development to better the product or service. Such a spur, a launch pad to better products and services must be one that firms should be willing to embark on. The competitive edge that standards can provide to a product and service is crucial particularly in seeking to break into new markets. In this connection, standards can help to reduce legitimate barriers to international trade. The ability and potential of standards help Singapore firms compete globally and to export to existing and new markets are often not adequately appreciated.

As with the harmonisation of laws in a region (e.g., ASEAN/Southeast Asia), standards can play that catalytic role in the harmonisation of specifications across the various jurisdictions' laws and regulations. Harmonisation can be a viable alternative to cross-jurisdictional regulation, reducing business costs and cutting back on red tape. This regional or international alignment across markets can be a tremendous boost.

Standards matter where exports are concerned. First, standards contain important information, both embedded and clearly indicated, on market conditions and preferences in the importing market. This can provide for a level playing field where exporters and importers are concerned as information gathering on the market requirements are concerned. However, in order to meet the importing market's standards, this may entail changes to products and production processes, which can increase costs for firms.

Notwithstanding the present-day global trade regime and the patent fears of trade wars, trade liberalisation has helped to lower tariffs in international trade. This is juxtaposed with the role of and importance of non-tariff measures. Barriers to trade do not only come in the form of tariffs. The growing trend of jurisdictions requiring exporters of good and services to demonstrate that the latter complies with the regulatory requirements of the importing

[44] *Ibid*. p. 25.

jurisdiction has ensured that the question of "technical barriers to trade" continue to remain in the forefront of exporting economies. While tariffs as a barrier to trade continues to present itself, it appears that non-tariff barriers to trade (NTBs) are rising in their usage. NTBs refer to restrictions that result from prohibitions, conditions, or specific market requirements that make importation or exportation of products difficult and/or costly. NTBs also include unjustified and/or improper application of Non-Tariff Measures (NTMs) such as sanitary and phytosanitary (SPS) measures and other technical barriers to Trade (TBT). NTBs often arise from different measures taken by governments and authorities in the form of government laws, regulations, policies, conditions, restrictions or specific requirements.

Such measures may be less transparent and often have uncertain effects on trade. Such regulation through laws, policies or required practices may be entirely justified and valid in law. One can think of regulations such as laws limiting pesticides in food (food safety). Other regulations could involve, for example, forestry standards for timber products, labour standards in the production of goods and services, and proper observance of human rights in supply chains. The World Trade Organization framework, primarily through its Committee on Technical Barriers to Trade (or TBT Committee), attempts to reduce non-tariff measures that may block or impede market access while giving effect to those that are legitimate. Often, the end game is to protect the domestic industries from foreign competition who may seek market access through unfair competition. TBTs are the most frequent forms of non-tariff measures, affecting 65 percent of world trade in terms of value, and 35 percent of product lines.[45]

To be clear, national economies have the right to set trade rules to improve the health, safety and wellbeing of their citizens, and protect animal and plant life. They arise because each country has its own rules on what sort of products and services can be sold, and how. It is not uncommon for a product or service to face different technical specifications, before it can be sold in any jurisdiction. Moreover, governments have to ensure that imported products and services will not be harmful and comply with their national laws. In any case, such rights are enshrined in the rules of the World Trade Organization (WTO) and other international bodies. But this begs the question of whether the requirement of product and service standards is protectionism in disguise? Such non-tariff measures can become barriers to trade when they are (a) unclear or unevenly applied; (b) exceed what is necessary to meet their stated objectives; or (c) are introduced to unfairly advantage local industries.

[45] UNCTAD and World Bank. "The Unseen Impact of Non-Tariff Measures: Insights from a New Database", 2017.

The WTO Agreement on Technical Barriers to Trade (WTO-TBT Agreement) seeks to ensure that technical regulations and standards as well as conformity assessment procedures are non-discriminatory. The Agreement strongly exhorts member-states to base their measures on international standards in order to facilitate trade.[46] Non-discrimination and the avoidance of unnecessary obstacles to trade undergird the WTO-TBT Agreement. The fair presumption is that a product or service that conforms to the relevant international standards is less likely to suffer impediments to trade. Similarly, a jurisdiction's technical regulations for a product or service would also not be an unfair or unnecessary obstacle to trade if they are aligned or harmonised with the relevant international standards. In this connection, the use of health, safety, and environmental (HSE) standards is provided for by the WTO Agreement on the Application of Sanitary and Phytosanitary Measures. Countries can set their own regulations and standards to protect people, animal and plant life, and health.

Yet, the reality is that an inability to show compliance with requirements in standards and regulations, even in the private or quasi-public domain, could increasingly be a significant hurdle for companies wanting to break into, remain, and grow in foreign markets. Unsurprisingly, small and medium enterprises (SMEs) are particularly vulnerable in their ability to participate in value chains since the cost of compliance or demonstrating compliance – or even simply getting information about requirements in foreign markets – can be disproportionately high. In Singapore's context, the challenge is that have SMEs be adequately mindful of and taking proactive steps in ensuring that they can meet private regulatory standards, which could also become public regulatory standards if they are so adopted as national standards. Such national standards could also be derived from international standards such as those of ISO.

The global context has evolved as well with the growing movement towards companies engaging in responsible behaviour has led to more measures, public or private, to regulate companies in non-traditional ways. Traditional modes of legitimate non-tariff regulation focus on compliance with requirements such as product specifications, safety standards, and environmental indicators (e.g., carbon emissions). These non-tariff measures need not necessarily be legislative or public in nature but could include private means such as industry standards put in place by an industry association or standards such as those of ISO. However,

[46] See further WTO website on "Technical barriers to trade" at <https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm> and ESG website on "What You Need to Know About Technical Barriers to Trade (TBTs)" at < https://www.enterprisesg.gov.sg/blog/quality-and-standards/what-you-need-to-know-about-technical-barriers-to-trade>.

they have now evolved to include socio-economic concerns such as social responsibility and anti-corruption.

This research explores two ISO standards viz ISO 26000:2010 (Guidance on Social Responsibility) and ISO 37001:2016 (Anti-Bribery Management Systems). ISO 26000 provides *guidance* on how businesses and organizations can operate in a socially responsible way. In broad terms, this means a company acting in an ethical and transparent way that contributes to the health and welfare of society. ISO 37001 is a technical standard that specifies requirements and provides guidance for establishing, implementing, maintaining, reviewing and improving an anti-bribery management system. For both ISO 26000 and ISO 37001, the overall system that is sought to be in put in place in managing social responsibility or bribery concerns can either be a stand-alone or can be integrated into an overall management system.

It must be noted that ISO 26000 is not a technical standard (i.e., amenable to certification) but provides guidance on appropriate conduct only. ISO 37001, on the other hand, is a technical standard for which certification can be attained. In any case, it is possible that both ISO 26000 and ISO 37001 would have similar effects in terms of getting businesses to achieve certain threshold standards required by a business partner or an importing jurisdiction.

An organisation's culture is critical to the success or failure of the endeavour to be socially responsible or to remain corruption-free. A well-managed organisation is expected to have a compliance policy supported by appropriate management systems to assist it in complying with its legal obligations and commitment to being responsible to the stakeholders and to conduct its business with integrity. Ultimately, both ISO 26000 and ISO 37001 can be regarded as components of an overall compliance policy. Both support proper functioning and best management of an organisation through avoiding or mitigating foreseeable costs, risks and damage from an organization's operations. Furthermore, both ISO standards should be conceived as the next generation of international standards which go beyond technical specifications of a product or service to focus on the supply chain of a product or service necessitating an enquiry into, broadly speaking, how a product was made. One can liken standards as being about the value a product or service provides and, increasingly, the values that went into the making of a product or service.

It is worth recalling that standards started as a benchmark for weights and measures, providing that vital reference point against which all other weights and measures in that society could be standardised. There is value in standardisation as people know when they purchase a product or service, they are getting certain minimum standards such as those pertaining to performance and safety. The value of standards lies in consistency, reliability, and assurance

relating to product quality: Does the product or service enable its use in a reliable and effective and efficient way? Where values of standards are concerned, it can be expressed as how a product or service positively impacts upon a community. Put simply, it seeks to emphasise and assess the net benefit of a product or service. This is where factors like public health and safety, social and community impact, environmental impact, the competitive nature, and economic impact. Taken together, the value and values of standardisation recognises that robust standards enable greater economic efficiency and ensuring a safer, more sustainable environment. While this is an end in itself, standards can also be the means to the end of signalling the values that are given effect in even as a society uses products and services.

Together, the ISO 26000 and ISO 37001 seek to promote trust and confidence in business dealings and to enhance its financial bottom line, reputation and sustainability. These ISO standards will very likely grow in importance given the growing concerns globally with how goods and services are sourced, produced, and marketed. ISO 26000 may, in the fullness of time, become a technical standard as the guidance and norms become well accepted and practised on a large scale.

In this regard, it is useful to conceive of evolving international standards and, especially, guidance standards as soft law. Their intrinsic value lies not so much in their being putative standards but in the signalling effect that the norms contained in the standards can rapidly become widely understood, accepted, and practised. A guidance standard need not evolve into a technical, and certifiable, standard for it to impact upon a firm's competitiveness. To have a better understanding of this, the study now turns to examining soft law.

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V Standards as Soft Law

Minimally, standards can and should be regarded as soft law, with the emphasis being on its regulatory power. Increasingly, even if countries do not regulate the quality, safety, and other requirements pertaining imports and exports by way of legislation, regulation takes place by way of other mechanisms including the use of standards. Furthermore, standards as soft law can easily evolve into hard law when countries decide to adopt international standards as their national standards. This has been the case in many countries where ISO standards are either adopted in *toto* or adapted as national standards. When standards in soft law is encoded in hard law, they become binding vis-a-vis their applicability to the export markets and the rules of importation.

Hard law is generally understood as "legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law".[47] Domestic legislation and international treaties, for example, are the tangible expressions of hard law. Most national corporate law legislations stipulate—in varying degrees of clarity and precision—the proscribed acts of commission and omission (obligations and compliance), the imposition of legally binding duties and obligations (accountability), and the punishment for transgression (sanctions).

The use of soft law mechanisms is a developing trend. This is not surprising. In some areas where public international law is unable to appropriately provide for the regulatory framework, international standards can perhaps function as a proxy to law. However, where international standards are either still in the process of being formulated or non-existent, then private standards may be developed by the stakeholders as a means of regulating that particular endeavour. Thus, even though soft law is less definitive and does not create enforceable rights and duties, the use of instruments such as rules, guidelines, or codes of conduct/practice can have regulative, practical effects similar to hard law.[48] As soft law cannot be enforced by legal means, it does not have the same deterrent effect as hard law. As such, it cannot be relied upon as a basis for enforcement action and punitive sanctions. However, soft law is flexible and has discursive power through its facilitative effort to set normative standards and enable social

[47] Kenneth W. Abbott, and Duncan Snidal, "Hard and Soft Law in International Governance," in Judith L. Goldstein *et al*, *Legalization and World Politics* (Cambridge, Massachusetts: MIT Press, 2001) at p. 37.

[48] Regardless of the nomenclature, these instruments share the common trait of having non-legally binding normative content but with the intent of setting out the "rules of the game".

learning. This is particularly useful in situations of flux where persuasion and reflexive adjustment, rather than rigid adherence or enforcement, are needed.

Standards, as soft law, have similar regulative, practical effects as hard law. Soft law also has the benefit of being facilitative of efforts to internalise the norms that constitute the soft law. For instance, the ideational standards or expectations first enunciated in a soft law instrument can subsequently form the basis on which the practical application of the hard law can subsequently acquire effectiveness, efficacy, and legitimacy. Soft law's trait of being facilitative of efforts to internalize the norms embedded in hard law should not be underestimated. In the context of regulatory frameworks, soft law instruments provide stakeholders with an idea of the regulatory concerns, the developing regulatory regime, and an early indication of the regulatory direction.[49]

Understanding soft law as hard law in its embryonic stage of formation can help stakeholders appreciate the need to raise their game so that can comply with the putative regulatory framework. As the precursor of emerging hard law, soft law can be viewed as principles and norms that might eventually consolidate and acquire a shared meaning and understanding. This can contribute to the legal interpretation of hard law or those principles and norms can become legally binding rules themselves. In this regard, soft law can help knowledge, norms and values to be framed strategically and dovetail with existing normative frameworks.

Soft law's strategic potential thus lies in its "soft power." Rather than resorting to threats (in essence, the use of hard law) or payments (incentives or bribes), soft power is the ability of an entity or an idea to obtain what it wants by virtue of being an attractive model and acquire traction and acceptance respectively.[50] It is this attribute of soft law: facilitating the socialisation, formation of consensual knowledge and a shared understanding of a particular value or concern or imperative, that can encourage and engender the desired regulatory response which hard law may find challenging. Hence, soft law can also possess the regulative and constraining effect of hard law.

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[49] See, for example, David M. Trubeck, Patrick Cottrell, and Mark Nance, "'Soft Law', 'Hard Law' and EU Integration" in G. de Búrca & J Scott (eds.), *Law and New Governance in the EU and the US* (Oxford: Hart, 2006); Karin Buhmann, "Corporate Social Responsibility: What Role for Law? Some Aspects of Law and CSR," *Corporate Governance*, vol. 6(2) (2006), pp. 188-202.

[50] Joseph Nye Jr., *Soft Power: The Means to Success in World Politics* (New York: Public Affairs, 2004). Speaking of international politics, Nye's conception of soft power is of one country's ability to obtain what it wants from other countries by virtue of it being an attractive model. The alternative is to resort to threats (in essence, the use of hard law) or payments (bribes).

The utility of soft law instruments, therefore, is its transformative capacity in socializing stakeholders through a consensual and confidence-building process. More directly, soft law speaks to reason, understanding, strives to develop consensus, and encourage the internalisation of desired values and interests. Lawrence Kohlberg's three levels of moral development help demonstrate how soft law's iterative, quasi-prescriptive nature can engage cognitive and informed responses in developing a nuanced regulative response to a societal threat (see Figure 1).[51]

Hard law approaches tend to elicit reasoning and responses that are primarily egocentric, denominated in self-centred terms of avoiding punishment, compliance with an authority, and group norms (levels one or two of Kohlberg's moral development). On the other hand, soft law approaches encourage the movement towards a level three moral development in which a person is able to adopt a perspective that factors the interests of affected parties based on impartial and reasonable principles.

When successfully imbibed, soft law approaches result in society being able to attain the post-conventional stage of moral reasoning in which critical and reflective reasoning are dominant. The takeaway is that hard and soft law should not be viewed in binary or antithetical terms, they can complement each in regulation. It is submitted that soft law instruments and the soft law approach will see greater prominence in emerging areas such as artificial intelligence, robotics. The potential and value of such instruments to socialise the citizenry to demand the corporate norms and conduct necessary to maintain a vibrant yet responsible corporate sector that is essential in any thriving economy.

[51] Lawrence Kohlberg, "Moral Stages and Moralization: The Cognitive-Developmental Approach" in T. Lockona, (ed.), *Moral Development and Behavior: Theory, Research, and Social Issues* (New York: Holt, Rinehart, & Winston, 1976).

Level 1: Pre-conventional Stages

(1) Punishment and obedience orientation

(2) Instrumental and relative orientation

- Obedience driven by self-centered motivation and fear of punishment; little awareness of others

↓

Level 2: Conventional Stages

(3) Interpersonal concordance orientation

(4) Law and order orientation

- Expectations maintenance vis-à-vis peers, family, and other communities characterized by loyalty to group and its needs and norms; greater awareness of the individual vis-à-vis the group

↓

Level 3: Post-conventional Stages

(5) Social contract orientation

(6) Universal ethical orientation

- Ability to adopt a perspective that factors the interests of those affected based on impartial and reasonable principles

Figure 2: Lawrence Kohlberg's Stages of Moral Development

CSR as a Governance and Regulatory Tool

CSR provides, in my view, a good example of how social and environmental expectations can evolve into norms and even standards. Once regarded as a "nice to have" as part of the larger effort at corporate engagement and public relations, it is now increasingly seen as a necessity and an indication of a firm's social licence to operate.[52] CSR standards, manifested in ISO26000 and ISO37001, can be regarded as soft law, forming putative standards of corporate responsibility. Moreover, networks of regulatory authorities often function as vectors of knowledge circulation, diffusion of norms, and regulatory coordination (Papadopoulos 2018). Collectively, they are often categorised under the label of "soft governance", which tends to underestimate the concrete practices within such a network.

If properly internalised, the use of standards represents a resolute departure from the compliance mindset to one which recognises that sustainable quality assurance must possess a normative, even an ethical, content in which the dimensions of responsibility, transparency, and accountability are evident, recognised and supported. Standards such as ISO 26000 and ISO 37001 reflect the corporate governance failures in which the ethical backbone does not extend into the leadership and sinews of the company. In some respects, standards point to the limitation of laws, rules and regulations. The reality is that there are infinite possibilities with regards to how laws and regulations can be circumvented or complied with in a perfunctory way. The crux of the matter in quality and assurance is whether compliance is merely to the *letter* of the law, or does it extend even further to the *spirit* of the law as well. In short, there are severe limits to what regulation and enforcement can do and this must be recognised. Too much regulation would jam the wheels of commerce, adding to the costs of doing business. All too often, however well intended, the inculcation of a rule-based, compliance mindset may do more harm than good. Regulators tend to look at laws and regulations as safety nets but too often such a rules-based approach, with bright-line tests and detailed guidance, only invite expedient interpretation by corporate executives and boards of directors.

The foregoing discussion underscores the centrality of standards, regulation and governance and getting the balance right in the corporate arena. Ultimately, prudent regulation and good governance are primarily about norms and values rather than just rules alone. As a standard setter, values-driven approaches to social responsibility and anti-corruption, embodied in ISO 26000 and ISO 37001, is about going beyond mere compliance. Perhaps the

[52] One example is John Gerard Ruggie, "Multinationals as global institution: Power, authority and relative autonomy," *Regulation & Governance*, vol. 12(3) (2018), pp. 317-333.

most significant development on the CSR front is the ongoing efforts by the ISO, in collaboration with a variety of international partners, to provide a guidance standard for social responsibility.

There is a patent need for the development of what Lawrence Kohlberg called the "post-conventional stage of moral development" wherein the economic players adopt an ethical perspective and reasoning that factors the interests of those affected based on impartial and reasonable principles (as opposed to the pre-conventional stance of obedience driven by self-centred motivation and fear of punishment). Standards can operate as 'soft law' and engender a regulatory approach that seeks to go beyond the form of a regulation to address the substance of the regulatory requirement.

In the area of standards, the use of hard law and, increasingly, soft law are the two main modes by which legalization in the area has taken place. The goal of requiring market players to demonstrate social responsibility and anti-corruption requires sustained stakeholder engagement. This approach means that regulation and governance cannot just be about a fixed set of rules to be applied and enforced. Rather, standards can also operate as a framework for collective problem solving wherein multiple stakeholders are involved and multiple levels of governance have to be coordinated. This is more likely to have better effects and outcomes where standards communicate, facilitate, and entrench effective and efficient governance without coercing.[53]

ISO 26000 – CSR as Putative Law?

ISO 26000, which is the guidance standard on social responsibility, defines social responsibility as the "responsibility of an organization for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that:

- Contributes to sustainable development, including health and the welfare of society;
- Takes into account the expectations of stakeholders;
- Is in compliance with applicable law and consistent with international norms of behaviour; and
- Is integrated throughout the organization and practised in its relationships."

[53] David M. Trubeck, Patrick Cottrell, and Mark Nance, "'Soft Law', 'Hard Law' and EU Integration" in G de Búrca & J Scott (eds.), *Law and New Governance in the EU and the US* (Oxford: Hart, 2006); Karin Buhmann, "Corporate Social Responsibility: What Role for Law? Some Aspects of Law and CSR," *Corporate Governance*, vol. 6(2) (2006), pp. 188-202.

ISO's use of "social responsibility", rather than CSR, is deliberate. Social responsibility applies universally - not just to companies but includes governments, non-profit entities, and professional industries as well. The guidance standard, unveiled in 2010 as ISO 26000, is for voluntary usage. Unlike other ISO technical standards, ISO 26000 is not a certification standard at the outset but may eventually evolve into one.[54]

What is noteworthy is that the ISO 26000 guidance standard seeks to help businesses, NGOs, governments, the labour movement, and other stakeholders internalise the desired norms and values of social responsibility. By virtue of its inherent flexibility and potential discursive power, ISO 26000 can facilitate the setting of normative standards and enable social learning about social responsibility. This is particularly useful in the sphere of CSR where persuasion and reflexive adjustment, rather than rigid adherence or enforcement, are needed. The ideational standards or expectations enunciated in such guidelines and industry-wide codes of conduct can form the basis on which the practical and universal application of CSR can subsequently acquire effectiveness, efficacy, and legitimacy. Thus, ISO 26000 can be treated as a soft law instrument. As discussed earlier, soft law's utility is in socialising stakeholders through a consensual and confidence-building process. More directly, soft law speaks to reason, understanding, strives to develop consensus among stakeholders, and encourage the internalization of desired values and interests.

The structural power of hard law manifested in rules and regulations is often not only reactionary but also grossly inadequate as a means of pre-emptive, adaptive socialisation and social learning prior to, during, and after a corporate crisis. In the corporate arena, corporate governance failures like Enron and WorldCom in the early 2000s tend to elicit a robust regulatory response but often also generating regulatory hubris and governance over-reach. In some ways, this is not surprising. In the halcyon days of economic exuberance, capitalism is seen as having the inordinate ability to promote the common good.[55] But when the market crashes due to systemic corporate malfeasance, the regulatory agencies have to step in and muscularly "right-size" the regulatory framework – all ostensibly to promote the common good. Regulation 'overkill' often results instead when the urgent need is to artificially rejuvenate and instill trust among stakeholders in the corporate system. Agency problems are often at the core of corporate governance weaknesses and failures. Regulatory robustness can

[54] For more information, see online: International Organization for Standardization <http://www.iso.org/iso/home/standards/iso26000.htm>.

[55] Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets* (London: Allen Lane, 2012).

help to ameliorate the excesses of principal-agent problems and risks but it would be a gross mistake to manage the decline of trust and accountability in such scenarios through the law only.

The existing literature on the use of CSR in supply chain contracts by focusing on the use of standards has not featured significantly the academic literature. The sampled literature on transnational corporations with global supply chains show that they are regularly incorporating suppliers' codes of conduct into their relations with suppliers. This is often done through their supply contracts. These codes, inter alia, stipulate corporate social responsibility (CSR) obligations and often refer to hard and soft international law instruments such as International Labour Organization conventions and the UN Global Compact.

McCall-Smith, Kasey, and Rühmkorf analysed 30 FTSE 100 companies and found that the most widely used international standards are the Universal Declaration of Human Rights (UDHR) and the ILO core conventions, followed by the UN Global Compact.[56] There are also some, but fewer, references to the Ethical Trading Initiative Base Code, the UN Guiding Principles and the OECD Guidelines for Multinational Enterprises. They found that private law is often resorted to fill any gaps (that public international law does not address) in the area of CSR. But the adjudicatory mechanisms of international law continue to focus on States. As such, in the realm of human rights, such mechanisms are not open to individuals in claims against States. This means that in order to access justice against a transnational corporation directly at the international level, other legal approaches, such as tort and contract law, are necessary for the development of an accountability framework. The authors consider that whether or not such contractual CSR terms are, in fact, enforceable depends on two key issues. First, the incorporation of the CSR clauses into the contract. Second, the way they have been drafted (i.e., are these clauses binding, precisely worded and not just aspirational?). The authors point out that the contractual reach of the CSR clauses and their enforcement is often limited in practice. Not surprisingly, the CSR clauses are only effective between TNCs and their direct suppliers. They cannot impose a contractual obligation onto third parties outside the contract due to the privity of contract doctrine. Furthermore, the right of enforcement is, in practice, limited to the contracting parties. Hence, notwithstanding the rights of third parties provided

[56] Kasey L. McCall-Smith and Andreas Rühmkorf, "From International Law to National Law: The Opportunities and Limits of Contractual CSR Supply Chain Governance" (September 21, 2018), forthcoming in V. Ulfbeck and A. Horowitz (eds), *Corporate Social Responsibility in Supply Chains: Contract and Tort – Interplay and Overlap* (London: Routledge); Edinburgh School of Law Research Paper No. 2018/30. Available online at: <https://ssrn.com/abstract=3253149>.

for through dedicated legislation but which can be excluded, promoting CSR through contract has limited efficacy.

The authors found that the use of international law in the supply chain, governed by national contract la w, is a significant phenomenon. It leads to a hybrid system of promoting CSR where different regulatory techniques and forms of regulation interact – national and international law, hard and soft law, public and private law, public regulation with private regulation. The hybrid system is heavily reliant on the home-State legislation for its effectiveness.

What this portends is the inter-mingling of public international law and private law (viz contract law) and this blend is growing. So even as the international standards may not be readily resorted to, firms can resort to contract law to develop a common understanding of CSR and an alternative route to access justice for rights breaches when it is otherwise denied.

Some of the challenges identified by McCall-Smith, Kasey, and Rühmkorf resonate in the effort to govern sustainable palm oil supply, a key ingredient in many household items. Governance has become a key word in the management of supply chains. Pacheco and his co-authors show the complex stakeholder relationships and linkages are increasingly being shaped by new public and private standards. No doubt these standards arise because of the imperative to ameliorate social and environmental costs while harnessing economic gains from this commodity.[57] At one level, there is the disconnect, complementarities, and antagonisms between public regulations and private standards. At another level, there are the global, national, and subnational policy domains shaping the supply chain actors' conduct notwithstanding that these domains are not entirely aligned with each other, giving rise to regulatory gaps. While the authors observe that there are greater complementarities among transnational instruments, state regulation disconnects persist and antagonisms prevail between national state regulations and transnational private standards.

In this regard, even Singapore firms in a variety of sectors may for now not be troubled by, and may instead be thriving on, this state of lack of alignment between the national and the global regulatory regimes, the reality is that efforts are made towards better coordination. In short, it is not a question of whether the regulatory regimes will be better aligned; the question is *when* they will be aligned and whether firms will be ready for a much more robust regulatory regime at the national and international level.

[57] Pablo Pacheco *et al*, "Governing Sustainable Palm Oil Supply: Disconnects, Complementarities, and Antagonisms between State Regulations and Private Standards," *Regulation & Governance*, vol. 14(3) (2020), pp, 568-598.

In this regard, Bres, Mena and Salles-Djelic are helpful in drawing attention to the mediating role of third party actors: regulatory intermediaries.[58] Standard-setting bodies, like the ISO, can be treated as a regulatory intermediary. They elaborate on the distinction between formal and informal modes of regulatory intermediation, in transnational multi-stakeholder regulation. They identify two key dimensions of intermediation (in)formalism: officialization and formalization. This results in a typology of intermediation in multi-stakeholder regulatory processes: formal, interpretive, alternative, and emergent. What is significant to note is that in an environment with multiple stakeholders, with competing and perhaps even conflicting interests, rights, and power, intermediation will grow in the process of regulation. The mutual interaction of formal and informal actions may create regulatory solutions or perhaps even undermining them. In this context, civil society organisations can and do use norms and standards to advocate or even demand better conduct from firms. They can also build transnational alliances. Hence, firms cannot avoid the adage that "all action is local". Ultimately, firms must not rely on regulators to protect them from themselves.

In some respects, one does not have to go to Europe or North America to realise that the trajectory of the standards movement. In Southeast Asia, while the emphasis has not been about standardisation, the effort is clearly one directed at developing norms. This is exemplified in the push by the regional body, ASEAN, as part of its larger endeavour to develop the ASEAN Economic Community (AEC). Breslin and Nesadurai note that transnational governance in Southeast Asia has been underestimated. They set out to focus on transnational governance, especially of private/non-state actors providing standards, rules and practices for other actors to voluntarily abide by.[59]

ASEAN's story in development is no different from other parts of the world. In pursuing the drive for growth, major social and environmental issues have arisen, whether as intended or unintended consequences. These include pollution, especially the transboundary haze; freshwater, terrestrial, wetland, marine and coastal ecosystems are under intensified use and increasing pressure from industrial and agricultural activities; environmental impacts of rapid urbanization; widening income gap; land grabs and labour issues especially forced labour, migrant labour and poor working conditions. A study on Business and Human Rights Disclosure in ASEAN done by ASEAN CSR Network (ACN) and Mahidol University in

[58] Luc Bres, Sebastian Mena, and Marie-Laure Salles-Djelic, "Exploring the formal and informal roles of regulatory intermediaries in transnational multistakeholder regulation," *Regulation & Governance*, vol. 13(2) (2019), pp. 127-140.

[59] Shaun Breslin, and Helen E.S. Nesadurai, "Who governs and how? Non-State Actors and Transnational Governance in Southeast Asia," *Journal of Contemporary Asia*, vol. 48(2) (2018), pp. 187-203.

Thailand (2019) clearly shows that very few ASEAN businesses exhibited awareness, readiness, compliance and strategy relative to their responsibility to respect human rights in accordance with the UN Guiding Principles on Business and Human Rights and on thematic subjects covered by the Global Reporting Initiative Framework (GRI).

Businesses need to look at how they can comply with the UN Guiding Principles on Business and Human Rights (UNGPs) which basically asks that there be a policy commitment, a due diligence process and a process for remedies when adverse impacts take place. They must also include these standards to their supply chains as well. To implement these Principles, businesses must embrace CSR and responsible business practices. The UN Global Compact, the OECD Guidelines for Multinational Enterprises and the ISO 26000 International Standard on Social Responsibility and other tools and initiatives provide useful guidance for businesses. Businesses should also communicate on their practices. The Global Reporting Initiative (GRI) has guidance on reporting. In May 2016, ASEAN Labour Ministers adopted the ASEAN Guidelines for CSR on Labour. It laid out guidance to businesses to operate responsibly and to international standards, including the core conventions of the International Labour Organisation.

There is no doubting that epistemic communities shape regulation and standards. Such an epistemic community would comprise multi-stakeholders such as firms, governments, regulators, civil society organisations (local and foreign), and the labour movement. Such international standards set already operate in contentious policy environments especially when they relate to nascent areas such as corporate responsibility. Firms are increasingly recognising the saliency of international standard-setting bodies like the ISO and the important role they play when it comes to standardisation.

VI Next Generation Standards: ISO 26000 and ISO 37001

What can we make of these various developments outlined thus far? First, private regulation, such as ISO standards, does affect the exportability in goods and services when they have to comply with such standards in order to access markets. Domestic laws and international standards play an important role in growing the role of regulation, whether public or private, in whether goods and services can be exported to a particular jurisdiction. Countries and firms ignore regulation to their export peril. Private regulation is growing strongly at a time when public regulation is seen as ineffective.

Second, rather than seeing private regulation as a potential barrier to innovative entrepreneurship in Singapore, the real issue is how can Singapore-based firms keep up with private regulation and ensure that they are able to manage the standards in a growing array of regulatory instruments. ISO 26000:2010 (Guidance on Social Responsibility) and ISO 37001:2016 (Anti-Bribery Management Systems) can potentially affect Singapore-based companies. These are areas where Singapore-based companies should have a competitive advantage given Singapore's laws and repute and standing. The key concern is how to enable firms to be alive to the imperative of competency and/or certification in the areas of social responsibility and anti-bribery systems. Finally, innovation has to be seen in much broader terms than it currently is. Taking on board sustainability challenges and meeting the standards required for export markets, ahead of time, should be seen as an integral part of what it means for a firm to be driven by innovation and its products and services innovative.

What is not so well appreciated is that deliberation, the process of seeking common ground, also functions as a coping or quasi-regulatory mechanism in dealing with uncertainty by advocating dialogue, compromise and consensus. Trust remains a fundamental attribute in developing rules of the game. The use of regulatory sandboxes speaks to this consensual development, of trial-and-error in arriving at a regulatory framework, and as standard-setting and norm-engendering mechanisms, soft law instruments help. Being pre-emptive in approach, soft law instruments such as codes of conduct and best practices, when properly internalized, encourage and facilitate compliance.

In my view, ISO 26000 and ISO 37001 are unique. Both standards embrace potentially hot-button issues: Human rights, labour practices, the environment, fair operating practices, consumer issues, and community involvement and development, and the scourge of corruption. It is not a certification standard like other popular standards such as ISO 9001 and 14001. ISO

26000 remains ISO's only guidance standard - it reflects ISO's pragmatic response to the contested nature and scope of CSR. A guidance standard is a better mode of introducing the expected values, norms and standards of socially responsible conduct. This preference for voluntary action, consensus and openness facilitates positive engagement, as opposed to a self-limiting compliance mindset that regulation or standardisation often elicits. With time, ISO 26000 will probably evolve into a technical standard.

As such, it is crucial for companies to be mindful of CSR concerns, especially in the export of goods and services overseas and in the management of supply chains. More urgently, it should not be a surprise if public and private entities, especially in Europe, North America, Japan, and China increasingly require their business partners to be "ISO 26000-compliant". ISO 26000 does not need to become a technical standard first before it can be used in the business world. Companies that are ISO 26000-compliant have a valuable differentiator, and can acquire the first-mover advantage — or risk being a laggard with the loss of business opportunities since ISO 26000 can effectively operate as a non-tariff trade barrier given the growing value placed on corporate values today.

It does not matter that ISO 26000 is a guidance standard where certification is not possible. However, countries have used ISO 26000 as a model and adapt for their own national standard on social responsibility. For instance, Denmark's Danish Standards has developed its national standard "DS 49001 Social Responsibility Management System – Requirements". ISO 26000 can be regarded as a management system standard integrating core subjects on social responsibility such as organizational governance, human rights, labour practices, the environment, fair operating practices, consumer welfare issues, and community involvement and development.

In similar vein, ISO 37001: Anti-bribery management system is a response to the needs of business in dealing with corruption.[60] It seeks through the implementation of a robust management system that allows public, private, and non-governmental organisations to prevent, detect and address bribery by adopting an anti-bribery policy, appointing a person to oversee anti-bribery compliance, training, risk assessments and due diligence on projects and business associates, implementing financial and commercial controls, and instituting reporting and investigation procedures.

[60] As the ISO brief on ISO 37001 observes at p. 1: "Providing a globally recognized way to address a destructive criminal activity that turns over a trillion dollars of dirty money each year, ISO 37001 addresses one of the world's most destructive and challenging issues head-on, and demonstrates a committed approach to stamping out corruption."

Increasingly, ISO certification is viewed by many firms as meeting a very high standard of leading practices for business systems and processes. So it is no surprise that it is much sought after. Some firms may even view ISO certification as a sort of "insurance policy" to demonstrate that they are on side with robust requirements even if they are not legislatively mandated. As more firms seek pursuing certification, it may well be that there would be pressure for others to follow suit. But certification may not be for every firm; each firm has to determine what works best for them. Where innovative entrepreneurship is concerned, standards can serve to galvanise the mindset of innovation, which will be very helpful for firms that have a strong external dimension in their business. This is because the demands and expectations on firms have grown.

The larger reality is that ISO 26000 need not become a certifiable standard for it to affect Singapore firms. A foreign firm could, for example, require a Singapore firm to show that it is "ISO 26000- compliant". While this study has not uncovered any empirical evidence of this, the potential remains and should not be underestimated. Likewise, where ISO 37001 is concerned, a foreign firm scrupulous of its reputation and mindful of how its business partners could affect it could require the business partners to be ISO 37001 certified or, minimally, to demonstrate that it is ISO 37001-compliant. Thus, firms have to consider how standards certification can work for it.

What it boils down to is that even if a firm is not keen on a particular ISO standard certification, that standard may still be applicable to the firm through a contractual requirement that the firm demonstrates it is, for example, complying or aligned with the ISO standard in question. Of course, a firm may go as far as to require their business partners to possess certain standards certification.

This study posits that as Singapore has a standing and reputation for social responsibility and anti-corruption, that it should leverage on this and seize that first-mover advantage in these two areas which will only grow in importance. Regulatory measures, in addition to tariffs, can affect trade, whether in terms of trade volumes or prices of the goods and services. A recent paper published by ISO considered the linkage between international standards and trade.[61] It made the following findings[62]:

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[61] Ben Shepherd, "International Standards and Trade: What Does the Research Say?" (Geneva: ISO, 2020); available online at <https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100448.pdf>. The author noted at p. 11, "The main reason that the literature on standards and trade remains relatively small, and far from global in its cover- age, can be simply stated: lack of data. It is still the case today that there is no comprehensive global database of technical regulations or product standards."

[62] *Ibid*., p. 11.

1 Standards in importing markets can contribute to cost increases for exporters because of the need to adapt products and production processes, as well as to comply with testing and certification requirements.

2 Developing-country firms may be constrained in their ability to absorb these costs due to difficulties in financing the necessary investments.

3 The balance of evidence therefore suggests that standards in importing markets may limit the ability of some developing-country firms to contest those markets.

4 Where importing-market standards are de facto harmonized with international standards, such as ISO or IEC, the negative effect on developing-country exporters is substantially lessened, or even reversed.

5 There is evidence that some standards in some sectors promote trade, likely by reducing information asymmetries between producers and consumers, and credibly signalling quality.

6 Effects of standards in importing markets differ substantially across exporting countries, sectors, and firms within each of them.

7. Even when there is an initially negative cost-impact of an importing-market standard, over time, firms and governments tend to show substantial ability to adapt and prosper in the new environment, and the standard can be the catalyst for higher productivity and quality.

It would appear from this limited study that for some countries, standards can function as catalysts for trade while for others, standards may operate as barriers. Such an outcome fits with the findings indicated above, specifically the ability of standards to transmit valuable information, and the ability of exporters to access a larger market through a widely adopted standard. For Singapore, even if "standards as catalysts" may not operate strongly in view of our being a developed economy with exports to similar economies, the need to ensure that "standards as barriers" does not apply cannot be ignored. This situation could arise if Singapore firms do not pay adequate attention to the nuances in the way international standards are evolving, including incorporating next generation standards that are not technical in nature.

Take for example, the European Union as well as other countries' focus on the environment and the attempt to promote environmental stewardship, values and norms through the trade policies. This has raised the spectre of whether these are masked attempts at protectionism even if the stated and lofty goal of such policies is to deal with the "climate

emergency" and to have a climate-neutral economy.[63] Earlier, in 2018, the European Parliament effectively banned the use of palm oil in biofuels as a result of intense lobbying over the impact of palm oil cultivation in deforestation.[64] It was also reported that the European Commission, which negotiates trade deals, has attempted to enhance the trade and sustainable development chapters to its FTAs through, for example, requiring certain levels of environmental stewardship and labour standards.[65]

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[63] See, for example, the recently-unveiled EU's Green Deal at https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en. This ambitious plan will integrate economic, regulatory, competition, and trade to be the first climate-neutral continent.

[64] On the challenges of regulating the global palm oil value chain, see Pablo Pacheco *et al*, "Governing Sustainable Palm Oil Supply: Disconnects, Complementarities, and Antagonisms between State Regulations and Private Standards," *Regulation & Governance*, vol. 14(3) (2020), pp, 568-598.

[65] Alan Beattie, "Is the EU's green policy protecting the planet or European industry?" *The Financial Times*, 12 December 2019, p. 7. The article also noted, "The potential for European trade policy in the next five years to be wrecked by an upsurge in environmental campaigning remains acute. The EU's deal-making capacity has almost been derailed by a surge in protests against the previously obscure issue of investor-state dispute settlement mechanisms". See also Gregory Shaffer, "Retooling Trade Agreements for Social Inclusion," *Illinois Law Review* (2019), pp. 1-45 (that international trade law needs to be restructured to promote social inclusion); James Harrison *et al*, "Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters," *Journal of Common Market Studies*, vol. 57(2) (2019), pp. 260-277 (that operational failings, including a lack of legal and political prioritization of TSD chapters and shortcomings in the implementation of key provisions, have hindered the impact of the FTAs on labour standards).

VII Trend towards a Broader Conception of the Licence to Operate

Another way of looking at and justifying the use of international standards revolves around the concept of a firm's 'licence to operate'. The licence has two meanings: the first is the *legal or formal* licence to operate which is essentially a formal grant of the licence to operate by the authorities in a jurisdiction. The second relates to the society's substantive social approval or cognizance of a company's corporate conduct and impact that is deemed to be acceptable. A broader understanding of the licence to operate has two related components: first, a contractual dimension in which a corporation is treated under the law as a separate legal personality, and, secondly, the subsistence of a *quid pro quo* arrangement expressed as an unwritten social contract in which a company maintains trust and confidence with stakeholders through operating in a manner that does not harm society.

To maintain the broader licence to operate, the firm's compliance with laws and regulations, while necessary, is not sufficient to sustain the social licence to operate. Increasingly, responsible conduct is seen as a vehicle by which companies can maintain the formal and social licences to operate. This approach underlines the importance of trust, the lack of which will result in negative commercial implications, including a tarnished reputation and increased government regulation. In a worst-case scenario, the licence (formal and social) to operate may be revoked. As such, the financial bottom-line is grossly inadequate as an indicator of corporate success even if the business of business is to make money and generate profits. But complementary to that is for a business to do good even as it strives, naturally, to do well.

What is evident is that social responsibility is conceived as a sound business approach that helps companies make money while doing good. Through the social contract idea, social responsibility embodies the symbiotic relationship between businesses and their wider operating environment. Interestingly, this is very much in line with the communitarian ethos espoused in many Asian societies. For instance, Article 5 of China's Company Law captures this perspective well. Article 5 stipulates: "In its business activities, a company must comply with laws and regulations, observe social morals and commercial ethics, act in an honest and trustworthy manner, subject itself to the supervision of the government and the public and assume social responsibility". [66] In February 2013, India's Lok Sabha passed the Companies

[66] Company Law of the People's Republic of China (Revised in 2013), promulgated on 28 Dec. 2013; available online at <http://www.fdi.gov.cn/1800000121_39_4814_0_7.html> (accessed 27 September 2019)

Bill 2011 to update the omnibus Companies Act. Under the law, companies must spend at least 2 per cent of their net profit towards CSR activities.[67]

However, in much of Asia, the encouragement of social responsibility by governments, consumer groups, and citizens has been dominated by the "business case" for CSR, even as socio-political and cultural norms are relied upon to buttress the relevance of CSR in various facets of life .[68] Further, there does not seem to be much critical discussion or concern with the fundamental need and imperative for companies to integrate CSR into their operations and way of doing business. CSR is still seen as an add-on, a luxury that is hard to justify in economic bad times. Such a hard-nosed approach to CSR is certainly not sustainable. The business case for CSR approach dwells obsessively on short-term costs and its impact on profits, without giving sufficient credence to the long-term benefits for companies engaging in CSR. In this regard, the appropriation of CSR by companies and the promotion of CSR by many governments and regulatory agencies appear to be unbalanced.[69]

Given the growing global footprint of many Asian business and economic activities, this need to widen the conception of CSR and corruption control arises on two fronts. First, the promotion of CSR understanding and action has to incorporate 'global corporate social responsibility' in which companies are responsible for their actions beyond their boundaries to include the supply chains.[70] Secondly, CSR has to engage the very issues that arise from doing business such as discrimination, labour, social, sustainability, corruption that are endemic in much of Asia. Indeed, CSR presents a platform for deeper interaction and engagement among corporate entities, society, and states/governments – one in which corporate power can be better secured rather than be limited but it depends on CSR frameworks remaining as privatised modes of governance.[71] Putting it broadly, this concern with the direction of capitalism has

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[67] *The Companies Act, 2013*, The Republic of India; available online at <http://www.mca.gov.in/MinistryV2/companiesact2013.html> (accessed 27 September 2019).

[68] "Business case" is understood as the engagement of businesses in corporate social responsibility as being similar to an investment in any other product attributes such as quality, service, or reputation that contribute to the profit making of the firm.

[69] Alwyn Lim and Kiyoteru Tsutsui, "Globalization and Commitment in Corporate Social Responsibility: Cross-National Analyses of Institutional and Political-Economy Effects," *American Sociological Review*, vol. 77(1) (2012), pp. 69-98.

[70] Gerald F. Davis, Marina V.N. Whitman, & Mayer N. Zald, "The Responsibility Paradox!" *Stanford Social Innovation Review*, vol. 6(1) (2008), pp. 1-30.

[71] See further in the US context of how CSR has pre-empted governmental intervention, Rami Kaplan, "Who Has Been Regulating Whom, Business or Society? The Mid-20th Century Institutionalization of 'Corporate Responsibility' in the USA," *Socio-Economic Review*, vol. 13(1) (2015), pp. 125-155. On rule-making through soft law and private regulation in the area of sustainability, see Stephen Kim Park and Gerlinde Berger-Walliser, "A Firm-Driven Approach to Global Governance and Sustainability," *American Business Law Journal*, vol. 52(2) (2015), pp. 255-315. See also David Detomasi, "The Multinational Corporation as a Political Actor: 'Varieties of Capitalism' Revisited," *Journal of Business Ethics*, vol. 128 (2015), pp. 685-700.

generated a reaction in which various stakeholders through organisations such as the Business Roundtable, through shareholder activism, and through laws and standards, seek to have corporate entities practise the principles of fair play, transparency, accountability, and responsibility can reduce the opportunities and the opportunism for value-reducing corporate behaviour.[72]

A Proposal

The low adoption rate of Singapore-based firms of ISO 26000 and ISO 37001 suggests that the benefits of doing so are not adequately understood. Commonly-cited factors as potential barriers to standards adoption are primarily about implementation processes and costs, a lack of information and understanding of what standards are about.[73] It is perhaps appropriate to consider how Singapore can respond to the growth and development of private regulation, especially of countries and corporate entities using standards as a mode of regulation. The challenge lies, in part, the proliferation of private regulation as attested to by the copious number of standards – national or international ones. This can sometimes create confusion and overlap with regard to the relevant or appropriate yardstick to be used. It can be hard for a firm seeking to export their products and services to assess and comply with all these different requirements. Coordination is needed. In this regard, it may be worthwhile to consider the establishing of a Standards Information & Coordination Taskforce (SICT). This entity would not duplicate or supplant ESG; in fact, it is best located within ESG to tap the expertise and experience there. SICT's main role is to provide a coordinating function in maintaining a repository of national, regional, and international standards in key and new markets for Singapore-based firms. SICT can also maintain a watchful eye over developments, emerging trends, and provide sound and timely studies of standards. The coordination functions lie in SICT being:

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[72] For an overview of some of the issues, challenges and proposal to "right-size" capitalism, see Branko Milanovic, *Capitalism Alone: The Future of the System That Rules the* World (Cambridge, MA: Belknap Press, 2019). The limits of markets in constraining socially sub-optimal corporate conduct, and how culture and ethics are needed as complementary mechanisms is examined in Dan Awrey, William Blair, and David Kershaw, "Between Law and Markets: Is There a Role for Culture and Ethics in Financial Regulation" Delaware Journal of Corporate Law, vol. 38 (2013), pp. 191-245.

[73] For a study of the uptake of another ISO standard, see Sue Cassells *et al*, "An Exploration of ISO 14001 Uptake by New Zealand Firms," *International Journal of Law and Management*, vol. 54(5) (2012), pp. 345-363. ISO 14001 is an Environmental Management System (EMS) standard. See also Christian Volpe Martincus et al., "ISO Standards: A Certificate to Expand Exports? Firm-Level Evidence from Argentina," *Review of International Economics*, vol. 18(5) (2010), pp. 896-912. Standard adoption can help firms in developing countries overcome information barriers and thereby perform better in international markets. ISO certification is associated with increased exports.

- Information intermediary and clearing house on standards, by collecting and reporting all significant trends, proposals, ideas or initiatives on standardisation; a trusted "go-to" source
- Monitoring and analysis of existing and proposed standards globally;
- Early warning system by noting emerging issues or challenges on standardisation;
- Evaluation programme, which examines how Singapore stacks up in being "standards-ready";
- Stakeholder Forum: for relevant stakeholders to share ideas and issues and to produce recommendations, reports, and roadmaps.

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VIII Conclusion

This research study regards international standards, specifically those of the International Organization for Standardization (ISO), as possessing the innate and real capacity to either operate as a catalyst or a barrier to innovative entrepreneurship in Singapore. Private (and quasi-public regulation) does affect competition in that it could affect products and services from Singapore from effectively competing with other products and services because the former is unable to meet the regulations. Such barriers may or may not be anti-competitive. The take-away is that while innovation and entrepreneurship is necessary in making a product or service competitive, it is not sufficient in ensuring that the product or service is able to access export markets. In other words, innovation and entrepreneurship cannot be just about making a product or service better in the technical sense. To be clear, making a product or service superior to its competitors is crucial – a *sine qua non* in a competitive market for such products and services. However, this research argues that innovation and entrepreneurship must be geared towards making products and services better by design, in particular *how* the product or service is made.

Legitimate regulatory hurdles are not just about efforts at breaking up monopoly power but more about bringing back the welfare and wellbeing of the citizen to the centre of value and supply chains. The role of non-state actors like the ISO and its technical standards cannot be ignored in an increasingly variegated architecture of international standards in transnational governance. They are no longer agents of the regulatory state but very much protagonists in setting standards and the evolution of norms that will impact upon innovation and entrepreneurship. Innovation and entrepreneurship will have to factor in regulatory standards in business and corporate conduct if their outputs in the form of good and services are to secure market access. Private regulation, in the form of widespread use of standards, need not be anti-competitive. Countries have often and will continue to justify them and making the regulatory framework compliant with the relevant rules. The way ahead is not dwell on the legal niceties and formalities but instead to respond to the regulatory shifts in the export markets. The alternative is to be prepared for disruptions to access of these markets.

The ISO 26000:2010 (Guidance on Social Responsibility) and ISO 37001:2016 (Anti-Bribery Management Systems) are two ISO standards that can boost the competitive advantage of products and services made by Singapore-based companies. The costs to secure certification or alignment should not be a deterrent. The greater challenge is whether Singapore-based companies want to hold themselves to higher standards in the areas of social responsibility and

anti-corruption. Ideationally, Singapore is broadly aligned with the role social responsibility and steadfast in her anti-corruption stance. More Singapore-based companies should seek certification in ISO 37001 and work towards being aligned with ISO 26000 norms. If so, these attributes can be regarded as adding to the quality of the product and service. It is time to adopt a more nuanced approach to the conception of quality and a more enlightened view of the way products and services are being regulated globally.

This research seeks to add to the nascent literature by bringing to light the growing role of ISO standards in areas previously seen as being hard to regulate: Social responsibility and corruption control. It goes beyond the dominant tenor of existing literature as revealing "the true and disturbing vision underlying private regulation—a world where public power promotes private interests, while public interests depend on private power for protection …".[74] But these are not exclusionary measures although they can act as such and are often portrayed in such terms. These standards are often about filling a gap in the regulation and motivated by higher-order ideals such as ethics.

In other words, private regulation and how it feeds into public or quasi-public regulation is ripe for a rethink. The longstanding key objective of competition policy, at least in the Anglo-American world, is to promote business efficacy, often measured in terms of consumer prices of goods and services and how they are affected by monopoly power.[75] The welfare of the citizen was the rallying cry and this was aligned with the then nascent neoliberal agenda. As this study has attempted to show, consumer welfare and sustainability concerns show how the understanding of efficacy in competition policy has evolved.

Why is private regulation and how it feeds into public or quasi-public regulation ripe for a rethink? This is because competition, consumer prices and choices are now affected not just by price but also by regulatory standards that increasingly have a private-public interface and manifestation. This broader concern with the economic power of business entities—and how that affects the political process, making it susceptible to political manipulation—is worth closer study. This rethink can help reduce the potential "weaponisation" of policy and practice of international and national standards.

To reiterate, Singapore must remain steadfast in its commitment to excellence in quality and assurance with international standards as the main driver. As export markets become more

[74] Joel Bakan, "The invisible hand of law: Private regulation and the rule of law," *Cornell International Law Journal*, vol. 48 (2015), pp. 279-300.
[75] See, for example, Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978).

competitive, standards should be the operating system and treated as a means to an end and not an end in itself.[76] This may well mean changing the way a firm operates, especially in engaging its stakeholders and remaining relevant. This is the means by which standards can be a catalyst for innovative entrepreneurship. The success of Singapore is about the success of its commitment to standards.

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[76] An operating system, or OS, is a software that communicates with the hardware and allows other programmes and applications on a computer, smart phone to run. It provides the basic functionality for the device.