

What makes a technical specification a WTO compliant standard?



**MANNHEIMER
SWARTLING**

INTRODUCTION

In light of the rapid evolution of digitalisation, standardisation in the private sector has become a way for industry sectors to self-regulate new technologies. Although private sector self-regulation may promote innovation, there is also a risk that such activity actually introduces more trade barriers and limits the potential of innovation. The WTO framework therefore sets rules for how standards should be developed to safeguard open global trade, which is particularly relevant for technology products.

The WTO framework has a two-fold rationale. Different national standards in different countries could amount to barriers to trade between these countries. Conversely, internationally agreed standards could instead facilitate global trade between countries. The WTO legal framework therefore encourages the use of *internationally agreed* standards as a means to facilitate trade. However, to ensure that neither the standard-setting procedures, nor the use of standards, causes discriminatory treatment and unnecessary obstacles to trade, the WTO framework includes several procedural requirements.

1. TBT CONDITIONS ON STANDARD-SETTING PROCEDURES

The WTO Agreement on Technical Barriers to Trade (“TBT”) aims at ensuring that international standards, regulations and conformity assessment procedures are neither discriminatory nor create unnecessary obstacles to trade.¹ Whereas the TBT does not identify specific standardisation bodies, it sets rules for how such bodies should operate in order to be compatible with international trade rules.

Article 4.1 of the TBT states that WTO members should ensure that standardisation organisations comply with the Code of Good Practice when developing standards.² This requires, for example, non-discriminatory treatment,³ efforts to avoid duplication of standards as well as openness in procedures. According to the Committee on Technical Barriers to Trade (“TBT Committee”), WTO member countries are responsible for monitoring that standardising bodies comply the Code of Good Practice.⁴ Furthermore, in 2000, the TBT Committee agreed on six guiding “founding principles”,⁵ which form part of the TBT.⁶ WTO member countries may therefore face criticism if they fail to ensure that standards that are put forward do not adhere to these principles.

2. TBT FOUNDING PRINCIPLES

The founding principles, which should be observed during the standard-setting procedures, include:

- **Transparency:** all essential information should be made easily accessible to, at a minimum, all interested parties within the territory of WTO

members and the procedure should provide opportunity for involvement of interested parties.

- **Openness:** a standard-setting procedure should be open in a non-discriminatory manner to at least all WTO members during all stages of the standard-setting procedure.⁷
- **Impartiality and Consensus:** all relevant bodies of WTO members should be provided with meaningful opportunities to contribute to the elaboration of an international standard. The procedure should be consensus-striving and neither privilege, nor favour, the interests of only a few.⁸
- **Effectiveness and Relevance:** international standards need to be relevant to the present regulatory and market need, as well as scientific and technological developments, why standards should not obstruct fair competition nor hamper innovation and technological development.⁹
- **Coherence:** international standardising bodies should avoid conflicting or overlapping standards, and cooperation and coordination between different standardising bodies is therefore essential.
- **Development Dimensions:** efforts must be made to ensure effective participation in the standard-setting process of all WTO members.¹⁰

¹ Paragraph (E) of Annex 3 TBT.

² The Code of Good Practice is set out in Annex 3 of the TBT.

³ Annex 3(D) TBT.

⁴ Committee on Technical Barriers to Trade, G/TBT/1/Rev.13, para. 4.1, available [here](#).

⁵ The six founding principles are available [here](#).

⁶ See the reasoning by the Appellate Body in *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (“US – Tuna II (Mexico)”)*, para. 372.

⁷ The Appellate Body has elaborated on the requirement of “openness” in case law, e.g. *US – Tuna II (Mexico)*, para. 358, 364, 373-375, 379, 382, 386 and 398, available [here](#).

⁸ Id. para. 383-384.

⁹ Id. para. 124-125.

¹⁰ Read about the principles [here](#).

The principles have been transposed into various regional free trade agreements and binding legislation within the European Union.¹¹

3. A VOLUNTARY STANDARD OR A COMPULSORY TECHNICAL REGULATION?

The TBT distinguishes between *standards*, which must be voluntary, and technical *regulations*, which are mandatory requirements.¹² Because technical regulations in a certain country will have more trade restrictive effects than voluntary standards, the TBT also places more strict requirements on a WTO member before it introduces such technical regulations.¹³ For instance, other WTO members may request justification of such mandatory specifications; further, mandatory specifications may only be maintained in case their objective cannot be achieved in a less trade-restrictive manner.¹⁴

4. RECOMMENDATIONS FOR ORGANISATIONS DEVELOPING TECHNICAL SPECIFICATIONS

Organisations developing private standards, and those developing technical specifications (a specific type of private standards), should consider their institutional set-up and procedural rules. Key aspects to ensure that their standards or technical specification would be WTO compliant would be to ensure that:

- all plans and programs should be disseminated and accessed easily;
- consultation should be held and input sought from a broad category of stakeholders;
- the decision-making process should be based on consensus as far as possible; and,
- the rationale for adopting new standards or technical specifications would be to foster technological development and overlap with existing standards or technical specifications should be avoided.

CONTACT

Carolina Dackö, Partner
+46 70 977 77 48
carolina.dacko@msa.se

¹¹ See preamble recital (2) Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council. The consolidated version available [here](#) (accessed 29 March 2021). See also, EU-Singapore free trade agreement, Chapter 4, available [here](#). EU-Japan free trade agreement, Chapter 7.2, available [here](#).

¹² See the Terms and their Definition in Annex 1 of the TBT.

¹³ See *e.g.* Article 2 TBT regarding technical regulations compared to Article 4 TBT regarding standards.

¹⁴ Article 2(5) and 2(3) TBT.