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Article 4 TBT: Preparation, Adoption and Application of Standards

1. **Members shall ensure that their central government standardizing bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to this Agreement (referred to in this Agreement as the "Code of Good Practice"). They shall take such reasonable measures as may be available to them to ensure that local government and non-governmental standardizing bodies within their territories, as well as regional standardizing bodies of which they or one or more bodies within their territories are members, accept and comply with this Code of Good Practice. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the Code of Good Practice. The obligations of Members with respect to compliance of standardizing bodies with the provisions of the Code of Good Practice shall apply irrespective of whether or not a standardizing body has accepted the Code of Good Practice.**

2. **Standardizing bodies that have accepted and are complying with the Code of Good Practice shall be acknowledged by the Members as complying with the principles of this Agreement.**

Annex 3

Code Of Good Practice for the Preparation, Adoption and Application of Standards

General Provisions

A. **For the purposes of this Code the definitions in Annex 1 of this Agreement shall apply.**

B. **This Code is open to acceptance by any standardizing body within the territory of a Member of the WTO, whether a central government body, a local government body, or a non-governmental body to any governmental regional standardizing body one or more members of which are Members of the WTO and to any non-governmental regional standardizing body one or more members of which are situated within the territory of a Member of the WTO (referred to in this Code collectively as "standardizing bodies" and individually as "the standardizing body").**

C. Standardizing bodies that have accepted or withdrawn from this Code shall notify this fact to the ISO/IEC Information Centre in Geneva. The notification shall include the name and address of the body concerned and the scope of its current and expected standardization activities. The notification may be sent either directly to the ISO/IEC Information Centre, or through the national member body of ISO/IEC or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate.

Substantive Provisions

D. In respect of standards, the standardizing body shall accord treatment to products originating in the territory of any other Member of the WTO no less favourable than that accorded to like products of national origin and to like products originating in any other country.

E. The standardizing body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

F. Where international standards exist or their completion is imminent, the standardizing body shall use them, or the relevant parts of them, as a basis for the standards it develops, except where such international standards or relevant parts would be ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems.

G. With a view to harmonizing standards on as wide a basis as possible, the standardizing body shall, in an appropriate way, play a full part, within the limits of its resources, in the preparation by relevant international standardizing bodies of international standards regarding subject matter for which it either has adopted, or expects to adopt, standards. For standardizing bodies within the territory of a Member, participation in a particular international standardization activity shall, whenever possible, take place through one delegation representing all standardizing bodies in the territory that have adopted, or expect to adopt, standards for the subject matter to which the international standardization activity relates.

H. The standardizing body within the territory of a Member shall

make every effort to avoid duplication of, or overlap with, the work of other standardizing bodies in the national territory or with the work of relevant international or regional standardizing bodies. They shall also make every effort to achieve a national consensus on the standards they develop. Likewise the regional standardizing body shall make every effort to avoid duplication of, or overlap with, the work of relevant international standardizing bodies.

I. Wherever appropriate, the standardizing body shall specify standards based on product requirements in terms of performance rather than design or descriptive characteristics.

J. At least once every six months, the standardizing body shall publish a work programme containing its name and address, the standards it is currently preparing and the standards which it has adopted in the preceding period. A standard is under preparation from the moment a decision has been taken to develop a standard until that standard has been adopted. The titles of specific draft standards shall, upon request, be provided in English, French or Spanish. A notice of the existence of the work programme shall be published in a national or, as the case may be, regional publication of standardization activities.

The work programme shall for each standard indicate, in accordance with any ISONET rules, the classification relevant to the subject matter, the stage attained in the standard's development, and the references of any international standards taken as a basis. No later than at the time of publication of its work programme, the standardizing body shall notify the existence thereof to the ISO/IEC Information Centre in Geneva.

The notification shall contain the name and address of the standardizing body, the name and issue of the publication in which the work programme is published, the period to which the work programme applies, its price (if any), and how and where it can be obtained. The notification may be sent directly to the ISO/IEC Information Centre, or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate.

K. The national member of ISO/IEC shall make every effort to become a member of ISONET or to appoint another body to

become a member as well as to acquire the most advanced membership type possible for the ISONET member. Other standardizing bodies shall make every effort to associate themselves with the ISONET member.

L. Before adopting a standard, the standardizing body shall allow a period of at least 60 days for the submission of comments on the draft standard by interested parties within the territory of a Member of the WTO. This period may, however, be shortened in cases where urgent problems of safety, health or environment arise or threaten to arise. No later than at the start of the comment period, the standardizing body shall publish a notice announcing the period for commenting in the publication referred to in paragraph J. Such notification shall include, as far as practicable, whether the draft standard deviates from relevant international standards.

M. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall promptly provide, or arrange to provide, a copy of a draft standard which it has submitted for comments. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.

N. The standardizing body shall take into account, in the further processing of the standard, the comments received during the period for commenting. Comments received through standardizing bodies that have accepted this Code of Good Practice shall, if so requested, be replied to as promptly as possible. The reply shall include an explanation why a deviation from relevant international standards is necessary.

O. Once the standard has been adopted, it shall be promptly published.

P. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall promptly provide, or arrange to provide, a copy of its most recent work programme or of a standard which it produced. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.

Q. The standardizing body shall afford sympathetic consideration to, and adequate opportunity for, consultation regarding

representations with respect to the operation of this Code presented by standardizing bodies that have accepted this Code of Good Practice. It shall make an objective effort to solve any complaints.

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A. General

1 The potential negative trade effects of heterogeneous domestic standards in the global markets have been explicitly recognized by the GATT Contracting Parties at least since the 1970s.[1] Although the term "**standards**" differs from "technical regulations" in the GATT/WTO legal terminology in that the use of, and compliance with, standards is not mandatory, often business enterprises have little choice but to comply with voluntary standards as non-adherence would make it more difficult, if not impossible, to sell their products.[2] This problem was aggravated by a worldwide shift towards a greater use of standards drawn up by non-governmental bodies and a lesser use of technical regulations drawn up by government bodies.[3] Therefore, the issue of standards was heatedly discussed in the Uruguay Round.[4] Yet, almost from the start of

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1 Committee on Trade in Industrial Products, Summary of Proposals in Reports of the Five Working Groups on Non-Tariff Barriers, COM.IND/W/36, 27 October 1970, 2-3.

2 *Büthe & Mattli*, 148-159.

3 Committee on Technical Barriers to Trade, A Code of Good Practice for Non-Governmental Bodies in the Agreement on Technical Barriers to Trade, Proposal by the European Economic Community, TBT/W/110, 7 July 1988, 1.

4 See *Stewart*, 1075.

negotiations on technical barriers to trade, the GATT Contracting Parties emphasized the need to draw a clear **distinction between mandatory technical regulations and voluntary standards**. This distinction was deemed important because it affected the possible scope of government action to address the related trade concerns, given that standards are issued not only by government bodies but also by purely private entities.[5] Therefore, despite the strong need for regulation, the rules pertaining to technical regulations cannot be translated and applied to standards without adaptation. The negotiation during the Uruguay Round culminated in the conclusion of Art. 4 and Annex 3 which complement one another in addressing standards in international trade. **Annex 3** - entitled Code of Good Practice for the Preparation, Adoption and Application of Standards - **provides a comprehensive legal state-of-the-art framework for the standardization activities of standardizing bodies** which, in many but not all facets, reiterates or mirrors the requirements found in the TBT Agreement with respect to technical regulations. **Art. 4**, on the other hand, **states how and to what extent WTO Members must implement the Code of Good Practice in their respective territories**. No panel or Appellate Body report has directly addressed the interpretation of Art. 4 or Annex 3.

B. Code of Good Practice (Annex 3)

2 The **Code of Good Practice** establishes a regulatory framework for the development, adoption and application of standards. Under Art. 4.1, WTO Members have the obligation to ensure that all public and private standards falling within the definition of 'standards' in Annex 1.2 are subject to the disciplines of the Code of Good Practice. The motivation behind the inclusion of a separate legal regime for standards, the norms of which can be accepted by standardizing bodies, was to **enhance legal disciplines** for the latter.[6] In the Uruguay Round it was believed that its inclusion would constitute a definitive improvement compared to the Tokyo

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5 See Committee on Trade in Industrial Products, Report to Council, L/3496, 10 February 1971, 54.

6 Committee on Trade and Environment, Committee on Technical Barriers to Trade, Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade With Regard to Labelling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to Product Characteristics, Note by Secretariat, G/TBT/W/11, 29 August 1995, para. 65.

Standard Code which did not contain such a code.[7] The objective of the Code of Good Practice is similar to the TBT Agreement in general, i.e. **striking a delicate balance between allowing standardizing bodies to adopt and apply standards necessary to achieve legitimate objectives and preventing such standards from becoming unjustified obstacles to international trade**.[8] This objective is reflected in the content of the Code of Good Practice. As a general rule, it can be said that the Code of Good Practice restates the substantive norms and principles of the TBT Agreement (without much adjustment) for the operation of standards and deviates from the former only in respect of the transparency and notification procedures for standardizing bodies. The Code of Good Practice itself differentiates between General Provisions (paras A to C) and Substantive Provisions (paras D to Q). The Code of Good Practice is **open to acceptance to all governmental, whether central or local, and non-governmental standardizing bodies which are active in the territory of a WTO Member**. Since its adoption, the Code of Good Practice has been playing an important role in guiding how standards are set at both national and international levels. Between 1995 and 2021, 192 governmental and non-governmental standardizing bodies from 154 countries/territories have accepted the Code of Good Practice.[9] The non-governmental standardizing bodies which have accepted the Code of Good Practice include not only those which enjoy a government mandate to coordinate standards in their respective countries such as the American National Standards Institute, but also private industry consortiums such as CalConnect in the United States and Seafood Services Australia Ltd established by the Australian seafood industry.[10] At the international level, international standardizing bodies such as the International Organization for Standardization (ISO), the Forest Stewardship Council (FSC) and the ISEAL Alliance (working towards credible sustainability standards) have revised their standardization procedures or their code of good practice to incorporate the principles outlined in the Code of Good Practice.[11]

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7 See *Stewart*, 1077.

8 See *Du*, 45-46.

9 WTO ISO Standards Information Gateway, <www.tbtcode.iso.org>

10 *Ibid*.

11 ISO/IEC Guide 59:2019; FSC Principles and Criteria for Forest Stewardship (22 July 2015); ISEAL Code of Good Practice (December 2014).

I. General Provisions (Paras A to C)

3 The basic specifications of the Code of Good Practice are laid down in paras A to C.

1. Incorporation of Definitions of Annex 1 (Para. A)

4 Para. A incorporates the definitions contained in **Annex 1** for purposes of the regulation of standard-setting under Annex 3. It thereby lays down a common legal basis for the regulation of standards and technical regulations.

2. Targeted Standardizing Bodies for Acceptance (Para. B)

5 Para. B states that the Code of Good Practice is open to **any kind of standardizing body**, whether central government, local government, or non-governmental and regional, and thereby strives to bring all standards, regardless of the source of promulgation, within its ambit.[12] The TBT Committee expressly calls on WTO Members to ensure compliance with the Code of Good Practice from "bodies which are not commonly considered as standardizing bodies and which have not accepted the Code of Good Practice".[13] The TBT Agreement retains the paradigm of international law that only States, and not private parties, are regulated.[14] The TBT Agreement does however, also provide for a text imposing rules which can guide and be followed by private standardization bodies.

3. Notification of Acceptance or Withdrawal (Para. C)

6 Para. C requires that any standardizing body that has either accepted or withdrawn from the Code of Good Practice must notify the ISO/IEC Information Centre in Geneva. Such **notification** may be sent directly to the ISO/IEC Information Centre through the national member body of ISO/IEC, preferably through the relevant national member or international affiliate of

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12 International Standardizing Bodies operating on a universal level are not covered, presumably because their practice is already in conformity with the spirit of the Code of Good Practice and because, on a global level, the danger of abuse are limited when all countries participate in the process of standardization.

13 See Committee on Technical Barriers to Trade, Third Triennial Review on the Implementation and Operation of the TBT Agreement, G/TBT/13, 11 November 2003, para. 25.

14 Eminent international law scholar Brierly defined the subject of his research "as the body of rules and principles of action which are binding upon civilized states in their relation with one another". See *Brierly*, 1.

ISONET. ISONET itself is a network based on an agreement among standardizing bodies to combine their efforts to make information readily available to any interested party.[15] In November 2016**, the WTO-ISO Standards Information Gateway** was launched to replace the ISO/IEC Information Centre. The new website provides information about standardizing bodies that have accepted or withdrawn from the Code of Good Practice; the work programmes these bodies must publish at least every six months; and the template for notification of such information.[16] Notifications on the "acceptance" of, or "withdrawal" from, the Code of Good Practice must be sent to the ISO via email and they are solely the responsibility of those making such notifications. Their inclusion in the WTO ISO Information Gateway is not subject to any assessment by the ISO Central Secretariat nor by the WTO Secretariat as to their compliance with the Code of Good Practice, or their legal status under the TBT Agreement.[17] The WTO ISO Standards Gateway website contains a full list of standardizing bodies that have accepted the Code of Good Practice. As of 31 August 2021, 192 public and private standardizing bodies from 154 countries/territories have accepted the Code of Good Practice.[18]

II. Substantive Framework (Paras D to Q)

7 The **core of the substantive obligations** under the Code of Good Practice is contained in paras D to I. By and large, they resemble the parallel provisions of the TBT Agreement on technical regulations. Very often, they copy them literally (with the notable exception of the substitution of "technical regulations" with "standards").

1. MFN and National Treatment (Para. D)

8 For example, para. D imposes a **national treatment** obligation and a **most-favoured-nation** obligation on standardizing bodies. It is identical to Art. 2.1 addressing technical regulations.[19]

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15 See ISO, ISONET (2001), available at: <https://studylib.net/doc/8884946/isonet>.

16 Committee on Technical Barriers to Trade, Eighth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade under Article 15.4, G/TBT/41, 19 November 2018, 15-16.

17 Information available at: <www.tbtcode.iso/org/sites/WTO-tbt/list-of-standardizing-bodies.html>.

18 *Ibid.*

19 See *Tamiotti* & *Ramos*, Article 2 TBT, paras 7 et seq.

2. Prohibition of Unnecessary Obstacles to Trade (Para. E)

9 Para. E requires, as does Art. 2.2 in respect of technical regulations, that standardizing bodies ensure that standards are not prepared, adopted, or applied with a view to, or with the effect of, creating **unnecessary obstacles to international trade.**[20] Unlike Art. 2.2, para. E does not clarify that standards shall be "no more trade-restrictive than necessary to fulfil a legitimate objective, taking into account the risks non-fulfilment would create"[21] and does not provide a list of legitimate objectives.[22] However, the different formulation should not amount to a substantial difference in the determination of what is an unnecessary obstacle to trade.

10 The first difference between the regimes of technical regulations in Art. 2 and para. E is the lack of an equivalent to the second sentence of Art. 2.5 which contains a rebuttable presumption of legality of technical regulations which comply with international standards. However, given that generally the burden of proof is upon the complaining party, the omission should not result in a practical difference.[23]

11 The second difference can be seen in the absence of an equivalent to Art. 2.3, which imposes a dynamic obligation by declaring that technical regulations shall not be maintained if the circumstances or objectives have changed or can be addressed in a **less trade-restrictive manner.** A possible reason for the omission is the will of the Members not to overburden non-governmental standardizing bodies.[24] Yet, typically, in practice, the most important standardizing bodies are non-governmental in some WTO Members, since they are better equipped with know-how and resources than their governmental counterparts.[25] The term "application" in para. E allows for a dynamic interpretation. Therefore, the omission is likely due to the fact that the non-binding nature of standards already allows faster adaptation and adjustment to new situations and developments as compared to binding technical regulations, which is the very reason why the business community favours standards over technical regulations.

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20 See Art. 2.2. However, Art. 2.2 goes on to define when a technical regulation is not more trade restrictive than necessary, including the process for determining when a technical regulation raises an unnecessary barrier to international trade.

21 See Art. 2.2.

22 Art. 2.2, sentence 3.

23 *Schick*, 167-168.

24 *Ibid*., 168.

25 *Ibid*.

3. Use of International Standards (Para. F)

12 Para. F restates Art. 2.4 on the use of **relevant international standards**. Other than Art. 2.4, para. F explicitly allows for deviation in instances of "insufficient level of protection" or "fundamental climatic or geographical or fundamental technological problems".[26] An open issue relates to the temporal scope of the application of para. F in comparison to that of Art. 2.4, since the former speaks merely of the development of standards. It is therefore questionable whether the obligation to use international standards under para. F is limited, other than for Art. 2.4, to standards to be developed and does not govern already existing, adopted standards. Despite the wording, a substantial reason for the different treatment of technical regulations and standards does not exist.[27]

4. Participation in International Standardizing Bodies (Para. G)

13 The first sentence of para. G mandating **international harmonization** efforts matches the second sentence of Art. 2.6. The fact that in the field of standard-setting, other than in respect of technical regulations, a multiplicity of bodies may be involved in WTO Members' territory creates a need for the coordination of efforts. Accordingly, the second sentence continues to explain that whenever possible one single delegation shall represent all standardization bodies within a Member's territory.

5. Avoidance of Duplication and Overlap (Para. H)

14 For the same reason, para. H calls upon standardizing bodies within the territory of a WTO Member to **avoid duplication** or overlap of work with other domestic, regional, and international standardizing bodies. It urges domestic standardizing bodies to achieve a consensus on a national level and demands from regional standardizing bodies the avoidance of duplication or overlap with the work of international standardizing bodies. The aim is to streamline the work of the various standardizing bodies at different levels.

6. Preference for Output Performance (Para. I)

15 Para. I reflects Art. 2.8 in requiring that standardizing bodies specify standards based on product requirements in terms of **performance** rather than design or description characteristics wherever appropriate. The reason for this

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26 *Müller-Graff*, in: *Müller-Graff* (ed.), 121.

27 *Schick*, 169-170.

is that output performance requirements are less trade-distorting.[28]

7. Publication of Work Programme (Para. J)

16 Para. J provides that at least once every six months, the standardizing body shall **publish a work programme** that outlines the standards it is currently preparing and the standards it has adopted over the preceding period.[29] In this respect, para. J clarifies that a standard is considered to be under preparation from the moment that a standardizing body decides to develop it until it is adopted. It further requires that the titles of draft standards be made available upon request in English, French or Spanish and that a notice as to the existence of a work programme shall be published in a suitable national or regional publication of standardization activities in which interested parties may look for such information.

17 Moreover, para. J stipulates that a work programme for each standard should state the **classification relevant to the subject matter, the stage of the process at the end of which a new standard is promulgated and indications as to what existing international standards have been employed as a basis or starting point**. In addition, para. J prescribes that before or simultaneously with the publication of the work programme, its existence must be notified to the ISO/IEC Information Centre, either directly or via the relevant national member or international affiliate. The ISO/IEC Information Centre was replaced by the WTO-ISO Standards Information Gateway (the "Gateway") in November 2016. Standardizing bodies are now required to use a particular form (Form C) available on the Gateway webpage to indicate the existence and location of work programmes, including how and where they can be obtained, preferably through a direct link to the website. Form C contains information about the name and address of the standardizing body, the title and issue of the publication in which the work programme is accessible to a broader forum, its time frame, the price of the publication and the forms in which the publication can be obtained.[30] Alternatively, standardizing bodies can submit an electronic

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28 *Sykes*, 3. An example of an output performance requirement is a decree stating that any door in a public building must withstand open fire for at least 30 minutes; an example of an non-output performance requirement is a decree which prescribes what kind of fire-resistant materials should be used for the production of doors for public buildings; see on Art. 2.8, *Tamiotti & Ramos*, Article 2 TBT, paras 53 et seq.

29 Paras J to Q strive to make the business of standardization transparent.

30 WTO ISO Standards Information Gateway, <https://tbtcode.iso.org/files/live/sites/wto-tbt/files/docs/Forms/en/Form%20C.pdf>.

copy of their work programme in pdf format to be made available through the Gateway.[31]

18 WTO Members noted in the TBT Committee that while the notification requirements for technical regulations and conformity assessment procedures have functioned very well, **in general less information about standards was available**. They attributed this information deficiency to the difference between notification requirements for technical regulations and those for standards. To address the problem, the TBT Committee encourages the standardizing bodies that have accepted the Code of Good Practice to publish their work programs on their website and notify the specific website addresses where the work programs are published to the WTO ISO Standards Information Gateway.[32] Some standardizing bodies that have accepted the Code of Practice have not notified their working programmes or the working programmes notified are out of date, contrary to the requirement that the working programme should be published every six months.[33]

8. ISONET Membership (Para. K)

19 In addition, to allow the smooth functioning of the transparency mechanism as envisaged by the Code, para. K provides that the national member of the ISO/IEC shall make every effort to become a member of the ISONET or to appoint another body to become a member of the ISONET and to acquire the most advanced type of membership possible.

9. Possibility of Submitting Comments on Drafts (Para. L)

20 Para. L requires that a minimum 60-day period for comment be allowed before a draft standard is adopted. The purpose of this period is to allow interested parties within the territory of a WTO Member to submit **comments on the draft standard**. The standardizing body is required to publish a notice announcing the period for comment no later than its start. The TBT Committee encourages the WTO Members to use electronic tools to publish a notice announcing the period for commenting on a draft

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31 WTO ISO Standards Information Gateway, <https://tbtcode.iso.org/sites/wto-tbt/home.html>.

32 Committee on Technical Barriers to Trade, Minutes of the Meeting of 10-11 November 2016, G/TBT/M/70, 17 February 2017, 76-77.

33 Information available at: <www.tbtcode.iso/org/sites/WTO-tbt/list-of-standardizing-bodies.html>.

standard (e.g., title and volume of publication and website address).[34] Interested parties are able to access the notice as work programmes of standardizing bodies are now readily available on the WTO-ISO Standards Information Gateway webpage, mostly through a direct link to the website. The notice must include, as far as practicable, a description of whether the standard deviates from relevant international standards. By allowing "interested parties" within the territory of a WTO Member to comment, para. L allows a range of parties other than WTO Members to make comments so long as they can be defined as "interested parties". In cases where urgent problems of safety, health, or environment arise or threaten to arise, the 60-day comment period can be shortened.

10. Provision of Copies of Draft Standards (Para. M)

21 Para. M provides that, upon the request of any interested party within the territory of a WTO Member, the standardizing body shall promptly provide, or arrange to provide, a **copy of a draft standard**. The provision of the draft standard facilitates the submission of comments by interested parties prescribed in para. L. It prohibits any form of discrimination by proscribing national treatment and most-favoured nation treatment (excluding costs of delivery). Para. M is equivalent to para. P, which covers completed standards.[35]

11. Consideration of and Reply to Comments (Para. N)

22 Para. N requires that the standardizing body **take into account** comments received during the comment period during its further processing of the standard. This requirement allows the concerns of interested parties to be considered in the standard-setting process and unnecessary trade impeding effects minimized. Clearly, taking into account refers to a process of considering, weighing and balancing the points raised and interests as expressed in the comments submitted in the mechanism of standard setting. It does not necessarily require the draft to be changed in response to criticism. Given this rather lenient substantive element, a more procedural approach is pursued in addition: under sentences 2 and 3 of para. N, standardizing bodies are required to respond as promptly as possible to comments received from standardizing bodies that have accepted the Code of Good Practice if a reply is requested. If applicable, the reply shall include an explanation of why a draft standard has deviated from relevant international standards. This further helps to ensure that the

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34 Committee on Technical Barriers to Trade, Minutes of the Meeting of 10-11 November 2016, G/TBT/M/70, 17 February 2017, 76-77.

35 See below, para. 24.

standardizing body actually considers and evaluates the comments received, in particular those expert comments from standardizing bodies which are also subject to disciplines of the Code of Good Practice.

12. Publication of Adopted Standards (Para. O)

23 Para. O requires that a **standard be published promptly once it has been adopted**. At the request of any interested party within the territory of a WTO Member, the standardizing body, pursuant to para. P, shall promptly provide, or arrange to provide, a copy of its most recent work programme or of a standard that it has produced.

13. Provision of Copies of Adopted Standards (Para. P)

24 Para. P is equivalent to para. M, which covers draft standards. It provides that, upon the request of any interested party within the territory of a WTO Member, the standardizing body shall promptly provide, or arrange to provide, a **copy of the adopted standard**. It prohibits any form of discrimination by proscribing national treatment and most-favoured nation treatment (excluding costs of delivery).

14. Coordination with Other Standardizing Bodies (Para. Q)

25 Para. Q **responds to the multiplicity of standardizing bodies worldwide** and accordingly calls for consultation among standardizing bodies. It requires that standardizing bodies afford sympathetic consideration to, and adequate opportunity for, consultation with regard to representations concerning the operation of the Code made by standardizing bodies that have accepted the Code of Good Practice. The standardizing body is required to make an objective effort to resolve any complaints. The obligation contained in para. Q is hortatory at best. Nevertheless, the procedure of coordination provides an additional incentive for standardizing bodies to accept the Code to have an impact on the work of such other bodies.

C. Members' Responsibility in Respect of Standards (Art. 4)

I. General

26 Art. 4 imposes different levels of legal obligations on WTO Members depending on **the nature of standardizing bodies**. For central government standardizing bodies, WTO Members shall ensure that they

accept and comply with the Code of Good Practice. This provision converts the Code of Good Practice into a fully enforceable instrument in respect of standards adopted by central government standardizing bodies, similar to central government technical regulations.[36] By contrast, WTO Members shall take "reasonable measures" as may be available to them to ensure that local government and non-governmental standardizing bodies accept and comply with the Code of Good Practice. Art. 4 in its current version **constitutes a compromise between the limited constitutional authority of the central government in some WTO Members to compel local or non-governmental entities on the one hand and maintenance of the balance of rights and obligations under the TBT Agreement on the other**. While taking into account the practical needs mainly of federal states, it was at the same time its objective not overly to disadvantage those WTO Members which have a non-federal constitutional structure or which do have efficient legal instruments to compel local government and non-governmental standardizing bodies. Consequently, the scope of a WTO Member's obligation in respect of standards adopted by a non-central governmental standardizing body under Art. 4 is member-specific and must take into account the legal and constitutional arrangements of a particular WTO Member.[37] What is reasonable for one WTO Member, for example, because the central government has legal authority to coerce private standards-setters, may not be reasonable for another Member that has different legal and constitutional arrangements.[38] It therefore comes as no surprise that the exact design of Members' responsibility was one of the most debated issues of the negotiation of the TBT Agreement during the Uruguay Round.[39] It is also important to highlight that Art. 4 obligation is imposed on WTO Members, and not on standardizing bodies directly. Irrespective of whether or not a standardizing body has accepted the Code of Good Practice, the obligation of WTO Members with respect to the compliance of standardizing bodies with the provisions of the Code of Good Practice always apply.

II. Attribution of Acts of Central Government Standardizing

36 *Davies*, 43.

37 *Wouters & Geraets*, 486.

38 Submission by the UK, Private Voluntary Standards within the WTO Multilateral Framework, G/SPS/GEN/802, 9 October 2007, 33.

39 *Stewart*, 1075.

Bodies (Art. 4.1, Sentence 1 and Sentence 4)

27 **In accordance with general international law on state responsibility**,[40] Art. 4.1, sentence 1 attributes the acts of central government standardizing bodies to the WTO Member in providing that WTO Members must ensure that their central government standardizing bodies accept and comply with the Code of Good Practice. Accordingly, **each Member has full responsibility for its central government standardizing bodies**. Again, in accordance with general international law, the obligation is neither limited nor otherwise qualified. The meaning of the term "accept" is not restricted to legally binding measures as long as the content of the Code of Good Practice is acknowledged as decisive in the development and application of standards. The term "comply" means that the bodies' practice conforms to the actual provisions of the Code of Good Practice. Note further that according to Art. 4.1, sentence 4, this obligation is imposed on Members regardless of whether or not the relevant standardizing bodies have accepted the Code of Good Practice.

III. Responsibility for Acts of Other Standardizing Bodies (Art. 4.1, Sentence 2 and Sentence 4)

1. General

28 As regards other standardizing bodies, i.e. local government, non-governmental and regional standardizing bodies, Art. 4.1, sentence 2 states in this respect that Members - as opposed to Art. 4.1, sentence 1 in respect of central government bodies - must take "**such reasonable measures as may be available to them**" to ensure the acceptance of and compliance with the Code of Good Practice by local government, non-governmental and regional standardizing bodies of which they are members or one or more bodies within their territories are members". The wording of Art. 4.1, sentence 2, and that of the TBT Agreement's predecessor, the Tokyo Standards Code, as such are derived from Art. XXIV:12 GATT which requires for the purposes of compliance with GATT "such reasonable measures as may be available by the regional and local governments and authorities within its territories". Historically, it had been included in the GATT to accommodate the needs of federal states, such as the United States or Australia, which in some areas may face significant hurdles within their federal structure to the full implementation of international law.[41] Other than the Tokyo Standards Code,

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40 See below, paras 29-30.

41 See *Hayes*, 21-25.

the obligation in Art. 4.1, sentence 2 is not limited to the acceptance of the Code of Good Practice but also requires compliance.[42] Other than Art. XXIV:12 GATT, which imposes a best efforts obligation only with respect to public entities such as regional and local authorities, the obligation also encompasses responsibility for non-governmental bodies. Such reach pays tribute to the overwhelming practical importance of private standardization bodies in the world of standardization. However, it raises the question of to what extent the GATT panels' findings on 'reasonable measures' in Article XXIV:12 GATT are relevant to the interpretation of Art. 4.1 sentence 2, which will be discussed below.

2. General Law on State Responsibility

29 With respect to local governmental bodies, such result constitutes a deviation from general international law on state responsibility as expressed in **Art. 27 VCLT**[43] and Art. 4.1 of the **International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts**[44] which hold a state responsible for any of its governmental actions regardless of the function or the level at which the governmental authority is exercised. Under general international law, from the principle of unity of a state flows its responsibility for all acts and omissions of its organs.[45] It is irrelevant in this respect whether the central government in a (federal) State has the authority to compel compliance by the local governmental body within its internal legal system.[46] However, it is also recognized that a treaty, in a so-called **federal clause**, may provide otherwise.[47] Art. 4.1, sentence 2 constitutes such a federal clause.

30 As far as non-governmental standardizing bodies are concerned, the law on state responsibility rests upon the general premise that a State is not responsible for private acts undertaken on its territory.[48] In other words: actions of private parties, such as non-governmental standardizing bodies to the extent

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42 See *Schick*, 221.

43 Vienna Convention on the Law of Treaties, UN Doc. A/Conf.39/27, UNTS 1155 (1969), 331, 23 May 1969.

44 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentary, Yearbook of the International Law Commission, 2001, vol. II, Part Two, at 84.

45 *Ibid.*, 85.

46 *Ibid.*, 89.

47 *Ibid.*, 90.

48 See *Wolfrum*, in: *Ragazzi* (ed.), 423, 424.

that they are of a private nature,[49] cannot be attributed to the States in which the events occurred by reason of the State's territorial sovereignty alone. In this respect, Art. 4.1, sentence 2 does not constitute a *lex specialis* on attribution of private acts to WTO Members. It rather imposes a separate and distinct obligation on the WTO Member to intervene.

31 Some scholars argue that the term "**non-governmental standardizing bodies**" in Art. 4.1 does not include *any* private standardizing body. Rather, the existence of an appropriate nexus between a non-governmental standardizing body and a WTO Member is required before imposing obligation on the WTO Member for activities of the non-governmental standardizing body.[50] Such a nexus may be reflected in governmental involvement, or support or incentives provided to a non-governmental measure at issue.[51] In other words, if there is no such nexus, a WTO Member does not have legal obligation to take reasonable measures to make these entities comply with the Code of Good Practice. This narrow reading of "non-governmental standardizing body" not only echoes the traditional view that WTO law does not regulate pure private market behaviours but also seems to be congruent with the negotiation history of the TBT Agreement and the Code of Good Practice during the Uruguay Round. At the time, WTO negotiators were concerned with the evasion of the TBT obligations by developing standards through independent agencies or regional networks of regulators with government links. The national standardizing bodies of many WTO Members are incorporated as non-governmental entities, such as the American National Standardization Institute in the U.S. and the British Standards Institute in the UK. If their non-governmental body status allowed WTO Members to circumvent the disciplines of the TBT Agreement, that would be unfair to other WTO Members whose national standardizing bodies are organized as governmental entities and are subject to the TBT obligations.[52] Nevertheless, this view is contested by a more broader understanding of "non-governmental standardizing bodies" as including all private standardizing bodies. Annex 1.8 of the TBT Agreement defines "non-governmental body" as "a body other

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49 On the possibility of attribution on various grounds, including, but not limited to, delegation of governmental powers or direct control by state actors, see International Law Commission, Arts 5-11 Draft Articles on Responsibility of States for Internationally Wrongful Acts, plus commentaries, 84-123.

50 *Pauwelyn*, 210; *Mavroidis* & *Wolfe*, 9-10.

51 *Kudryavtsev*, 290.

52 *Bernstein* & *Hannah*, 578

than the a central government body or a local government body, ***including*** a non-governmental body which has legal power to enforce a technical regulation". Since the use of the word "including" must be taken to mean that the definition only provides an example of what may constitute a "non-governmental body", some scholars argue that a private standardizing body that is not trusted by a government with legal power to enforce a technical regulation should also be included in the definition of "non-govermental body".[53] This textual interpretation is less convincing than the first narrow interpretation of "non-governmental body".[54]

32 There seems to be a **disassociation of the scope of a WTO Member's legal obligation and who may accept the Code of Good Practice**. In practice, only a few private firms have accepted the Code of Good Practice, such as Calconnect in the U.S. and Seafood Services Australia Ltd.[55] The TBT Committee encourages private entities to accept the Code of Good Practice and expressly calls on WTO Members to ensure compliance with the Code of Good Practice from 'bodies which are not commonly considered as standardizing bodies and which have not accepted the Code of Good Practice'.[56]

3. Qualifications to the Obligation

33 It is clear from the wording of Art. 4.1, sentence 2 that the requirement to take reasonable measures as available to WTO Members in relation to local government and non-governmental standardizing bodies is **less stringent than the obligation to ensure compliance under Art. 4.1, sentence 1 with regard to central government standardizing bodies**. The standard of "reasonable" and "available" measures does not entail any obligation of result butimposes a positive obligation of conduct on WTO Members to actively attempt to address in good faith possible deviations by standardizing bodies from the Code of Good Practice.[57] The precise scope of a WTO Member's obligation under Art. 4.1, sentence 2 is member-specific and must take into account the domestic legal and

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53 *Vidal-Leon*, 905; *Gandhi*, 867-868; *Partiti*, 836.

54 *Du*, 200-201.

55 <www.tbtcode.iso.org>.

56 See Committee on Technical Barriers to Trade, Third Triennial Review on the Implementation and Operation of the TBT Agreement, G/TBT/13, 11 November 2003, para. 25.

57 *Bohanes & Sandford*, 35.

constitutional arrangements of a particular WTO Member. Note further that according to Art. 4.1, sentence 4 this obligation is imposed on Members regardless of whether or not the relevant standardizing bodies have accepted the Code of Good Practice.

a) Limit of Availability

34 According to the wording of Art. 4.1, sentence 2, a **Member's obligation is limited to instances where the central government body is actually in a position to direct or at least influence the standardizing bodies at stake**. If the Member is unable to act for factual or legal reasons, it has not breached its obligation. This is in stark contrast to the rules of general international law, which attribute to the state not only all acts of a state organ, but also the conduct of a non-state entity if the non-entity is empowered by law to exercise elements of governmental authority and is acting in that capacity in the particular instance.

b) Limit of Reasonableness

35 The next question which arises is more difficult to resolve: **whether the element of "reasonable" as provided for in Art. 4.1, sentence 2 further restricts the obligation of a WTO Member to interfere within its internal legal system**. Reasonableness implies "a degree of flexibility that involves consideration of all of the circumstances of a particular case".[58] It is an indeterminate legal term open to interpretation and concretization by panels and the Appellate Body. What is clear is that the **obligation does not require full compliance**. Some commentators argue that a measure would not be reasonably available if it entails substantial costs or technical difficulties in its implementation and enforcement. A reasonably available measure must also leave an appropriate scope of autonomy and freedom to the non-governmental standardizing bodies concerned.[59] The determination of what are "reasonable measures" depends on the constitutional relationship between the different levels of government within a WTO Member. Although nearly all non-governmental national standards bodies have some form of institutionalised collaboration with central government bodies, the extent of this collaboration varies greatly from one country to another.[60] Yet, it must be noted that any broad understanding of unreasonableness

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58 Appellate Body Report, *US—Hot-Rolled Steel*, WT/DS184/AB/R, para. 84.
59 *Partiti*, 837.
60 E.g. *Middleton*, 208-209.

would result in the further disadvantaging of non-federal WTO members for which legal impediments to implementation on lower stages of their internal hierarchy are usually unknown. Moreover, it should not be forgotten that the mass of standards is promulgated by non-central government bodies. Accordingly, in the interest of reciprocity, i.e., the preservation of balancing the mutual rights and obligations of WTO Members, further limitations on the obligations of WTO Members under the TBT Agreement should be applied carefully. Accordingly, it may be reasonable for all WTO Members to adopt measures which aim at familiarizing standardizing bodies with the content of the Code of Good Practice. What is less clear is the circumstance under which it would be reasonable to expect the central government to withdraw or reduce a subsidy to a standardizing body as a result of non-compliance with the Code of Good Practice.

36 In *Canada—Gold Coins*, the GATT Panel held that the basic principle in determining which measures are reasonable in Art. XXIV:12 GATT is that the consequences of the non-observance of the provisions of the GATT by local government for trade relations with other contracting parties "are to be weighed against the domestic difficulties of securing compliance".[61] The GATT Panel in *Canada—Alcoholic drinks* further held that, in order to examine whether Canada had demonstrated that it had taken all reasonable measures available to it, Canada would have to show that it had made "*a serious, persistent and convincing effort*" to ensure compliance with the provisions of the GATT Agreement.[62] It is not clear to what extent the GATT panels' findings on "reasonable measures" as embodying an onerous positive duty in Art. XXIV:12 GATT are relevant to the interpretation of Art. 4.1 sentence 2. The key difference between these two provisions is clear: while Art. XXIV:12 GATT addresses a GATT member's obligation regarding *regional and local governments* which exercise governmental authority, Article 4.1 sentence 2 deals with not only local government bodies, but also non-governmental standardizing bodies with no public authority. Although negotiators at the Uruguay Round have envisaged problems with the implementation of the provisions in respect of private bodies, in particular regional standardizing bodies, the wording of Art. 4.1, sentence 2 does not differentiate between the various standardizing

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61 Panel Report, *Canada—Measures Affecting the Sale of Gold Coins*, L/5863, paras 68-69.

62 Panel Report, *Canada—Import Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, DS17/R, 39S/27, para. 5.37.

bodies.[63] It may be assumed that, to the extent that the central government authority has constitutional power or influence over a local government body, it would be reasonable to expect it to exercise it. However, a higher level of central government intervention may be inappropriate in the case of non-governmental entities without government links. Otherwise, it would put voluntary private standards in the same position as mandatory governmental technical regulations, an outcome which seems to be contrary to the requirement of WTO Members taking only reasonable measures to ensure compliance.[64]

4. Dispute Settlement

a) Judicial Review

37 Under GATT 1947, panels under Art. XXIV:12 GATT 1947 rejected the view advanced by defending parties that what is reasonable can only be determined by that party alone.[65] This is even more true in determining reasonableness under Art. 4.1, sentence 2 under the DSU. This is confirmed by Art. 14 on dispute settlement.[66] Accordingly, **what is considered reasonable is fully reviewable by a panel** and does not lie within the discretion of a WTO Member.

c) Burden of Proof

38 Unlike is the case with Art. XXIV:12 GATT which forms an exception to the general obligations under GATT, the burden of proof is - in accordance with the general rules - **upon the complaining party to present a *prima facie* case** that the defending WTO Member has acted inconsistently with Art. 4.1.[67] Yet, the **threshold for a *prima facie* case is relatively low** as the defending party is in a more appropriate position to judge and present its internal legal system in respect of reasonable and available measures.

5. Members' Responsibility

39 Interestingly enough, an equivalent provision to Art. 3.5, which explicitly

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63 Related Attempts of the EC to impose stricter responsibility at least with respect to local government bodies failed. See *Stewart*, 1078.

64 *Prévost*, 23.

65 Panel Report, *Canada—Provincial Liquor Boards (EEC)*, BISD 35S/37; today, see Understanding on the Interpretation of Art. XXIV GATT, paras 13-14.

66 See *Eliason*, Article 14 TBT, *passim*.

67 See *Mavroidis*, Article 11 DSU, para. 3.

imposes full Member responsibility for acts of local government bodies and non-governmental bodies in respect of technical regulations, does not exist in Art. 4.[68] The difference in wording from that of Art. 4.1, sentence 4 reveals that the latter is not the equivalent of the former. **Its purpose is merely to clarify that an Art. 4.1 obligation is imposed on WTO Members, and not on standardizing bodies directly.** The responsibility of WTO Members applies regardless of whether or not the standardizing body has accepted the Code of Good Practice. Accordingly, the question remains whether a WTO Member can be held responsible for acts of non-central governmental bodies although the WTO member has either no possibility to intervene for factual or internal legal reasons or has the possibility to intervene but can only employ unreasonable measures. Given the lack of an equivalent provision to Art. 3.5 concerning technical regulations, it can be argued *e contrario* that a Member's responsibility is of a more limited nature.[69] On the other hand, Art. 14.4 on dispute settlement lists *inter alia* Arts 3 and 4 without further distinction and simply declares that unsatisfactory "results shall be equivalent to those as if the body in question were a Member". One may interpret Art. 14.4 as indicating that Art. 4 entails the full Member responsibility even in the absence of available and reasonable measures.[70] However, this interpretation may render Art. 4.1 sentence 2 inutile because the latter only requires a WTO Member to "take reasonable measures available to it". A competing and arguably more sensible interpretation is that Art 14.4 reinforces the principle embodied in Art 4.1 sentence 4, i.e., WTO Members are responsible for local government and non-governmental standardizing bodies' violations of the Code of Good Practice.[71] A dispute settlement proceeding can be commenced against a WTO Member in the event of non-compliance. Nevertheless, the scope of WTO Members' obligation must be interpreted in light of Art. 4.1.

IV. Responsibility for Violations of Abstention (Art. 4.1, Sentence 3)

40 Lastly, Art. 4.1, sentence 3 provides for direct Member responsibility without the need to attribute the conduct of standardizing bodies to WTO Members. It prohibits with respect to all standardizing bodies, be they central

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68 See Art. 3.5.

69 *Schick*, 225.

70 *Kudryavtsev*, 301.

71 Ibid, 302.

government bodies, local government bodies, regional bodies or non-governmental bodies, any WTO Member's measures which have the direct or indirect effect of requiring or encouraging non-compliance with the Code of Good Practice by such standardizing bodies. In other words, Art. 4.1, sentence 3 lays down a **general rule of abstention for WTO Members**. This responsibility is independent from the responsibility by attribution outlined above.[72] By complementing the obligations arising under Art. 4.1, sentences 1 and 2, Art. 4.1, sentence 3 closes any potential gap in the law on Members' responsibility.

V. Parallelism of TBT Agreement and Code of Good Practice (Art. 4.2)

41 Art. 4.2 provides that standardizing bodies that have accepted and are complying with the Code of Good Practice are acknowledged by WTO Members to be complying with the principles of the TBT Agreement. This paragraph clarifies the relationship between the TBT Agreement as such and the Code of Good Practice. So long as a standardizing body accepts and fulfils the requirements of the Code of Good Practice, there is no legal risk that it may be found to have acted inconsistently with the principles of the TBT Agreement in WTO disputes. The inclusion of Art. 4.2 was necessary since the Code of Good Practice was designed as a separate and special legal instrument for standards, distinct from the TBT Agreement which covers both technical regulations and standards but primarily focuses on the former.

D. Evaluation

42 In broad terms, the requirements of Annex 3 and Art. 4 for standards are similar to the obligations respecting the preparation, adoption, and application of technical regulations set out in Art. 2, but with important differences. These differences reflect the distinction between mandatory technical regulations and voluntary standards and the difficulty of governing a standardization body which in many countries is dominated by a network of private institutions. Through the inclusion of a separate of Code of Good Practice in Annex 3, WTO Members were able to avoid the direct application

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72 See also the comparable provision in Art. 10.1 of the Energy Charter Treaty.

of TBT disciplines to such private institutions while at the same time increasing the chances of the compliance of such private standard setting with the principles of the TBT Agreement. Since its adoption in 1995, the Code of Good Practice has been either formally accepted by governmental and non-governmental standardizing bodies in accordance with Sub-Annex C or its principles incorporated in the standardization procedures of many international standardization bodies. It is fair to say that the Code of Good Practice is widely accepted as representing the international best practice in setting standards.