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Methodological Arrangements to Avoid Technical Barriers to Trade

Note by the Secretariat

Summary

The enclosed document has been made available by the Senior Advisor to the WP.6 Bureau (Mr Christer Arvius). It gives an overview of instruments of regulatory co-operation and examples of actual agreements on such co-operation with regard to the level of ambition of eliminating technical barriers to trade (TBTs).

The document constitutes an extract and re-edited version of a Study by Andersson, F and Arvius, C (2010) "Arrangements to Avoid Technical Barriers to Trade". It is submitted to the delegations as background to take a decision on whether or not to pursue a revision of the UNECE "International Model" enshrined in Recommendation L.

Action items

Having regard to the enclosed study with findings concerning different arrangements to avoid TBTs and the experience gathered so far with the regulatory co-operation work under the UNECE "International Model", it is suggested that a review is initiated by the Working Party of the International Model.

The review should aim at:

- Assessing what has worked well and what has worked less well in implementing the International Model;
- Deciding if an amendment of the text of the Recommendation L would be conducive to a strengthening of regulatory cooperation projects under the WP. 6 and if so:
 - Giving a precise mandate to the Bureau on the step forward so as to make the International Model more effective for use by trading partners.

1. Which are the main instruments for regulatory cooperation?

1. The market constantly seeks new ways to avoid TBTs when possible. Examples of such solutions include international standardization and different forms of cooperation between test laboratories. However the market cannot solve all types of TBTs, e.g. in regulated areas which might call for government to government regulatory cooperation in order to cope with the appearance of TBTs.

2. There are three main avenues to eliminate trade distorting effects of technical rules: regulatory reform/liberalization, mutual recognition and harmonization.

3. Regulatory measures are almost without any exception based on legitimate objectives such as protection of life and safety of humans and animals, and the environment. If such measures follow good regulatory practice liberalization is not a viable option. Harmonization is a far reaching approach which requires a legislative identity e.g. in a region of countries such as the EU, and is an expensive and lengthy exercise for the trade partners concerned. Thus, harmonization is not an easy alternative when it comes to trade facilitation between sovereign states. Ultimately mutual recognition is a less demanding and more flexible method.

4. The need for differences in technical rules between states should however be acknowledged. Local differences due to the climate or the need to protect unique and endangered species etc. might call for deviations in technical rules among trading partners. This is also recognized in the WTO/TBT Agreement: "Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or of the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement".

5. Hence the obligations stemming from the TBT Agreement is not to advocate full elimination of technical barriers to trade - free circulation of products - but to eliminate "unnecessary" barriers. This can be done with different degrees of ambition.

6. With the terminology of the WTO-TBT Agreement three main categories of technical rules are identified:

(a) *Technical regulations*, which are mandatory requirements prepared, adopted and applied by central or local governmental bodies, and non-governmental bodies. They are designed to fulfil the objectives of placing safe products on the domestic market. These objectives aim to ensure the health and safety of the citizens, animals or plants.

(b) *Standards* (including packaging, marketing and labelling requirements) given by central or local government standardizing bodies and non-governmental or regional standardizing bodies. Standards are voluntary documents, developed for common and repeated use. Their objective could include those of technical regulations, but they also have another aims, for example increase the transparency, quality and competitiveness of products and services as well as to promote innovation, the reduction of trade barriers and consumer protection. Further, the TBT Agreement recommends the use of international standards whenever possible which facilitates import and export (i.e. trade).

(c) *Procedures for conformity assessment* with technical regulations and standards provided by central or local governmental bodies, and non-governmental bodies. Such procedure are used to ensure that technical regulations or standards are met, and thus that the safety of humans, animal or plants is protected.

7. The general economic approach to regulation and the provisions of the TBT Agreement favour rules that are transparent, predictable and non-discriminatory both in objectives and in application. Technical rules that vary between countries may result in barriers to trade. When countries do not align or recognize each other's technical rules, the processes for companies operating in the markets of those countries become costly and time-consuming.

8. TBTs may also occur due to "bad regulatory practice" such as when the technical rules are not well-targeted to the specific objective they aim to fulfil, are implemented arbitrarily or are enforced through testing and certification requirements that are unclear, not well-publicized or difficult or expensive for foreign manufacturers or producers to access. Findings by the OECD show that the cost of testing and compliance certification could constitute between 2 and 10% of overall production costs.¹

9. In short, technical rules may become TBTs, reducing trade and hampering productivity growth and eventually welfare. To avoid unnecessary conflicts between national rules, trading partners increasingly co-operate. The TBT Agreement is an example of this, and the single market program in the EU another. The examples also point to the variety of depth and degree of ambition in the co-operation. In a number of areas the EU has almost completely harmonized necessary aspects of technical regulations, standards and conformity assessment procedures and structures. In the "non-harmonized area" within the EU a general principle of mutual recognition of goods prevails. The TBT Agreement on the other hand is focused on a discipline of good (national) regulatory practice through a number of policy principles. Between those two avenues there could be different types of transnational arrangements such as mutual recognition agreements (MRAs) and free trade agreements (FTAs).

2. The level of ambitions in regulatory co-operation

10. Regulatory co-operation is a concept that includes a wide range of activities. The easiest form includes discussions and exchange of information and the most ambitious form is fully harmonized technical regulations through agreements on common rules. The activities in between relate to good national regulatory practice and to further gradual deepening of trans-national cooperation. This ranges from agreements on common procedures for testing, recognition of test results and certificates, to recognition of product specifications. Each step includes a variety of possible actions which might include unilateral, bilateral and plurilateral arrangements.² The different levels of regulatory cooperation are sketched in Table I.

11. The first level of ambition in co-operation is to conduct **information exchange** in order to provide transparency. Examples include the *notification procedures and Enquiry Point functions* in the TBT Agreement, and within the EU (Directive 98/34/EC). When it comes to provisions on TBTs in FTAs typically the provisions of the TBT agreement is restated. Furthermore, those FTAs could include provisions for technical dialogues through the establishment of a bilateral "TBT Committee". A more ambitious form of information exchange is represented by bilateral *regulatory dialogues* e.g. EU-Japan and EU-US.

12. The second level contains **observance of principal trade policy provisions**. Such principles are laid down in the TBT Agreement as well as in other internationally accepted

¹ Lesser (2007) with reference to an OECD study from 1996.

² Arvius (2003).

documents on Good Regulatory Practice (GRP) and Regulatory Reform provided by e.g. the OECD and APEC.

13. The TBT Agreement focuses on the first two levels. In order to avoid unnecessary TBTs, the TBT Agreement prescribes a number of key policy provisions to be observed when members prepare, adopt and apply technical regulations, conformity assessment procedures etc. Hence the TBT Agreement is primarily to be seen as a "discipline on national practices".

Table 1: Level of ambition in regulatory co-operation

<i>Nature of action</i>	<i>Different degrees of regulatory co-operation</i>	<i>Example of agreement</i>
National practices (“good regulatory practice”)	Information exchange procedures/ transparency measures	- TBT Agreement - Directive 98/34/EC - Regulatory dialogues
	Observance of principal trade policy provisions - non-discrimination, proportionality, performance based regulations, use of international standards etc.	- TBT Agreement - GATS - FTA - EU New Approach Policy - UNECE recommendations
Trans-national arrangements (“Regulatory co-operation”)	Recognition of conformity assessment procedures - common procedures (testing procedures, test report forms) - accreditation systems	- MLA ³
	Recognition of results of conformity assessment procedures - certificates of conformity - inspections - test results	- MRA - OECD: GLP ⁴
	Recognition of (functional) equivalent technical regulations - product specifications (essential requirements and standards linked to those requirements) - marking specifications, marks etc.	- ACAA ⁵ - PECA ⁶ - UNECE "International Model" - EU-South Korea FTA Annex on Automotives - NAMA (NTB annexes) - EU-US MRA on marine equipment
	Recognition of - fully harmonized technical regulations	- EU – harmonized area

³ Multilateral recognition agreements between accreditors.

⁴ Good Laboratory Practice.

⁵ Agreements on Conformity Assessment and Acceptance of Industrial Products.

⁶ Protocol to the European Agreements on Conformity Assessment and Acceptance of Industrial Products.

14. The third level of co-operation includes **recognition of conformity assessment procedures**. Examples are recognition of the use of common testing procedures or test report forms, as well as recognition of accreditation systems (including procedures for assessment and criteria for acceptance of conformity assessment bodies). Examples of the latter include the MLAs (multilateral recognition agreements) between accreditors within the IAF (International Accreditation Forum), ILAC (International Laboratory Accreditation Cooperation), and the EA (European co-operation for Accreditation).

15. A further deepening of the degree of co-operation includes, at the fourth level, **recognition of results of conformity assessment procedures**. The ambition varies from the stage including *recognition of test results*, to a more advanced level with e.g. *recognition of certificates of conformity*, or of inspection, or of marks of conformity. Examples are the bilateral MRAs between EU and Australia, New Zealand, Canada, the US and Japan. Other examples include MRAs concluded between countries within APEC.⁷

16. The fifth level includes **recognition of functionally equivalent technical regulation**. This level includes, in addition to conformity assessment procedures, recognition of product specifications and marking specifications. Examples of such co-operation include the previous agreements between the EU and acceding countries (PECA) and agreements under discussion between the EU and some neighbouring countries (ACAA), where these countries have approximated their legislation to the EU legislation in specific sectors. A method that can be used as a platform for plurilateral agreements in specific sectors is the *International Model for Technical Harmonization* developed within the UNECE.⁸

17. The most ambitious level of technical co-operation is the establishment of **fully harmonized technical regulations**. The obvious example here is the harmonized technical regulations within the EU.

18. Regulatory co-operation arrangements at the fourth level, only give *partial elimination of TBTs* covering specific aspects (e.g. MRAs to avoid the need for products to be re-tested or re-certified in the importing country). *Full market access* ("free circulation") on the other hand requires regulatory convergence/harmonization of regulations (levels five and six). Depending on the situation two possibilities are present. *Full technical harmonization* (sixth level) requires "legislative identity" to agree in detail, e.g. on the basis of common legislation in the EU, and in the EFTA⁹/EEA¹⁰ countries. In regards to agreements between countries without "legislative identity" the UNECE "International Model" offers the possibility to co-operate on the basis of regulatory convergence creating *regulatory equivalence* (fifth level).

3. Agreements on mutual recognition

MLA – recognition of conformity assessment procedures

19. Multilateral Agreements between Accreditors (MLA) have been formed between accreditation bodies within IAF (International Accreditation Forum), ILAC (International Laboratory Accreditation Cooperation) and the EA (European cooperation for accreditation). MLA serves the purpose of building confidence between accreditation bodies, but it does not in itself remove TBTs. The agreements could be seen as means to

⁷ Asia-Pacific Economic Cooperation.

⁸ United Nations Economic Commission for Europe.

⁹ European Free Trade Area.

¹⁰ European Economic Area.

provide a basis for further government to government agreements e.g. different forms of MRAs.

MRA – recognition of results of conformity assessment procedures

20. To ease the burden of proving compliance with technical regulations and to avoid duplication of testing, agreements have been formed with the purpose to enable firms to conduct conformity assessment in the home country with the regulations of the country where the products are to be sold. The parties in such an agreement are thus still free to formulate their own regulations, why MRAs of this type just partly remove TBTs.

21. In this form of MRA the parties can designate Conformity Assessment Bodies (CABs) that have the right to assess conformity of technical rules and standards of the other part. In practice this implies that the authorities of one part reveal some of the enforcement of technical regulations to the other part. Such a system requires mutual confidence that the system of the other part is effective and can deliver reliable results. The experience shows that, despite MLAs being in place, it has been hard to establish the necessary mutual trust. Further, this has shown to be more difficult the larger the regulatory differences between the parties.

22. The EU has agreements of this type with US, Japan, Canada, Australia, New Zealand, Switzerland, and Israel.

23. MRAs of this type have shown to be complex both in negotiation and implementation. Evaluations ¹¹ of the agreements led to the European Commission in 2001 concluding that MRAs are only worth negotiating if the certification systems are not too different, if the regulatory infrastructures are not too different, and if trade between the parties is sufficient to justify the cost.

MRA – Recognition of equivalent technical regulations (MRA+, ACAA anti PECA)

Even in cases where technical regulations differ a possibility to create increased market access between two parties exists if the parties recognize the respective regulations as equivalent. A prerequisite for such a recognition would be that the regulations of the two parties have the same regulative objectives, which also could be expressed as having the same effect. In such cases the parties can agree that products that fulfill the requirements of one part are allowed to be placed on the market of the other part. This type of agreement is recommended in the WTO/TBT Agreement.

An example of an agreement of this type is the MRA between the US and EU on maritime equipment, which is based on regulations developed under the Conventions of the International Maritime Organization (IMO). The Agreement is based on international, within the IMO, agreed definitions of equipment, which is to be covered by mutual recognition. For each product, relevant equivalent regulations in the US and EU are identified. This agreement also opens up for negotiations with third countries. Thus, this bilateral agreement between the EU and the US could be developed into a plurilateral agreement with other interested countries. The experience of this type of agreement is that it is considered to be well- functioning.

When it comes to agreements between EU and neighbouring countries alignment mechanisms are used in order to achieve functioning regulative cooperation. The alignment mechanism requires that accession countries achieve full conformity with Community technical regulations and European conformity assessment procedures. This can be done on

¹¹ E.g. Hogan & Hartson LLP (2003).

full scale, like in the cases of the pre EU accession strategy (in the field of free movement of goods) of certain countries in forms of *PECAs*,¹² or *partly*, where alignment is achieved in few specific sectors based on prioritized sectors in form of *ACAAs*.¹³ The different degrees of alignment processes aim to integrate third countries to the union in the area of free movement of goods, and expand trade, without putting certain EU interest, like public protection, on stake.

24. As the alignment mechanisms are relatively new the real effects of the mechanisms are hard to evaluate. A prerequisite for successful alignment in the area of free movement of goods is, however, that the legislative alignment is followed by a practical implementation of organizational, practical and methodical systems. There is evidence from trade related technical assistance that legislative implementation is not always followed by practical implementation of the system, but that principles of the European conformity assessment merely exist on paper in new member countries integrating with the EU.

25. In relation to *ACAAs*, problems occur when only certain product sectors have been subjected to alignment and others are left out, creating confusion of the underlying principles of technical harmonization.

26. It must also be observed that in transition economies pre-accession process often start with building up the national conformity assessment infrastructure (based on the EU system with large freedom of the manufacturer) while the enforcement infrastructure, with market surveillance, gets less attention. This naturally creates problems in trade with countries with no, or very weak, consumer protection.

27. As a result the most important factor in achieving successful technical harmonization in transition economies and accession countries is not the technical assessment projects as such, but the quality of measures that are taken for infrastructure development as well as the coverage of the elements that constitute the European system for conformity assessment, including enforcement and consumer protection.

28. A method for mutual recognition of equivalent regulations and international approximation has been established within the cooperation in the UNECE, *International Model for Technical Harmonization*.¹⁴ The International model implies that countries agree on Common Regulatory Objectives (CROs) and otherwise refer to applicable international standards. Thus this "International model" is a parallel to the New Approach method of technical harmonization used in the EU. In short the principle elements to be included in a CRO are:¹⁵

- *Scope statement*

A statement of the products covered by the CRO.

¹² The Community therefore negotiated Protocols to the Europe Agreements 011 Conformity Assessment and Acceptance of Industrial Products (PECAs) with a number of countries that acceded to the European Union on 1 May 2004 - Hungary, the Czech Republic, Lithuania, Latvia, Slovenia, the Slovak Republic and Estonia. Formal negotiations on PECAs are ongoing with the candidate countries Bulgaria and Romania.

¹³ This agreement is currently prepared and negotiated with neighbouring countries, notably Mediterranean ones (Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Palestinian Authority, Tunisia) and Ukraine in industrial sectors where the legislation is harmonized at EU level.

¹⁴ Recommendation L. International Model for Technical Harmonization Based on Good Regulatory Practice for the Preparation, Adoption and Application of Technical Regulations via the Use of International Standards.

¹⁵ Annex B of Recommendation I.

- *Product requirements*

Such requirements needed for protection of legitimate objectives (which are conform to the definition in the TBT Agreement) should lay down the principal issues of concern and be specified in terms of performance requirements rather than design or descriptive characteristics . Requirements should be limited to relevant aspects and be proportionate to the hazard inherent in a given product.

The detailed provisions on how to meet the requirements of the CRO should preferably be specified in international standards.

- *Reference to standards clause*

A list of applicable international standards that correspond as a whole or partially to the requirements.

- *Compliance clause*

Provisions on how compliance is demonstrated. Countries should agree on the range and contents of possible conformity assessment procedures that are considered to give the necessary level of protection under the CRO. When applicable the CRO should also state the conditions under which the supplier can make a choice if more than one option is provided for. Such options include SDoC, third party certification or inspection.

When applicable a list of conformity assessment bodies that are recognized to assess and attest conformity assessment should be included.

- *Market surveillance and protection clause*

The countries that have agreed on CROs are responsible for market surveillance on their territory and have the right to withdraw products from national markets that do not comply with the CRO.

29. Within the cooperation in the UNECE - Regulatory cooperation and standardization policies (WP.6) there are currently three initiatives of cooperation with the aim to obtain converging rules in the areas of Earth- moving machinery, Telecommunication Equipment, and Equipment for explosive environments.

30. The EU has expressed its support to the UNECE International model¹⁶ and the expert group on European standardization, EXPRESS,¹⁷ recommend that EU/EFTA member states: "As a key ingredient of trade policy, work with the ESOs [European Standardization Organizations] to make better use of standardization in the context of bi- and multi-lateral programme dialogues and engage more effectively in areas of strategic importance in the building of alliances (particularly in relation to enlargement , EU neighbourhood policy, the BRIC countries; and other trading partners)."

4. Conclusions – a strategy to continue the work to avoid TBTs

31. There is a multitude of instrument to use in the complex work to eliminate or reduce the effect of TBTs. Which instrument to use depends on the situation at hand, e.g. on the degree of regulatory difference between the parties or on whether international standards exist in a particular sector and the amount of trade. Since the work of avoiding TBTs is of

¹⁶ This has been recognized in the Council conclusions 1 March 2002 on standardization (2002/C 66/01) and the Council conclusions 21 December 2004 on the role of European standardization (14790/2/04).

¹⁷ Express (2010).

long term character, and it easily falls into complex negotiations it is important to be careful in the choice of level of ambition based on the expected result and the economic potential of a measure.

32. Different types of arrangements and measures are thus required. With regard to the general relationship between trade in goods and services, the methods at hand to avoid obstacles to trade from technical regulations or standards do not differ in substance. Thus, a strategy to avoid TBTs may well be applied to trade in services as well as in goods.

33. A fundament in the effort to avoid TBTs is to apply **good regulatory practice (GRP)** also from a trade perspective in the preparation, adoption and implementation of technical regulations and standards. If countries follow such principles together with the obligations of the WTO/TBT Agreement, on e.g. transparency and non-discrimination, it would be a substantial achievement in the efforts to avoid TBTs. This is not the least important in the field of services.

34. The efforts to develop and implement GRP domestically should continue. Active participation on information exchange and further developments of good regulatory practice within the **WTO/TBT Committee** in combination with **technical assistance** in this area to developing countries should continue to be a priority. Further, the **OECD** conducts important work in this area in the form of studies and country peer reviews, which needs to be continued in order to further develop the concept and identify best practice as well as to increase the efficiency in implementation. International cooperation in the field of GRP between the OECD and other organizations such as APEC should also be supported.

35. One important aspect of regulatory cooperation is **trade policy dialogue** between countries and the UNECE WP.6 provides an ideal forum for this.

36. Solving **existing TBTs** is also important. A TBT strategy should include a long-term strategy to avoid TBTs in new legislation based on GRP and regulatory cooperation. Therefore, the efforts to reduce TBTs in existing fora for **regulatory trade dialogue**, in the WTO/TBT Committee and through MRA-based solutions are needed.

37. **MRA on results of conformity assessment procedures** have however shown disappointing results. Complex and costly negotiations have been followed by practical problems and slow implementation. Previous conclusions by the EU on MRAs with trading partners imply that such agreements should only be negotiated when the regulatory differences between the parties are not too large and when trade is sufficient to justify the cost of such an investment. The focus should instead be on **MRA of equivalent technical regulations**. Such agreements are possible only when such equality is codified e.g. in a specific agreement. Therefore, it should be worth aiming at effective participation in the work and support to the efforts within UNECE and other relevant international organizations to increase equivalence of technical regulations on international level. Within the area of **standardization**, the work should focus on promoting increased identity between European and international standards.

38. Emphasis should be made to use **standards receptive regulatory models** such as the *International Model* developed by the UNECE in regulatory trade-related cooperation. When it comes to developing countries **technical assistance** is needed both as regards to governments developing and implementing quality infrastructures and to firms to ease the burden of complying to mandatory requirements as well as to product specification demanded by business partners.

4. Way forwards: a proposal for the revision of Recommendation L

39. Having regard to the above study with findings concerning different arrangements to avoid TBTs and the experience gathered so far with the regulatory co-operation work under the UNECE “International Model”, it is suggested that a review is initiated by the Working Party of the International Model.

40. The review should aim at:

- Assessing what has worked well and what has worked less well in implementing the International Model;
- Deciding if an amendment of the text of the Recommendation L would be conducive to a strengthening of regulatory cooperation projects under the WP. 6 and if so:
- Giving a precise mandate to the Bureau on the step forward so as to make the International Model more effective for use by trading partners.