

2 July 2003

**UNICE COMMENTS ON NON-TARIFF BARRIERS TO TRADE:
TECHNICAL BARRIERS TO TRADE**

In its position of 25 October 2003 on non-agricultural market access negotiations¹, UNICE insisted that equal importance be given to the removal of non-tariff barriers to trade (NTBs) and listed a number of examples of NTBs that are of particular concern for business. Such barriers can take many forms and can change quickly, depriving economic actors of effective access to other markets. Experience shows that as tariffs are reduced, the importance of NTBs grows. Consequently, effective market access depends on the reduction and/or elimination of both types of barriers.

UNICE therefore welcomes the incorporation of a section on non-tariff barriers in the Draft Elements of Modalities for Negotiations on Non-Agricultural Products submitted by the chairman of the WTO negotiating group on Market Access², even though the level of ambition in this area remains rather vague. We continue to insist that all types of NTBs are addressed in the market access negotiations, whether they result from a lack of implementation of existing rules or from an absence of rules.

UNICE also welcomes the third submission by the European Communities on Market Access for Non-agricultural Products.³ This submission clearly highlights that most barriers are either covered by WTO rules or can be addressed in the context of the Doha negotiating mandate.

In this position UNICE would like to specifically focus on technical and/or regulatory barriers to trade. Business is concerned that regulatory barriers are becoming one of the main obstacles to the free flow of industrial goods notwithstanding the already far reaching obligations contained in the Agreement on Technical Barriers to Trade (TBT Agreement).

Technical Barriers to Trade (TBT)

UNICE recognizes that the TBT Agreement goes beyond the traditional GATT non-discrimination principle and obliges the membership to ensure that technical regulations do not become unnecessary obstacles to international trade. However, while the TBT Agreement's notification requirements ensure transparency, they leave the membership with a (too) wide margin of discretion. The TBT Agreement falls short of requiring harmonisation or obliging its members to facilitate market access and trade when regulating.

Although the TBT Agreement has not been tested in many WTO dispute settlement cases, UNICE calls on the WTO membership to improve the TBT Agreement both substantially and procedurally, in order to meet the needs of business.

¹ UNICE (25 October 2002) UNICE Position on non-Agricultural Market Access Negotiations.

² World Trade Organisation (16 May 2003) Draft Elements of Modalities for Negotiations on Non-Agricultural Products, Negotiating Group on Market Access, TN/MA/W/35.

³ Commission of the European Communities (1 April 2003) Market Access for Non-Agricultural Products: Non-Tariff Barriers, WTO Negotiating Group on Market Access, TN/MA/W/11/Add.3.

Problems with the TBT Agreement

The following points are examples of inefficiencies in the TBT Agreement

- The TBT Agreement requires members to use international standards as a basis for technical regulations wherever possible. Although the Agreement states that members “shall use” international standards, in practical terms this requirement does not translate into an obligation for the Member to show that the regulation, standard or conformity assessment procedure is in line with the international standard. For instance, the Agreement requires the Member to refer to an international standard and to use the least trade-restrictive conformity assessment method when regulating, but nothing obliges a Member to motivate its decision when not doing so. And the notification procedure does not sufficiently cover this aspect meaning that there is no transparency on Members’ usage of international standards.
- The link between the WTO obligations and standards and conformity assessment procedures is weak compared with regulations since private bodies cannot per se be subject to the TBT agreement. That is why the Standards Code of Good Practice has been incorporated into the TBT Agreement. Yet many private standard setting bodies are not bound by the Code of Good Practice. As technical details are often left to “private” standards and conformity assessment procedures, we need stronger obligations and incentives to coordinate these systems internationally and to create a stronger link to the WTO in order to guarantee transparency and harmonisation/equivalence.
- The WTO / TBT notification system is intended to provide regulatory transparency and serve as an early warning for TBT. However, it is up to the Members to decide whether or not proposals have a “significant effect” on trade. This gives too much room for discrepancies and interpretation.
- Many TBTs cannot be removed without extensive bilateral regulatory cooperation, often on a sector basis. It is therefore a weakness that the TBT Agreement does not contain stronger incentives for regulatory cooperation and best regulatory practice including the goal of harmonisation and equivalence.
- One of the most important means of addressing TBT is to ensure a more efficient implementation and functioning of the TBT Agreement and Standards Code of Good Practice. A clearer definition of what is an international standard is needed.
- The Agreement stipulates, “technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create” (Article 2.2). To date this provision has not yet been put to the test, so that its interpretation remains open. The same goes for other principles in the agreement like proportionality, necessity and the use of international standards.

Business proposals to remedy TBT issues

- *Market access assessment of regulations*

UNICE believes that the ambition needs to be raised encouraging members to regulate with the purpose of facilitating market access and trade. This means that regulations, standards and conformity assessment procedures should be designed and implemented not only with the aim of avoiding “unnecessary obstacles to trade” but also keeping in mind the WTO obligations of necessity, proportionality, least trade-restrictiveness and the use of international standards

UNICE therefore supports the proposal put forward in the European Communities communication on market access for non-agricultural products that WTO members put in place or maintain procedures and criteria, in the context of their domestic regulatory process, to examine regulations affecting market access. Such a proposal would necessitate a modification of the TBT Agreement.

- *Best regulatory practice*

Analogue to the EU new approach to technical regulations, UNICE proposes that regulators should focus on regulating *essential requirements* for public health, safety and environment, leaving technical details to market-driven *international standards*, bearing in mind that compliance with standards is voluntary. Regulators should use the least trade-restrictive mode of conformity assessment, i.e. *Suppliers Declaration of Conformity (SDoC)*, as the preferred option.

- *New TBT problem-solving mechanism*

There is little WTO case law giving guidance and clarification on the TBT Agreement. There is no mechanism below the level of formal WTO dispute settlement procedure that can deal with the lack of implementation and barriers.

To resolve technical problems swiftly and without disproportionate bureaucratic burden, UNICE strongly urges the EU, within the new round, to propose a new TBT problem-solving mechanism, below the level of formal WTO dispute settlement.

- *Private right of action for filing complaints under the TBT Agreement*

The WTO should consider the weakness in the present system where it is not possible for other parties than Member States to notify infringements under the Agreement. This leaves the WTO TBT Agreement inaccessible to business even though companies have the best knowledge of TBTs and their effects on trade and competitiveness. Furthermore, today’s trans-national trade and structure of many companies, even SMEs, makes the WTO procedure for filing complaints via Member States insufficient. A comparison could be made with the situation in the EU, where companies can notify infringements of free movement to the Commission.

UNICE strongly urges the EU, within the new round, to discuss the possibilities of introducing a private right of action into the TBT agreement in order to enable industry and private actors to notify infringements under the agreement / filing complaints.

- *Strengthening the implementation of the “Standards Code”*

UNICE suggests that the EU propose further incentives to promote signing on to the Standards Code of Good Practice. The TBT Agreement needs to be implemented more forcefully by giving stronger support for the use of international standards.

- *Clarification of the definition of “International Standard”*

In order to achieve an efficient application of the Agreement, a consistent view of WTO members on how to define the term “international standard” is needed taking the following into account:

- Reflecting the privilege given to international standards by the Agreement, accountability towards a broad range of interests is a key requisite for international standardising bodies. A common understanding of international standards should therefore build on the WTO-accepted principles for international standardisation, notably the principles of openness, transparency, impartiality and consensus.
- UNICE also considers that the principle of participation through one national delegation representing all relevant standardising bodies in a WTO member country, as referred to in lit. "G." of the Standards Code of Good Practice, is essential for ensuring the accommodation of all relevant interests and should be forcefully promoted by the Commission. Granting an equal voting right to each delegation, the national delegation principle is designed to:
 - Ensure that participation in the work of an international standardising body is on equal terms and without discrimination as to nationality. In fact, the openness principle would be ineffective and void if its scope were limited to merely providing a membership option to WTO members without ensuring that every participating party actually has a say and a vote in the matter. Consideration of comments submitted by participating members, as required by the transparency principle, will be significantly promoted if members have a voting right. Also, equal voting rights for delegations plays a key role in making sure the principles of impartiality and global consensus in the standards preparation and decision-making processes are properly observed;
 - Encourage participation of developing countries in the international standardising process. This specific concern of the Doha mandate should be highlighted in upcoming WTO platforms since it is through the national delegation principle that developing countries will be able to effectively influence and shape international standards work in order to ensure that their interests are accounted for in the outcome.

In conclusion, in order to fully leverage the above principles and in view of their significant potential to facilitate global trade, UNICE urges the Commission to strive for *an explicit and exemplary reference* to be made, in the text of the TBT Agreement, to international standardising bodies that have implemented all of these principles, including in particular the national delegation principle, *such as ISO, IEC, and ITU-T*.

- *Promote a Code regarding conformity assessment procedures*

Along the same lines as the Standards Code of Practice, UNICE would welcome a Code of Good Practice for Conformity Assessment to be developed under the TBT Agreement, to foster acceptance of foreign conformity assessment results. The aim should be to ensure the same understanding of accreditation globally as the last level of control of technical competence. Regulators should align their work on ongoing work in existing fora for

harmonising conformity assessment procedures (IAF and ILAC), which have set up international multilateral agreements based on peer evaluation.

- *Eco-Labeling*

The Agreement on Technical Barriers to Trade (TBT) covers voluntary eco-labels awarded on the grounds of product-related PPMs. However, there is a strong controversy among WTO members as to whether the TBT or the General Agreement on Tariffs and Trade (GATT) applies to voluntary eco-labelling schemes based on non-product-related PPMs. In order to obtain legal certainty UNICE expects the Cancun WTO Ministerial Conference to start negotiations on eco-labelling. Industry wants clarification on the extent to which the TBT or the GATT applies to voluntary eco-labelling schemes, which are awarded on the basis on non-product-related process and production methods (PPMs).

Whichever agreement finally applies, the TBT Agreement as well as the GATT provide for non-discrimination and most-favoured nation treatment. The principle of non-discrimination requires equal treatment of a product carrying an eco-label and a like-product not carrying an eco-label.

Various approaches can be used to prevent eco-labelling schemes from becoming an unnecessary trade obstacle, including equivalency, mutual recognition of eco-labelling schemes, development of international standards and notification of voluntary eco-labelling schemes under the TBT Agreement. The notion of ecological equivalence is crucial for minimising trade-distorting effects; it means that foreign producers' efforts and achievements are recognised as equivalent to the fulfilment of the legitimate domestic policy objectives and that differing domestic policies and priorities are taken into account whenever these objectives are fulfilled by different but equal methods.

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Three WTO frameworks for addressing TBTs

UNICE sees three possible avenues for addressing TBTs:

- Within the framework of the Doha Development Agenda market access negotiations: Although TBTs are not specifically mentioned in the Doha Declaration, they could be considered as being covered by non-tariff barriers to trade which are included in the mandate of the market access negotiations (paragraph 16 of the Doha Declaration).
- The Triennial review of the TBT Agreement: The upcoming Triennial Review of the TBT Agreement also offers an opportunity to strive for concrete proposals by the TBT Committee on clarifications and amendments to the text of the Agreement aiming at a substantial enhancement of its implementation. These proposals should then be submitted to the Council for Trade in Goods as is foreseen by Art. 15.4 of the Agreement.
- Extending the Doha Development Agenda: The upcoming Ministerial in Mexico could provide an opportunity to enter into negotiations to improve the TBT Agreement.

UNICE will review/complement this position as the negotiations develop in the WTO on this matter. It is keen to continue the dialogue with all interested parties in order to contribute to an approach which is acceptable to all WTO members.