UNICE
Union of Industrial and Employers' Confederations of Europe
Union des Confédérations de l'Industrie et des Employeurs d'Europe

20 January 1999

UNICE Position Paper on Market Access and the Environment

1. Introduction

Item 6 on the Work Programme of the WTO Committee on Trade and Environment is entitled

The Effects of Environmental Measures on Market Access, especially in relation to Developing Countries, in particular to the Least Developed among them, and Environmental Benefits of Removing Trade Restrictions and Distortions.

In the following UNICE would like to develop some industry considerations on the effects of environmental measures on market access, and to comment on some of the subjects dealt with by CTE. The UNICE comments refer to tariffs, technical regulations and standards, like-products, the exceptions contained in Article XX and creative unilateralism.

2. Elimination of Trade Barriers for Environment-Friendly Products and Services

The removal of barriers to trade in environmental goods and services could give greater impetus to sustainable development and global economic growth. UNICE supports the idea of eliminating these barriers in principle and suggests that this subject be part of the next WTO round.

UNICE supports the position of the European Union for engagement in a new and comprehensive round of multilateral trade negotiations. A comprehensive approach to tariff negotiations is to be preferred over a selective approach whereby a WTO member only suggests sectoral tariff reductions which it considers advantageous. The discussion on tariff elimination of environment-friendly products must be seen in this context and, therefore, only finds our support within a new round of trade negotiations.

Before going into the substance of the issue the negotiators need to establish a definition of what constitutes an environment-friendly product. OECD defines the environment industry as consisting of activities which produce goods and services to measure, prevent, limit or correct environmental damage to water, air, and soil, as well as problems related to waste, noise and eco-systems. This definition gives an indication but does not answer the question. So far no definition exists. Within APEC a list of environment-friendly products has been tabled. UNICE has two concerns with such a list: discriminatory product assessments and support for end-of-pipe technologies.

The special orientation towards environment-friendly products could lead to a different assessment of different products which compete with each other. The APEC list, for example, contains the item polyethylene having a specific gravity of 0.94 or more. Would it be justified from an environmental point of view to treat low-density polyethylene, or polypropylene

differently from high-density polyethylene? Furthermore catalytic converters, water treatment products, pumps, blowers and shredders might be considered products which are utilised as end-of-pipe technologies.

Would elimination of tariffs on these products substantively contribute to environmental protection or would it further delay the introduction of an integrated approach to environmental protection, beginning at the design stage of a product and ending with the disposal of the product? OECD warns that this approach could lead to increased trade in end-of-pipe technologies.

The establishment of a specific list also creates administrative problems since the tariff schedules are not so specific as to make all the necessary distinctions. Thus administrative checks have to be established. Given the fact that average tariffs in developed countries are low, that exports from developing countries benefit from GSP anyway and that one of the new issues of the future round is trade facilitation, negotiators should consider tariff reduction or elimination for whole tariff chapters rather than engaging in a selective list-based approach.

The dissemination of environmental technology and services requires adequate national provisions in compliance with both GATS and TRIPs. UNICE has elaborated on the latter's importance with respect to the transfer of technology in a separate paper and would like to repeat that strong and efficient IP protection is one prerequisite for an increased transfer of technology from developed to developing countries.

3. Environmental Product Standards

Environmental requirements can take the form of technical regulations and standards, product-content requirements (limitation of certain dangerous inputs in end-products), recycled content requirements, labelling and packaging requirements, taxes and charges as well as a broad range of voluntary measures. During the discussions in CTE developing countries have argued that such environmental requirements can dissuade a producer from entering a market in which they exist. In particular small companies cannot afford expensive testing and certification procedures. UNICE acknowledges the burden on exporters from developing countries to comply with the above-mentioned requirements, does however consider that environmental requirements are a necessity for a credible environmental policy. Whilst regulators should consider the impact of environmental requirements on third-country exporters, environmental requirements should not be lowered in order to gain easier access to markets.

A recent case study entitled *Unlocking Trade Opportunities* by the International Institute for Environment and Development for the UN Department of Policy Co-ordination and Sustainable Development has shown that exporters in developing countries have managed to turn allegedly burdensome requirements into opportunities.

Exporters need to take into account that importers in developed countries increasingly require compliance with voluntary standards, codes of conduct or corporate environmental policies. For example, the ISO 14000 series could become a condition for doing business globally. ISO 14001 does not require a specific standard for pollution control, rather it contains a commitment to improve environmental management systems and the prevention of pollution continuously. Standards should not be considered a burden imposed by the importer on the exporter but should be seen as a response to a societal demand for environmentally sound products.

Environmental requirements are covered by the WTO TBT or SPS Agreements. Basically these agreements require that technical regulations should not create unnecessary obstacles to international trade and that they should not be more restrictive than necessary to fulfil a legitimate objective. Neither SPS nor TBT prescribes the level of protection, and encourages, but does not mandate, WTO members to use international standards. They do subject to WTO review the means chosen to implement domestic policies provided that the national measure in question affects international trade. UNICE considers the scope of these agreements adequate. They set an appropriate balance between the aim of ”environmental protection” and the aim of ”free trade”.

The last decade has seen an increased use of national environmental regulations, packaging and recycling decrees. UNICE considers that it is not so much the substantive requirements of these laws which cause problems but their proliferation and their divergent requirements which need to be addressed by the international community. In countries where there are similarities between environmental, health or safety requirements it would be useful to have recourse to mutual recognition or other forms of regulatory convergence including complete harmonisation. For example, the recommendations of the Transatlantic Business Dialogue (TABD) help to overcome trade and administrative barriers between the United States and the European Union whilst at the same time supporting a high level of protection. At a world-wide level such an approach is not yet possible, the development of international standards is however a means to eliminate the negative effects of different national laws and regulations.

If national environmental regulation is more trade-restrictive than necessary or discriminates intentionally or unintentionally against foreign producers, WTO members should use the consultation and conciliation procedures, including WTO dispute settlement, in order to guarantee that these regulations serve their real purpose, namely to protect the environment.

4. Like-Products and the Exceptions contained in Article XX

At the heart of the trade and environment discussion is the question whether an importing country can discriminate against a product on the basis of its production process. An import prohibition of a product based on the production process could be a violation of the principle of non-discrimination (GATT Article III para. 4) or a violation of the prohibition of quantitative restrictions (GATT Article XI). In the first case the argument could be made that, given the difference in the production , otherwise identical products should not be considered as like-products within the meaning of GATT Article III. In the second case the violation of GATT Article XI could be justified with Article XX. The discussion therefore requires an analysis of the ”like-product”-concept of GATT and an interpretation of the exceptions contained in Article XX.

The ”like-product”-concept

In its Report on *Environmental, Health and Consumer Protection Aspects of World Trade* adopted on 30 April 1998, the European Parliament suggests that the concept of “like product” should be interpreted differently to meet specific environmental criteria. The report *urges the Commission to advocate at the WTO Ministerial Conference due to meet in Geneva in May that the WTO should draw up a Statement or Understanding concerning the application of the principle of ‚like-products‘ which enables otherwise identical products to be differentiated where the production or processing of such products have different impacts on the environment; this Statement or Understanding should elaborate on the findings of the panel on the US tax treatment of automobiles (the so-called ‚Gas-Guzzler ruling).*

The WTO Appellate Body also recently ruled on the issue of like-product. *In Japanese Liquor Tax II*, the Appellate Body states: *The panel emphasised the need to look not only at such matters as physical characteristics, common end uses, and tariff classifications, but also at the ‚market place. This seems appropriate. The GATT 1994 is a commercial agreement, and the WTO is concerned, after all, with markets.*

It should be recalled that in the gas-guzzler case the EU attacked a US sales tax on fuel-inefficient cars as a violation of the principle of non-discrimination contained in GATT Article III para. 2. The EU argued that the US could not distinguish between fuel-efficient and fuel inefficient cars when imposing the sales tax. The panel disagreed. It looked at the aims and effects of the tax and concluded that it had no protectionist effect but the laudable aim of protecting the environment. It should also be recalled that the gas-guzzler case was never adopted by the GATT Council.

UNICE regards the suggestion to define ”like-product” with an aims-and-effects test as dangerous. This test is unsuitable to determine protectionist intent when hidden in environmental legislation. A respectable aim of a certain measure cannot be the decisive factor in a like-product definition since, otherwise, WTO members could construct their laws in such a way as to exclude unwanted products. In other words, such a test imposes an impossible burden of proof on the WTO member attacking the national measure.

The market-based approach applied by the Appellate Body refers to GATT Article III para. 2 (non-discrimination with respect to taxes) and not to GATT Article III para. 4 (non-discrimination with respect to products). Given the similarity in wording of the two paragraphs it seems likely that the market-based approach might also be decisive in a case concerning Article III para. 4. This however remains to be decided.

UNICE acknowledges that the aims-and-effects test has been rejected by the Appellate Body. In *Japanese Liquor Taxes II* the panel discussed and rejected this test using textual arguments. The Appellate Body accepted the panel’s reasoning. It seems that the market-based approach to defining ”like-products” will permit some distinctions in regulatory treatment. It is superior to an aims-and-effects test since the decisive factor is market perception and not legislative intent. This approach does not prescribe a formula to decide about ”likeness” but requires a case-by case-analysis.

The exceptions contained in Article XX

The interpretation of GATT Article XX has been clarified by the Appellate Body in *US Gasoline Standards* and in *Shrimps/Turtle.* UNICE welcomes the two-tier test applied to define whether a measure meets the requirements contained in Article XX. First, the national measure needs to be covered by the different exceptions contained in Article XX, second, the measure must also be covered by the headnote of Article XX. If a national measure meets the first test, it cannot be justified if it constitutes an arbitrary and unjustifiable discrimination or a disguised restriction on international trade. The thrust of the headnote of Article XX is the prevention of abuse. As the Appellate Body stated *a balance must be struck between the right of a member to invoke an exception under Article XX and the duty of the same member to respect the treaty rights of the other members.*

UNICE considers that the test applied by the Appellate Body will force legislators to consider carefully the measures they apply against other WTO members. Whilst the Appellate Body has broadened the scope of Article XX (g) and whilst it can be assumed that the Appellate Body will broaden the scope of other provisions contained in Article XX, in particular Article XX (b) in future environment-related WTO cases, the interpretation of the headnote of Article XX obliges WTO members to examine whether (1) the application of the national measure results in discrimination, (2) whether the discrimination is arbitrary or unjustifiable in character and (3) whether the discrimination occurs between countries where the same conditions prevail.

To sum up, UNICE would like to underline that there are some possibilities for the WTO membership to adopt measures which distinguish on the basis of how a product is made. Given their potential disruptive effects on the international trading system such measures need to be construed very carefully and are subject to close scrutiny through WTO dispute settlement. It will most probably be more advantageous to try to achieve multilateral consensus on the issue at stake than to try to act unilaterally. UNICE wholeheartedly supports this approach.

5. Creative Unilateralism

Principle 12 of the Rio Declaration states *Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.*

Notwithstanding this declaration or probably because of it declaration some countries consider that they can bend the WTO rules, or even violate them, if there is a strong societal and environmental conviction that the trade measure is necessary from a political point of view.

Creative unilateralism could be defined as an action by a country which considers itself at the forefront of certain environmental, health- or animal-welfare-related problems which need to be addressed not only at the national but also at the international level. Instead of going the difficult multilateral avenue of negotiating an international agreement, the country concerned adopts a unilateral measure intended to force others through trade actions to change their policy and to adopt a policy similar to the one in force in the country taking the action.

There are some examples for creative unilateralism: the tuna/dolphin case, the shrimp/turtle case, or, to some extent, the leghold trap case.

Creative unilateralism is a demonstration of a specific political will which might go as far as violating international norms in order to achieve the intended aim, namely a solution to the environmental, health- or animal-welfare-related problem. It has been said that creative unilateralism should find its place in the WTO in order to foster the principle of sustainability.

UNICE considers that the WTO should not accommodate this kind of unilateral action. Creative unilateralism contradicts the notion of sustainable development.

Legally speaking, it is difficult to defend an action which openly defies international norms. It will also be extremely difficult to imagine the criteria which need to be established, and also be accepted by negotiators, in order to accommodate creative unilateralism. As mentioned

above the WTO dispute settlement system has developed, and will continue to develop over time, interpretations which will solve some of the problems at stake.

The notion of sustainable development requires guarantees that economic, ecological and societal needs, including development needs, are given equal treatment, since neglect of any one component, or undue concentration on one of the components, will jeopardise sustainable development as such. There is therefore an inherent conflict between creative unilateralism and sustainable development. If a country wants to exert influence on the policy of another country by imposing a trade measure in order to force the other country to change its policy within its jurisdiction, it needs to demonstrate - from a point of view of sustainability - that it has taken the ecological, economic and societal consequences in its own and the other State into account and that, on balance, the unilateral measure is considered the necessary course of action. Such a test will almost automatically fail because there will be other solutions to the problem which are more in line with the concept of sustainability than the unilateral measure.

Whilst UNICE continues to argue that unilateral actions should not have a place in WTO, it needs to take into account the political reality. It seems that creative unilateralism works to some extent. Both the tuna/dolphin problem and the question of leghold traps were solved by bilateral or plurilateral agreements. If a unilateral national action or the threat thereof leads to negotiations and the conclusion of a bilateral or a plurilateral agreement, principle 12 of the Rio Declaration has been complied with.

Whilst acknowledging political reality, UNICE would like to point out the WTO's balancing effect on unilateral actions. States will have to consider carefully what options there are when they pursue a certain policy. They might come to the conclusion that in order to bring a subject further at the international level, they need to resort to an otherwise objectionable action. But they will not take such a decision lightly. There is always the threat that the WTO's binding dispute settlement mechanism might force them to withdraw the measure. Therefore, the few cases whereby trading rules are not respected will not destabilise the international trading system. On the contrary, WTO is able to exercise restraint on state actions to solve some highly political issues outside its rules.