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Summary of UNICE Positions on Individual Trade and Environment Subjects

1. Multilateral Environment Agreements (MEA)/WTO Relationship

UNICE is of the view that WTO should accommodate trade measures contained in Multilateral Environment Agreements. Even if there has been no conflict in the past, it must be borne in mind that the MEA/WTO relationship is a highly explosive political and legal timebomb which could do great damage to both WTO rules and international environmental protection. In addition, it should be remembered that some MEAs, in particular the Basle Convention (exports of dangerous wastes) or the Montreal Protocol (protection of the ozone layer), allow trade measures which allegedly contravene WTO's basic principles.

Our concrete proposal is that WTO should adopt an Understanding which targets compatibility of trade measures in MEAs with WTO. From the legal angle, this Understanding could start by laying down a number of trade policy considerations and other suggestions which MEA negotiators should take into account (e.g. proof that the measure is necessary to achieve the agreement's environmental goal, including least-trade restrictiveness and proportionality, or, that the MEA seeks to solve a global problem, etc.) and then lay down the assumption that such trade measures are presumed to be compatible with GATT Article XX (exceptions). Such an Understanding would have the advantage that WTO members would not lose their right to initiate a dispute-settlement procedure against an MEA trade measure, the complainant however would have to prove that the trade measure was not compatible with GATT Article XX. We consider that it will be very difficult for the complainant to satisfy the burden of proof if the negotiators of the MEA have ensured that the trade measure concerned is necessary to achieve the environmental goal of the MEA.

It will be the task and responsibility of the negotiators of an MEA to decide the If and How of trade measures. The WTO Understanding will demonstrate the WTO membership's preference for multilateral solutions over unilateral measures. Dispute settlement will remain possible since WTO cannot and should not deprive its members of rights which they have been granted, the Understanding however will create a bias in favour of the MEA trade measure. Only in very severe cases of violation of WTO rules and principles will it be possible to rebut the presumption of compatibility. We do hope that MEA negotiators will make it impossible for such cases to occur.

This kind of approach requires certain conditions to be met. First, at national level there has to be intensive co-operation between trade and environment ministries with respect to MEA negotiations. UNICE appreciates the recent developments in that direction. Second, at international level, there has to be great awareness of the inter-relationship of trade and environment. This has already been achieved to a certain extent, thanks to the work done by

UNEP, UNCTAD and WTO. Third, the WTO Appellate Body has clarified the interpretation of GATT Article XX.

2. Eco-labelling

Eco-labelling involves three problems: application of the Technical Barriers to Trade Agreement (TBT), life-cycle analysis and ecological equivalence. Here, too, an explanatory declaration by WTO on the application of the TBT Agreement to eco-labelling would help. First, WTO members should establish that the TBT Agreement is applicable to national rules on eco-labelling. This would lead to notification of such rules to WTO, and therefore to greater transparency. The current situation, where WTO members notify their rules or not as they please, is unacceptable. Clarification is also needed as to the extent to which private eco-labelling rules should be covered. Could an analogy be established between the provisions contained in TBT Annex II concerning the application of TBT rules with respect to private standard setting bodies and private eco-labelling schemes?

Eco-labelling only makes sense if the entire life-cycle of a product is taken into account. Labelling must therefore cover all the phases of a product (production, use, disposal). The WTO declaration should expressly establish that life-cycle analysis is allowed for eco-labelling. The otherwise justified WTO distinction between product and process needs to be broken down since the main purpose of this exercise is labelling and not the product as such or its characteristics. Such a declaration should however make clear that eco-labelling cannot have any influence on the like product definition of GATT. A washing machine with an eco-label and a washing machine without one are most probably "like-products". In addition, the comparability of criteria for awarding eco-labels needs to be ensured in order to avoid discrimination (ecological equivalence).

3. TRIPS and Environment

There exist a wide range of national, European and international rules which ensure a satisfactory level of protection for intellectual property. Some of these rules still deserve implementation and enforcement. UNICE continues to ask for effective and efficient protection of intellectual property rights. We believe that protection of intellectual property can lead to new environment-friendly inventions and facilitate the transfer of technology which is needed for better environmental protection. We expressly endorse the TRIPs Agreement and hope that it can be strengthened. We regret to note that some countries want to use the discussion on trade and environment to advance false arguments which would weaken TRIPs standards. We express the strongest opposition to this development and call on WTO members not to allow a weakening of TRIPs based on poorly understood environmental grounds and refer to our position paper. We believe that in the future the WTO TRIPs Council should examine the issue of TRIPs and Environment rather than CTE.

4. Market Access and Environment

4.1 Tariff Reduction/Elimination for Environmental Products

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 elimination of these barriers 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 for environment-friendly products must be seen in this context and, therefore, only finds our support within a new round of trade negotiations.

UNICE does not oppose the idea for eliminating tariffs on environment-friendly products. Yet before this can be done several preliminary questions need to be answered. First, there is no clear definition as to what constitutes an environment-friendly product. The definition needs to be elaborated carefully in order to avoid discriminatory product assessments. Second, elimination of tariffs might only promote end-of-pipe technologies and products. UNICE does however advocate integrated environmental protection. We therefore urge policy-makers to work on a definition which will indeed promote environmental protection.

4.2 Technical Standards

Some less developed countries complain that environment-relevant standards in developed countries make market access for their products difficult. We accept that testing and certification procedures can create barriers to market access, but believe that environment-relevant product standards are a necessity for credible environmental protection, and that the question of easier market access for less developed countries cannot be solved via a dilution of these standards. Insofar as product standards have protectionist effects, each WTO member can have recourse to a WTO dispute-settlement process which will eventually rule whether a technical standard is a necessary or an unnecessary obstacle to international trade. In our view, there is no need to amend the TBT Agreement out of these environmental considerations.

4.3 Like-Product

Proposals have been made to change the “like-product” definition of GATT in order to contribute to positive environmental protection. Positive discrimination between like-products should be allowed on the basis of their production process and the WTO distinction between product and process should be dropped. We consider these proposals to be dangerous.

The purpose of this initiative would be to distinguish between identical products on the basis of how they are produced. This means that a product produced in an environment-friendly manner would be treated differently at the border than a like product produced in a less environment-friendly manner. If such a distinction were allowed, there would soon no longer be any argument against taking account of all different national rules relating to the production of a product on import of such a product. We call on WTO members to tackle problems with environment-unfriendly production processes via MEAs and not through a creative redefinition of “like-product”.

The concept of “like product” should be defined on the basis of the WTO-relevant criteria as defined by the Appellate Body. These include physical characteristics, customs classification and market behaviour vis-à-vis the product. The WTO Appellate Body recently gave this last criterion prominence when it stated that WTO was after all about markets. It gives WTO members adequate scope to differentiate individual products.

5. Creative Unilateralism

Some WTO members have in the past consciously adopted WTO-adverse laws to force other WTO members on to the “path of virtue”. These include the case of tuna fish, the case of shrimps/turtles and the EU leg-hold trap regulation. Even if such creative unilateralism can lead to success if the exporting states in question are forced to become more environment- or animal-friendly, we reject this approach. The basis of WTO is law, not muscle. If powerful WTO members abandon the basis of law and impose their strength, the WTO system will be damaged. It is precisely strong WTO members which have a particular duty to adhere to the rules and set an example. The only way out of the dilemma between national demands for stronger rules and rejection of these demands by third countries are confidence building measures and international negotiations which eventually lead to internationally agreed rules for the problem at stake.

6. Border Tax Adjustment (BTA) for Environmental Taxes

CTE has so far taken little notice of the question of the extent to which national eco-taxes can be adjusted at the border. National eco-taxes on products (e.g. a tax on gas-guzzling cars) are subject to BTA on condition that GATT Article III is complied with. Taxes on the use of resources, e.g. emission levies or water charges, are not subject to BTA. Taxes on input products contained in other products (e.g. a tax on particular chemicals physically present in a finished product) are subject to BTA. However, the treatment of input products (e.g. energy taxes) which are no longer physically contained in the finished product is problematic and controversial. WTO provisions on BTA for such taxes are contradictory. On the import side, it can be concluded from GATT Article II:2(a) that a BTA for such taxes is not possible. Article II seems to require that the input product is still physically present in the finished product. On the export side, footnote 61 of the WTO Subsidies Agreement seems to allow BTA even for input products which are no longer physically present in the finished product.

UNICE urges the WTO membership to draft clear rules for border tax adjustment of environmental taxes. In this context, workability must be a guiding principle. It is not enough to draw up complicated legal arrangements for BTA which prove unworkable in practice. In addition, the distinction between product and process should also be taken into account in the BTA debate.