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UNICE position paper on WTO high-level symposium on trade and environment to be held on 15-16 March 1999

INTRODUCTION

UNICE welcomes the proposal to convene a WTO high-level meeting on environment and trade in order to bring an end to the present deadlock in discussions in Geneva and finally to take the decisions necessary for environmental considerations to be taken into account in trade policy and vice versa. In the past UNICE has actively contributed to the GATT and WTO trade and environment discussions and has adopted several position papers on the subject. With this paper UNICE would like to make specific proposals for the high-level meeting, summarise its positions on trade and environment and adapt them, where necessary, to new developments and to new industry considerations. UNICE believes that the analytical work of the WTO Committee on Trade and Environment (CTE) can be concluded. The WTO high-level meeting should take as many decisions as possible and refer all the other subjects on the trade and environment agenda to the new round of multilateral trade negotiations which UNICE strongly supports.

UNICE fully supports the WTO framework of rules. In its view, WTO is one of the most important and most efficient international organisations of our time. Its primary objective is to regulate international trade with as few restrictions as possible. WTO is not an environmental organisation and should not become one. However, as stated in its preamble, it is expected to incorporate environmental aspects in its decisions, following the principle of sustainable development.

European Industry is committed to the principle of sustainable development. It believes that trade and environment policies are, or need to be made, mutually supportive. It is however not the task of WTO to set international environmental or labour standards. These standards should be developed by other international organisations. UNICE supports international negotiations on global environmental problems. WTO's role with respect to national measures consists in ensuring that these measures are compatible with WTO rules.

WTO cannot be made a scapegoat for speaking out against unilateral trade measures even when the latter serve for implementation of environmental goals. The multilateral trade rules, ratified by the parliaments of all WTO members and therefore subject to democratic control, limit the sovereignty of WTO members on the one hand, but leave them wide scope to shape their own national environment policies on the other. Trade measures designed to protect the environment should not contravene the fundamental WTO aims of most-favoured nation treatment and of non-discrimination. Their goal should be protection of the environment and not protection of domestic industries.

UNICE resists the idea of WTO becoming a victim of its own success. To weaken WTO contradicts the principle of sustainable development. The WTO cannot and should not be turned into an instrument for environmental purposes. The international community needs to have similarly successful agreements and institutions in the area of environmental and social policy as it has in the area of trade. Much remains to be done in these areas. Only if we have similar organisations and structures will the pressure on WTO ease and will the WTO not be held responsible for subjects for which it has no mandate whatsoever.

DECISIONS OF THE HIGH-LEVEL MEETING

The proposal to convene a high-level meeting creates expectations. UNICE considers it necessary that the meeting not only discusses and analyses the issues at stake, but that it takes decisions or makes recommendations to facilitate decisions. We note with satisfaction that the CTE has continued its analysis process and has clarified most of the issues on its working programme. The analytical work of the CTE enables the WTO membership to take the necessary decisions. It is time for the WTO membership to exercise political will and move the subject forward. UNICE believes that the high-level meeting could make the following suggestions and ask the respective WTO bodies to take decisions:

- clarification of the relationship between trade measures incorporated in MEAs and WTO;
- submission of all other aspects of the trade and environment discussion to the new WTO round with the task of verifying whether the results of CTE's work require a change to the existing rules;
- during future negotiations, take decisions on CTE's future role and function including possible disbandment.

UNICE believes that the high-level meeting should take a decision to clarify the relationship between trade measures contained in MEAs and WTO. The ever-increasing number of these agreements and the permanent threat of a conflict between them and WTO require a decision as to the extent to which WTO should accommodate such trade measures. All the other subjects examined by CTE should be dealt with by the individual negotiating groups of the new WTO Round. Consideration of these subjects in isolation is sensible in the analysis phase, but no longer makes sense once the analysis has been made. The WTO must decide in the upcoming negotiations whether the WTO agreements need to be modified in order to take environmental aspects into account. This cannot be done by CTE alone but must be achieved through negotiations on the basis of CTE's analytical work. Therefore it seems that the present work of CTE has come to a natural conclusion.

<p style="text-align: center;">Summary of UNICE Positions on Individual Trade and Environment Subjects</p>

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.

UNICE's 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 work on the presumption that such trade measures are 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 the responsibility of the negotiators of an MEA to decide the if and how of trade measures. The Understanding of the WTO 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. It is to be hoped 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 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 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 exists a wide range of national, European and international rules which ensure a satisfactory level of protection for intellectual property. Some of these rules still need to be implemented and enforced. UNICE continues to call for effective and efficient protection of intellectual property rights. It believes 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. It expressly endorses the TRIPs Agreement and hopes that it can be strengthened. It regrets to note that some countries want to use the discussion on trade and environment to advance false arguments which would weaken TRIPs standards. UNICE expresses the strongest opposition to this development and urges WTO members not to allow a weakening of TRIPs based on poorly understood environmental grounds, and refers to its position paper. 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

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 UNICE's support within a new round of trade negotiations.

UNICE does not oppose the idea of 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, the elimination of tariffs might only promote end-of-pipe technologies and products. UNICE does, however, promote integrated environmental protection. It therefore urges policy-makers to work on a definition which will effectively 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. UNICE accepts that testing and certification procedures can create barriers to market access, but believes 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 WTO dispute settlement which will eventually rule whether a technical standard is a necessary or unnecessary obstacle to international trade. 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. Allowance should be made for positive discrimination between like-products on the basis of their production process and the WTO distinction between product and process should be abandoned. Industry regards these proposals as 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. UNICE calls 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 the 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, UNICE 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 in question.

6. Border Tax Adjustment (BTA) for Environmental Taxes

The WTO Committee for Trade and Environment (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 of particular chemicals physically present in a finished product) are subject to BTA. However, problematic and controversial is the treatment of input products (e.g. energy taxes) which are no longer physically contained in the finished product. 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 of 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. Thus, a general CO₂ tax would not qualify for compensation since this is a tax on a resource and not a tax on a product.
