UNICE

POSITIONS ON

TRADE AND ENVIRONMENT

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

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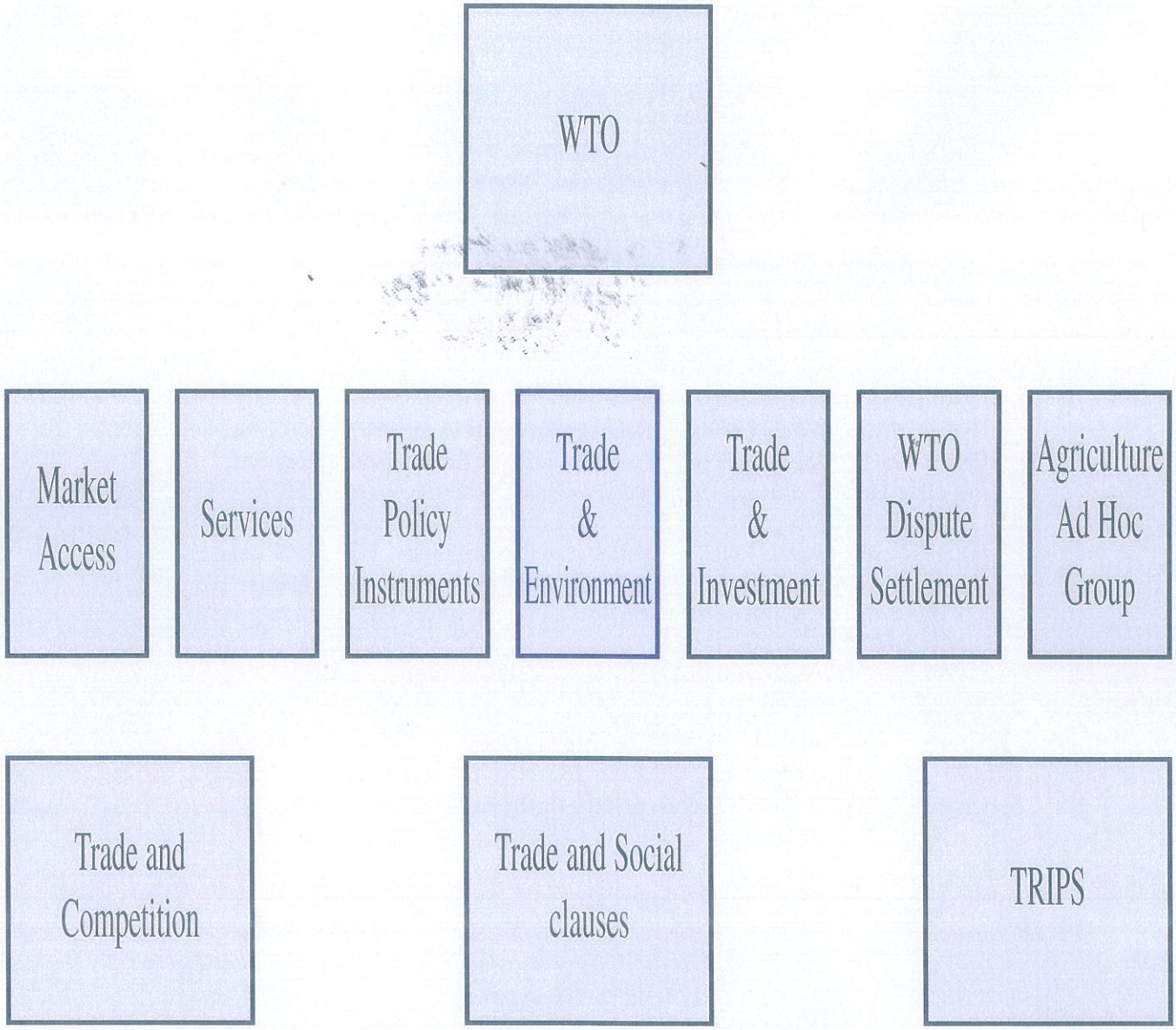
UNICE Structure for WTO matters



FOREWORD

UNICE unreservedly supports the World Trade Organisation (WTO) framework of rules. For European companies WTO is one of the most important and most efficient international organisations. It is the international body which most directly affects their activities. They are determined to see it succeed in its vital mission, which is to ensure that international trade is fair and as free from restrictions as possible in order to guarantee liberal world trade.

In this respect, UNICE actively supports the launch of a new global round of WTO negotiations in the year 2000. For UNICE these negotiations should be concluded by a single agreement and take place on the basis of a timetable which is as brief as possible, and in any event not exceeding three years.

UNICE strongly supports sustainable development and is convinced 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 standards. WTO is not an environmental organisation, and should not become one. 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 they 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 environmental 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.

UNICE welcomes the proposal to convene a WTO high-level symposium on environment and trade on 15-16 March 1999. It believes it will bring an end to the present deadlock in discussions in Geneva and will give a new impulse for environmental considerations to be taken into account in trade policy and vice versa.

UNICE would like to contribute to the debate under way. It hopes that this booklet, which contains all UNICE's positions on trade and environment adopted to date, will not only facilitate discussions during the symposium but also be a precious aid in the elaboration of future decisions on the issues at stake. UNICE is open to dialogue on this important matter with every part of civil society concerned, as well as with every WTO government. This booklet will also serve as an input for the WTO Ministerial Declaration to be adopted at the meeting in Seattle.

As Secretary General of UNICE and spokesman for the millions of large, medium and small European companies engaged in international trade, I call on the political authorities concerned to give the fullest possible consideration to the views expressed in the pages that follow. These UNICE positions have been developed by UNICE's "Trade and Environment" Working Group under the chairmanship of Mr Reinhard Quick (Verband der Chemischen Industrie e.V.).

March 1999

Dirk F. Hudig
Secretary General of UNICE

UNICE Position Paper on WTO High-level Symposium on Trade and Environment to be held on 15-16 March 1999

15 February 1999

Introduction

UNICE welcomes the proposal to convene a WTO high-level symposium on trade and environment in order to bring an end to the present deadlock in discussions in Geneva and finally to give a new impulse for environmental considerations to be taken into account in trade policy and vice versa. In the past UNICE has actively contributed to 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 symposium, 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 symposium should enable WTO to 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 our 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. We believe 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 the scapegoat for speaking out against unilateral trade measures even when they 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 the protection of the environment and not the protection of domestic industries.

UNICE resists the idea of WTO becoming a victim of its own success. A weakening of WTO contradicts the principle of sustainable development. The WTO cannot and should not be hi-jacked 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.

What European industry expects

The proposal to convene a high-level symposium creates expectations. UNICE considers it necessary that the meeting does not only discuss and analyse the issues at stake, but that it makes recommendations to facilitate WTO decisions. We note with satisfaction that CTE has continued its analytical process and has clarified most of the issues in its work programme. The analytical work of 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 symposium could make the following suggestions and ask the respective WTO bodies to take decision on:

- 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 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 symposium should underline the importance of 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 right and proper in the analysis phase, but no longer makes sense once the analysis has been made. 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 the CTE's analytical work. Therefore it seems that the present work of CTE has come to a natural conclusion.

These initial UNICE comments will be reviewed in the light of the developments on trade and environment in WTO.

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.

Update of UNICE Position on the Relationship Between the Provisions of the Multilateral Trading System and Trade Measures for Environmental Purposes, Including Those Pursuant to Multilateral Environmental Agreements (MEAs)

15 February 1999

1. Introduction

The following position is an update of the UNICE position dated 22 July 1996 (position attached). Originally, UNICE had suggested that trade measures be accommodated by amending GATT Article XX (exceptions) and by adding a WTO Understanding on the treatment of trade measures contained in MEAs. European industry considers it important that the high-level meeting on trade and environment comes to a conclusion on how to handle the relationship between MEAs and WTO. The subject is ripe for a decision, which will also give a positive impetus to future negotiations on trade and environment issues. Such negotiations should be launched at the third WTO Ministerial Conference as part of a new and comprehensive round of multilateral trade negotiations.

This update seeks to clarify how MEA trade measures could be made compatible with WTO. All other points mentioned in the attached UNICE position remain valid.

2. The New UNICE Position Adoption of an Understanding to accommodate MEA trade measures

UNICE would like to propose that WTO accept, in principle, the validity of trade measures contained in MEAs. These measures aim at solving an international environmental problem. The WTO should decide that such measures are presumed compatible with GATT Article XX. Legally speaking the decision would constitute a rebuttable presumption in favour of the trade measure.

The presumption of compatibility will allow WTO members to initiate WTO dispute settlement proceedings against MEA trade measures, but it will require them to provide a higher burden of proof. In a typical trade case involving a unilateral measure the complainant has to prove that the measures violate a certain GATT provision, whilst the defendant will have to prove that this measure is justified by GATT Article XX. With respect to MEA trade measures, this burden of proof should be reversed. UNICE acknowledges the right of a WTO member to attack an MEA trade measure, in particular when this member is not a party to the MEA. In some cases the affected WTO member will only have the possibility of recourse to the WTO dispute settlement. The WTO should therefore not deprive its members of the only rights they might have. Nevertheless WTO should accept that MEAs reflect a broad consensus in the international community on how to solve global environmental issues.

UNICE has consistently supported an international approach to solving global environmental problems. This is also reflected in the Rio Declaration and in its follow-up. WTO therefore cannot and should not treat MEA trade measures in exactly the same way as it treats unilateral trade actions.

UNICE considers this suggested approach reasonable. WTO accords MEA trade measures the benefit of the doubt. It neither rejects them out of hand nor does it give them carte blanche.

Such a proposal will not cause deadlock in global international negotiations aimed at solving environmental problems. MEA negotiators should be able to choose and decide the necessary means to achieve their environmental objectives while at the same time taking account of WTO rules and obligations. In so doing, MEA negotiators need to address such issues as necessity of the trade measure for the environmental aim, least trade-restrictiveness, and scientific justification coupled with risk assessment. UNICE accepts that it is the responsibility of MEA negotiators which measures they propose. If these criteria are met, a WTO challenge will not be successful.

3. Reasons for this Position Update

The following events have prompted this update of the 22 July UNICE position. First, the trade and environment debate has increased awareness on the interrelationship between the two subjects. Thanks to the work done by the WTO Committee on Trade and Environment (CTE), there is much more co-operation and coordination between trade and environment ministries at national level during international environmental negotiations. UNICE is satisfied with this development.

Second, at international level, UNEP, UNCTAD and WTO have increasingly shown greater understanding of potential trade and environmental conflicts. Third, the WTO Appellate Body has clarified the interpretation of GATT Article XX in recent environmental cases which could be considered to be an opening of WTO towards environmental arguments.

UNICE hopes that the WTO can settle this important issue rapidly. This will enhance WTO's credibility in the trade and environment debate.

UNICE Position on the Relationship between the Provisions of the Multilateral Trading System and Trade Measures for Environmental Purposes, Including those Pursuant to Multilateral Environmental Agreements (MEAs)*

22 July 1996

1. Executive Summary

1.1. UNICE considers that trade measures taken pursuant to MEAs should be accommodated by the WTO. The accommodation of these trade measures could be achieved by introducing into GATT Article XX (b) the words *„and the environment"* and by adding to this amendment an Understanding on the relationship between trade measures taken pursuant to MEAs and the WTO rules.

1.2. The Understanding needs to set out certain basic criteria which MEAs have to meet in order to benefit from the WTO accommodation, in particular a test as to whether the trade measure is necessary to achieve the environmental objective of the MEA. If the MEA meets the criteria the trade measures will be presumed to be necessary within the meaning of GATT Article XX (b). A challenge remains possible, but the challenger needs to rebut the presumption of necessity. Thus, UNICE favours the „ex-ante" approach combined with the possibility of a very limited „ex-post" WTO review of the trade measure.

1.3. UNICE considers the Commission's non-paper on MEAs a step in the right direction. It is however of the view that the proposal concerning the criteria which the MEA has to meet is too weak. The Commission's position could be viewed as giving environmental negotiators carte blanche for introducing discriminatory trade measures. The Commission's approach means that a member of the WTO which is not a signatory of the MEA could only challenge the trade measure taken by a signatory of the MEA if the measure was arbitrary or unjustifiable or a disguised restriction on trade. The WTO member could not argue that the measure was not necessary to achieve the environmental aim of the MEA. Given the experience with existing agreements UNICE cannot underwrite the Commission's position but needs to insist that safeguards are introduced against possible protectionist abuses of the intended WTO accommodation.

1.4. UNICE makes specific practical proposals on how the ex-ante approach could be put into practice without the WTO second-guessing the environmental wisdom of the negotiators of the MEA and without giving the negotiators of an MEA carte blanche. UNICE notes, however, that many trade and environment problems occur due to a lack of policy co-ordination at national level between environment and trade ministries. UNICE urges policy makers at national and supranational level to co-ordinate trade and environmental policies.

2. Introductory Remarks

2.1 The subject of trade measures in MEAs is part of the work programme of the WTO Committee on Trade and Environment (CTE). It is well advanced and WTO members are considering putting it on the agenda of the WTO Ministerial Meeting to be held in December 1996 in Singapore.

2.2 The fundamental question of this issue is whether the WTO should judge trade measures taken pursuant to MEAs more leniently than trade measures taken unilaterally; in other words whether GATT Article XX should be less rigorously applied in trade disputes concerning a trade action of an MEA than it is normally applied. The main problem of trade measures allowed by MEAs is that of discrimination. Some MEAs allow trade measures to be taken against non-parties. These measures are allegedly considered necessary to achieve the environmental aim of the agreement. One of the pillars of the WTO, and its predecessor the GATT, is most-favoured nation and non-discrimination. Trade

* This position complements the 28 May 1996 UNICE comments on the Commission communication on trade and environment (COM(96)54 final of 28 February 1996). The glossary of abbreviations used in this position paper is at annex.

measures against non-parties of an MEA which are members of the WTO can only be accepted if they meet the conditions of GATT Article XX. Given the fact that Article XX contains exceptions to the rules, it has been interpreted narrowly in the past.

2.3 MEAs and WTO are international agreements which bind their members. The WTO does not take priority over MEAs and MEAs do not take priority over the WTO. WTO and MEAs exist in parallel. The WTO is the multilateral agreement dealing with trade issues and is therefore, and rightly so, the ultimate instance to decide on trade issues. MEAs rule on international environmental issues. If a WTO member attacks a trade measure taken by an MEA-member the WTO dispute settlement could rule that the measure was inconsistent with WTO. Such a ruling could put into question the objectives of the MEA and could subject the WTO to criticism insofar as the WTO should not second-guess the decisions taken by the members of an MEA. Whilst, for the time being, no trade measure taken pursuant to an MEA has been attacked in WTO, the issue of the relationship between WTO and MEA needs to be resolved.

2.4 Should Article XX, therefore, be changed in order to accommodate trade measures taken pursuant to MEAs? UNICE`s short answer to this question is a conditional Yes.

Before outlining UNICE`s conditional Yes *(see item 3.3. below)*, reference has to be made to the problem of policy co-ordination at national level. UNICE is of the view that the WTO is not the right body to deal with environmental issues. Some environmental issues do, however, become important in case of a WTO dispute, such as the question as to whether the trade measure is necessary to achieve the environmental aim of the agreement or whether the trade measure is the least trade-restrictive.

Many problems would not have to be addressed if environmental negotiators had a clear answer to the environmental problem itself and if they discussed the trade issues with their trade counterparts before negotiating an MEA. If the environmental foundations of the MEA are doubtful one cannot attack the WTO for second-guessing the trade measures contained in an MEA but one has to live with the consequences of the outcome of a WTO dispute settlement.

2.5 The Basel Convention is a case in point:

UNICE holds that the Basel ban on exports for recycling of dangerous waste to non-OECD countries is neither ecologically nor economically sustainable. The Basel ban does not refer to the issue of whether a country or a company is capable, in an ecological sense, of recycling the dangerous waste, it just discriminates between OECD and non-OECD members. One cannot expect the WTO to handle a trade dispute arising from a trade measure taken pursuant to an MEA if the MEA in question disregards both the ecological necessity of the trade measure and the basic concepts of the international trading system. Article 4 A in conjunction with Annex VII of the Basel Convention cannot be justified in WTO terms. The distinction between OECD and non-OECD members constitutes an arbitrary and unjustifiable discrimination. Environmental negotiators cannot expect the international trading system to be silent on a specific trade issue if they are not able to solve the environmental issue at stake in a coherent and sustainable manner.

3. UNICE´s Basic Position

3.1 UNICE supports the United Nations Conference on Environment and Development (UNCED) position that multilateral solutions to global or crossborder environmental problems are more effective and durable than unilateral actions. Given the fact that the effectiveness of trade measures needs to be carefully analysed, UNICE is of the view that trade measures of MEAs which are considered necessary to achieve the environmental aim of the agreement should be accommodated by the WTO.

3.2 Of all the suggestions made so far UNICE prefers the so-called „ex-ante" approach, i.e. the WTO develops a set of criteria which MEAs containing trade measures have to respect, coupled with a very limited „ex-post" review of the trade measure in question.

3.3 UNICE favours an amendment of GATT Article XX (b) together with an Understanding on the relationship between trade measures taken pursuant to MEAs and the WTO rules. The Understanding would set out the basic criteria which the MEA has to meet and spell out that trade measures taken pursuant to an MEA meeting the criteria would be presumed to be necessary within the meaning of GATT Article XX (b).

In the Understanding, the WTO should elaborate on the following criteria:

- the necessity test of Article XX (b), namely an analysis as to whether the trade measure is indeed necessary to achieve the non-trade aim of the MEA, including proportionality, and the concept of least-trade-restrictive measure;
- the «chapeau» of Article XX, including arbitrary and unjustifiable discrimination or disguised restrictions of international trade;
- the environmental objective of the MEA needs to be justified scientifically;
- the agreement must be truly global and address a global environmental problem;
- the WTO dispute settlement should apply not only between signatories and non-signatories but, as a last resort, also between signatories of the MEA.

4. Comments on the Commission's Non-Paper on MEAs

4.1 The Commission recently presented a non-paper on MEAs to the WTO CTE[1]. UNICE believes that the Commission's approach on how to accommodate trade measures taken pursuant to MEAs in WTO is a step in the right direction. The Commission suggests amendment of GATT Article XX and addition to the amended Article XX of an *Understanding on the relationship between trade measures taken pursuant to MEAs and the WTO rules* which lays down certain criteria that MEAs have to respect. According to the Commission, in case of a dispute arising from a trade measure of an MEA, the WTO panel would have a limited review.

The panel would check whether:

- the measure is taken pursuant to specific provisions of an MEA, and
- the MEA meets the parameters of the Understanding and is therefore taken for the achievement of a legitimate environmental objective, and
- the measure has been complied in conformity with the requirements of the headnote to Article XX.

The panel would not check whether:

- the measure was necessary to achieve the environmental objective of the MEA, including proportionality;
- the measure was the least-trade-restrictive;
- the environmental objective of the agreement was based on sound science;
- the MEA was global and dealt with a global environmental problem.

According to the Commission, the WTO should accept the views embodied in the MEA and only check the three above-mentioned criteria. The Commission argues that if the agreement is global and addresses a global environmental problem the WTO should accept the environmental wisdom of the signatories of the MEA.

4.2 UNICE and other business organisations have repeatedly stated that the issue of scientific evidence, the necessity test, the least-trade-restrictive test are indispensable requirements which also have to be respected by the negotiators of an MEA.

4.2.1 The concept of necessity is viewed as fundamental in the interpretation of GATT Article XX. GATT has been an agreement on trade which provided for its Contracting Parties to take measures for non-trade purposes which were inconsistent with the GATT obligations only if the measures were necessary to achieve the stated non-trade objective. This approach is continued in the WTO and is reflected not only in Article XX but also in the WTO Agreement on Technical Barriers to Trade (TBT) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS).

UNICE is concerned that the Commission's proposal gives environmental negotiators a carte blanche to deviate from the most fundamental principles of the WTO. The scope of WTO review of trade measures taken pursuant to an MEA cannot be limited in such a drastic way as proposed by the Commission.

At stake is the issue of how the WTO should handle disputes brought by non-signatories of the MEA against

1 «The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to Multilateral Environmental Agreements», February 1996.

trade measures decided by the signatories of an MEA, in other words, the issue of most-favoured nation treatment and the principle of non-discrimination. In such a situation, the fundamental WTO principles cannot be given up without strong evidence that the measure is really necessary to protect the environment.

The Commission itself has stated in its Communication on Trade and Environment that *the use of trade restrictions within MEAs should not go beyond what is necessary to ensure the effectiveness of such agreements and the achievement of their environmental objectives.* UNICE is somewhat puzzled that this statement has not been introduced by the Commission as a prerequisite for the Understanding as well.

UNICE therefore suggests that trade measures taken pursuant to MEAs should only be accommodated by WTO if the Understanding contains at least the necessity criterion. The application of the Commission's concept without this safeguard would leave WTO members defenceless against trade measures provided for in an MEA whose purpose is not guided by environmental, but by socio-economic, political, or moral considerations. It would be an open invitation for protectionism if signatories of an MEA could take trade measures against non-signatories without having to justify the necessity of the trade measure. Such a far-reaching deviation from traditional WTO principles has to be resisted.

4.2.2 The Understanding should also address the following non-trade-related issues:

Sound Science: The rationale for the MEA should be based on sound science. The MEA should be global and deal with a global environmental problem. The issue, as such, has no relation to trade. The necessity of a trade measure can however only be demonstrated with scientific evidence. The WTO SPS and the WTO TBT Agreement contain specific references to scientific evidence when analysing whether a trade measure taken by a WTO member creates an unnecessary obstacle to international trade. If trade measures taken pursuant to an MEA should be accommodated in WTO the same principle should apply.

Negotiation and global participation: As far as negotiation of, and participation in, an MEA is concerned, UNICE considers that MEAs should be negotiated in a transparent way. They should encourage participation by all interested and potentially affected parties. As far as global participation is concerned, UNICE subscribes to the suggestion made by others that global participation should be defined as *participation by countries which account for a substantial proportion of the activity giving rise to the agreement.*

Regional Agreements: UNICE is reluctant to give trade measures taken pursuant to regional environmental agreements the same WTO accommodation as to trade measures taken pursuant to a true MEA. The reason for this position is simple: a minority of countries should not be able to impose on a majority of countries a deviation from the WTO rules without giving the majority the possibility to challenge the trade measure taken by the minority.

Therefore the Commission's approach as amended by UNICE can only be accepted in case of truly global MEAs: it cannot be accepted for MEAs which either have a non-representative participation or which are regional in character. Trade measures taken pursuant to any of the latter two agreements would have to face a full Article XX test on an ex-post basis. No presumption of necessity would apply.

Dispute Settlement: UNICE is of the view that dispute settlement will mainly occur in case of trade measure taken by a WTO member and signatory of an MEA against a WTO member, non-signatory of an MEA. The Commission is however right in pointing out that the WTO dispute-settlement mechanism could probably also apply, as a last resort, between members of the MEA once they have exhausted to no avail the dispute settlement possibilities of the MEA.

5. Practical Suggestions on How to Accommodate Trade Measures Taken Pursuant to an MEA

5.1 UNICE would like that the Commission's line of thinking be followed, namely to amend Article XX and to add those criteria into the Understanding which have to be met if the trade measures taken pursuant to the MEA should be accommodated by WTO. UNICE furthermore combines this ex-ante approach with a very limited possibility to challenge the trade measure ex-post.

UNICE suggests the following amendment to Article XX (b):

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary and unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
(b) necessary to protect human, animal, plant life or health or ***the environment;***

UNICE believes that the addition of the word environment into Article XX(b) should not cause any difficulties for WTO members. The WTO preamble refers to the protection and the preservation of the environment. It is therefore a logical consequence to introduce into the exceptions contained in Article XX the notion that the protection and preservation of the environment can be used to justify measures which would otherwise be inconsistent with WTO.

5.2 Addition of the word environment is not sufficient to address the relationship between WTO and MEAs. Therefore UNICE follows the Commission's concept of an Understanding on the relationship between trade measures taken pursuant to MEAs and the WTO rules. The Understanding needs, however, to address all of the above-mentioned criteria *(see item 3.3.above)*.

The WTO`s accommodation of trade measures taken pursuant to an MEA which meet the criteria of the Understanding would be made by a rebuttable presumption. These trade measures would be presumed necessary in the meaning of Article XX (b). In other words the UNICE proposal suggests that, if the prerequisites of the Understanding are met, the trade measure taken pursuant to the MEA should be accorded the benefit of the doubt. A WTO challenge would be possible, the challenger would have to overcome, however, a higher procedural threshold than if he challenged a unilateral measure. Given the notions of sustainable development and the protection and preservation of the environment in the WTO preamble, UNICE considers that a challenger of the trade measure would not be able to rebut the presumption unless he can demonstrate that the negotiators of the MEA have not met the criteria laid down in the Understanding.

5.3 Apart from this rebuttable presumption concerning Article XX (b), measures taken pursuant to an MEA shall remain subject to the requirements of the headnote to Article XX.

5.4 Some practical suggestions concerning the implementation of UNICE`s approach:

- The WTO needs to establish the criteria to be incorporated into the Understanding.

- Negotiators of an MEA need to co-ordinate their policies with trade negotiators at a national level. They need to have completed the environmental analysis both from a scientific but also from a result-based point of view before they envisage the use of trade measures.

- Negotiators of an MEA which contain trade measures should, upon conclusion of the negotiations, send to WTO a written statement containing an explanation that the criteria mentioned in the Understanding have been met. They could also consult with the WTO during the negotiations of the MEA. Given the fact that the WTO Secretariat cannot make an authoritative statement on the compatibility of a certain trade measure with the WTO, the WTO should, upon request of the negotiators of an MEA, ask a member of the WTO Appellate Body to advise the MEA negotiators.

UNICE Position Paper on Market Access and the Environment

20 January 1999

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 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.

UNICE Position Paper on TRIPs and the Environment

16 September 1997

Executive Summary

This paper elaborates on issues (such as patents, biodiversity and biotechnology, technology transfer and environmental technology) which have been discussed during the first two years of work in the WTO Committee on Trade and Environment.

European industry considers the TRIPs Agreement to be one of the most fundamental and important results of the Uruguay Round and places therefore much emphasis on correct and timely implementation of TRIPs minimum standards for patents by all WTO Members. In so doing, Members should be careful to comply with both the letter and spirit of TRIPs («Pacta sunt servanda»).

TRIPs constitutes an opportunity for *all* WTO Members. The transition periods which less developed countries enjoy should allow them to carry out adequate reform of their intellectual property regimes. This will enable them to reap the benefits of TRIPs implementation, namely increased research activities, increased investment opportunities, and increased transfer of the latest technology.

UNICE is dismayed that a number of non-governmental organisations seem to oppose effective protection of intellectual property rights on environmental grounds. They request amendments to TRIPs, e.g. to exclude biotechnological inventions, while it is generally recognised that the protection of these rights fosters the invention of products and processes supporting sustainable development and contributes directly to the invention and dissemination of environment-friendly products and processes. UNICE believes that some of the proposals tabled in the Committee on Trade and Environment will not lead to the desired results but to a confiscation of private rights incompatible with the TRIPs Agreement. In this respect, UNICE:

- notes that the Rio Convention on Biological Diversity and the TRIPs Agreement are two different bodies of law which exist in parallel but do not govern the same subject-matter. The obligations under the Convention on Biological Diversity (usually referred to as the «Biodiversity Convention») are not in contradiction with the obligations under TRIPs. The Biodiversity Convention states that it cannot be applied in a manner inconsistent with adequate and effective protection of intellectual property rights (e.g. TRIPs) unless the exercise of those rights would cause a serious damage or threat to biological diversity. Article 27.2 of TRIPs allows Members to exclude from patentability inventions the exploitation of which would seriously prejudice the environment;

- regards article 27.1 TRIPs as fundamental. It clearly prohibits discrimination as to the place of invention, the field of technology and whether products are imported or locally produced. It follows that excluding biotechnological inventions from patentability violates both the letter and the spirit of TRIPs;

- supports the transfer of technology between States providing the terms of this transfer do not amount to a confiscation of private rights.

UNICE would like to stress that one of the achievements of the Uruguay Round was a clear demonstration of the benefit in refraining from unilateral measures for purely domestic purposes, and in relying instead on internationally agreed rules and principles. The price to be paid for this is the commitment by all WTO Members to implement the substantive provisions of the Uruguay Round agreements and to apply them correctly. If WTO Members now openly call this commitment into question, they themselves will invite others not to follow the rule of law.

Introduction

UNICE has taken note of the work programme of the WTO Committee on Trade and Environment and has, in the past, adopted positions on some of the items on this programme. The present position paper is an industry contribution to the discussions on item 8 *Trade-related aspects of intellectual property rights and the Environment*. It elaborates on issues (such as patents, biodiversity and biotechnology, technology transfer and environmental technology) which have been discussed during the Committee's first two years of work.

I. TRIPs, Environment and Investment

1. UNICE's Basic Position on Patents

The European business community considers the TRIPs Agreement to be one of the most fundamental and important results of the Uruguay Round and therefore places great emphasis on correct and timely implementation of TRIPs minimum standards, notably for patents, by all WTO Members. The transition periods granted to less developed countries should allow them to carry out adequate reform of their intellectual property regimes. In so doing, they should be careful to comply with both the letter and spirit of TRIPs.

UNICE would like to point to Article 27.1 of TRIPs, which it regards as a fundamental provision in respect of discussions on TRIPs and the Environment. This Article clearly prohibits discrimination as to the place of invention, the field of technology and whether products are imported or locally produced. It would be a clear violation of TRIPs if a WTO Member were systematically to exclude the granting of patents in a certain field of technology. A general exclusion such as to exclude patenting for biotechnological inventions involving life forms would constitute a violation of Article 27.1 which European companies would fight with all the legal means provided for by European trade law. UNICE is determined to request the European Union and/or its Member States to use the WTO dispute settlement system to redress any violations of Article 27.1.

Having analysed many of the contributions from other non-governmental organisations, and in view of the scepticism of some less developed countries about the subject, UNICE would like to stress that the granting of a patent to an inventor does not, in itself, allow the inventor to *exploit* the invention; rather it enables him to prevent others from commercially exploiting the invention, for a limited period of time and in a defined geographical area. Patents protect the rights of the inventor against piracy and give him the opportunity to make an equitable return on his investments, a necessary basis to underpin innovation and foster competitiveness in both the short and the longer term. By the compulsory publication of any patented invention, patents prevent secrecy, promote transparency and further technological advance for the benefit of mankind. Denying patent protection only benefits unscrupulous opportunists, certainly not the public at large.

2. TRIPs and Sustainable Development

The concept of sustainable development, which European industry supports, is explicitly mentioned in the preamble to the WTO. Development of new technologies is necessary to solve today's environmental problems and respond to the needs of future generations. Adequate and effective intellectual property protection regimes will contribute to achieving sustainable development by stimulating investment and research and by promoting new environment-friendly technologies and products. The absence of intellectual property protection does not mean cheap new products instead of expensive new products, but old products and processes with some degree of negative environmental impact instead of new environment-friendly ones.

If developing countries are involved in early research for the solution of environmental problems, this will ensure that their companies obtain the rights and benefits associated with manufacture of new products rather than having to import them. However, in order to foster a sound research base to do this, effective intellectual property protection regimes are a pre-requisite.

3. TRIPs, Investment and Technology Transfer

Even though other factors have to be taken into account, the link between intellectual property protection and investment is of significant importance. Quite legitimately, IPR owners will always be reluctant to transfer their knowledge to countries with weak intellectual property protection regimes. Adequate protection is one of the most decisive factors in sectors such as chemicals and pharmaceuticals. In a world where countries compete with each other for investment, compliance with TRIPs' minimum standards will influence the investor's perception of the attractiveness of a location and will encourage technology transfer, in particular to less developed countries. UNICE firmly believes that implementation of TRIPs will promote North-South transfers of technology.

In this context, it is worth noting that the Financial Times recently indicated (*Patent medicine promises recovery for drugs sector,* FT, 18 February 1997) that liberalisation of the industry and planned introduction of new patent laws have renewed foreign investors' interests in India's domestic market and in the country's potential as an exporter of low-cost drugs.

4. TRIPs and Environmental Concerns

One of the many misconceptions about patents arises in the context of exclusions from patentability. A number of arguments are often put forward for using intellectual property laws as a panacea to deal with societal concerns, e.g. protection of the environment. The TRIPs Agreement rightly distinguishes between those concerns which fall under the scope of intellectual property legislation and those which the legislator needs to address under public law. The idea that threats to the environment can be countered by discouraging investment in research in areas thought to be environmentally damaging is unsound. On the contrary, research in areas in which better protection for the environment can be expected should be fostered.

The suggestion by the government of India (first non-paper presented to CTE by India - March 1996) to *amend the TRIPs agreement in order to take into account the environmental objective of discouraging the global use of technologies incorporating intellectual property which harm the environment* is one such misconception. This suggestion aims to deny intellectual property protection in the chemical and pharmaceutical fields – which would be in keeping with current practice in India. Since exclusions from patentability can be considered a confiscation of private and commercial rights, such exclusions need to be checked against the strict legal limits which TRIPs imposes on WTO Members.

Article 27.2 TRIPs makes it quite clear that an exclusion from patentability applies only when exploitation of the invention would be contrary to *ordre public* and morality. The fact that an invention might – *if* exploite – have a negative impact on the environment is not as such sufficient reason for denying the *grant* of a patent. For such an exclusion from patentability to be justified, the concept of *ordre public* and morality requires fundamental or constitutional objections to the invention itself, not just to its use. *Ordre public* is not an abstract feeling of what is good or bad, but relates to fundamental laws and social values and has to be interpreted with reference to these. The European Patent Office's Guidelines state that *a fair test to apply is whether the general public would regard the invention as so abhorrent that the grant of patent rights is inconceivable.*

UNICE is of the view that this is the proper test to apply to Article 27.2. All other concerns need to be addressed, at national level, through legislation or, at international level, through negotiation of an International Environmental Agreement. Intellectual property laws are not a universal remedy for environmental problems, they merely confer private rights.

This interpretation is also confirmed by the last part of Article 27.2 which explicitly shows that the threshold for excluding an invention from patentability needs to be higher than a mere prohibition under domestic law to *exploit* the invention. It is essential for CTE negotiators to bear in mind that the *use or exploitation* of an invention might be prohibited by law while a patent may nevertheless be *granted* on such an invention. Clorofluorocarbons, hand guns and automatic rifles or pathogens are patentable but their use is sometimes prohibited by law.

II. TRIPs and Biodiversity

1. The relationship between TRIPs and the Convention on Biological Diversity (CBD)

In UNICE's view, it is quite clear that these two agreements exist in parallel and that the two bodies of law can coexist harmoniously and be applied in parallel without creating conflict. The Rio Convention on Biological Diversity (hereinafter referred to as «CBD») makes it clear that the Contracting Parties have a sovereign right over the biological resources in their territories. TRIPs sets out minimum standards for intellectual property protection which all WTO Members have to respect. Hence, TRIPs may not be applied in a way that undermines the objectives of CBD, and conversely CBD cannot be applied in such a way that it would undermine the objectives of TRIPs.

It cannot seriously be argued that CBD is more specific with respect to IPRs than the TRIPs agreement. Even the most creative interpretation of Article 16 CBD must adhere to the wording in paragraphs 2 and 5 of this provision. TRIPs must be relied on for the interpretation of «adequate and effective protection of IP rights». Article 16.5 CBD speaks about cooperation and mutual supportiveness. Strong intellectual property protection in less developed countries might therefore be just the right way for them to secure the fundamental objective of CBD, namely the conservation of biological diversity and the sustainable use of its components.

Article 22 CBD cannot be interpreted as meaning that CBD supersedes TRIPs because it clearly cannot be

argued that TRIPs *per se* causes serious damage or a threat to biological diversity. In some extreme cases, the actions of governments could have an effect of this kind, such as permission by governments for total clearance of rain forests. This cannot, however, be the case when patent rights are granted. While a patent confers a right to exclude others from commercial exploitation of an invention, it does not actually grant the patent holder a right to *exploit* the invention. In addition, as mentioned above, TRIPs already contains safeguards in that Member Countries may exclude inventions to protect *ordre public* and morality, including avoidance of serious prejudice to the environment (Article 27.2). UNICE considers that less developed countries must have an interest in strong intellectual property protection since this might help them secure the conservation of biological diversity and its sustainable use.

In this whole debate, UNICE would like to comment briefly on the emotional slogan «no patents on life» often used by some non-governmental organisations to oppose effective protection of biotechnological inventions. The TRIPs agreement does not make it possible to grant patents on life. A clear distinction must be made between life «*per se*» and life «*forms*». Life «*per se*» is neither an invention nor a material and cannot therefore be patented under any intellectual property regime. Nevertheless, if all criteria for patentability are fulfilled, the TRIPs agreement makes it possible to grant a patent on some biological material. This cannot seriously be equated to granting «patents on life». Therefore excluding or delaying patents on biotechnological inventions would amount to a direct violation of Article 27.3 TRIPs. UNICE is confident that all WTO signatories intend to respect their obligations in this matter.

To sum up, it is UNICE's considered opinion that adequate protection of IPRs is a key to developing the very technologies which will contribute to the conservation aims of CBD. Examples of such technologies would be: innovative products and processes which help preserve the ozone layer and thereby the earth's biosphere, inventions aimed at improving the climate in conservation regions, or the development of plants with the capacity to absorb a higher level of carbon dioxide.

2. Biodiversity and Technology Transfer

CBD recognises that there is a link between a right of access to biological resources and the transfer of technology. While the right of access to biological resources is based on a contractual relationship between the country rich in biodiversity and a company, the transfer of technology is a commitment which States have agreed to. Industrialised countries have agreed to facilitate technology transfer to help countries conserve and use sustainable biological diversity. CBD does not contain an obligation for private citizens to transfer their rights over a given technology.

The rules on technology transfer have to be seen in the light of developments in international economic law. While the development of international environmental law has led to the conservation of biological diversity being attributed to States, the parallel development of international economic law, in particular the results of the Uruguay Round and more specifically TRIPs, has led to international recognition that rights over a technology are granted for a limited period of time to private persons who invented and developed the technology.

The first set of rules is in the realm of government-to-government relations, while the second deals with the government-to-person (or government-to-company) level. The general thrust of these joint sets of objectives is that, while the benefits arising out of the utilisation of genetic resources are to be shared in a fair and equitable manner, States must nevertheless respect intellectual property rights whether or not these are embodied in relevant technologies aimed at the conservation and sustainable use of the environment.

Although the ambiguity of some aspects of Article 16 CBD might be seen as allowing for conflicting interpretations, it clearly does not, however, authorise confiscation of private rights. It follows from this that there is no obligation whatsoever to transfer technology without remuneration or without respecting property rights, except based on a contractual relationship, e.g. in exchange for access to genetic resources. The European Union, in its interpretative declaration to CBD, states that transfer of technology will be carried out in accordance with Article 16 CBD *and* in compliance with the principles and rules for protection of intellectual property.

3. TRIPs and Indigenous and Traditional Knowledge

The Biodiversity Convention requires that, *as far as possible and appropriate, signatories respect, preserve and protect indigenous and traditional knowledge that encourage the equitable sharing of the benefits resulting from the use of such knowledge.*

The question of indigenous knowledge is another bone of contention and it demonstrates that arguments against patent laws are misconstrued for ideological purposes. The European business community recognises the importance of indigenous knowledge and encourages all WTO Members to protect this knowledge in order to maintain the earth's diversity and the sustainable use thereof.

However, it is erroneous to argue that intellectual property regimes usurp the knowledge of indigenous peoples and local communities. Patent laws do *not* deprive local communities of continued use of their indigenous products and processes. The requirements for obtaining a patent are: novelty, inventive step (non-obviousness), and industrial applicability (usefulness), and Patent Offices rigorously distinguish between «inventions» and «discoveries». Furthermore, indigenous knowledge may be the foundation on which a novel patentable process or product is developed. When this happens, UNICE believes that this must be acknowledged by the inventor and compensation should be provided for on mutually agreed terms, as required by CBD.

Examples surrounding the *neem tree* might help to clarify the misconceptions. The US National Research Council noted: *For centuries, millions have cleaned their teeth with neem twigs, smeared skin disorders with neem-leaf juice, taken neem as a tonic, and placed neem leaves in their beds, books, grain bins, cupboards and closets to keep away bugs. The tree has relieved so many different pains, fevers, infections and other complaints that it has been called the village pharmacy.*

TRIPs does not require patenting of diagnostic, therapeutic and surgical methods for treatment of humans and animals. Thus, such methods of treatment can be denied patentability, including treatments based on neem leaves. Furthermore the indigenous production of a pesticide made out of neem leaves or juice would destroy the novelty and inventive step of a patent claim to the same pesticide. In other words, even where a country *does* grant patents for the treatment of humans (e.g. the USA) the invention, to be patentable, must fulfil the above-mentioned criteria. Consequently, if a particular use of neem or a composition thereof is known, it just *cannot* be patented and, in addition, patents on other, novel production methods or compositions can never prejudice the *continued use* of pre-existing production methods, including their non-inventive variants.

Some circles argue that, because the starting point of any biotechnological invention is material existing in nature, no patents should be granted because these are discoveries and not inventions. UNICE rejects this as being in flagrant contradiction with TRIPs and with existing patent laws in many countries. The innovative element of such inventions lies in isolation and characterisation of a novel natural product and the instructions on how to use the product industrially. It is this combination of features and technical character that makes it an invention, which may be considered patentable *if* there is an inventive step.

To treat biotechnological inventions in a way that differs from the way other inventions are treated would be contrary to Article 27.1 TRIPs and would stifle research in this generally recognised area for future technological progress.

To give a concrete example. It is known that camomile has a sedative effect and camomile tea has been used for centuries for that purpose. Nevertheless, isolating and characterising the chemical substance contained in the camomile plant and responsible for the effect, and giving instructions on how to produce the compound and use it industrially, could be regarded as patentable *if* unobvious. Such a patent would not cover the compound in the camomile plant or any other plant of which that substance is a natural component and could not be used against any traditional or known use of the plants.

III. Environmental Technology

Regarding technologies that benefit the environment, the government of India suggests (in its «non-paper» submitted to the Committee on Trade and Environment on 20 June 1996) that the generation of environmentally sound technologies and products should be encouraged by international law.

UNICE fully supports this suggestion. It is one of the tasks of international environmental agencies or negotiating fora to conclude agreements whose purpose is to improve the global environment. UNICE has stated time and again that international measures are to be preferred over unilateral ones. It would however distinguish between the development of public international law and the granting of property rights at national level.

In this context, the suggestion by the government of India regarding how to allow access to patented environmentally sound technologies and products raises much concern: *The owners of the environmentally sound technologies and products shall sell these technologies and products at fair and most favourable terms and conditions, upon demand, to any interested party which has an obligation to adopt these under national law of another country or under international law. Members have to revoke or cancel patents already granted in order to allow for free production and use of such technologies as are essential to safeguard or improve the environment.*

This proposal amounts to confiscation of private rights which, in most countries, are enshrined in the constitution. Here again the reasoning is based on an assumption that might seem logical at first sight but would, when considered more carefully, amount to destroying the minimum patent standard provided for by TRIPs and would at the same time discourage investment in any future invention.

Patents support innovation, including the development of environmentally sound technologies and products, and promote the sustainable use of the earth's resources. UNICE believes that market forces are well suited to promoting such inventions that have been proven to provide the best and most economic solutions to specific problems. The proposal tabled by the government of India would not help provide the international community with new, environmentally sound technologies and products but would, on the contrary, stifle research and development. If the inventor fears that his property rights will not be respected, he will think twice before providing the public with the benefit of his invention. Therefore, the argument should not focus on whether bringing environmentally sound technologies and products into the public domain will give easy access to technologies at reasonably low prices. Rather, it is a choice between having innovative – and therefore protected – environmentally sound technologies and products, and not having them at all. For UNICE the choice is clear.

UNICE believes that WTO Members should demonstrate their willingness to comply with their commitments undertaken by ratifying the Uruguay Round results, and implement the TRIPs agreement. Thereafter the WTO can examine whether the provisions in TRIPs are sufficient to *encourage* reasonable dissemination of environmentally sound technologies and products.

In addition, UNICE firmly rejects the suggestion that patents already granted should be revoked or cancelled to allow for free production and use of environmentally sound technologies and products. Such a suggestion would render meaningless Article 27.1, which requires patents to be available and patent rights to be enjoyable without discrimination as to the field of technology. UNICE submits that Article 27.1 TRIPs imposes a fundamental non-discrimination requirement which might also be invoked against revocation of patents in a given field of technology.

The many and very creative suggestions to amend TRIPs seem to have the common goal of granting a level of protection for patents which would be lower than that currently provided. Given the hostility to intellectual property protection regimes in some circles, UNICE would like to stress that one of the achievements of the Uruguay Round was a clear demonstration of the benefit in refraining from unilateral measures for purely domestic purposes, and in relying, instead, on internationally agreed rules and principles. These advantages are obtained through the commitment by all WTO Members to implement the substantive provisions of the Uruguay Round agreements and to apply them correctly. If WTO Members now openly call this commitment into question, they themselves will invite others not to follow the rule of law. UNICE can only call on all WTO Members to contribute to item 8 of the Committee on Trade and Environment work programme having in mind the success, and the consequences, of the Uruguay Round for the multilateral trading system.

UNICE Position on Eco-Labelling for the WTO Discussions on Trade and Environment

22 July 1996

1. Introduction

In the following paragraphs UNICE addresses a number of questions which have arisen in discussions at the WTO's Committee on Trade and Environment (CTE) with respect to the treatment of eco-labelling schemes by the WTO. The main purpose of UNICE`s paper is to make proposals on the trade-related aspects of eco-labelling and not to deal with eco-labelling as such. Nevertheless it is important to define eco-labelling as being the provision of voluntary information for consumers on the ecological qualities of a product or a service, accredited by a public or private body. The award of an eco-label is made dependent on the life-cycle analysis of a product comprising the following phases: pre-production, production, distribution, use and disposal.

1. The Principle

The WTO Agreement on Technical Barriers to Trade (TBT) and the basic GATT provisions of Articles I (Most-favoured-nation treatment) and III (national treatment) prohibit conditioning access to the domestic market on compliance with the production regulations of the importing country. If an imported product is like the domestically produced product it cannot be prohibited for reasons of differences in the production process between the importing and the exporting country. The international business community adamantly defends this principle for it fears that if it were to allow exceptions to this principle that would open protectionist floodgates.

2. The Dilemma

Eco-labelling schemes are new instruments of environmental policy which rely more on consumer choice than on establishing direct trade restrictions at the frontiers. A product without an eco-label can be imported as freely as a product with an eco-label. Eco-labelling schemes are voluntary. Producers of a certain product do not need to apply for a label. One could therefore argue that eco-labelling schemes are outside the scope of the WTO altogether. Eco-labelling schemes could, however, have potential trade effects, the most important of which is determination of the criteria for awarding an eco-label. There are other trade effects as well: selection of product groups, cost of obtaining a label, as well as certification and approval.

Eco-labelling requirements not only deal with products and their related process and production methods (PPMs) but also with non-product-related PPMs, i.e. the methods of production which leave no trace in the final product, such as the use of energy or of hazardous pre-products. Award of the label is made dependent on the basis of a life-cycle analysis. For the purpose of the WTO and the rules relating to eco-label and international trade, the life-cycle analysis could affect the situation in two different countries, the producing and the consuming country. Given the fact that the WTO prohibits the importation of a product being made dependent on the production process used in the importing country, the WTO has to address the problem that an eco-label is normally made dependent on how the product was produced.

3. Questions to be addressed in the Trade and Environment context

3.1 Application of the WTO TBT Agreement to Eco-labelling

- Is the WTO TBT Agreement applicable to eco-labelling schemes?
- Do Eco-labelling schemes have to be notified to the WTO?
- Do the criteria for awarding a label have to be notified to the WTO?

3.2 Award of an Eco-label on the basis of non-product-related Process and Production Methods

- Does the WTO permit eco-labelling schemes which make the award of the label dependent on non-product-related PPMs?
- Would one create a dangerous precedent if it were accepted that a label can be awarded relying on non-product-related PPMs?

- Could such an approach be interpreted as an amendment to the WTO distinction between like and unlike products? Could one say that a product with a label is *unlike* a product without a label and on this basis apply (legally) trade measures against the unlike product at the border?

3.3. A WTO Interpretative Statement on Eco-label

- What would be the content of this Interpretative Statement?

- What is the relation between the ISO standard on eco-labelling and the WTO TBT Agreement?

4. Relevant Text of the WTO TBT Agreement

Before discussing these questions the relevant provisions of the WTO TBT Agrement should be recalled. [emphasis added]:

Annex I

1. Technical Regulation

*Document which lays down product characteristics or their **related** processes and production methods, including the applicable administrative provisions, with which compliance is mandatory.*

*It may also include or deal exclusively with terminology, symbols, packaging, **marking or labelling requirements** as they apply to a product, process or production method.*

2. Standard

*Document approved by a recognised body, that provides, for common and repeated use, rules, guidelines or characteristics for products or **related** processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, **marking or labelling requirements** as they apply to a product, process or production method.*

5. Examples of the trade-related aspects of eco-labelling

Given the fact that eco-labelling schemes do not establish direct border trade restrictions they could nevertheless be seen as insurmountable obstacles to international trade and should therefore be subjected to WTO control. The following examples describe the trade-related aspects of eco-labelling:

- Suppose that the body in country Z deciding on the criteria for the award of an eco-label decides that the label will be granted if criteria A, B and C are met. In country X a label is awarded if criteria A, B and D are fulfilled. Ecologically the criteria A, B and D are as valid as criteria A, B and C. Can the exporter insist on the award of the label? Does he have legal recourse in the event of refusal?

- Country X requires that new paper needs to have a certain recycled paper content otherwise new paper cannot be sold. Given its vast expanse of forests, its great area and scarce population Country Z decides that a requirement to recycle paper is economically and ecologically unfeasible because, in its specific situation, the case for insisting on paper recycling could not be sustained. The import prohibition of new paper without any recycled content is problematic under WTO rules. Would the same be true also for the award of a label?

The examples demonstrate that there is often a national environmental choice in the award of the eco-label. Is this choice purely guided by environmental reasons or is it an easy way of hiding protectionist attitudes?

2. UNICE's answers to the questions

1. The Application of the WTO Agreement on Technical Barriers to Trade (TBT) to Eco-labelling

UNICE is of the view that the WTO TBT Agreement covers eco-labelling schemes.

In general, eco-labelling schemes are voluntary. A distinction can however be made concerning the basis of the scheme. Some schemes are based on regulation or legislation, others are based on the action of a private body.

The first question to be addressed is whether there is a distinction to be made between eco-labelling schemes based on legislation and those which are purely private.

There is no question that mandatory eco-labelling schemes are covered by the TBT Agreement.

One of the new features of the WTO TBT Agreement is that it also applies to non-governmental standard-making bodies. The WTO members decided that there should be a balance of obligations between governmental and non-

governmental standard-setting bodies. WTO members should not escape WTO disciplines by leaving the process of standard-setting in the hands of a private body while those which decided to regulate the issue would be subjected to WTO disciplines. The WTO TBT Agreement therefore contains a Code of Conduct for Standard-Setting Bodies which lays down analogous rules for standards and for technical regulations.

The preamble of the WTO TBT Agreement makes clear that the TBT discipline applies both to technical regulations (mandatory) and standards (voluntary) with respect to labelling. It therefore seems obvious that both legislative schemes and purely private schemes are covered by the TBT Agreement. Otherwise, countries with legislative schemes could repeal them and encourage non-governmental bodies to adopt private schemes so as to escape TBT Agreement disciplines.

The second question to be addressed is whether the voluntary nature of eco-labelling schemes should have an effect as far as the TBT Agreement is concerned. In other words, could it be argued that while the schemes as such are covered by the TBT Agreement, their application is not covered because compliance is voluntary?

If one were to follow this argument one would create an incentive to circumvent the purpose of the WTO TBT Agreement. The essence of this agreement is that neither technical regulations nor standards create unnecessary obstacles to international trade. Even if compliance with a scheme is voluntary, the criteria established by the public or private body could nevertheless be regarded as an unnecessary obstacle to international trade. The Commission argued in its communication on trade and environment that consumers are willing to buy ecologically friendly products and are even prepared to pay a higher price for these products. Thus it seems obvious that eco-labelling schemes will have an effect on trade notwithstanding their voluntary nature.

For these reasons, UNICE considers that the TBT Agreement needs to be interpreted broadly not only to cover eco-labelling schemes as such but also their voluntary application. WTO members should not be able to escape their TBT Agreement obligations by:

- either not issuing regulations on eco-labelling but also by relying on private actors to award eco-labels:
- or by not being subjected to some WTO scrutiny when it comes to the establishment of the criteria for the award of the label.

It follows from this position that the notification provisions of the TBT Agreement should also apply to eco-labelling. UNICE is of the view that WTO members should notify both the eco-labelling schemes and the specific criteria for the award of the label. The notification should be made well in advance so that comments on the system or the criteria by other WTO members can still be taken into account. UNICE believes that transparency will help to make new instruments of environmental policy accepted at international level. It is therefore in the best interest of the country which introduces an eco-labelling scheme to demonstrate its willingness to undergo WTO scrutiny and to give other WTO members the opportunity to comment on the scheme and its criteria.

2. Award of an Eco-label on the Basis of Non-product-related Process and Production Measures

UNICE is of the view that the WTO TBT Agreement allows the award of an eco-label to be made dependent on non-product-related PPMs.

Whilst UNICE supports the view that the importation of a product cannot be made dependent on non-product-related PPMs, the same view does not apply to eco-labelling. There are two basic arguments for this position: first, the eco-label does not trigger any action at the border; second, the definitions of the terms „technical regulation" and „standard" do not refer to related processes and production methods.

The fact that the drafters of the TBT Agreement have not mentioned the word «related» in the sentence *It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method* allows the interpretation that the award of a label can be made dependent on process and production methods without them being related to the specific product. Had the drafters of the TBT Agreement wanted the basic GATT distinction between related PPMs and non-related PPMs to apply also with respect to labelling, they would have had to repeat the word «related» in the second sentence of the definitions of the Annex to the TBT Agreement.

This interpretation has to be qualified however with a reference to the „like product" definition of WTO. Products with or without an eco-label must be considered like. For otherwise one could legally apply a different border treatment between products with an eco-label and those without one which in turn would jeopardise the basic WTO rule that non-product-related PPMs cannot be used to make a product „unlike".

3. A WTO Interpretative Statement on Eco-labelling Schemes?

UNICE considers that there is no need to negotiate a WTO agreement on eco-labelling schemes. The TBT Agreement is applicable.
UNICE would however suggest that the WTO adopts an Interpretative Statement on the application of the WTO TBT Agreement to eco-labelling schemes:

The Interpretative Statement would clarify that the WTO TBT Agreement applies to eco-labelling schemes, and would elaborate on the notification requirement so that WTO members have enough time to comment on the scheme and the criteria for the award of the label. It would also clarify some of the contentious issues concerning the WTO TBT Agreement and eco-labelling, such as the award of an eco-label on the basis of non-product-related PPMs, and the question of like products.

The Interpretative Statement could furthermore clarify the TBT Agreement rules with respect to eco-labelling schemes administered by private bodies. It could for example state that the WTO TBT Code of Good Practice applies to eco-labelling schemes administered by private bodies and elaborate on the notification requirement. Notification should have the purpose of allowing WTO members to comment on the scheme and the criteria for the award of the label.

The Interpretative Statement should also refer to the on-going work in the International Standardisation Organisation, in particular to the ISO 14000 standard on eco-labelling. ISO is contributing to the goal of achieving international harmonisation and/or equivalency and mutual recognition. UNICE believes that national eco-labelling schemes should be consistent with the forthcoming standard of the ISO 14000 series, subject to their successful completion. The proliferation of national eco-labelling schemes that are not compatible with the ISO standards should be discouraged.

The most important aspect of the Interpretative Statement would however be the explanation of what WTO members or private bodies have to recognise in setting up their eco-labelling scheme in order to avoid conflict with the WTO TBT Agreement rules.

WTO members could challenge eco-labelling schemes as an unnecessary restriction of international trade if the system does not comply with the following basic requirements

- eco-labelling schemes have to be transparent,
- the reasons for awarding a label must be comprehensible, and
- eco-labelling schemes should contain the criterion „ecological equivalence".

The latter criterion is decisive for the question of whether an eco-labelling scheme discriminates against foreign products. If a WTO member alleges that the non-award of a label is unjustified for ecological reasons and argues that this constitutes an unnecessary obstacle to international trade it will force the WTO dispute settlement system to judge on a purely environmental question. This question needs to be addressed, however, in order to decide whether the non-award was discriminatory. WTO members who have introduced, or want to introduce, eco-labelling schemes could avoid this conflict if they explicitly included the environmental equivalence criterion. If they are not willing to include this criterion they themselves impose on WTO to deal with a purely environmental question. They therefore cannot argue any longer that the WTO should not deal with environmental questions. It is up to the WTO members to choose whether they correctly address all environmental issues at a national level when it comes to eco-labelling or whether they adopt an environmental policy choice which could be subject to WTO review.

UNICE would like to conclude this paper by quoting the position of the Commission on Sustainable Development regarding eco-labelling, adopted in May 1996 *The Commission recognises that eco-labelling can have an impact on trade. The Commission invites Governments to ensure adequate transparency of eco-labelling, inter alia by considering inputs from interested third parties, including consumer and environmental groups, domestic and foreign producers, at an appropriately early stage in the design of the measures, and to encourage private bodies involved in eco-labelling to do the same. Calls upon national Governments and private bodies involved in eco-labelling to explore the scope for mutual recognition of procedures and approaches on the basis of equivalency at appropriately high levels of environmental protection taking into account differing environmental and developmental conditions in different countries. The Commission also invites UNCTAD, UNEP, WTO and, as appropriate, ISO, to give the fullest consideration to these concepts in the future work on environmental labelling in the best interests of transparency.*

UNICE Comments on the Commission's Communication on Trade and Environment (COM (96) 54 final of 28 February 1996)

28 May 1996

General remarks

UNICE welcomes the 28 February 1996 Communication and supports the basic ideas put forward by the Commission. The Paper demonstrates that views on trade and environment have evolved, the subject has become less emotional and more factual, and that the main issues are, or are going to be, addressed by the WTO Committee on Trade and Environment. European industry is pleased with this development and hopes that the WTO`s Ministerial Conference to be held in Singapore in December 1996 will help to clarify, or even adopt a position on, some of the issues outstanding in trade and environment discussions.

In its position papers on trade and environment dated 20 May 1994 and 9 November 1995[1], UNICE made several references on the interaction between trade and environment. It underlined in these two papers in particular that trade liberalisation and environmental protection are not contradictory objectives. Rather, trade and environmental policies can be mutually supportive in the attainment of sustainable development. UNICE also clearly stated that unilateral trade measures are inappropriate to remedy global or cross-border environmental problems. It considers that the most effective way of tackling these problems is to negotiate and implement bilateral, plurilateral or multilateral environmental agreements reflecting the nature or the extent of the problem to be dealt with. UNICE's comments on the Communication should be seen in light of the UNICE general principles developed in the two above-mentioned papers.

UNICE fully agrees with the Commission's views expressed in the executive summary of the communication in terms of objectives and ways to achieve them. It particularly welcomes the explicit reference to the principle of sustainable development. European industry believes that sustainable development can only be achieved if environment, economic and social policy objectives are put into a common context. No single policy objective can be regarded as taking precedence over others, otherwise the concept of sustainability would be jeopardised.

Specific remarks

1. Interaction between Trade and the Environment

UNICE agrees with the Commission's view on the environmental effects of trade liberalisation and with the view that if the policies necessary to protect the environment and to promote sustainable development are in place, trade-led growth will be sustainable. This view demonstrates clearly how the concept of sustainable development should be interpreted.

Given the interaction between trade and the environment, the Commission should not only conduct environmental reviews of trade instruments and agreements but also conduct trade reviews of environmental instruments and agreements. Whilst UNICE fully agrees with the need to solve global environmental problems within the context of multilateral environmental agreements, the effects of MEAs on trade need to be looked at not only from a trade policy but also from a sustainable development point of view.

UNICE believes that the Commission's figures on cost of compliance with environmental regulatory requirements could leave the wrong impression. Until there is clear understanding on how the costs of compliance with environmental regulations should be computed, the Commission's figures are only indications, which, as the Commission rightly points out, can vary from sector to sector or from product to product and thus do not give a realistic picture of the situation of individual companies and sectors. UNICE, therefore, believes that closer analysis of this argument is necessary.

1 UNICE preliminary comments on trade and environment (20 May 1994) and UNICE additional comments on trade and environment (9 November 1995).

UNICE notes the survey on ecologically sound products. UNICE questions whether a single survey can justify the Commission's statement that 67% of people have already purchased or are prepared to buy products with an environmental bonus, even at a higher price. If the survey does reflect reality, UNICE would argue that government intervention for other products at the border becomes unnecessary, because the consumer is willing to pay a higher price for an ecologically sound product.

UNICE fully agrees with the Commission's statement that differences in environmental policies should not lead to the introduction of compensating duties or export rebates. To propose a system of compensating duties would not only bring into question some fundamental principles of the world trading system but would also be an administrative nightmare.

As far as the use of trade restrictions within MEAs is concerned UNICE has repeatedly stated that these restrictions should not go beyond what is necessary to achieve the environmental objectives of the agreement. The Commission is correct in stating that a different rationale could be abused for protectionist purposes. UNICE is however less convinced by the Commission's statement that the trade measures of some MEAs it refers to are a useful instrument to enforce internationally agreed standards, in particular when the environmental effectiveness and efficiency of the trade measure remain doubtful. The world trading system is unfit to solve environmental problems to which the environmental community provides a panoply of diverging arguments.

2. Developing Countries and Economies in Transition in the Trade and Environment Debate

Whilst UNICE agrees that trade and environmental issues must be approached in ways that do not jeopardise sustainable development prospects or undermine the overall export performance of developing countries and countries with economies in transition, it is however not convinced by the market access argument. In the course of discussions on introduction of environmental aspects in the EU's system of generalised preferences, the Commission itself has explained that it does not always believe that LDCs are a *potentially rich source of environmental products and technologies*. It also has to be recognised that some LDCs do not always produce according to the latest state-of-the-art technologies of environmental protection.

European industry regrets the Commission's tendency towards oversimplification to support its otherwise acceptable position vis-à-vis developing countries, such as the argument that organic rather than synthetic inputs lead to environmentally sound products.

UNICE believes that bodies like ISO should not only develop environmental management standards but should also encourage LDCs to adhere to and implement these standards. Environmentally oriented consumers in developed countries are already forcing industry to use products from suppliers which have been certified as pursuing sound environmental management systems. The development of such internationally agreed standards also has the positive effect that governments do not have to interfere with trade at the border but can rely on environmentally conscious market forces.

3. The Multilateral Trading System and Environmental Protection

European industry has difficulties with some of the Commission's positions in this respect. UNICE agrees with the Commission's analysis that trade-related environmental measures are not inconsistent with the multilateral trading system if they conform to certain basic trade requirements. Unfortunately the Commission does not define these basic trade requirements in precise terms. UNICE is furthermore of the view that the WTO dispute settlement will have to take the WTO preamble - and its concepts of environmental protection and of sustainable development - into account. Thus it is not clear whether WTO panels will apply to trade and environment cases the same interpretation as GATT panels have done in the past.

3.1. GATT/WTO Rules and Multilateral Environmental Agreements

The Commission refers to three MEAs with trade measures (CITES, the Montreal Protocol and the Basle Convention) to support its argumentation.

UNICE does not share the interpretation of Principles 7 and 12 of the Rio declaration as meaning *that it is generally recognised that the multilateral trading system should consider favourably trade-restrictive measures which are taken pursuant to MEAs*. Principles 7 and 12 speak about international co-operation, they do not however provide a carte blanche for trade- restrictive measures taken pursuant to an international agreement. Each case has to be analysed individually and the

Commission is right to call for clear and predictable rules. It is however not clear what exactly the Commission understands as „clear" and „predictable".

UNICE believes that the WTO CTE should develop an ex-ante approach laying down the fundamental requirements which MEAs containing trade measures have to respect if these trade measures should be presumed to be compatible with GATT Article XX. These minimum requirements should contain, inter alia, the following issues:

- the „chapeau" of Article XX, including arbitrary and unjustifiable discrimination;
- the necessity test of Article XX, namely an analysis of whether the trade measure is indeed necessary to achieve the non-trade aim of the MEA, including proportionality, and the concept of least trade-restrictive measure;
- the environmental objective of the MEA need to be justified scientifically;
- the agreement must be truly global and address a global environmental problem;
- the WTO dispute settlement should apply not only between signatories and non-signatories but, as a last resort, also between signatories.

Were such requirements in force, the specific trade measures of at least one of the MEAs cited by the Commission would not qualify as an exemption from the WTO`s provisions.

Even with the most lenient interpretation of WTO rules, Article 4 A in conjunction with Annex VII of the Basel Convention cannot be justified. The distinction between OECD and non-OECD countries constitutes an arbitrary and unjustifiable discrimination. The „chapeau" of Article XX explicitly states that the exceptions to this Article can only be invoked if certain basic requirements are met. It could furthermore be argued that the Basel Convention also fails to comply with some of the other basic requirements mentioned above. For the purposes of these discussions the argument about arbitrary and unjustifiable discrimination should suffice.

Whilst the Montreal Protocol is often cited as a case in point for successful and effective trade measures pursuant to an MEA, recent developments seem to call for a more cautious approach. In particular the question of global coverage has to be addressed when less and less signatories are willing to ratify the latest amendments to the Protocol while at the same time the rules on trade measures against non-signatories remain unchanged. Application of the rules of the Montreal Protocol has also led to an enormous amount of abuse and there are few examples of industries which are subject to as many controls as those phasing out the Montreal substances.

It is for these reasons that UNICE is concerned about the Commission's vagueness on the term „clear and predictable rules". UNICE considers that the Commission should develop a comprehensive list of requirements which MEAs have to meet when they allow for discriminatory trade measures, if these measures should in turn be presumed to be compatible with GATT Article XX.

UNICE is also concerned with the discussion that the WTO allegedly takes priority over MEAs. The relationship between the WTO and MEAs has to be seen in the context of their substantive provisions. WTO and MEAs exist parallel to each other. The WTO is the multilateral agreement dealing with trade issues and is therefore, and rightly so, the ultimate body to decide on trade issues. MEAs rule on international environmental issues and bind their signatories.

3.2. Product-related and Processes and Production Method-related measures

UNICE agrees with the Commission's analysis of this point that a WTO Member cannot unilaterally ban or restrict the import of products because of the environmental effects of processes and production methods (PPMs) used in the exporting (producing) country. Whilst UNICE appreciates the Commission's efforts to explain this difficult subject by mentioning certain specific products, it would have appreciated it if the Commission had stated that the specific mention of these products was for explanatory purposes only and could not be regarded as a Commission position on these products.

UNICE is, however, concerned about the Commission's ultimate conclusions on PPMs. The Commission does not seem to exclude the possibility that cases might exist where unilateral trade measures against non-product related PPMs could be justified. UNICE has some doubts about such conclusions but cannot exclude that a WTO

panel might uphold a unilateral trade measure taken against a non-product-related PPM. One could for example argue that, for health and environmental reasons, products produced with ozone depletion substances could be prohibited at the border even if they no longer contain these substances.

Whilst it would have been preferable to give an example of when „specific exceptional circumstances" exist which could justify the use of unilateral trade measures, such difficult legal interpretations of GATT Article XX can only be solved by the WTO dispute settlement system itself. WTO dispute settlement ensures the protection against protectionist trade measures.

As far as unilateral trade measures for environmental purposes are concerned UNICE refers to recent discussions within the Community on the prohibition of imported furs or the use of growth hormones in beef. There are many political actors in the European Union who do not show any willingness to honour the commitments undertaken in Marrakesh. UNICE would like to point out that all institutions of the European Union have accepted the Uruguay Round results with great enthusiasm. In the case of political difficulties with some of the provisions of the WTO, UNICE not only asks for compliance with the rules but also for consistency in the approach taken by the authorities. UNICE therefore commends the Commission's initiative to try to find a solution for the issue of leg-hold traps compatible with WTO rules. The European Union cannot successfully pursue the second Tuna fish case against the United States in GATT while at the same time introducing trade restrictions which are as WTO-illegal as the US measures in the tuna case.

3.3. New Instruments of Environmental Policy, including Eco-labelling Schemes; Economic Instruments

UNICE is of the view that new instruments of environmental policy can provide solutions to many of the trade and environment problems and would like to name two examples:

- **Voluntary agreements:** If industry were to agree on a voluntary basis to improve energy efficiency and to comply with the Rio CO2 emission reductions, the authorities need not interfere with regulations (such as introduction of a CO2 tax), which, in turn, raise all sorts of trade-related questions. In partieular the issues of subsidisation and border tax adjustment would not have to be addressed if voluntary agreements were to take effect.
- **International standards:** The development of International Environmental Management Standards, via ISO, could also help to solve some of the most worrying PPM issues. If an international standard exists, industrial consumers can demand from a foreign producer compliance with the standard and ask for certification by an independent body. If the foreign producer does not comply with this request the industrial consumer will buy the product from a different source. The authorities do not need to interfere with a trade measure at the border but can leave the decision to a market which is driven by environmental considerations.

UNICE is of the view that Eco-labelling schemes and eco-declarations deserve closer analysis and considers that there should be no difference between governmental and non-governmental schemes. If not already applicable, it should be decided that the rules of the WTO TBT Agreement apply for eco-labelling schemes. Application of the TBT provisions to eco-labelling schemes would guarantee transparency and non-discrimination. In order not to overload the WTO with problems which are outside its mandate, the criteria for awarding an eco-label need careful analysis.

These criteria need to be comprehensible and contain a reference to „equivalence": if the ecological requirements for a certain product in a specific country are equivalent to the ones established by the Eco-label body, award of the label to the product from that country cannot be refused. UNICE believes that the TBT-Committee should be the forum to develop the WTO rules on eco-labelling schemes further.

European industry has taken a clear and negative position on the introduction of a CO2/energy tax in the European Union. For the purpose of the trade and environment discussions, the only question at stake here is the issue of border tax adjustment of fiscal and economic instruments. Whilst UNICE agrees with the Commission's position that the WTO rules are not totally clear, industry would like to see the basic GATT concept on border tax adjustment unchanged, namely that the WTO rules should continue to limit the possibility of border tax adjustments for ecological taxes on products and inputs physically incorporated into the final product. Any other interpretation could lead to the creation of an enormous bureaucracy for calculation of the correct amount of border tax adjustment unless discriminatory assumptions are accepted for these calculations.

3.4. Dispute Settlement for Environment-related Trade Measures

UNICE is pleased with the Commission's comments on dispute settlement. There is indeed a need for MEAs to contain an effective dispute settlement system. The WTO dispute settlement system could perhaps be cited as a model for MEAs.

The preamble of the WTO introduces the concepts of sustainable development and protection of the environment. WTO provisions will have to be interpreted in the light of the preamble. It is for this reason that environmental expertise will be needed to deal with environment-related dispute settlement procedures. UNICE agrees with the Commission that the provisions of the Uruguay Round Understanding on Dispute Settlement should be applied.

UNICE is also pleased to see that the Commission has not even excluded from the outset the possibility of using WTO dispute settlement mechanism between members of an MEA, after the exhaustion of the MEA dispute settlement mechanism. The Commission, however, rightly points out that this WTO dispute settlement mechanism cannot be used by the members of an MEA with the aim of circumventing or impairing the obligations undertaken in the MEA.

3.5. Trade in Dangerous Substances and the Issue of Domestically Prohibited Goods

The Commission is right to point out that the role of the WTO on the issue of DPG can only be complementary and that unnecessary duplication should be avoided. UNICE agrees that a notification system should only apply to those DPGs which are not covered by existing international agreements. The WTO discussions should however lead to a clear definition of what constitutes a domestically prohibited good. This subject seems to be causing some problems in Geneva at the present time.

UNICE would like to recall the Prior Informed Consent system which has been developed by UNEP and FAO with regard to exports of domestically banned or severely restricted products. The system deserves mentioning because it leaves the decision to import a domestically prohibited good to the importing country, once the country has been fully informed by UNEP about the properties of the product. This system relies much more heavily on the sovereign decision of an informed country than some of the trade provisions contained in other MEAs.

3.6. Intellectual Property Rights and the Environment

UNICE has repeatedly stated that the TRIPs agreement is a cornerstone of the Uruguay Round. Any moves to jeopardise intellectual property protection through the introduction of new discussions or concepts are rejected from the outset by industry. UNICE therefore fully shares the Commission's view that Article 16 of the Biodiversity Convention includes the WTO agreement and its TRIPs provisions.
Adequate and effective protection of intellectual property rights combined with a national framework for economic development will ensure not only technology transfer but also growth; both of which are necessary for developing countries.

4. The Way Forward in the International Trade and Environment Debate

UNICE is fully in line with the Commission's views regarding the future work of the WTO Committee on Trade and Environment and the other relevant bodies. It hopes that, at the first WTO Ministerial Conference, the WTO members can already take some decisions on trade and environment and launch negotiations on some of the issues where sufficient progress has been made.

UNICE welcomes the fact that the Commission supports the view that increased transparency is needed in the work of the CTE. European industry would very much like to contribute to the discussions in Geneva and Brussels. In order to be able to do so, industry needs to be informed about the status of deliberations both in Geneva and in Brussels. Industry would therefore appreciate it if non-governmental actors were informed about the status of the discussions at a pre-decision stage and not thereafter.

UNICE is willing to contribute constructively to the European Union's position on trade and environment.

ANNEX
GLOSSARY OF ABBREVIATIONS USED

CTE:	Committee on Trade and Environment
GATT:	General Agreement on Tariffs and Trade
ISO:	International Standards Organization
MEAs:	Multilateral Environmental Agreements
OECD:	Organisation for Economic Cooperation and Development
PPM:	Process and Production Methods
SPS Agreement:	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement:	Agreement on Technical Barriers to Trade
UNCED:	United Nations Conference on Environment and Development
UNCTAD:	United Nations Conference on Trade and development
UNEP:	United Nations Environment Programme
WTO:	World Trade Organization