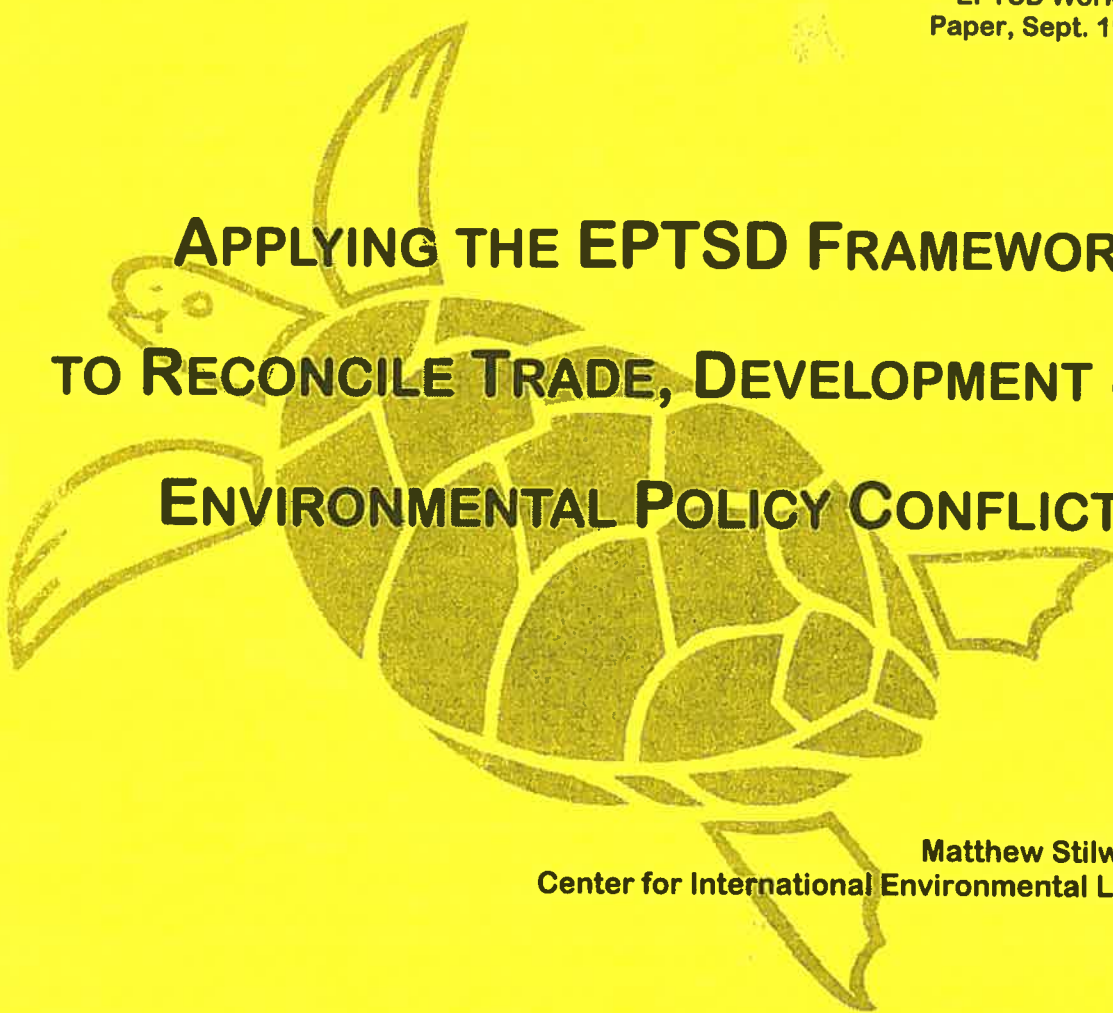




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EPTSD Working
Paper, Sept. 1999



**APPLYING THE EPTSD FRAMEWORK
TO RECONCILE TRADE, DEVELOPMENT &
ENVIRONMENTAL POLICY CONFLICTS**

by

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This work was prepared by Matthew Stilwell, Center for International Environmental Law. It was initially presented at the 6th EPTSD Meeting in Rio de Janeiro, 17-19 May 1999. Based on comments generated from this meeting; discussions and subsequent inputs, the paper was revised and presented as background paper at the EPTSD Workshop on Reconciling Policy Conflicts on Trade, Environment and Development in Geneva, 21-22 September 1999.

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Desktop Publication by Delwyn Dupuis
Cover Illustration by Hild Glattbach
Printed on recycled paper

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1. INTRODUCTION

The Expert Panel on Trade and Sustainable Development (EPTSD) was convened to examine the interface of international trade, environment and development policy. As part of its work, the EPTSD has developed and is testing its Framework which is aimed at maximising synergies and minimising conflicts between these policies in order to promote their joint contribution to sustainable development.

Increasingly, the conflicts between these policies are finding themselves before the dispute settlement system of the World Trade Organisation. These disputes are proving divisive and seem unlikely to abate. In fact, considering the growing interdependencies between nations, both economic and environmental, the regularity and intensity of these disputes may increase, with consequences for the integrity of the multilateral trading system.

Preventing these conflicts from occurring, and resolving them once they start, requires the creation of a more integrated approach to dispute settlement. As a contribution to this process, the EPTSD, at its VIth meeting, considered two case studies to examine how the Framework Principles could be used to develop integrated policy packages to prevent trade-environment-development conflicts from escalating into formal trade disputes at the multilateral level. The case studies were considered again at a Workshop on reconciling policy conflicts, held between the ETPSD and representatives of WTO Member governments, intergovernmental organisations and civil society, 21-22 September 1999¹.

These case studies, which are annexed to this introductory paper, provide a vivid illustration of the complex, and potentially controversial, disputes facing the multilateral trading system. The first case study examines the recent WTO

Shrimp-Turtle dispute and offers some observations about how the parties could have developed an innovative integrated policy package to prevent this conflict. The *Shrimp-Turtle* dispute, as one of the most high profile trade-environment-development disputes yet before the WTO, provides an ideal test case for the EPTSD Framework.

The second case study examines the potential future dispute between the United States and the European Union over the EU's compulsory labelling scheme for products that contain genetically modified organisms (GMOs). It discusses both the immediate conflict surrounding the EU GMO labelling law, and the broader international debate about the creation, commercialisation and trade in GMO products. On the basis of the EPTSD Framework, the case study calls for greater coherence in international GMO policy making and suggests that present and future GMO policy conflicts will not be avoided without a predictable Framework to govern international trade in GMO products.

The lessons learned by applying the EPTSD Framework to the *Shrimp-Turtle* and *GMO Labelling* policy conflicts are drawn together in this introductory paper. It commences with an overview of the EPTSD Framework Principles, and the facts of each case. Based on the *Shrimp-Turtle* case study, it suggests a process that could be used by WTO parties in an effort to cooperatively develop integrated policy packages to resolve these disputes and it offers a discussion of the substantive elements of such policy packages. Based on the results of the *GMO Labelling* case study, the paper argues that trade-environment-development disputes must be resolved in a way that explicitly promotes policy coherence between the WTO and other international rules and institutions.

2. OVERVIEW OF THE EPTSD FRAMEWORK OF POLICY INTEGRATION

The EPTSD Framework² provides an integrated approach for examining the linkages between trade, development and environmental policy. The Framework continues to be developed and refined by the EPTSD by applying it in specific case studies, including the two attached studies relating to WTO actual and potential disputes. The Framework's five² main principles – efficiency, equity, good governance, stakeholder participation and responsibility, and international cooperation – provide a Framework for ensuring that trade, development and environmental policy are mutually supportive and that conflicts, when they occur, are resolved efficiently, equitably and sustainably.

Each of the five principles is supported by a set of guidelines, which offer direction as to how the

principles can be implemented. The guidelines for efficiency, for example, direct policy makers to maximise consumer's welfare, to encourage competition through fair trade and to internalise benefits and costs. These guidelines build on the principles by showing how they can be operationalized by specific kinds of policy measures.

Each guideline, in turn, is supported by a set of suggested *policy tools* that may be used, where appropriate, to achieve the desired goal. The policy tool for the *internalising costs* guideline, for example, encourages policymakers to reduce subsidies, implement market based instruments, use command and control regulations, and encourage voluntary approaches and business eco-efficiency initiatives.

3. OVERVIEW OF SHRIMP-TURTLE & GMO LABELLING POLICY CONFLICTS

The policy conflicts underlying the *Shrimp-Turtle* and potential *GMO Labelling* disputes illustrate the growing tendency for trade policy to overlap with other national and international policy issues, including those relating to environmental protection and sustainable development.

3.1. Shrimp-Turtle Dispute

The *Shrimp-Turtle* dispute involved a WTO challenge by four countries – India, Malaysia, Pakistan and Thailand (the Complainants) – to a US law banning the importation of certain shrimp products on the grounds that they had been harvested in a way that harmed endangered sea turtles. This law effectively required shrimp exporting countries to implement a national conservation scheme that required the use of certain fishing equipment known as "turtle excluder devices" (TEDs). TEDs prevent turtles from drowning in shrimp trawl nets by allowing them to escape through a trapdoor, while ensuring shrimp remain in the net.

The US law was challenged by the Complainants on the basis that it violated the General Agreement on Tariffs and Trade's (GATT) rules on "quantitative restrictions", which prevent countries from imposing trade bans. In response, the United States argued their law was necessary as it "protects animal life and health" and "conserves exhaustible natural resources" and was thus justified under the GATT Article XX environmental exceptions. The WTO Appellate Body determined that the US measure, as applied to the Complainants, violated the GATT and was not saved by the environmental exceptions.

This case is important as it raises questions about the extent to which countries can restrict the importation of products that are produced in a way that has negative environmental consequences. It

also illustrates that, because of its adversarial nature, formal WTO dispute settlement may not provide the best way to resolve disputes of this kind. The trade ban, and the ensuing dispute, harmed the parties' relationships, undermined cooperation in multilateral trade and environmental fora, increased public resistance to trade liberalisation and, ultimately, failed to address the underlying environmental problem – the protection of endangered sea turtles. The dispute suggests the need for an alternative method of solving trade-environment-development disputes to be found. As discussed in the attached *Shrimp-Turtle* case study, the EPTSD Framework may provide significant guidance in developing such an alternative approach.

3.2. GMO Labelling Policy Conflict

Whereas the *Shrimp-Turtle* dispute involves developed and developing countries, the *GMO Labelling* policy conflict arises from a potential conflict between two large economic powers. It involves a possible WTO challenge by the United States to the European Union's GMO labelling scheme. This scheme requires the mandatory labelling of all products that include GMOs, and therefore affects US exports to the European Union of genetically modified agricultural products such as soybeans and maize.

The *GMO Labelling* policy conflict raises a number of important issues of relevance to the EPTSD Framework. As discussed in the attached case study, the conflict raises questions about WTO rules governing national health, safety and environmental laws, and the role of "sound science" and the precautionary principle at the WTO in situations where scientific information about the effects of GMOs is incomplete. More generally, the United States' threatened challenge represents one shot in an international conflict

about the appropriate balance between liberalised trade, and the right of countries to regulate new technologies such as genetic engineering. Finally, it raises questions of international policy coherence: GMO policy is being considered in a number of international fora including the WTO (TBT Committee and TRIPS Council), the Biosafety Protocol, currently being negotiated under the auspices of the Convention on Biological Diversity, and the Codex Alimentarius

Commission of the FAO. The issue of policy coherence has now become particularly acute since three WTO members – the United States, Canada and Japan – have formally proposed that GMO issues be discussed at the WTO, raising questions about the appropriate role and limits of the multilateral trading system, and about its relationship with other multilateral rules and institutions.

4. DISPUTE PREVENTION

APPLYING THE EPTSD FRAMEWORK TO AVOID FORMAL TRADE DISPUTES

Together, the *Shrimp-Turtle* and *GMO Labelling* policy conflicts demonstrate the need for a more effective way to prevent trade-environment-development policy conflicts of this kind from escalating into divisive international disputes that threaten the integrity of the multilateral trading system.

To prevent disputes, parties must work cooperatively to fashion integrated policy packages that address their shared concerns, and that maximise synergies and minimise conflicts between trade-environment-development policies. A number of useful lessons can be learned by examining trade-environment-development disputes in light of the EPTSD Framework. As noted already, applying these principles to these disputes raises issues of *process* and *substance*. It also raises questions about how to ensure *policy coherence* among the rules and policy made in different international institutions.

4.1. The process of dispute prevention

Dispute prevention is, first of all, a *process*. Effective dispute prevention involves getting the parties and relevant stakeholders together early in order to establish dialogue, build trust and work cooperatively towards a package of measures that reconciles competing trade-environment-development concerns. The EPTSD Framework principles make a number of suggestions about the process that governments should adopt.

The EPTSD “process” elements exhort governments to encourage *good governance*, by fostering cooperation between government agencies to build effective regulatory frameworks, and by ensuring multi-departmental representation in international negotiations. They promote *stakeholder participation and responsibility* by

encouraging greater openness and accountability in policy-making and implementation, and by developing consultative mechanisms to promote better understanding and equal participation of stakeholders representing a diversity of interests. Moreover, the EPTSD Framework suggest that governments should pursue *international cooperation* to prevent environmentally-based trade disputes from arising, or to avoid resolving them with prejudice to environment or development objectives by seeking cooperative solutions.

Rather than implementing trade bans and responding immediately with binding dispute settlement proceedings, as what occurred in *Shrimp-Turtle*, a preferable approach to trade-environment-development disputes is to adopt a *staged process of dispute prevention* that provides greater opportunity to build trust, and to jointly define and pursue common objectives. The process of dispute prevention involves at least four progressive stages.

International cooperation

The first step usually involves an informal, bilateral process of discussion. Good practice generally involves giving other countries reasonable notification of a proposed action - such as taking a trade ban - and a detailed process of information exchange and dialogue. Technical and scientific cooperation is also a prominent feature of many international dispute avoidance mechanisms, particularly those found in Multilateral Environmental Agreements (MEAs). As noted by the EPTSD Framework, governments, in particular developed country governments, should offer technical cooperation and help build capacity to avoid trade disputes.

Bilateral or multilateral consultation and negotiation

The second stage of dispute prevention involves a more structured effort to find a cooperative solution. Bilateral or multilateral consultation and negotiation generally involve a formalised exchange of views with the objective of finding a compromise. As noted in the EPTSD Framework, dispute prevention processes such as this should be *rule and equity-oriented, rather than power-oriented* and must be capable of addressing all social, economic and environmental needs. They should also involve participation by all affected stakeholders. Opportunities for independent consultations and negotiation are complemented by the WTO's formal consultation procedures. The WTO Dispute Settlement Understanding (DSU) (Article 4), include provisions for consultation to promote "mutually agreed solutions".

Non-binding, third-party assisted dispute settlement processes

Failing a negotiated outcome, third-party assisted dispute settlement may often be used to help resolve a conflict. This process may be described as facilitated negotiation, and involves a third party to clarify the facts underlying the dispute, to facilitate communication between the disputants, and to encourage them to re-evaluate their positions. The third party may also offer compromise suggestions and solutions, and generally maintains a constructive environment for discussion. In their various forms, these processes are referred to as "fact finding, conciliation, good offices and mediation." Provisions for such processes exist in Article 5 of the WTO's DSU, which allow disputants to voluntarily undertake third-party assisted discussions at *any stage* during the course of a dispute and permit the Director General, in an *ex officio* capacity, to offer these services. The Article 5 procedures have rarely been used. To prevent future conflicts from escalating into full trade disputes, WTO Members may wish to consider how to more effectively use WTO third party assisted processes. Members could, for example, develop guidelines to govern Article 5 procedures as part of the DSU review. The role and advantages of such guidelines are discussed further in the *Shrimp-Turtle* case study.

Binding dispute settlement processes

The final step in most dispute settlement

procedures is reference of the dispute to a binding arbitration or judicial process. Binding dispute settlement is the centrepiece of the WTO system. These procedures allow parties to request the WTO to establish a panel to examine facts and make a recommendation about whether a country's trade measure is in conformity with its obligations under the WTO Agreements. A dissatisfied party may appeal a panel's decision to the Appellate Body, which may uphold, modify or reverse the legal findings of the panel. Binding dispute settlement, at the WTO and elsewhere, represents an important contribution to the international rule of law. Nevertheless, because of their adversarial nature, binding dispute settlement procedures should be only considered after cooperative efforts have been exhausted, and as a last resort for resolving trade-environment-development disputes.

To promote international cooperation and to resolve disputes amicably, governments should seriously consider each of the stages in the above hierarchy before implementing a trade ban to address environmental problems. Similarly, countries that are subject to such a ban should consider the above options before invoking formal dispute settlement proceedings at the WTO or elsewhere. It is only if parties consider each of the steps in this *process* of dispute prevention that trade-environment-development conflicts will be minimised.

4.2. The substantive content of dispute prevention

The goal of any process of dispute prevention is to come to a *substantive outcome* that is acceptable to the parties – one that strikes the right balance between their interests. The policy package's content should maximise synergies between trade-environment-development policies, and equitably resolve conflicts where they arise.

Again, the EPTSD Framework offer substantive guidelines and policy tools for achieving such a balance. These substantive elements of the EPTSD Framework provide a sound basis for a system of dispute prevention that may be used to develop integrated policy packages to prevent conflicts, such as *Shrimp-Turtle* and *GMO Labelling*, from escalating into trade disputes at the multilateral level. Any such policy package must

respect the Framework principles of *efficiency* and *equity*. These principles are supported by a number of guidelines and policy tools with direct relevance to trade-environment-development disputes. Other EPTSD principles, guidelines and tools are also relevant to the analysis.

Of course, these principles, guidelines and tools cannot be considered in isolation. When applying the principles and guidelines to actual trade-environment-development disputes the complex interplay between them may require a trade off to be made. In different situations, the right mix of policy tools will differ. The role of the EPTSD Framework in developing specific recommendations to resolve disputes is explored further in Appendices I and II in relation to *Shrimp-Turtle* and *GMO Labelling* policy conflicts.

4.3. Dispute prevention and coherence among international rules and institutions

In addition to these issues of process and substance, dispute prevention requires that parties consider the dispute in the broader context of international relations. As noted in the attached *GMO Labelling* case study, disputes must be resolved in a way that promotes coherence among different international rules and institutions. International law, including the rules of the multilateral trading system, should be developed,

interpreted and applied in a way that promotes clarity and encourages consistency among the competencies of different international institutions. Clarity and coherence, in turn, reduce the potential for disputes.

The EPTSD Framework encourages parties to promote coherence. It calls for *good governance* and *international cooperation*. It suggests the need for cooperation among government agencies and multi-departmental representation at international negotiations. It also calls for governments to establish partnerships with stakeholders - including local government, business, community and citizens' organisations, environmental and development NGOs, academia, and research institutes - to ensure that a wide range of views are considered.

Sustainable development requires strengthening international systems of cooperation at all levels. International cooperation is necessary to ensure coherence among different rules and institutions, and to minimise conflicts. Through harmonisation, cooperation reduces the need for exporters to comply with numerous, and sometimes conflicting, national regulations. Coherence requires national governments to develop policy that advances a unified vision of the international economic architecture necessary to promote sustainable development, rather than merely promoting their short-term economic interests.

5. CONCLUSION

The EPTSD Framework provides a useful tool for developing integrated policy packages to prevent conflicts from escalating into formal trade disputes at the multilateral level. As illustrated by the analysis in the attached *Shrimp-Turtle* and *GMO Labelling* case studies, the EPTSD Framework principles provide a useful device for examining

policy conflicts and suggesting sophisticated solutions. Based on the Framework, the attached case studies offer a number of recommendations which, if implemented by the parties to these policy conflicts could have avoided the *Shrimp-Turtle* dispute, and might still prevent a dispute over GMO labelling.

APPENDIX A

APPLYING THE EPTSD FRAMEWORK TO THE SHRIMP-TURTLE DISPUTE

1. Introduction

This paper applies the EPTSD Framework to the recent WTO *Shrimp-Turtle* dispute. This dispute, as one of the most high profile trade-environment-development disputes yet before the WTO, provides an ideal test case for the EPTSD Framework. After a brief overview of the *Shrimp-Turtle* dispute, the paper examines the dispute in light of the EPTSD Framework. It explores both the a process that could have been used by WTO parties in an effort to cooperatively develop an integrated policy package to resolve the dispute, and offers some recommendations about the substantive elements of such a policy package.

2. Overview of the WTO Shrimp-Turtle Dispute

The *Shrimp-Turtle* dispute involved a WTO challenge by four countries – India, Malaysia, Pakistan and Thailand (the Complainants) – to a US law banning the importation of certain shrimp products on the grounds that they had been harvested in a way that harmed endangered sea turtles.

Sea turtles have survived in marine ecosystems for more than 100 million years, migrating thousands of miles between continents. In recent decades, human impacts have brought them to the brink of extinction. The international community has recognised the urgency of saving turtles by listing all five species at issue in the *Shrimp-Turtle* dispute as endangered under the Convention on International Trade in Endangered Species (CITES), the IUCN (World Conservation) Red

List, and the Bonn Convention on the Conservation of Migratory Species of Wild Animals.

Among the major causes of sea turtle mortality is shrimp trawling. As early as the 1970's, it was recognised as a global threat to sea turtle populations², and has been acknowledged in the United States as "killing more sea turtles than all other human activities combined"³. IUCN's Marine Turtle Specialist Group has identified reduction of mortality from fishing trawls as a priority action item⁴.

One of the most effective ways of reducing turtle mortality from shrimp trawling is a simple mechanism known as a Turtle Excluder Device (TED). TEDs prevent turtles from drowning in shrimp trawl nets by allowing them to escape through a trapdoor, while ensuring shrimp remain in the net. TEDs have been shown to retain shrimp, exclude 97% of sea turtles, reduce other by-catch by 50-60% and increase trawling effectiveness and fuel efficiency by reducing drag⁵. In addition, TEDs are simple to construct and can be made from local material⁶. As such, TEDs form one essential element of an integrated package of measures to adequately protect endangered sea turtles.

TEDs were developed during the 1970's by government agencies in the United States. As the world's second largest consumer of shrimp products the United States bears a special responsibility to reduce impacts on sea turtle populations. In 1997, the United States passed a law, known commonly as Section 609, to reduce the impact of its consumption on turtle populations, and to encourage other countries to

adopt national conservation programs that require the use of TEDs. Effectively, the law banned imports of shrimp from all countries that do not require their shrimp trawling vessels to use TEDs. In 1997, this law was challenged by the Complainants on the grounds that it violated the United States' trade obligations embodied in the General Agreement on Tariffs and Trade (GATT). Underlying their challenge was a concern that Section 609 forced them to alter their national policy in order to gain access to the US market. The Complainants argued that the US ban on shrimp imports violated the GATT rules on "quantitative restrictions" (Article XI), which prevent countries from imposing import bans, quotas and other trade restrictions. In response, the United States invoked the environmental exceptions in Article XX of the GATT, arguing that they have a responsibility to protect sea turtles, and that Section 609 protects "animal life and health" (Article XX(b)) and "conserves exhaustible natural resources" (Article XX(g)).

At the first instance, a WTO panel determined that the US measure was a quantitative restriction, and it was not saved by the environmental exceptions. The United States appealed the panel decision to the WTO Appellate Body, which overturned much of the panel's reasoning, but agreed with its conclusion that the US measure, as applied to the Complainants, violated the GATT and was not saved by the environmental exceptions.

Despite their victory, this decision was not celebrated by the Complainants. Rather, at the WTO Dispute Settlement Body they and numerous other developing countries expressed concern at the Appellate Body's decision, arguing it altered their WTO rights and obligations. Indeed, in the aftermath of the decision, it is unclear whether anyone benefited from the dispute. The United States suffered a defeat and had the application of its national law called into question; the WTO was heavily criticised by environmental groups; and the plight of the endangered sea turtles remained un-addressed.

The costs of the trade ban and the ensuing dispute have been significant. It harmed the parties' diplomatic relationships in both multilateral trade and environmental fora. It wasted scarce administrative, financial and technical resources on

an expensive and protracted trade dispute, rather than on addressing mutual concerns about the plight of sea turtles. It damaged public support for the multilateral trading system, and raised further questions about its ability to handle complex trade-environment-development conflicts. As a result of the ban, the Complainants lost at least one year of market access. And the United States failed to achieve their goal of changing the fishing methods and the marine protection policies of the Complainant countries.

The parties' brinkmanship and their reliance on positional bargaining obscured the real potential for a mutually beneficial, cooperative solution to the dispute. Underlying their unitary and confrontational national positions, are a complex set of interests that are, to a large degree, compatible. As members of CITES, each of the parties has demonstrated a commitment to saving endangered sea turtles from extinction. Additionally, each of the parties has committed themselves, both domestically and in international agreements such as UNCLOS, to the use of fishing techniques that reduce by-catch and minimise impacts on non-target species, such as turtles. Each of them has a strong interest in avoiding the risk, expense and administrative burden of WTO proceedings. And each has an overriding interest in promoting a cooperative, rules-based international system to promote trade and to protect the environment. Despite these mutual interests, the parties were unable to agree a solution. The process before and during the WTO dispute, rather than enabling them to seek a cooperative agreement, polarised their positions, and undermined their interests.

3. Dispute Prevention – Applying the EPTSD Framework to the Shrimp-Turtle Dispute

To prevent disputes, parties must work cooperatively to fashion integrated policy packages that address their shared concerns, and that maximise synergies and minimise conflicts between trade-environment-development policies. A number of useful lessons can be learned by examining *Shrimp-Turtle* in light of the EPTSD Framework principles. Applying these principles to *Shrimp-Turtle* raises issues of *process* and

substance.

Dispute prevention is, first of all, a *process*. It first requires the acting party, in this case the United States, to consider whether its action is the most suitable response to a perceived problem. It involves getting the parties and relevant stakeholders together early in order to establish dialogue, build trust and work cooperatively towards a package of measures that reconciles competing trade-environment-development concerns. The goal of such a process is to come to a *substantive outcome* that is acceptable to the parties – one that strikes the right balance between their interests. The policy package's content should maximise positive linkages between trade-environment-development policies, and equitably resolve tensions where they arise. Again, the EPTSD Framework offers substantive guidelines and policy tools for achieving such a balance.

Together, these *process* and *substantive* elements of the EPTSD Framework provide a sound basis for a system of dispute prevention that may be used to prevent conflicts such as *Shrimp-Turtle* from escalating into trade disputes at the multilateral level.

3.1. Dispute prevention – process elements

The EPTSD "process" elements exhort governments to encourage *good governance*, to promote *stakeholder participation and responsibility* and to pursue *international cooperation* to prevent environmentally-based trade disputes from arising, or to avoid resolving them with prejudice to environment or development by seeking cooperative solutions. In this section we examine *Shrimp-Turtle* in light of these EPTSD process elements, and in light of four progressive stages of dispute resolution.

International cooperation

In *Shrimp-Turtle*, the parties adopted a confrontational approach. The United States, with little notice, imposed a trade ban, and the Complainants responded by pursuing binding dispute settlement at the WTO. There was little opportunity for the parties, or for other interested groups such as intergovernmental organisations, and development and environmental NGOs, to exchange views and seek a cooperative solution. In particular, the trade ban was motivated by

pressure from NGOs within the United States, with little discussion with other NGOs in the affected developing countries.

A preferable approach to trade-environment-development disputes is to adopt a *staged process of dispute prevention* that provides greater opportunity to build trust, and to jointly pursue their common objective of protecting endangered sea turtles. The first step in international environmental disputes is usually an informal, bilateral process of discussion. Good practice generally involves giving other countries reasonable notification of a proposed action - such as taking a trade ban - and a detailed process of information exchange and dialogue. Technical and scientific cooperation is also a prominent feature of many international dispute avoidance mechanisms, particularly those found in Multilateral Environmental Agreements (MEAs). As noted by the EPTSD Framework, governments, particularly developed country governments, should offer technical cooperation and build capacity to avoid environmentally-based trade disputes from arising.

In *Shrimp-Turtle*, the United States made extensive technical efforts to transfer TED technology. However, they did little to engage the Complainants at a political level during the substantive development and implementation of Section 609. Nor were there significant efforts by NGOs within the United States to communicate with development and environment NGOs in the affected developing countries. Without serious engagement, these parties denied themselves the opportunity to convince the Complainants that the US law was not protectionism disguised in green clothing, but rather reflected genuine environmental concerns. Similarly, the Complainants lost the opportunity to deepen the United States' knowledge about their respective fishing conditions, including any areas where, as asserted by the Complainants, TEDs may not be the most effective technique for preventing unnecessary sea turtle deaths. Stronger cooperative efforts by the parties to resolve the underlying environmental issue – including further offers by the United States of technical assistance - may have avoided a protracted trade dispute from evolving.

Bilateral or multilateral consultation and negotiation

The second stage of dispute prevention involves a more structured effort to find a cooperative solution. Bilateral or multilateral consultation and negotiation generally involve a formalised exchange of views with the objective of finding a compromise. As noted in the introductory paper, dispute prevention processes such as this should, according to the EPTSD Framework, be *rule and equity-oriented, rather than power-oriented* and must be capable of addressing all social, economic and environmental needs. They should also involve participation by all affected stakeholders. The parties in *Shrimp-Turtle* failed to make significant efforts to negotiate a settlement. Partially, this was because the US government was compelled by their own Court of International Trade to impose a trade ban world-wide at short notice. This prevented them from following other requirements in their national law to "initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations for the protection and conservation of such species of sea turtles". This requirement had been followed by the United States in its own hemisphere. The United States had earlier initiated the Inter-American Convention on the Protection and Conservation of Sea Turtles, which requires the parties to take "appropriate and necessary" measures for the conservation of sea turtles, including the use of TEDs.

Opportunities for independent consultations and negotiation are complemented by the WTO's formal consultation procedures. The WTO Dispute Settlement Understanding (DSU) (Article 4), include provisions for consultation to promote "mutually agreed solutions". In practice, these procedures only resolve disputes in a minority of cases. Moreover, they include little formal structure to promote dispute avoidance, and no mechanism for stakeholder participation to help address the underlying environment and development issue.

The failure to seek a negotiated solution to trade-environment-development conflicts may adversely affect WTO proceedings. In this case, the Appellate Body concluded that the United States' had not adequately pursued a multilateral solution. This supplied them with one reason to question the

US measure, and to deny it protection under environmental exceptions in Article XX. While the Appellate Body decision encourages bilateral or multilateral agreement, its precise implication is, however, unclear. The Appellate Body explicitly declined to rule on whether the United States, absent a satisfactory result from good faith negotiation, would have been entitled to adopt unilateral measures.

Non-binding, third-party assisted dispute settlement processes

Failing a negotiated outcome, third-party assisted dispute settlement may often be used to help resolve a conflict. This process may be described as facilitated negotiation, and involves a third party to clarify the facts underlying the dispute, to facilitate communication between the disputants, to encourage them to re-evaluate their positions, to offer compromise suggestions and solutions and to generally maintain a constructive environment for discussion. In their various forms, these processes are referred to as "fact finding, conciliation, good offices and mediation."

Both this process, and bilateral or multilateral negotiations, were open to the parties in *Shrimp-Turtle*. With assistance from a third-party, the disputants should have considered options other than a trade ban, such as certification and labelling, or additional financial and technical assistance to implement sustainable shrimp fishing techniques, to build capacity and train technical staff.

Different options could also have been considered as part of a third-party assisted process under existing WTO mechanisms. Article 5 of the DSU provides for "good offices, conciliation and mediation". This provision allows disputants to voluntarily undertake third-party assisted discussions at *any stage* during the course of a dispute and permit the Director General, in an *ex officio* capacity, to offer these services. Despite their attractiveness, the Article 5 procedures have never been used. To prevent future conflicts from escalating into full trade disputes, WTO Members may wish to consider how to more effectively use WTO third-party assisted processes.

Members could, for example, develop guidelines to govern Article 5 procedures as part of the DSU review. These could include provisions for

notification and exchange of information. They could also provide an opportunity for affected stakeholders, including environment and development NGOs, and relevant international organisations, to be consulted. These consultations could be held in one or a number of the countries involved in the dispute to ensure that all affected stakeholders have an opportunity to express their interests. To ensure that they are not used to delay access to formal WTO procedures, the Article 5 procedures could run in parallel to the consultation period, or formal dispute settlement.

A more detailed third-party procedure has significant advantages for both developed and developing countries. As an informal process, it can operate outside the formal WTO structure and requires no changes to WTO rules. As an informal process operating outside the formal WTO structure it may also address environmentalists legitimate concerns about the WTO dispute settlement system becoming an international environmental court. By involving relevant stakeholders it would engage the creativity of experts and a broader cross-section of society to find a solution to the underlying environmental problem. As noted by the EPTSD principles, adequate stakeholder participation is necessary to promote sustainable development and ensure policy has legitimacy in the public eye. It would also provide the parties with an opportunity to educate each other about their respective views, and to educate the public about the legitimate constraints facing policy makers at the national and international level. And, finally, it may allow the parties to come to a negotiated settlement without the need for formal and expensive, binding dispute settlement procedures. As noted by the EPTSD principles, institutional innovation at the multilateral level is necessary if trade, environment and development objectives are to be integrated to achieve policy coherence.

Binding dispute settlement processes

The final step in most dispute settlement procedures is reference of the dispute to a binding arbitral or judicial process. Binding dispute settlement is the centrepiece of the WTO system. These dispute settlement procedures allow the parties to request the WTO to establish a panel to examine facts and make a recommendation about whether a country's trade measure is in conformity

with its obligations under the WTO Agreements. A dissatisfied party may appeal a panel's decision to the Appellate Body, which may uphold, modify or reverse the legal findings of the panel.

As noted in the introductory paper, binding dispute settlement procedures should be only considered as a last resort for resolving trade-environment-development disputes. To promote international cooperation and to resolve disputes amicably, governments should seriously consider each of the stages in the above hierarchy before implementing a trade ban to address environmental problems. Similarly, countries that are subject to such a ban should consider the above options before invoking formal dispute settlement proceedings at the WTO or elsewhere.

3.2. Dispute prevention – substantive elements

The goal of any *process* of dispute settlement is to come to a *substantive outcome* that is acceptable to the parties – one that balances competing interests, maximises synergies between trade-environment-development policies and equitably resolves conflicts. The EPTSD Framework includes numerous *substantive elements* that may be applied to develop an integrated policy package to address the policy conflict in *Shrimp-Turtle*. Any such policy package must respect the Framework principles of *efficiency* and *equity*. These principles are supported by a number of guidelines and policy tools with direct relevance to the dispute.

Because of its adversarial nature, the WTO dispute settlement process was unable to offer an effective solution to the *Shrimp-Turtle* dispute. Instead, it created a legal compromise. This compromise failed to draw a clear line between the Complainants' right of market access, and the United States' right to ban access to protect endangered sea turtles. As a consequence, the United States may merely re-impose its ban, albeit in refined form, and the Complainants then return to the WTO for arbitration. Without a concerted attempt to cooperate, the dispute is likely to continue without a substantive outcome that encourages the protection of endangered sea turtles.

For this dispute to be resolved properly, the parties

Bilateral or multilateral consultation and negotiation

The second stage of dispute prevention involves a more structured effort to find a cooperative solution. Bilateral or multilateral consultation and negotiation generally involve a formalised exchange of views with the objective of finding a compromise. As noted in the introductory paper, dispute prevention processes such as this should, according to the EPTSD Framework, be *rule and equity-oriented, rather than power-oriented* and must be capable of addressing all social, economic and environmental needs. They should also involve participation by all affected stakeholders. The parties in *Shrimp-Turtle* failed to make significant efforts to negotiate a settlement. Partially, this was because the US government was compelled by their own Court of International Trade to impose a trade ban world-wide at short notice. This prevented them from following other requirements in their national law to "initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations for the protection and conservation of such species of sea turtles". This requirement had been followed by the United States in its own hemisphere. The United States had earlier initiated the Inter-American Convention on the Protection and Conservation of Sea Turtles, which requires the parties to take "appropriate and necessary" measures for the conservation of sea turtles, including the use of TEDs.

Opportunities for independent consultations and negotiation are complemented by the WTO's formal consultation procedures. The WTO Dispute Settlement Understanding (DSU) (Article 4), include provisions for consultation to promote "mutually agreed solutions". In practice, these procedures only resolve disputes in a minority of cases. Moreover, they include little formal structure to promote dispute avoidance, and no mechanism for stakeholder participation to help address the underlying environment and development issue.

The failure to seek a negotiated solution to trade-environment-development conflicts may adversely affect WTO proceedings. In this case, the Appellate Body concluded that the United States' had not adequately pursued a multilateral solution. This supplied them with one reason to question the

US measure, and to deny it protection under environmental exceptions in Article XX. While the Appellate Body decision encourages bilateral or multilateral agreement, its precise implication is, however, unclear. The Appellate Body explicitly declined to rule on whether the United States, absent a satisfactory result from good faith negotiation, would have been entitled to adopt unilateral measures.

Non-binding, third-party assisted dispute settlement processes

Failing a negotiated outcome, third-party assisted dispute settlement may often be used to help resolve a conflict. This process may be described as facilitated negotiation, and involves a third party to clarify the facts underlying the dispute, to facilitate communication between the disputants, to encourage them to re-evaluate their positions, to offer compromise suggestions and solutions and to generally maintain a constructive environment for discussion. In their various forms, these processes are referred to as "fact finding, conciliation, good offices and mediation."

Both this process, and bilateral or multilateral negotiations, were open to the parties in *Shrimp-Turtle*. With assistance from a third-party, the disputants should have considered options other than a trade ban, such as certification and labelling, or additional financial and technical assistance to implement sustainable shrimp fishing techniques, to build capacity and train technical staff.

Different options could also have been considered as part of a third-party assisted process under existing WTO mechanisms. Article 5 of the DSU provides for "good offices, conciliation and mediation". This provision allows disputants to voluntarily undertake third-party assisted discussions at *any stage* during the course of a dispute and permit the Director General, in an *ex officio* capacity, to offer these services. Despite their attractiveness, the Article 5 procedures have never been used. To prevent future conflicts from escalating into full trade disputes, WTO Members may wish to consider how to more effectively use WTO third-party assisted processes.

Members could, for example, develop guidelines to govern Article 5 procedures as part of the DSU review. These could include provisions for

notification and exchange of information. They could also provide an opportunity for affected stakeholders, including environment and development NGOs, and relevant international organisations, to be consulted. These consultations could be held in one or a number of the countries involved in the dispute to ensure that all affected stakeholders have an opportunity to express their interests. To ensure that they are not used to delay access to formal WTO procedures, the Article 5 procedures could run in parallel to the consultation period, or formal dispute settlement.

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For this dispute to be resolved properly, the parties

will need to go beyond the adversarial approach adopted at the WTO. An efficient and equitable solution to protect endangered sea turtles is likely to require cooperation at both national and international levels. The following section briefly identifies necessary national measures, before focusing on the international measures required to resolve the *Shrimp-Turtle* dispute.

National measures

The specific contours of a national response will depend on each country's policy Framework, their level of development, and their peculiar fishing conditions. National measures should, in turn, be supported by international measures to build capacity and provide technical and financial support. While it is beyond the scope of this paper to examine required national measures in detail a number of initial comments can be made.

In general terms, the principle of *efficiency* encourages governments to use subsidies, taxation, market-based instruments, and command-and-control measures to internalise costs and benefits, and to maximise consumer's welfare. The EPTSD Framework suggests that national measures to protect sea turtles from shrimp fishing practices will include at least the following elements. To promote an efficient shrimp fishing industry, governments must enact national measures to get shrimp prices "right" by *internalising the environmental costs* of shrimp fishing, and by *internalising the environmental benefits* of healthy sea turtle populations.

When designing and implementing measures, governments must also consider how to ensure an *equitable* sharing of the benefits and burdens of trade and environmental protection, both within and between generations, and within and between countries. As noted in the EPTSD Framework, the principle of equity encourages governments to give special consideration to the poorest, and to encourage the sustainable use of natural resources. A number of steps can be taken to promote fairness in national policy. First, governments should consider *assessing the environmental and social impacts* of proposed national measures to address the environmental harm of shrimp fishing. Second, they could employ competition policy and other measures to ensure the fishing industry is not dominated by a few multinational fishing

companies, that the fishing industry *supports small- and medium-sized enterprises* (SMEs) and that adequate natural resources remain for artisanal fishers. *Training programs and export facilitation* could be undertaken to assist SMEs gain access to foreign markets. *Export credit and soft business loans* could also be used to promote sustainable production and market access. Finally, they could consider intervention in the shrimp market where justified to ensure an adequate proportion of the shrimp fishing *rents are directed to primary producers*. This could involve creating cooperatives to jointly market shrimp products and ensure fair pricing⁷.

International measures

Turtles are a shared resource that cannot be managed by any single state in isolation. Because sea turtles are highly migratory, the cost of shrimp fishing is externalised *beyond* national boundaries to the global commons. Therefore, a coordinated international response will be required to promote an efficient and sustainable level of turtle protection and to address the problem of sea turtle extinction at its source.

A key part of this strategy would be to encourage all nations to use TEDs as appropriate in their national fisheries. In return for their promise to implement TEDs, exporting developing countries would need a commitment to receive TED technology, financial and technical assistance, and to share the burden of monitoring the trans-boundary impacts of shrimp fishing. The benefits and burdens of these measures should be shared according to the principle of *common but differentiated responsibility*.

The extent of these common but differentiated obligations will depend on the cost of upgrading process and production methods. As noted above, TEDs are relatively cheap, easy to implement and may, in many cases, improve efficiency. These efficiency gains may cover the minimal cost of purchasing and fitting TEDs. To the extent they do not, the cost of upgrading to sustainable production methods may be passed on to consumers (depending on shrimp price-elasticity). Financial and technical assistance under a multilateral agreement should offset the remaining costs and ensure that producers retain predictable market access.

To improve market access for sustainably produced shrimp, importing countries may wish to offer *voluntary labels* for shrimp products certified as "turtle-safe." As an alternative to immediately banning shrimp imports, they could also consider *compulsory* "may harm turtles" labels for all non-certified shrimp products. These could be based on a shipment-by-shipment approach that would encourage the shrimping industry to rapidly change their process and production methods, without depriving them of the funds to do so by foreclosing export markets. To support sustainable producers, and to enhance their market penetration, governments could also promote *producer-consumer agreements* for sustainably produced shrimp.

Sustainable process and production methods are in the interests of importing and exporting countries alike. Without adequate cost internalisation, international trade may magnify domestic market failures by expanding them into an international market. This threatens to promote inefficient fishing practices, to encourage over-use of shrimp resources, and to exacerbate environmental damage to fisheries in both exporting countries and on the global commons. Promoting sound fisheries management is especially important for exporting countries. Without these measures, current and future generations in exporting countries are effectively subsidising the consumption of shrimp products in importing countries. To ensure the price of fish products reflects their true economic and environmental value, exporting countries may therefore wish to consider pursuing an *international commodity agreement* for shrimp and other fish products⁸.

As noted by trade economists, banning trade is rarely the "first-best" way to internalise costs and protect the environment. However, it is also rare that we operate in a first-best world. Political inertia, international coordination problems, and the reality of trans-boundary cost externalisation may, in certain cases, require governments to invoke their sovereign right to impose measures at the border to restrict unsustainable imports. While this right must be used rarely, and with caution, it remains an important component of an international system to address global environmental problems. Global environmental problems must ultimately be addressed through

multilateral, cooperative measures. But, as demonstrated by the early stages of many such cooperative measures, unilateral action may sometimes be required to catalyse action.

In *Shrimp-Turtle*, unilateral action has provided this catalyst. The WTO Appellate Body has said that the U.S. measure "serves an environmental objective that is recognised as legitimate" under WTO rules⁹. Although the *application* of the measure in this specific case offended WTO rules, its underlying objective was recognised as sound. The parties might still wish to make efforts to overcome their differences and to pursue a cooperative, multilateral solution – one that avoids further damage to their individual interests, to the multilateral trading system and to the environment. This solution must protect endangered sea turtles, encourage the use of TEDs, and equitably share the burden of these solutions. The following conclusions and recommendations are offered to help stimulate such a process.

4. Conclusions & recommendations for Shrimp-Turtle Dispute

The *Shrimp-Turtle* case demonstrates the urgent need for greater integration of trade-environment-development considerations to prevent conflicts escalating into formal trade disputes. As first steps towards the creation of an innovative, integrated policy package to resolve this conflict, parties to the dispute, other affected governments and concerned citizens' organisations may wish to consider the following four recommendations:

- establish a multi-stakeholder consultation process to address the conflict underlying the *Shrimp-Turtle* dispute. This meeting would seek an integrated solution that protects turtles, encourages international cooperation and participation and respects the different interests of the countries involved. It could include as participants: representatives of a variety of different national ministries including trade, fisheries and environment; relevant intergovernmental organisations such as UNDP, UNEP and IUCN; relevant MEA secretariats including CITES and the Bonn Convention on the Conservation of Migratory

Species of Wild Animals; and civil society. The consultation process could be scheduled to take place before the WTO formal consultations examine the adequacy of U.S. revisions to their turtle conservation law to provide a foundation for a constructive and sustainable solution to the dispute;

- encourage WTO Members to develop formal WTO guidelines for the Article 5 DSU mediation procedure. This procedure could provide a useful mechanism to prevent future trade-environment-development conflicts from escalating into formal WTO trade disputes; and
- consider the negotiation of a new treaty or protocol to protect marine migratory species and ensure that adequate financial and technical assistance is provided to developing

countries. At the centre of any such agreement would be an obligation to use TEDs, where appropriate, to protect endangered sea turtles from entrapment in shrimp fishing equipment and provision of appropriate financial and technical assistance to this end. An agreement could, for example, be negotiated as a stand-alone treaty like the Inter-American Convention for the Protection and Conservation of Sea Turtles, or as a protocol to the Bonn Convention.

- consider the environmental effects of producing shrimp, including shrimp aquaculture, as changes to shrimp trawling practices may increase pressures on shrimp farming to produce shrimp for export and thus increase associated ecological damage.

APPENDIX B

APPLYING THE EPTSD FRAMEWORK TO THE GMO LABELLING POLICY CONFLICT

1. Introduction

This paper applies the EPTSD Framework to the *GMO Labelling* policy conflict. It examines how the EPTSD Framework could be applied to resolve a potential future dispute between the United States and the European Union over the EU's compulsory labelling scheme for products that contain genetically modified organisms (GMOs) before it becomes formulated in the WTO dispute settlement mechanism.

The *GMO Labelling* conflict differs from the *Shrimp-Turtle* dispute in a number of important respects that will have implications for how the EPTSD Framework is applied. First, it involves a dispute between two large economic powers, rather than between a developed and developing countries. The dispute is thus focused more on environmental and consumers right-to-know issues, than on development. Second, it involves the labelling of a product once it is within the EU, rather than an outright trade ban. The EU's measure thus has less impact on trade, and fewer alternative measures will be available to achieve the same goal. Third, it deals with concerns both about GMOs as a product and about the process and production method used to create them, whereas *Shrimp-Turtle* dealt primarily with concerns about the impact on endangered sea turtles of the process and production methods used to catch shrimp. Because the *GMO Labelling* conflict deals with labelling based on product characteristics it lacks the complexity, and thus the potential for mutually beneficial compromise, of the *Shrimp-Turtle* dispute.

Nevertheless, the *GMO labelling* policy conflict raises a number of important issues of relevance to

the EPTSD Framework. It prompts questions about the role of "sound science" and the precautionary principle at the WTO. It also raises issues about the scope and application of WTO rules governing national health, safety and environmental laws, and about the coherence between the WTO and other international institutions that are responsible for making *GMO* policy.

After a brief overview of the EPTSD Framework and the *GMO Labelling* conflict, the paper applies the Framework principles to the conflict. It discusses both the immediate conflict surrounding the EU *GMO* labelling law, and the broader international debate about the creation, commercialisation and trade in *GMO* products. On the basis of the EPTSD Framework, the paper calls for greater coherence in international *GMO* policy making, suggests that present and future *GMO* policy conflicts will not be avoided without a predictable Framework to govern international trade in *GMO* products, and offers preliminary support for the EU's labelling scheme.

2. Overview of the *GMO* Labelling Policy Conflict

The *GMO Labelling* conflict involves a potential WTO challenge by the United States to the European Union's *GMO* labelling scheme. The European Union's scheme requires the mandatory labelling of all products that include *GMOs*, and therefore affects US exports to the European Union of genetically modified agricultural products such as soybeans and maize.

This policy conflict raises issues about the role of "sound science" and the precautionary principle at

the WTO in situations where scientific information about the effects of GMOs is inadequate and the magnitude and probability of harm are unknown, but potentially significant. It also raises issues about WTO rules governing national health, safety and environmental laws. More generally, the potential challenge by the United States represents one shot in an international conflict about the appropriate balance between market access and liberalised trade on one hand, and the right of countries to regulate new technologies such as genetic engineering on the other.

This debate is occurring in a variety of international fora including the WTO TRIPs Council, the Codex Alimentarius Commission and the Biosafety Protocol. As well as prompting questions about international policy coherence, the debate raises issues about the regulation and ownership of biotechnology, the protection of biological diversity, the control of food production and maintenance of food security, and the ethics of genetic engineering.

Genetic engineering is a revolutionary technology. It offers humanity the power to change the characteristics of living organisms by transferring the genetic information from one organism, across species boundaries, into another organism. Changing the characteristics of organisms may bring benefits to society, including new drugs and medical applications and enhanced plant varieties and food. However, while it provides a powerful tool to alter the characteristics of organisms, genetic engineering does not come without risk and uncertainty.

These risks and uncertainties arise both from the process of genetic engineering, and from the resulting GMO products. The process causes risk because it regularly involves the use of "antibiotic marker genes" (to trace whether the genetic modification has been successful) that may increase resistance to antibiotics, with implications for public health. Imprecise methods for inserting new genetic material, and unknown impacts on the regulatory functions of cells, also create risk and uncertainty.

As products, GMOs may involve risk because the impact of new genetic material on the regulatory functions of cells may, in some cases, increase

allergenicity and toxicity or alter nutritional value. When released from a controlled environment, the potential for adverse effects is compounded. Many scientists are concerned that the interaction between GMOs and complex biological systems cannot be fully known in advance, and that the creation and commercialisation of GMO products may have negative environmental consequences. In agriculture, for example, GMO products may reduce agricultural biodiversity, increase use of and therefore resistance to herbicides, create new strains of "super weeds", and harm non-target organisms¹⁰. While the magnitude of these risks is difficult to evaluate, the potential for significant or irreversible harm suggests the need to take precautionary measures.

The risk and uncertainty surrounding genetic modification have given rise to widespread public calls to regulate genetic engineering. In both the European Union and in the United States, consumer polls have consistently demonstrated that over 90% of consumers want GMO products to be labelled. Of course, labelling is not a complete response to the risks associated with genetic engineering, and many governments have considered stronger precautionary measures, including banning GMO products. Nevertheless, as a first step, labelling provides a valuable tool for promoting public education and awareness, encouraging debate about genetic engineering's risks and benefits, reducing risk by allowing early identification of harmful products and, generally, for advancing the consumers' right to know.

The European Union's compulsory labelling scheme defines a GMO as any "organism in which genetic material has been altered in a way that does not occur naturally by mating and/or natural recombination¹¹." It requires food to be labelled if it differs from "equivalent" food due to a change in composition or nutritional value, it has health implications due to allergens or other factors not present in equivalent foods, it creates ethical considerations (e.g. plants containing animal DNA), or it consists of or contains a GMO. In addition to this general labelling requirement, the EU recently enacted a regulation requiring certain GMO agricultural products (including soybeans and maize) to be labelled, closing an exemption previously granted to these crops¹².

The EU's regulation regarding soybeans and maize has been challenged by the United States in a paper to the WTO's Committee on Technical Barriers to Trade (TBT Committee)¹³. The United States is concerned that the scheme will reduce its share of the EU food market and that it will assist consumers to select non-GMO products. As noted in their paper, the United States is also concerned that testing for genetic modification is "expensive and time-consuming" and that, as the "variety and number of traits that are introduced into crops via modern biotechnology are increasing rapidly ... the complexity and difficulty of such testing will become increasingly burdensome¹⁴ ...". It also states that the labelling scheme may create a de-facto requirement to segregate GMO and non-GMO products¹⁵. Segregating products would, according to the United States, "be extremely burdensome for suppliers and difficult to justify¹⁶".

So far, the United States has postponed a formal challenge at the WTO dispute settlement system. The possibility of a challenge is, however, real. In the event of a formal challenge, the United States would likely invoke two WTO Agreements: the Agreement on Technical Barriers to Trade (TBT Agreement); and the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement). To understand the *GMO Labelling* policy conflict it is necessary to briefly examine the requirements of these agreements, and the arguments the United States may offer in a formal challenge.

To prevent national regulations and standards – including various environment laws – from restricting trade, the TBT Agreement: 1) imposes "non-discrimination" obligations to ensure that governments do not use national laws to discriminate against the exports of one country, in favour of their domestic products (national treatment) or products exported from another country (MFN); and 2) disciplines national laws to ensure that they are not "more trade-restrictive than necessary" to achieve their legitimate objective, and that they do not create "unnecessary obstacles to international trade".

In its paper to the TBT Committee, the United States addresses the TBT Agreement's requirements by asserting that: 1) they are aware of no information that their GMO products differ as a class from other products¹⁷, implying that the EU

labelling scheme therefore discriminates between GMO and "like" non-GMO products by requiring only the former to be labelled; and 2) because they do not differ as a class, labelling GMO products may "contribute to consumer deception" rather than achieving the legitimate objective of informing consumers¹⁸. "Excessive labelling also tends to confuse, rather than inform, the consumer¹⁹." Finally, the United States argues that products are generally labelled on the basis of their "attributes or characteristics", but that the EU scheme labels GMOs on the basis of their means of production²⁰. Here it seems to imply that products should only be labelled on the basis of their "attributes" or "characteristics" and not on the basis of the process by which they are produced (PPM based labels).

The second relevant set of WTO rules is the SPS Agreement. This agreement seeks to encourage the development of international standards and to impose disciplines on a specific range of national health and safety laws to ensure they do not unduly inhibit international trade. To achieve this goal, the SPS Agreement provides that health and safety laws: 1) must be based on science and risk assessment; 2) must not create "arbitrary distinctions" in the levels of protection applied to different products (e.g. beef and pork); and 3) must not be "more trade restrictive than required" to achieve the chosen level of protection.

Implicitly addressing each of these elements in its paper, the United States argues: 1) that the EU has failed to provide an "empirical basis" (i.e. risk assessment) for the labelling law²¹; 2) other products such as the genetically modified "Flavr Savr" tomato do not yet bear labels, implying distinctions in levels of protection²²; and 3) labels are not the most "practical way to provide access" to information about genetically modified products, and that aspects of the testing procedures under the labelling scheme could "unnecessarily and negatively impact trade²³". These arguments have been reiterated in subsequent TBT Committee Meetings.

The United States' challenge in the TBT Committee forms part of a broader discussion about the role and regulation of biotechnology. This discussion is occurring in a number of international institutions and must be considered

when seeking a solution to the immediate *GMO Labelling* dispute. First, at the Biosafety Protocol negotiations, parties to the Biodiversity Convention (and the United States) are discussing an international Framework to encourage the safe transfer, handling and use of living modified organisms (GMOs). Early drafts of the Protocol contemplated strong procedures for advanced informed agreement, labelling, as well as liability and compensation for damage. Some aspects of these rules governing trade in GMOs have been opposed by some GMO exporting countries (known as the "Miami Group"), which argue that the SPS Agreement is the appropriate agreement to regulate government measures to protect human health from GMO-related health concerns. Under pressure from this group, the provisions of the draft Protocol have subsequently been weakened.

Second, at the Codex Alimentarius Commission of the FAO, the United States and other GMO exporting nations have promoted an international *GMO Labelling* standard. This standard, referred to as the "substantial equivalence" approach, would classify some GMO and non-GMO products as substantially alike. If adopted, the standard may affect the outcome of a formal dispute between the United States and the European Union over labelling. As Codex standards are applicable at the WTO, a "substantial equivalence" approach would be cited by the United States to support its argument that the EU scheme, by requiring only GMO products to be labelled, discriminates between "like" GMO and non-GMO products and thus violates the TBT non-discrimination obligations.

Finally, GMO exporting countries have explored how the WTO TRIPs Agreement could be extended to require countries to grant patents over plants and animals. This would conceivably allow biotech companies to extend their intellectual property rights over new GMO products to all WTO Member states. There is significant resistance, particularly by some developing countries, to any extension of the existing provisions of the TRIPs Agreement regarding life patenting.

As noted in the introduction, the importance of examining the linkages between these institutions and the WTO has become more urgent in light of three recent proposals to consider GMO-related issues at the WTO. The United States has called for the WTO to address "disciplines to ensure trade in agricultural biotechnology products is based on transparent, predictable and timely processes."²⁴ It seems likely that the United States will push for new disciplines on the right of national governments to regulate the importation of GMO products to ensure more "timely" approval processes. Japan and Canada have both proposed that the WTO consider the broader issue of how GMOs are by a range of existing WTO agreements. Canada has called for the WTO to establish a Working Party on Biotechnology address "disciplines to ensure trade in agricultural biotechnology products is based on transparent, predictable and timely processes."²⁵ Japan has requested the WTO to establish "a sub-group of an independent negotiating group on agriculture to identify topics on food-related matters of GMOs."²⁶

Together, these proposals raise a number of difficult issues including the proper balance between WTO disciplines on regulation and the need for regulation to address GMO-related risks, coherence with work in other international fora including the Biosafety Protocol, and the proper role and limits of the multilateral trading system. In addition, trade in GMOs implicates a range of wider concern, including food security, agriculture, environmental protection, human and animal health, and equitable development. While this case study concentrates on the *GMO Labelling* issue, these broader issues must also be considered in order to ensure the development of a coherent policy framework for the regulation and transboundary movement of GMOs.

3. Dispute Prevention – Applying the EPTSD Framework to GMO Labelling Policy Conflict

To prevent disputes, parties must work cooperatively to fashion integrated policy packages that address their shared concerns, and that maximise synergies and minimise conflicts between trade-environment-development policies. A number of useful lessons can be learned by examining the *GMO Labelling* conflict in light of the EPTSD Framework principles.

Because the immediate *GMO Labelling* conflict is embedded in a larger debate about the creation, commercialisation and trade in GMO products, it is necessary to examine the conflict in view of the other international institutions dealing with GMO issues. This is especially true in the present case where the potential for compromise on GMO labelling is limited. Moreover, the labelling issue is one relating to consumer preference, and cannot therefore be resolved simply by reference to "sound science". Using sound science to restrict consumer information is likely to prove counterproductive, both for trade in GMO products, and for the multilateral trading system. As noted in the following discussion, a solution that both protects the consumer's right to know and that promotes a predictable trading system, therefore, seems unlikely without recourse to a broader context where trade-offs can be made – including the next round of trade negotiations.

To prevent this and other GMO policy conflicts from escalating into formal trade disputes, the European Union, the United States and other countries must agree a more predictable and coherent international Framework for trade in genetically modified organisms. In the absence of a broader Framework, it is likely that GMO trade disputes such as the present one will proliferate, as importing countries such as the European Union respond to public pressure to regulate GMOs, and exporting countries such as the United States respond to pressure by GMO producer lobbies to maintain and expand their market access.

Creating a predictable and coherent international Framework to govern international trade in GMO products raises questions of both *international*

cooperation and *good governance*. According to the principle of international cooperation, sustainable development requires strengthening international systems of cooperation at all levels, encompassing environment, development and trade policies. International cooperation is necessary to ensure coherence among different rules and institutions, and to minimise conflicts. Through harmonisation, it reduces the need for exporters to comply with numerous, and sometimes conflicting, national regulations.

In addition to international cooperation, good governance is required to avoid unnecessary GMO-related trade disputes. Governments, as well as regional and multilateral institutions, must be responsive to civil society and respectful of human rights and democracy if they are to advance trade, environment and development objectives. Accountability is a prerequisite for sound policy-making, especially at the international level where public scrutiny is reduced. Unfortunately, the international institutions in which GMO policy is being made lack the transparency and accountability necessary to advance a balanced trade, environment and development agenda. Limited international transparency also reduces the democratic accountability of national governments, and increases potential for disputes insofar as governments are enabled to advance the narrow agenda of special interest groups.

For example, a lack of public access to WTO processes may allow WTO Members to pursue short-term economic interests, without considering the wider social and environmental impacts of their actions. It may permit countries to adopt positions within the WTO that would be untenable within their own national systems, or to adopt somewhat contradictory positions in different fora. For example, the argument made by GMO exporting countries at the WTO and at Codex that GMO products are "substantially equivalent" to non-GMO products is at odds with the argument that GMOs are "novel and innovative" and consequently all WTO Members should offer them patent protection. Stronger international cooperation, and more transparent and accountable governance, would help shift the dynamic of international trade policy making from short-term economic profit seeking, towards a longer term approach to creating coherent, predictable and

equitable international economic architecture.

While improved transparency and accountability are a step in the right direction, avoiding this and other GMO disputes will require a more sophisticated package of policies to be developed. Here, a number of EPTSD principles are relevant. The following section examines how the principles of *efficiency*, *equity* and *stakeholder participation and responsibility* apply to the immediate *GMO Labelling* policy conflict.

In general terms, the principle of *efficiency* encourages governments to use subsidies, taxation, market-based instruments, and command-and-control measures to internalise costs and benefits, and to maximise consumer's welfare. The efficient allocation of the risks and burdens of international trade requires that the full costs of GMO production be internalised. Currently, while the benefits of GMO products (e.g. increased crop yields) have been largely internalised by the industry, the health and environmental risks of GMO products are, to a considerable extent, externalised to the public and to future generations. These risks should be borne by the producers of GMO products to ensure a socially optimal level of testing and production.

Where costs are unknown (due to scientific uncertainty about genetic modification's health and environmental implications) efficiency suggests that the burden of establishing the nature and extent of costs should be allocated to the party that can establish these most cheaply and effectively²⁷. The cost of this process, and the consequent estimate of the externalised costs, should then be borne by the manufacturers of GMO products. To the extent that these costs are not internalised, riskier GMO products and more of them are likely to be produced, with consequent implications for health and the environment.

In addition, where GMO products are traded, questions arise about the proper allocation of risks and benefits among countries. The rules of the international system must establish a set of incentives that are capable of promoting the responsible use and development of GMO products. In addition, they must reflect the differing levels of scientific and technical capacity and, more generally, the differing levels of

development of countries when allocating the risks and benefits of GMO trade.

It is currently unclear which trade rules will apply to GMO products. In the event the SPS Agreement covers GMO trade, the obligation falls primarily on the *importing* country to show the existence of risk as a prerequisite to regulating GMO products, although importing countries may take "provisional measures" in the absence of adequate scientific evidence. In the event the TBT Agreement covers GMO trade, then it is less certain which country bears the burden of proof, as this agreement has not yet been authoritatively interpreted. In either case, it is unclear whether the current rules of the multilateral trading system provide a sufficient Framework for trade in GMO products, or whether additional obligations are necessary to promote transparency, and predictability, and thus avoid GMO-related trade disputes.

This question underpins the debate at the Biosafety Protocol negotiations, including how the Protocol relates to the WTO Agreements, and the circumstances under which it should govern the transboundary movement of living modified organisms. Supporting additional regulation of GMO trade is the view that, unless complemented by additional rules (as well as stringent national regulation), the current liberal approach to GMO trade may allow the GMO producing companies and countries to externalise the risk of GMO products to importing countries. It may also encourage a lower level of testing, and a higher level of GMO "riskiness" and GMO production, than is in the best interests of society. Addressing this is particularly important for developing countries that may not have the scientific capacity to test GMO products.

In addition to more sophisticated international measures to guide GMO trade, *GMO Labelling* schemes provide an important, albeit in some cases insufficient, national policy tool to address these concerns. Labelling may contribute to a more *efficient* and *equitable* product market. It may also promote *stakeholder participation and responsibility* by enhancing consumer awareness and understanding about GMOs. Moreover, the information provided by labels may help address consumer concerns and reduce the potential for

consumers to demand more stringent measures such as trade bans - measures which would more likely result in a GMO policy conflict escalating into a trade dispute at the multilateral level.

A proper analysis of the economic and social impacts of the European Union's labelling scheme is beyond the scope of this paper. Nevertheless, a number of initial observations may be made. First, the European Union's compulsory labelling schemes may promote efficiency by encouraging industry to "internalise" the risk and costs otherwise borne by society (and future generations). Compulsory labelling provides producers with an incentive to improve their own monitoring and testing before releasing GMO products. Faced with the possibility of adverse publicity, reduced market share, and potential legal liability resulting from the identification of harmful products, firms are more likely to undertake testing before release.

Second, stakeholder participation may also be promoted by labelling schemes. Here, voluntary GMO-free labelling schemes could be promoted to provide market incentives for non-GMO products. Whereas compulsory labelling schemes such as the European Unions' identify GMO products, voluntary labels identify products that do not contain GMOs. Voluntary labelling works at the demand, rather than the supply side of the market, and provides a positive, market-based incentive to producers of GMO-free products to avoid the environmental risks associated with GMO products by rewarding them with potential price increments and increased market shares. Countries considering compulsory *GMO Labelling* schemes may also wish to complement them with voluntary schemes for non-GMO products.

Third, compulsory labelling may correct the failure of markets to provide a sufficient level of the "public good" of information. Accurate information is an essential prerequisite for an efficiently functioning product market. Without it, consumers are unable to make informed decisions. Without government intervention, information about the potential adverse effects of consumer products is unlikely to be supplied at a "socially optimal" level. This is particularly true in the case of GMO labelling, as the information consumers require is unlikely to benefit those holding it (i.e.

companies selling GMO products).

Finally, by providing consumers with information and allowing them to make informed decisions, compulsory GMO labelling arguably supports the traditional aim of the international trade system - to promote efficient markets and to provide consumers with greater choice. Moreover, the labelling scheme is non-discriminatory and applies equally to GMO products from the European Union, the United States and other countries. By providing consumers with information it corrects a bias in the market towards biotech products by requiring companies to disclose information and allowing consumers to choose products in line with their social, ethical, dietary and environmental preferences.

In sum, the labelling of GMO products is generally supported by the EPTSD principles. Given the nature of the *GMO Labelling* policy conflict, it is unlikely that this dispute can be resolved to benefit both the United States and the European Union without an examination of the broader issues surrounding international trade in GMO products.

4. Conclusions and Recommendations for GMO Labelling Policy Conflict

The *GMO Labelling* policy conflict demonstrates the need for a more coherent international response to genetic engineering and to the commercialisation of and trade in GMO products. Currently policy in this area is being driven by commercial imperatives, rather than a cohesive vision of the role and limitations of genetic engineering in providing a sound, sustainable international system of food production. Moreover, the debate lacks formal opportunities for stakeholder participation and has failed to address the wider social, environmental and ethical implications of genetic engineering. As first steps towards a more balanced approach, the European Union, the United States, other affected governments and civil society may wish to:

- promote the creation of national *GMO Labelling* schemes to ensure that consumers are informed about the products they purchase and consume;
- ensure that international policy making on

GMO-related issues at the WTO, Codex Alimentarius Commission and the Biosafety Protocol is open to greater public accountability and transparency. In particular, discussions at the WTO TBT and SPS Committees and the TRIPs Council should be opened to public scrutiny;

- establish a multi-stakeholder meeting to examine the GMO issue and the linkages between the various international fora in which this issue is being debated. Greater coherence is required among international organisations

to ensure that short-term economic objectives are not met at the expense of long-term social and environmental policy;

- support the Biosafety Protocol negotiations to ensure that strong international rules are developed to govern the transboundary movement of GMO products and to protect developing countries that may not have the scientific and financial resources to test GMO products and guarantee the health and safety of their citizens.

ENDNOTES

1. The cut-off date for this paper is 22 September 1999. Developments on the shrimp-turtle case and on the GMO debate after this date have not been taken into consideration.
2. Based on lessons learned during the framework's application to the dispute prevention cases, a sixth principle on ecosystems integrity is being considered to be added to the current EPTSD framework.
3. Other human-caused threats to sea turtles include direct hunting, which has been reduced considerably under CITES over the last 25 years, and losses of nesting beaches and foraging habitats. Karen L. Eckert, *Anthropogenic Threats to Sea Turtles*, in *Biology and Conservation of Sea Turtles*, 611 (Karen A. Bjorndal ed.; rev. ed. 1995).
4. National Research Council, *Decline of the Sea Turtles: Causes and Prevention* 26 (National Academy Press 1990), at 76, 145. At the request of the U.S. Congress, the National Academy of Sciences looked at the status of sea turtle population and the causes of their declines in U.S. waters. The Academy concluded that without TEDs other conservation measures would be ineffective. *Id.*; see also, Deborah T. Crouse et al., *A Stage-based Population Model for Loggerhead Sea Turtles & Implications for Conservation*, 68 *Ecology* 1412, 1421 (1987).
5. Marine Turtle Specialist Group, IUCN, *A Global Strategy for the Conservation of Marine Turtles* 8 (1995).
6. Charley W. Taylor et al., *Construction and Installation Instructions for the Trawling Efficiency Device* 1 NMFS-SEFC-71 (1985).
7. See Maurice Renaud et al., *Loss of Shrimp by Turtle Excluder Devices (TEDs) in Coastal Waters of the United States, North Carolina to Texas: March 1988 - August 1990*, 91 *Fisheries Bulletin* 133 (1993); 61 *Fed. Reg.* 18102, 18111 (1996).
8. In addition, measures to regulate the shrimp fishing industry must, of course, be complemented by national measures to protect sea turtles. These include improved national research and monitoring; integrated programs for the management of turtle populations; campaigns to improve public information, awareness and education; and mechanism to guarantee community participation. Because this paper focuses on harm to turtle populations from shrimp fishing, these measures will not be considered in detail here.
9. This provides a good example of the potential conflict between *efficiency* and *equity* at the international level. An efficient market for the sale of shrimp products may do not always guarantee an equitable distribution of resources or wealth. At the national level, the trade-off between equitable distribution and efficiency is resolved as part of a political bargain: efficient markets allocate resources and create wealth, and governments redistribute it to create a just society. At the international level, however, the tendency of markets to redistribute wealth is more difficult to address. In this sense, a pure "free market" approach to the international economy may not be the most consistent with equitable and sustainable development – either within or between generations – and a more nuanced approach involving selective intervention at the national and multilateral level may be

- required. International institutions such as the WTO must be evaluated to ensure that they promote the right balance between efficiency and equity.
10. *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp-Turtle)*, at para. 44, WT/DS58/AB/R.
 11. See, Miguel Altieri, *The Environmental Risks of Transgenic Crops: an Agroecological Assessment*, Department of Environmental Science, Policy and Management, University of California, Berkely at <http://www.pmac.net/miguel.htm>
 12. EU Regulation 258/97, *Novel Foods and Novel Food Ingredients*.
 13. EU Regulation 1139/98, *Compulsory Indication of the Labeling of Certain Foodstuffs Produced from Genetically Modified Organisms*.
 14. Submission by the United States to the WTO Committee on Technical Barriers to Trade, 16 October 1998, (G/TBT/W/94).
 15. *Id.*, at para. 14.
 16. *Id.*, at para. 11.
 17. *Id.*
 18. *Id.*, at para. 6.
 19. *Id.*, at para. 5.
 20. *Id.*, at para. 9.
 21. *Id.*, at para. 7.
 22. *Id.*, at para. 5.
 23. *Id.* at para. 7.
 24. *Id.*, at para. 10.
 25. *Measures Affecting Trade in Agricultural Biotechnological Products*, Communication from the United States, 27 July 1999, para 1, WT/GC/W/288.
 26. *Measures Affecting Trade in Agricultural Biotechnological Products*, Communication from the United States, 27 July 1999, para 1, WT/GC/W/288.
 27. *Id.*, para 6.
 28. These could, for example, be verified by an international agency charged with this responsibility.

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•
ensuring that the use of
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•
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Presently, it is difficult to obtain an authoritative view because the available information is often diffuse, technical and partisan. Hence, the EPTSD workshop in Seattle will seek to explore and the following issues:

- a. The structure of the market of GMOs in both developed and developing countries. What are the commercial crops that are genetically modified? Where are the supply and demand points?
- b. The progress being made by the scientific community in determining the scale of risks and benefits of GMOs.
- c. The different institutions with mandates related to GMO regulation. What are the current GMO-related activities of these institutions? Are current international rules sufficient to regulate GMOs? Should the WTO consider this 'new issue' in its trade agenda?
- d. Issues on risk and public trust
- e. Types of information available and how to increase access by developing countries governments and NGOs.
- f. Other important issues that needs to be considered to deepen understanding and raise awareness in a broader context.

A multilateral consultative process aimed at preventing the dispute is more appropriate if there is a credible convenor available and governments are willing to engage in the process. The objectives of a multi-stakeholder consultative process may include:

1. information sharing and fact finding,
2. understanding the interests, concerns and perspectives of all parties and stakeholders of the issue,
3. mapping out the points of agreements and difference to better inform the policy choices and decisions,
4. desire for a cooperative solution.

The informality of the process could also allow for the exploration of an integrated policy package that satisfies the interests of the stakeholders.

Concerns were raised about the impartiality of the non-binding dispute processes since they may be contingent on the relative political strengths of the parties involved. Hence it was suggested that the political nature of the conflicts ought to be carefully considered in developing the third party facilitated processes.

It was suggested that third party facilitated processes should be made binding otherwise there are no incentives for parties to use this third stage. Making it binding could also lead the process to generate more enforceable outcomes. However, it was clarified that this may not be realistic and acceptable to parties involved and it seemed more practical to confine these processes to fact finding and information sharing.

The participants agreed that there are no clear solutions to conflicts in the trade-environment-development nexus, but certainly a transparent and integrated approach will lead to better resolutions of the disputes.

Preparation for a workshop in Seattle

The participants agreed that an EPTSD convened workshop on Trade in GMOs and Genetic Resources in Seattle would be timely. So far, the debate on GMOs at the international level has been limited to discussions between large economic powers and on specific issues like labelling and risk assessment. The participants agreed that there is a need to expand the current agenda and set it in a broader context involving developing countries and a wider set of players from civil society. Issues of food safety, sustainable use of biodiversity, benefit sharing and intellectual property suggest the need for careful consideration of the benefits and costs of biotechnology use and trade and the need of new protocols in the WTO and other institutions.

EPTSD will convene a workshop in Seattle on November 30 from 10:30–12:00 AM at the NGO centre (Renaissance Madison) to raise awareness and exchange information on the current state of the trade in GMOs and genetic resources. The EPTSD Framework will be used as the organising structure of the workshop.

6. Issues on the environment, development, economic and social implications of biotechnology production and use (end-product and intermediate). For example, issues like biodiversity protection, food security, human and animal life or health, ethical and religious concerns as well as economic considerations.

7. Genetic resource rights, intellectual property rights, access and benefit sharing. Many developing countries are concerned that companies from a number of industrialised countries are patenting genetic materials taken from their countries without sharing benefits as required by the Convention on Biological Diversity.

Dispute Prevention – Some Lessons

Based on the analysis and discussion of the two cases, the workshop participants recognise that the WTO dispute settlement panel may still be the right forum to address the high legal content of the disputes on which not only the parties to the case but also WTO member countries may desire more clarity on WTO rules. However, it was considered desirable that there be a clarification of the procedures and rules of pre-panel stages already possible under the WTO Dispute Settlement Understanding. The participants propose different options of two- or three- party facilitated processes that could be possible in a more vigorous application of Articles IV and V of the DSU.

The following table illustrates the differences between the possible options.

| Process | Two party negotiated processes | Third party facilitated processes | Arbitration/ adjudication |
|---------|--------------------------------|-----------------------------------------------------|---------------------------------------|
| Outcome | High control over outcome | Fact finding, conciliation, facilitation, mediation | Little or no control over the outcome |

The workshop participants agreed that if the objective of the dispute is to seek enforcement of the rules then resorting to the WTO dispute settlement mechanism might be a better option. However, if a dispute arises due to ambiguities in the language of the rules, limited ability and capacity to implement WTO rules, changed circumstances of parties and state of the world since the rule was adopted, then it may be more sensible to consider either a binding or non-binding third party assisted process.

Multi-stakeholder consultations could take place within the negotiated and facilitated processes to help in fact finding. However, there needs to be some clarity on the convenor and the objectives of these consultations. WTO members could explore the establishment of the multi-stakeholder consultative processes whereby relevant facts could be put on the table by all interested and relevant parties from governments, NGOs, industry, academia, local communities, etc. It was also explained that there is no reason why such multi-stakeholder consultation processes could not be established outside of the WTO when the Organization will not conduct necessary consultations.

is insufficient understanding on the issues involved and on how they should be addressed within the WTO. There is also a need for policy coherence among different intergovernmental bodies and a need to clarify the relationship between WTO rules and other MEAs (e.g. Biosafety Protocol). Moreover, there is a need to understand the processes involved in the relevant MEAs and other institutions that have stakes in the production and trade of products containing GMOs. Special efforts need to be made to involve developing countries given their strong interest in regulating genetic engineering as has been articulated clearly at the Biosafety Protocol negotiations to protect their biodiversity and genetic resources.

Multi-stakeholder consultation processes would aim at closer cooperation and collaboration among intergovernmental institutions involved in the GMOs issues such as WTO (SPS, TBT, TRIPS), FAO Codex Alimentarius, WHO, UNEP, CBD, Biosafety Protocol and OECD. It would also strive for balanced stakeholder representation that includes governments, business, experts, consumer groups, NGOs and intergovernmental bodies. Involving a wide range of stakeholders would give legitimacy and support to the consultation processes.

The consultations would strive to clarify and explain a number of complex substantive issues. Among the critical issues identified by the workshop participants are:

Institutional Issues

1. The need for a credible information clearing house, independent from governments and industry, but would have representatives from these sectors. This body will generate information to aid decision-making processes at both the national and international levels. An IPCC- like body is envisaged composed of scientific, economic, technological and natural science experts. This body would formulate appropriate guidelines on technology transfer and capacity building especially for developing countries.

2. Institutional coherence among intergovernmental bodies regulating the movement and trade of biotechnologies. A first step would be to gather accurate information on the current situation of these institutions and examining the linkages between the different institutions and issues. This analysis of the situation would then be the basis of identifying the gaps of essential tasks that still need to be done and the areas of possible cooperation between the different institutions.

Substantive Issues

3. Consumer information development and dissemination and right to know. Many consumers would like to be informed on the risks and benefits of using GMO products.

4. Risk assessment, including science and precautionary principle.

5. International and national regulations on trade and transfer of technology.

Participants from environmental NGOs recognised that the Shrimp-Turtle case provided a window of opportunity to pin down a significant ruling on trade-environment links involving the PPMs problem and relationship of Multilateral Environmental Agreements (MEAs) with WTO rules. In retrospect, they indicated that they would have handled their advocacy work on the dispute differently. Particular efforts should have been made to engage Southern NGOs in dialogues that would address conflicts of interests (e.g. plight of poor fisherfolk and protection of endangered turtles). Stronger advocacy could have been made for alternative resource management schemes especially by artisanal shrimp fisherfolk caught in the middle of the conflict.

Workshop participants expressed concern that the rulings in the Shrimp-Turtle case has stifled and will continue to stifle the negotiations of MEAs due to possible ramifications of trade-related measures in MEAs on WTO rules. It was explained that underlying rulings in cases like the Shrimp-Turtle dispute are complex environmental and economic factors which may make it necessary for the problems to find their way back repeatedly to the WTO dispute settlement mechanism. This possibility only serves to emphasise that resolving such conflicts requires multilateral responses that incorporate trade-environment-development concerns.

GMOs case

The second case examined by the participants was a potential dispute between the United States and the European Union over the E.U.'s compulsory labelling scheme for products that contain genetically modified organisms (GMOs). Unlike the Shrimp-Turtle dispute, the possible permutations of this case are incredibly broad and the types of responses are vastly varied. The GMOs labelling dispute is a potential conflict between major economic powers. It involves a possible WTO challenge by the U.S. to the E.U.'s GMO labeling scheme. This scheme requires the mandatory labeling of all products that include GMOs, and therefore affects U.S. exports to the E.U. of genetically modified agricultural products such as soybeans and maize

The GMO conflict raises a number of important issues. The conflict raises questions about WTO rules governing national health, safety and environmental laws, and the role of science and the "precautionary principle" in situations where scientific information about the effects of GMOs is incomplete. The possible challenge of the U.S. could only be the first of many international conflicts about the appropriate balance between liberalized trade and the right of countries to regulate new technologies such as genetic engineering. The case also raises questions of international policy coherence as GMO policy is being considered in a number of international fora including the WTO (TBT Committee and TRIPS Council), the Biosafety Protocol currently being negotiated under the auspices of the Convention on Biological Diversity, and the Codex Alimentarius Commission of the FAO.

The participants agreed that in dealing with GMO disputes, multi-stakeholder consultation processes would be highly desirable because of the wide range of interrelated issues involve in the manufacturing, use and trade of GMOs. Presently, there

environment-development conditions and avoid political and financial costs of adversarial litigation.

However, the participants acknowledged that dispute prevention might not be relevant in all cases brought before the WTO. Subscribing to the staged process of dispute prevention will depend on the type of conflict involved, the motives of the parties for going into the disputes and the interests involved. Information on these factors are important to help determine the types of incentives needed to encourage parties to come together early enough to resolve the conflict.

In the Shrimp-Turtle case, it was argued that dispute prevention might not have been practical. WTO members have spent four years in disagreement on the problem of the Process and Production Methods (PPMs) regulation. PPMs regulation is a type of environmental law that targets products or services that are categorised as environmentally unfriendly because they are produced by processes that are environmentally damaging.³ It was explained that a possible intention for the complainants to lodge the case before the WTO was to seek clarification on the extent to which countries can restrict the importation of products that are produced in a way that has negative environmental consequences. Another reason cited was that the U.S. action was viewed as problematic because of the fear that environmental policies could also be applied to other trade sectors, so complainants considered it important to contain the scope of such trade-related environmental measures.

The participants also emphasised that it is crucial to determine the appropriate timing in undertaking multi-stakeholder consultation processes to prevent disputes and in resorting to costly and adversarial dispute settlement procedures at the WTO. In the Shrimp-Turtle case, the participants argued that it was regrettably unfortunate that no multi-stakeholder consultations were conducted after the issues surfaced in the U.S. and before actual WTO panel proceedings were initiated. These consultations could have explored different options of technical and financial assistance that would allow more environmentally friendly shrimp production. The provision of such assistance especially to developing countries would have been more desirable than imposing trade sanctions.

It was argued that 'government-to-government' discussion was a process too difficult, too narrow and too inadequate to resolve the Shrimp-Turtle conflict. The U.S. Court of International Trade prevented the U.S. government from undertaking negotiations with complainant countries. This court order was interpreted to cover any attempt to resolve the conflict and to prevent a case from being filed in the WTO. A suggestion was made to examine the dynamic process of rule making to determine the appropriateness and practicality of preventing a conflict from becoming a formal WTO dispute. Such an examination would involve three levels: the WTO negotiations, development of jurisprudence (i.e. speed of court rulings and implementation of court decisions) and subsequent treaty implementation by the executive branch of governments.

³ In the Shrimp-Turtle case, U.S. regulations banned shrimp imports based on the injury to turtles from the fishing methods used to harvest the shrimps.

Staged process of dispute prevention

EPTSD recommends that instead of proceeding directly and immediately to formal WTO dispute settlement, following a staged process of dispute prevention would be more desirable. In a staged process of dispute prevention the parties would get together early in the conflict to look at the underlying issues, build a common understanding of the conflict and together develop an integrated policy package of solutions. The process involves a four stage approach to dispute prevention: 1) international cooperation, 2) bilateral or multilateral consultation, 3) third-party assisted processes like fact-finding, mediation, conciliation, 4) binding dispute settlement mechanism.

The first three stages involve consultations between governments and other relevant stakeholders and experts. These consultations would aim at integrated packages of solutions that are mutually acceptable to all parties concerned. It should be noted that these consultations could be undertaken as part of the WTO dispute settlement system. Provisions under the WTO Dispute Settlement Understanding (DSU) exist for stages two and three. Article IV of DSU include provisions for consultation to promote “mutually agreed solutions” and Article V allow parties to voluntarily undertake third-party assisted discussions at any stage during the course of the dispute and permit the Director General in an ex officio capacity to offer these services.² Although the Article V procedures have rarely been used, there is a significant potential to develop guidelines that would make these procedures essential parts of the WTO dispute settlement process.

The fourth stage is considered the centrepiece of the WTO system. Binding dispute settlement allows parties to request the WTO to establish a panel to examine facts and determine whether a country’s trade measure conforms with its obligations under the WTO agreements. Furthermore, a dissatisfied party may appeal a panel’s decision to the appellate body, which may uphold, modify or reverse the findings of the panel. Nonetheless, the WTO binding dispute settlement may not provide the right forum for managing a trade, environment and development conflict since primarily legal arguments are used to resolve the case. These legal arguments do not necessarily present and use all the relevant facts of the dispute and hence adjudication at the WTO could ignore other equally important concerns in the trade-environment-development interface. Binding dispute settlement should therefore be considered as a measure of last resort for resolving trade-environment-development conflicts.

The workshop participants agreed that a stage process of dispute prevention could make adversarial procedures unnecessary. They also agreed that the process should commence as early in the conflict as possible when problems are still few and manageable. It would be preferable that the first three stages are undertaken before engaging in the formal procedures of WTO binding dispute settlement. The practical objectives of a staged process would be to examine the underlying problems of the conflict through multi-stakeholder consultation processes, minimise the deleterious impacts on trade-

² Under DSU provisions, the outcome of third-party assisted mediation is non-binding and does not prejudice parties’ right to invoke formal dispute settlement procedures.

Background on EPTSD Framework

The EPTSD formulated a Framework for integrating trade, environment and development policy objectives. It consists of five principles namely: Efficiency, Equity, Good Governance, Stakeholder Participation and Responsibility, International Cooperation. Illustrating each principle are guidelines and examples of policy tools. The principles can be used as a basis for making difficult trade-offs as well as setting priorities in the use of specific tools. This combination of principles, guidelines and tools provides a systematic approach in minimizing conflicts and maximizing synergies in the trade-environment-development interface.

The EPTSD Framework suggests a *process* that could be used by disputing parties in a cooperative effort to develop integrated policy solutions to resolve conflicts. It highlights the *substantive elements* of such policy packages and emphasizes the need for trade-environment-development disputes to be resolved in a way that promotes *policy coherence* between the WTO and other relevant institutions.

Shrimp-Turtle case

The workshop participants discussed the recent and widely publicised Shrimp-Turtle dispute in which four countries (India, Malaysia, Pakistan and Thailand) lodged a complaint at the WTO challenging a U.S. law banning the importation of certain shrimp products that have been harvested in ways that harmed endangered sea turtles. This law effectively required shrimp exporting countries to implement a conservation scheme that required the use of certain fishing equipment known as "turtle excluder devices".¹ This U.S. law was challenged by the complainants on the basis that it violated the rules of the General Agreement on Tariffs and Trade (GATT) on "quantitative restrictions", which prevent countries from imposing trade bans. In response, the U.S. argued their law was necessary as it "protects animal life and health" and "conserves exhaustible natural resources" and was thus justified under the GATT Article XX environmental exceptions. The WTO Appellate Body determined that the US measure as applied to the complainants, violated the GATT rules and was not covered by the environmental exceptions.

The case is important as it raises questions about the extent to which countries can restrict the importation of products that are produced by processes which have negative environmental consequences. It also illustrates that because of its adversarial nature, formal WTO dispute settlement may not be the best means to resolve disputes of this kind. The trade ban and its ensuing dispute damaged the parties' relationships, undermined cooperation in multilateral trade and environmental fora, and failed to address adequately the underlying environmental problem (i.e. the protection of endangered sea turtles). The dispute suggests the need for an alternative method of solving trade-environment-development conflicts. The EPTSD Framework provides significant guidance in developing such an alternative approach.

¹ Turtle excluder devices prevent turtles from drowning in shrimp trawl nets by allowing them to escape through a trapdoor, while ensuring that the shrimp remain in the net.

Secretariat Report on the
EPTSD Workshop on
Reconciling Policy Conflicts on Trade, Environment and Development
September 21-22, 1999
Geneva, Switzerland

Increasingly, the dispute settlement system of the World Trade Organisation (WTO) has been dealing with divisive conflicts in the interface of international trade, environment and development policies. Considering the growing economic and environmental interdependencies between nations, these disputes can be expected to become more regular and more intense. These conflicts will have significant consequences on the integrity of the multilateral trading system.

Preventing these conflicts from occurring or from escalating into full-blown trade disputes at the multilateral level requires the creation of a more integrated approach to dispute settlement. The Expert Panel on Trade and Sustainable Development (EPTSD) is convinced that there are ways to manage trade-environment-development disputes by utilizing policy tools beyond those available in the trade arena and by promoting dialogue through which different stakeholders who see different aspects of the conflict can constructively explore their view points and collectively search for creative and integrated solutions.

Although EPTSD promotes multi-stakeholder consultation processes in dispute prevention, it should be made clear that the Panel also recognises the importance of the WTO dispute settlement mechanism justifiably to address situations in which protectionist policies do in fact contravene a country's rights and obligations under the multilateral trading system. EPTSD's primary motivation in exploring multi-stakeholder consultation processes in dispute prevention is to ensure that environment and development concerns underlying trade disputes are validly recognised and appropriately acted upon.

During September 21-22, 1999, EPTSD convened a workshop on reconciling policy conflicts on trade, environment and development with participants from governments, intergovernmental bodies, academia, non-governmental organisations and business. The workshop explored the issues and processes involved in managing trade-environment-development conflicts by examining concrete cases. Emphasis was given to developing recommendations that would prevent such conflicts from escalating into full-blown disputes at the WTO.

Prior to the workshop, a background paper analyzing the recent WTO Shrimp-Turtle dispute and a potential conflict between the E.U. and the U.S. on the labelling of products using genetically modified organisms (GMOs) was circulated to the participants. In analyzing these two cases, the discussion paper used the EPTSD Framework on policy integration.