

# **Ten Year Presidential Review**

## **Review of Trade and Investment Negotiations**

*FINAL REPORT*

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## Acronyms

ACP	African, Caribbean and Pacific countries (party to the Lomé Convention and its successor the Cotonou Agreement, with the EU)
BLNS	Botswana, Lesotho, Namibia and Swaziland (members of the Southern African Customs Union, together with South Africa)
DFA	Department of Foreign Affairs
DOA	Department of Agriculture
DTI	Department of Trade and Industry
EPA	Economic Partnership Arrangement
FTA	Free Trade Agreement
IRPS	International Relations, Peace and Security Cluster
ITED	International Trade and Economic Development Division
NAFTA	North American Free Trade Area
Nedlac	National Economic Development and Labour Council
SACU	Southern African Customs Union
SADC	Southern African Development Community
TDCA	Trade and Development Cooperation Agreement (between RSA and EU)
TIPS	Trade and Industrial Policy Secretariat
TRIPS	Trade-related Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
US	United States
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

## 1. Objectives of Review and Methodology

This review of trade and investment negotiations forms part of the overall Ten Year Presidential Review conducted under the auspices of the President's Office.

The terms of reference are as follows:

<b>Main Objective</b>	A descriptive and prescriptive study of the DTI's role in trade and investment negotiations since 1994, and lessons for the future.
<b>Research Questions</b>	An appraisal of the DTI's role in trade and investment negotiations (bilaterally and within multilateral structures – SADC, SACU, WTO etc)  An analysis of such issues as capacity, skills, problems, lessons etc for upcoming trade negotiations with Mercosur, China, India and the SACU-US negotiations.
<b>Methodology</b>	A qualitative study based on primary and secondary sources and aided by selective interviews.

Following the terms of reference provided by the President's Office, the following methodology has specifically been adopted.

First, a desk study was conducted to independently determine the scope of DTI' role in trade and investment negotiations since 1994, both in terms of substantive focus of the negotiations and also in terms of with whom the negotiations were conducted. The desk study also ascertained, as far as possible, the negotiations that have been concluded by DTI since 1994, and the status of those negotiations still in process.

Second, the concluded agreements were perused to determine the specific outcomes of the negotiations. This provides important input to the assessment of 'capacity, skills, problems and lessons' for future negotiations, as required by the terms of reference.

Third, interviews were held with DTI representatives involved in the trade and investment negotiations, and select other DTI representatives, as well as representatives outside DTI involved in negotiations. As a first step in the identification of relevant interviewees, Tshediso Matona, Deputy,

Director General was contacted. He suggested a list of interviewees, all of whom were interviewed. This process took longer than anticipated as a result of the negotiating demands currently being addressed by these individuals.<sup>1</sup> Once all interviews had been conducted, a final interview with Tshediso Matona was conducted to situate some of the information gathered from previous interviews.

## **2. Trade and Investment Negotiations since 1994: Overview of Scope and Coverage**

The trade<sup>2</sup> and investment negotiations that DTI has been involved in since 1994 are summarised below. The status of the negotiations has been ascertained from DTI representatives. Given the scope of the terms of references, as presented above, the substantive focus of the review is on DTI's role in trade and investment negotiations. It is important to note however that other Departments do play a role in the negotiations. These departments include the Department of Foreign Affairs, as well as the sector departments such as Agriculture, Communications and others. Select reference is made to these departments and their role in trade and investment negotiations.

### *Bilateral Trade Negotiations*

South Africa has signed Trade Agreements with the following countries. These agreements commit parties to extend most favoured nation (MFN) status to one another:

- ❖ India (1994) – Negotiations to establish an FTA are due to begin soon
- ❖ Malaysia (1997)
- ❖ Indonesia (1997)
- ❖ Philippines (1997)
- ❖ Vietnam (1997)
- ❖ China (2000) – Negotiations to establish an FTA are due to begin soon
- ❖ Thailand (2001)
- ❖ Pakistan (awaiting the suspension of sanctions)
- ❖ Bangladesh (to be signed in 2003)

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<sup>1</sup> For example, the SACU Trade Policy Review, of the WTO, required the presence of key negotiators in Geneva towards the end of April 2003; the negotiations for the SACU-US free trade agreement began in May 2003. These two examples indicate that multiple negotiations are being conducted simultaneously; placing significant demands on key negotiators, especially in DTI, but also in other Government Departments such as the sector Departments eg Agriculture.

<sup>2</sup> Trade negotiations may be aimed at achieving different objectives: establishing a free trade area (in terms of which, substantively all trade between the countries will be free of tariff or other restrictions), a customs union (in terms of which countries agree to have a common external tariff) or a general trade agreement (which may promote trade between the two countries, and provide most favoured nation (MFN) status to each other).

Negotiations with the European Union to establish a free trade area (FTA), lasting approximately four years, led to the:

- ❖ Trade and Development Cooperation Agreement (TDCA) (with the Wine and Spirits Agreement not yet ratified, and no agreement on Fisheries yet). The TDCA came into effect on 1 January 2000.

FTA negotiations with China, India and Mercosur are due to begin soon. Given the new SACU Agreement, these negotiations have to be conducted with the customs union countries.

*Bilateral Investment Negotiations* have been engaged in, with the following countries. Unless otherwise indicated, agreements have been concluded.<sup>3</sup>

- ❖ Algeria
- ❖ Australia
- ❖ Egypt
- ❖ India
- ❖ Indonesia
- ❖ Iran
- ❖ Iraq (documents have been exchanged)
- ❖ Kuwait (documents have been initialed)
- ❖ Libya
- ❖ Malaysia
- ❖ Morocco (documents initialed in April 2003)
- ❖ Oman (legal process underway)
- ❖ Syria (documents have been exchanged)
- ❖ Qatar (documents have been initialed)
- ❖ Taiwan
- ❖ Thailand
- ❖ Tunisia
- ❖ United Arab Emirates (documents have been initialed)
- ❖ Vietnam
- ❖ Yemen

*Multilateral Trade Negotiations*, engaged in since 1994 are:

- ❖ WTO negotiations (making South Africa's GATT Offer, and subsequent participation in the on-going (built-in agenda) negotiations on the WTO agenda, as well as new negotiations, and preparing for negotiations which have not yet begun).
- ❖ SADC<sup>4</sup> – Trade Protocol was signed in 1996, subsequently there were negotiations around revised rules of origin
- ❖ SACU<sup>5</sup> – New SACU Agreement was concluded in October 2002

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<sup>3</sup> Status report obtained from DTI

<sup>4</sup> South Africa became a SADC member in 1995.

- ❖ SACU-EFTA negotiations – first round of negotiations to establish an FTA were held in May 2003 (to be concluded before end of 2004)
- ❖ SACU-US FTA negotiations started in May 2003 (phase II to begin in January 2004)

### *Unilateral Preference Arrangement*

The Africa Growth and Opportunity Act, (AGOA), was signed by President Bill Clinton in May 2000. It is a unilateral offer by the United States (US) to African countries that qualify in terms of eligibility requirements determined by the US. South Africa is one of the African countries that qualifies for duty-free access to the US market for specific products. Since this is not a negotiated agreement, it may be unilaterally changed by the US, and this makes it a risky arrangement for the recipient countries, including South Africa.

AGOA however paves the way for the negotiation of free trade agreements between the US and AGOA eligible countries. In this regard, it is important to note that negotiations to establish an FTA between the US and SACU began in May 2003. It is envisaged that the negotiations will be concluded by the end of 2004, as indicated above.

## **3. DTI's Role in Trade and Investment Negotiations**

### 3.1 Trade Negotiations<sup>6</sup>

Trade negotiations may have different objectives; to establish a free trade area<sup>7</sup> or include provisions on specific aspects of trade (related to particular trade flows, for example).

Trade negotiations that have been conducted by South Africa since 1994 have developed or arisen in different ways. In the case of the FTA negotiations with the European Union, South Africa's approach to the EU for admission to the Lomé Convention, and the EU reconsideration of its engagement with the ACP during the early 1990s, evolved into the FTA negotiations between South Africa and the EU.<sup>8</sup>

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<sup>5</sup> This new agreement has important implications for the conduct of future negotiations, in that it requires (and although the Agreement has not been ratified by all SACU members, this particular requirement was affirmed by all members in November 2002) that all future negotiations by any SACU member be conducted with SACU.

<sup>6</sup> It should be noted that it is usual for a free trade agreement (eg the TDCA) and also for the customs union agreement (SACU) to include both trade and investment provisions.

<sup>7</sup> An FTA requires that substantially all trade between the two countries be free of tariff or other restrictions.

<sup>8</sup> DTI information

In the case of other negotiations, South Africa may have responded to a request from the other party (eg the SACU-US negotiations), while in some cases, high level diplomatic engagement leads to trade negotiations.

The multiplicity of negotiations being undertaken by DTI during the past decade as well as the simultaneity of multiple negotiations raises several strategic questions. First, how are priorities developed and articulated as regards the various negotiations, both in terms of who the DTI negotiates eg an FTA with, and also as regards priorities with respect to substantive issues? Second, how are trade and investment negotiations coordinated and incorporated into a coherent trade policy framework? Third, how do the trade negotiating priorities fit into South Africa's broader economic policy and foreign policy objectives? These questions are to a large extent outside the scope of this review, but information gathered seems to suggest that greater coordination among government departments and participation by these departments, as well as more broadly among all stakeholders, could be garnered.

DTI representatives provided insights into these questions, and some answers are also evident in DTI's Global Economic Relations Strategy.<sup>9</sup> Given that a significant number of negotiations are embarked on in response to approaches from the other parties, challenges for DTI in terms of policy coherence, and a pro-active stance on trade negotiations, are to be expected. As has been noted in comments provided by the IRPS Task Team, DFA was not, as a general rule, consulted when trade or investment negotiations were initiated by South Africa. It would seem that the DFA's role in negotiations, and the preparation for negotiations, could be strengthened; given the significant interface between trade and foreign policy. Such participation would also boost South Africa's capacity to negotiate appropriate trade and investment agreements.

The first stage of the negotiating process requires preparation by DTI and other stakeholders (including relevant Government Departments, private sector and labour representation), to identify key interests and priorities.<sup>10</sup> Research plays a critical role in this preparatory phase of the negotiations. According to DTI representatives, obtaining a 'negotiating mandate' from stakeholders is key at this stage<sup>11</sup>. The final phase of this preparatory stage is to reach agreement on the negotiating agenda.

### 3.2 Conduct of Trade Negotiations and Implementation of Agreements

In terms of the conduct of negotiations, DTI is the lead agency, with DTI representatives serving as negotiators. Representatives from the

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<sup>9</sup> The status of the Global Economic Relations Strategy is not clear at this stage, given that it was developed prior to the most recent restructuring of the DTI.

<sup>10</sup> The DTI refers to 'impact studies' that are required at this stage of the negotiations.

<sup>11</sup> It seems as if this process of obtaining a negotiating mandate may be truncated in certain instances – where approaches for negotiations come from other parties.

Department of Foreign Affairs serve as observers to monitor the negotiations, representatives from sector departments such as agriculture may be drawn into the negotiations as required, especially on technical matters, and representatives from the Department of Justice are called into supplement the legal expertise of the DTI.

DTI plays an important role in the implementation of agreements once they have been concluded. For example, notification of tariff changes needs to be made to customs officials who are responsible for customs administration. DTI is responsible for the notification and publication of tariff changes resulting from trade agreements. There have been occasions where incorrect information has been provided by DTI.<sup>12</sup>

### 3.3 Investment Negotiations

The negotiation for investment treaties or agreements has, according to the DTI, most often developed from approaches by the other parties. That means that investment agreements, in particular, have been reactive rather than proactive.

The DTI has a standard draft agreement. Parties usually exchange documents, and then negotiate or discuss specific provisions before concluding the agreement. In some cases, investment negotiations are incorporated with trade negotiations. For example, negotiations with the EU which culminated in the TDCA, incorporated investment negotiations, and provisions related to investment are included in the TDCA.

## 4. Skills and Capacity, Problems and Lessons

### 4.1 Involvement in negotiations: DTI and other agencies

As noted above DTI is South Africa's lead negotiating agency. As such it carries the major responsibility for coordination of stakeholder interests as well as articulating the broad national interest, coordination and development of the negotiating strategy and the conduct of the negotiations. Negotiations for a particular agreement have, of necessity, specificity dimensions, which DTI has to put into the context of overall trade and investment policy. Trade and investment negotiations are obviously closely connected to trade and investment policy more broadly speaking. In addition it is important to recognise the role of trade and investment policy (and hence trade and investment negotiations) in the context of South Africa's overall economic policy, and its foreign policy.

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<sup>12</sup> In addition, under the TDCA, the DTI had to notify the EU authorities that it was the sole issuer of the EUR1 form, to be used by SA exporters to gain duty-free access to EU markets. This was not done timeously, by DTI and thus exporters were only able to claim back duties once the EUR1 was duly recognised by the EU.



This particular modality of negotiations places very significant demands on DTI in terms of skills and capacity. It is worthwhile noting that there other modalities in terms of which for example the Department of Foreign Affairs would be the lead negotiating agency carrying, what in South Africa's case is, DTI's responsibility. The pros and cons of various modalities are not specifically the focus of this review, but the specific modality that South Africa adopts has implications for this review.

It may be argued, for example, that a Department of Foreign Affairs, rather than a Department of Trade and Industry or a sector Department, would have the advantage of a broader focus on overall development priorities. By contrast, it might be expected that a Department of Trade and Industry or a sector Department may be more likely to focus on its specific constituency and its interests.

Ideally a modality should be developed whereby the Department of Trade and Industry, Foreign Affairs and relevant sector Departments are all involved in the processes leading to the conclusion of trade and investment agreements ie from identification of priorities, to formulating a negotiating strategy (based on clearly identified priorities) through implementation of the agreement. DTI's suggestion to establish a Permanent Negotiating Forum is a very positive step in this direction to ensure policy coherence, and the negotiation of agreements that promote broad development objectives.

#### 4.2 DTI Organisational Developments: Relevance for Negotiations

The current Deputy Director General heading ITED is Tshediso Matona, who succeeded Faizel Ismail, who is now South Africa's WTO representative in Geneva. Ismail replaced Xavier Carim, in Geneva, who is now Chief Director, Multilateral Negotiations at DTI. These three individuals are key to the DTI's trade and investment negotiations, having been appointed to the DTI soon after South Africa's democratic transition in 1994. They are therefore key sources of DTI's institutional memory and negotiating capacity.

Trade and investment negotiations are conducted by representatives from the International Trade and Economic Development Division (ITED). The process of restructuring of the DTI has led to structural changes of ITED in recent years. In brief, relevant aspects of the restructuring process are included in this review.

During the early phase of the new regime at DTI (1995 – 1999), a recognised challenge was that of lack of research capacity within DTI. The Trade and Industrial Policy Secretariat (TIPS) was established in 1996 to provide support to DTI, by conducting both strategic, longer term focused, and shorter-term research. Initially this was a five-year plan. However, TIPS continues to provide research on trade and industrial policy issues,

and has played an important role for example in conducting research in the area of trade in services.

DTI has been engaged in a process of restructuring, which started soon after the appointment of the current Director General. A key element of the restructuring of DTI, and specifically ITED, during the first phase of restructuring, was the establishment of a Research Department within ITED. The rationale for this was that the division needed dedicated and expert research capacity to address its specific requirements. A Research Director, Peter Draper was appointed and he canvassed very broadly among the research organisations and academic departments of the South African universities to discuss research priorities and existing research programmes, as well as to assess the capacity existing in these institutions with a view to developing modalities for collaboration with DTI.

During a more recent phase of restructuring, research activities were centralised in DTI. This centralised model of research capability in DTI, emphasises also the importance of DTI's linkages with the external research community. Indications are that a more decentralised modality is likely to be implemented soon. This would have the advantage of being able to respond more effectively and timeously to the research demands articulated in negotiations.

#### 4.3 Skills and Capacity

Negotiations require a complex of skills and capacity. During the preparatory phase of the negotiations, strategic skills are required to guide the preparations, to identify key interests and to assess the impact of specific concessions that may be required, in terms of, for example trade liberalisation. More specifically, the skills and capacity required are:

##### ❖ Strategic capacity

This capacity consists in, amongst others, an in-depth understanding of economic linkages and relationships within the South African economy, insight into the comparative advantages of the parties to the negotiations, and knowledge of South Africa's broader policy objectives, and synergies between trade and other policy areas.

Strategic capacity is, to some extent, built through experience. Such experience is also an important building block of institutional memory. In this regard, turnover of staff is important. With high staff turnover institutionalisation of experience and lessons learned through negotiations is critical. This was a recurring theme amongst interviewees<sup>13</sup>. The depth of capacity and experience, relevant to negotiating trade and investment agreements, is currently vested in a relatively small number of senior DTI officials. The loss of any one of

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<sup>13</sup> It is of course also important to assess reasons for high staff turnover.

these key officials would be very significant, especially in view of the current negotiating demands.

A number of issues arise as a result of this situation. First, facilities must be in place to retain the institutional memory. Experiences and lessons from the negotiations must be recorded, and transferred to more junior staff. Lessons from the Foreign Service Institute (training institution) of the DFA may be apposite in this regard. Secondly, the loss of senior staff should be investigated to develop a strategy to assist in the development of a strategy to retain such expertise. Third, there are various capacity building initiatives in the area of trade and investment negotiations, and related areas. These include international institutions such as the WTO, UNCTAD, WIPO, as well as South African institutions such as universities and research and capacity building organisations (eg Trade Law Centre for Southern Africa).

It came to our attention that for the last two WTO Trade Policy Courses (3-month programmes held in Nairobi - September to November 2002, and April - June 2003) that no South African participated in these training initiatives. These were missed opportunities for capacity building. It is recommended that a coordinated capacity plan be developed by DTI, DFA and relevant sector Departments, and that specific capacity building organisations (both South African and international) be approached to deliver such capacity building as may be necessary.

#### ❖ Negotiating Skills

Negotiating skills are extremely important to the successful conduct of trade and investment negotiations. Such skills are anchored in an understanding of bargaining processes and the importance of trade-offs within the overall context of the agreement, as well as the impact of specific concessions.

While on the job training is important (ie experience matters), training is also critical in this area. Several interviewees indicated that they had benefited from training at the WTO and UNCTAD, but that DTI itself did not have a structured training or capacity building programme for the development of negotiating skills. This is particularly important given the high staff turnover that has taken place in ITED generally, and the remaining number of experienced negotiators relative to more recently appointed officials.

#### ❖ Legal Capacity

The importance of the interface between law and economics, as well as the specific role of legal capacity both in the negotiation of agreements

as well in the process of incorporating the international agreements into the domestic legal framework, was well recognised by the DTI representatives appointed in 1995-1996. According to interviewees, the importance of appointing legal experts in the area of trade (and related disciplines) law was incorporated into the human resource plans for DTI.

Currently however, ITED has limited legal capacity (2 lawyers in the Division). Given the multiplicity of negotiations being conducted simultaneously, and the increasingly technical nature of trade and investment agreements, this is not adequate. This specific paucity of capacity needs to be put into a broader context, recognising that International Trade Law is scarce in South Africa, and therefore addressing this issue requires discussions with other stakeholders eg universities, the legal profession and research organisations.

An area, for example, where the importance of specialised legal capacity is obvious is in the field of intellectual property. According to information received, DTI has experienced difficulties in finding a suitable candidate to appoint in relation to TRIPS matters (an appointment has recently been made after a vacancy of approximately two years). In such cases the relationship between DTI and the legal profession takes on special significance. Apparently, support to DTI, has been offered by the legal profession, but as yet not been taken up.

#### ❖ Research Capacity

Research capacity plays an extremely important role in, especially the preparatory phase of negotiations, and then also during the conduct of negotiations to assess the likely impact of specific proposals made by the negotiating parties. Subsequent to the conclusion of negotiations, during the implementation phase of the negotiations, impact assessment is also critical.

It was explicitly recognised that DTI's research capacity was quite inadequate in 1994, and that this had to be addressed. The establishment of TIPS was proposed as an interim (five-year) solution while DTI developed in-house research capacity. TIPS has played an extremely important role in providing research support to DTI through its network of researchers, both in South Africa, but also regionally and internationally.

As indicated earlier, DTI's restructuring plans did focus on addressing this challenge. However these plans have changed from a decentralised (matrix) model to a centralised model, and it seems that there may be current discussions, recognising the merits of a decentralised model, related to perhaps changing from the centralised model, back to a decentralised model.

Research capacity refers not only to the capacity to conduct research, but also to the capacity to absorb research. The latter capacity is of course extremely important as regards the access to and use of externally conducted research. If reliance on external research is to play an important role in providing input to ITED, the interface between research organisations (including universities) needs to be developed and modalities for engagement to ensure that research addresses the specific needs of DTI in negotiations, and modalities and the capacity to absorb such research should be developed or expanded.

#### ❖ Specialist capacity

As the lead agency in negotiations, DTI has the responsibility to draw in the specific expertise from sector government departments, as well as other stakeholders. Senior DTI representatives have indicated that the expertise in some of the sector departments is weak, as regards the requirements of especially trade negotiations. Specifically, a challenge arises from their lack of focus on and insight into trade issues; some of these departments are much more involved in addressing the challenges of domestic regulatory reform. This is an important challenge from DTI's perspective, in that it may be required to mitigate the lack of capacity in these departments to be in a position to adequately negotiate in these areas.

An important issue, in terms of DTI's role in the negotiations, is its perceived bias towards manufacturing. Sector department representatives indicate that the role of services and agriculture, for example, in the South African economy, require that these sectors enjoy specific focus, and hence the active involvement of expertise in these areas.

The Department of Agriculture (DOA), which has itself been engaged in a process of restructuring, as well as having been involved in an extensive process of domestic regulatory reform, indicates that it has a relatively good working relationship with DTI, but that it could be improved in certain respects. Specifically DOA indicates that at more senior levels within DTI there is a good understanding of agricultural interests and concerns, while this is not the case among more junior ranks.

DOA indicates that it sees an important role in the preparatory phase of the negotiations eg when going on reconnaissance trips to prospective negotiating parties, and that they have not always been involved in these activities, while still being required to participate address subsequent issues that may arise.<sup>14</sup> DOA no longer has a

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<sup>14</sup> The preparations for negotiations with Mercosur and China were specifically noted in this regard. As regards Mercosur, DOA expressed the concern that South Africa and Mercosur countries have similar competitive advantages in agriculture, and that if specific concerns of South African agriculture are not taken into account, serious negative impact may result.

representative in Geneva (having been recalled three years ago). DOA is supported by DTI in its request for representation in Geneva, but this is still to materialise.

A specific concern of DOA is that DTI does not focus sufficiently on agriculture and small black farmers. DTI is perceived to have a closed preparation process for negotiations<sup>15</sup> and a fairly top-down approach. Agri-industry, with whom DOA has good interaction, indicates that it is difficult to obtain information from DTI, and that DTI presents *fait accompli* to Nedlac. The agricultural industry gets information from the Agri-Forum (a tri-partite organisation), rather than from Nedlac, as its view is that there are insufficient consultations on agricultural negotiations in Nedlac.

Collaboration with other departments may be boosted as a result of the recently formed International Relations, Peace and Security Cluster (IRPS) and the fact that Tshediso Matona, Deputy Director General of DTI, chairs the Economic Committee. This offers an opportunity to discuss South Africa's position in the international trade arena, to identify and articulate priority relationships and key substantive issues for negotiations, as well as more broadly the contribution of trade and investment agreements to South Africa's development objectives.

#### ❖ *Private Sector-DTI Interface*

Trade agreements are negotiated and concluded so that the private sector (firms and farms) are better able to realise trade opportunities; to facilitate efficient economic decisions to engage in markets geographically distinct from South Africa; while simultaneously permitting easier access for foreign firms to South Africa's markets. As such trade agreements promote contestability of markets, and specifically bring more competition to South Africa's markets. It is therefore extremely important that the specific concerns of the private sector are well articulated in the preparatory phase of negotiations, and that the negotiations support their particular interests.

Nedlac is the forum in which business, labour and government meets to discuss all policy initiatives and concerns including negotiations. Effectiveness of this forum is predicated upon the ability of all parties to articulate effectively specific concerns, the sharing of all relevant information, and effective consultation to reach agreement on how to proceed, in for example an FTA negotiation. DTI has made attempts to foster greater industry coherence on trade and also investment issues through the establishment of Export Councils. How effectively they are working to articulate industry views and concerns with respect to negotiations is not clear. The sectors which are often perceived to

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<sup>15</sup> A Department that is perceived to be 'sidelined' in the negotiations is the Department of Minerals and Energy.

be organised in terms of articulating their concerns, are clothing and textiles, and the automotive sector.

The relationship between DTI and the private sector also takes on a complex nature in regard to the requirement to negotiate with the BLNS countries. The involvement of the private sector in negotiations, in these countries is likely to be even more challenging than in South Africa.

According to one respondent, the importance of the public-private sector interface, is particularly apparent when dealing with the US. The private sector in the US is specifically pro-active in articulating its requirements so that appropriate provisions may be negotiated in trade agreements. It is particularly important that the interface between business and the public sector, especially those departments engaged in negotiations be developed.

## **5. Achievements, Challenges, Problems and Lessons**

### **5.1 Achievements**

It is difficult to underestimate the significant challenges that emerged with the new logic of international trade relations in the mid-1990s. The establishment of the WTO in 1995 (with South Africa a founding member) determined a new paradigm in terms of governance of international trade. The WTO provides an institutional anchor for the rules based system of international trade. Effective functioning of this rule-making system requires effective participation in this system by its members. The DTI participated in the development of South Africa's GATT Offer, outlining a trade liberalisation agenda, and has participated in the on-going negotiations built into the WTO agenda, as well as preparing for the negotiation of 'new issues'.

More or less at the same time as these WTO developments unfolded, the EU's discussions with South Africa, and DTI specifically, matured into negotiations for an FTA. This marks another significant shift in international trade relations. The engagement between North and South underwent seismic shift, as the EU articulated its new vision for, not only its engagement with South Africa, but indeed all the ACP countries. Its proposed Economic Partnership Arrangements (EPAs) will be based, not on benevolent, asymmetric preferences, but on reciprocity.

The protracted negotiations with the EU tested the mettle of the DTI negotiators. The SA-EU Agreement (TDCA) is the flagship agreement of the DTI during this review period. It entered into force on 1 January 2000, despite the fact that two specific agreements, Wine and Spirits and Fisheries had not been concluded.

The Wine and Spirits Agreement has not been ratified. It was (according to one of the chief negotiators of the TDCA), the most challenging in the entire negotiations. It has now taken on very specific technical challenges (related to eg geographical indications – GIs), and high-level legal expertise may be required in these final stages.

No agreement on Fisheries has been concluded. The sticking point in this case has been access to South Africa's fishing waters, on which DTI held out. Again this is significant especially as regards the importance of the South African industry, in terms of job creation for example, and the impact that access to its waters could have.

The scope of the EU negotiations provided significant challenges to DTI. It is acknowledged that the EU, although not making any concessions to South Africa, could have taken an even tougher approach. It (according to one source) did not do since it wanted the FTA to succeed, given the demonstration effect that it is expected to have for ACP countries.

The valuable experience of these protracted negotiations could have provided an important base from which to develop capacity for negotiations in DTI. It seems that this has not happened, and that the experience and expertise garnered during these negotiations remains with specific individuals, most of whom are no longer with DTI. DTI therefore needs to develop modalities for internalising such experience from current negotiations, to ensure that the intellectual capital developed during the negotiations is institutionalised in DTI.

A key question related to the achievements in the area of trade and investment negotiations, is what has been the contribution of the concluded agreements to South Africa's trade performance, economic growth, FDI and job creation. On this score it is important to note that a direct causal link between a trade or investment agreement and any one of the indicators mentioned, does not exist. There are multiple factors which will determine the impact on these indicators, and to isolate them would require a detailed econometric study. It is worth noting however, that South Africa's exports of manufactured products to the EU increased by 19.8% in 2001/2002; specifically its exports to the Netherlands during this period grew by 33.5%.<sup>16</sup> The TDCA also provides for ongoing financial assistance to South Africa in the form of grants and loans for development, amounting to about R900 million per annum. South Africa's manufactured exports to the NAFTA region grew by 16.6% over the period 2001/2002, with a surplus being recorded for the first time in 2000 with this region.

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<sup>16</sup> [www.dti.gov.za](http://www.dti.gov.za), [www.tips.org.za](http://www.tips.org.za)



## 5.2 Forthcoming Negotiations

A raft of FTA negotiations have either just begun or are about to begin. It is generally acknowledged by DTI representatives that these negotiations, and perhaps the SACU-US negotiations are a particular case in point, will turn out to be a significant challenge. Phase I of the SACU-US negotiations started in May 2003, and Phase II will begin in 2004. DTI's expectations are that Phase II will be especially challenging as the issues to be negotiated include, investment, competition, government procurement and intellectual property issues. A senior DTI representative has indicated that DTI does not have capacity, at this stage, to deal with these phase II negotiations. He indicated that the US is seeking stability in trade and investment relations, and although phase I focuses on market access issues, the importance of technical barriers to trade and SPS need to be focused on. These also pose challenges due to their technical nature.

At the same time, the WTO agenda is expanding and moving towards the 'new issues'.<sup>17</sup> The very nature of market access negotiations has also changed, in that the focus is now, in the WTO, on technical barriers to trade rather than on tariff barriers. Again it is in these areas where DTI lacks capacity. Select capacity does exist in some of the sector government departments, but not in all of the areas to be negotiated. This will be a significant challenge to DTI in the WTO negotiations.

## 5.3 Implications of the 2002 SACU Agreement

The recently concluded SACU Agreement has not been ratified by all signatories.<sup>18</sup> Despite this agreement was reached in November last year that, as from then, all SACU members would enter into FTA negotiations collectively. This has important implications for DTI and the conduct of negotiations. The skills and capacity challenges that the South African DTI contends with, are magnified in the BLNS countries. In addition, there are hurdles to overcome as regards the political sensitivity of South Africa and its economic hegemony in the southern African region.

Concerns have been expressed by representatives from the Ministries of Trade and Industry in some of the BLNS countries that their specific interests are quite different from South Africa's. The significant differences in levels of development as well as economic profiles and specific interests could pose challenges for DTI in future negotiations.<sup>19</sup> A senior DTI official has indicated that negotiating with BLNS is time

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<sup>17</sup> The 'new issues' in the WTO are also referred to at the Singapore issues – trade and competition, investment, government procurement, amongst others.

<sup>18</sup> Namibia ratified the Agreement earlier this year (2003), but other signatories are still to ratify the Agreement.

<sup>19</sup> A specific challenge has arisen, for example as regards negotiations with China. Swaziland recognises Taiwan, and hence China does not want to negotiate with SACU.

consuming and complex. This has important implications in terms of resource requirements from DTI for future negotiations.

#### 5.4 DTI: A Learning Organisation

Significant challenges were recognised in 1994 to develop DTI into a learning organisation. While substantive restructuring has been undertaken during the past (approximately) three years; it seems that the process has not yet been completed. This restructuring process has very important implications for the conduct of trade and investment negotiations.

High staff turnover poses significant challenges to building a culture of learning within an organisation. In addition the very demanding agenda in terms of multiple negotiations being conducted simultaneously, provides little respite for internal capacity building (especially of newer appointees), and for reflection on past experiences and endogenising that intellectual capital that is developed through those negotiations.

### 6. Lessons for Future Negotiations

DTI has played a very significant role in the trade and investment negotiations that have been conducted since 1994. As lead agency in the negotiations, DTI has to manage the negotiating process, drawing expertise from other government departments and other stakeholders. It has to step outside its narrowly defined constituency (trade and industry) to take account of the bigger picture to ensure that the specific trade and investment agreements promote the development of the South African economy, and to incorporate the expertise of other government departments such as DFA, and relevant sector departments.

The complexity of trade and investment issues now being negotiated, the greater sophistication and technicality of the provisions in these agreements, provide significant challenges to DTI. The following are key to address the challenges for trade and investment negotiations:

- ❖ Enhancing the collaborative linkages with DFA, sector government departments, and other stakeholders eg private sector and labour, as well as involving these stakeholders in the negotiations. This is important to ensure that specialist, technical expertise is available, and that specific economic interests are effectively articulated in negotiations, and the agreements concluded.
- ❖ Institutionalising or endogenising the lessons from previous negotiations to make DTI a learning organisation. In the face of high staff turnover, this takes on a special urgency for DTI.

- ❖ Negotiating capacity and experience is currently concentrated in a relatively small number of DTI officials. Such concentration entails significant risks for DTI. If one of these individuals leaves DTI, this will result in a significant capacity drain, and this could endanger specific aspects of current negotiations.
- ❖ The multiplicity of negotiations currently underway raises questions concerning priorities (both in terms of partner focus, but also in terms of the substantive focus of the negotiations). How do the different negotiations (and the agreements being striven for) contribute to South Africa's development objectives? These questions must be considered, not only by DTI, but within a forum which incorporates all relevant stakeholders.
- ❖ Developing the interface between law and economics in the DTI; these two disciplines are inextricably linked in the increasingly sophisticated nature of the provisions in trade and investment agreements. It is thus necessary to strengthen the legal capacity in DTI.
- ❖ Enhancing the research capacity to support effective negotiations; this is important both within DTI (and in ITED in particular) as well as in organisations which can provide support to DTI and other government departments in specific specialist areas related to negotiations
- ❖ Building social capital in the southern African region. Given the implications of having to negotiate with the BLNS countries, the importance of collaborative relationships (rather than competing relationships) is obvious.
- ❖ Kenya recently established a WTO Forum which brings together representatives from relevant governments departments, the private sector and civil society. The Forum considers any position or submission that is made to the WTO. The Permanent Negotiating Forum, suggested by the DTI, could play a similar role with respect to all trade and investment negotiations.

## Reference Material

### 1. Trade Agreements

[www.tralac.org](http://www.tralac.org)

### 2. Investment Agreements

Department of Trade and Industry

### 3. Impact Analysis of Trade and Investment Agreements

Trade and Industrial Policy Secretariat ([www.tips.org.za](http://www.tips.org.za))

### 4. DTI Documents

[www.dti.gov.za](http://www.dti.gov.za)

## **Appendix: List of Interviewees**

- Dave Kaplan, DTI
- Martin Nicol, ODA Consultancy, formerly DTI
- Tshediso Matona, DTI
- Sfiso Ngwenya, DTI
- Fancis Moloji, DTI
- Xavier Carim, DTI
- Peter Draper, SAIIA, formerly DTI
- Eltie Links – former Ambassador to the EU (DFA)
- Claus Marer, PWC
- Faizel Ismail, DTI
- Gerda van Dijk, DOA
- Rashad Cassim, TIPS