

EXECUTIVE SUMMARY:

**A PRELIMINARY NATIONAL POSITION
FOR SOUTH AFRICA
ON PARAGRAPH 31(i) OF THE DOHA
DECLARATION ON THE RELATIONSHIP
BETWEEN
MULTILATERAL ENVIRONMENTAL
AGREEMENTS ("MEAs")
WITH TRADE OBLIGATIONS
AND
WORLD TRADE ORGANISATION ("WTO")
RULES**

An executive summary of the discussion document for South African Stakeholders commissioned through the Industrial Development Corporation by the FRIDGE Sub-Committee of the Trade and Industry Chamber of the National Economic Development and Labour Council ("NEDLAC")

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1. INTRODUCTION

The international negotiations on Paragraph 31(i) of the Doha Declaration have been, even in the context of the general difficulties of the Doha Round, comparatively slow and lacking clarity as to the scope and desired outcome thereof. Many member countries have made submissions in order to attempt to clarify and give the negotiations more direction, though there is general disagreement on some fundamental concepts and process, the resolution of which would assist greatly in moving the negotiation along more purposefully.

South Africa has not yet made a formal submission on Paragraph 31(i). This paper has been commissioned by the Industrial Development Corporation, in its role as administrator of certain funds of the Fund for Research into Industrial Development, Growth and Equity ("FRIDGE"), with the purpose of assisting with the development of a final national position on paragraph 31(i).

In terms of the Industrial Development Corporation's tender document T12/04/06, the authors' mandate is the **"proposed drafting of a preliminary national position on the relationship between Multilateral Environmental Agreements (MEAs) with trade obligations and World Trade Organization (WTO) Rules which can be used to develop a final national position in response to paragraph 31(i)"**.

The IDC Mandate covers a certain group of MEAs, which have been divided into two broad groups for convenience, namely the Biodiversity Group and the Chemicals and Other Group, though this division has little to add to the overall debate on Doha Paragraph 31(i). The latter MEAs do, however, contain certain trade measures, details of which are included in the Matrix entitled "Matrix on Trade Measures pursuant to Selected Multilateral Environmental Agreements" prepared by the WTO Secretariat and to be used as the basis for the negotiation under paragraph 31(i) of the Doha Declaration.

The authors have submitted a full report under the IDC mandate detailed above. They were subsequently requested to provide this executive summary thereof, which would highlight the issues to be faced by South Africa in particular, in respect of her final position on the negotiation.

The authors wish to make it clear once again, that the issues are complex and the international debate is fraught with differences of interpretation of the definitions within the mandate contained in Doha Paragraph 31(i), the desired outcomes of the negotiations and what the best method of attaining those outcomes might be. Thus a final position on South Africa's submission to the WTO under Doha Paragraph 31(i) cannot be responsibly developed without resort to the full report, and a thorough scoping of South African stakeholders. This Executive Summary can by no means be seen as a replacement thereof.

In addition, there has been no substantive discussion between the authors and the counterpart group subsequent to the submission of the full report, accordingly the views

of the counterpart group regarding the position and policy choices to be made in this debate as discussed in the full report have not been made known. Accordingly, the authors are compelled to highlight areas of policy and position which, in their subjective opinion, are the areas of focus from which the final position of South Africa on the Doha Paragraph 31(i) mandate will emerge.

It is important to obtain stakeholder involvement in the overall strategy and the underlying policy and position choices to be made in this debate as such choices will have a long term effect, and the authors trust that steps will be taken in this regard prior to finalization of the South African submission to the WTO.

2. THE RELATIONSHIP BETWEEN TRADE AND THE ENVIRONMENT – THE INTERNATIONAL NEGOTIATION ON PARAGRAPH 31(i) OF THE DOHA DECLARATION THUS FAR:

2.1 PARAGRAPH 31(i) OF THE DOHA DECLARATION.

It would seem from a plain reading of the text of DOHA 31(i) that the mandate of this particular paragraph is narrowly and rather clearly defined:

- The Chapeau, or preamble outlining the purpose of paragraph 31, states that the overall objective of negotiations on paragraph 31 is “enhancing the mutual supportiveness of trade and environment”
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- Thereafter, the specific mandate under paragraph 31(i) is **limited to negotiations** on the following:
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 - The relationship between **existing WTO Rules**; and
 - **Specific Trade Obligations** (“STOs”) [NOT TRADE MEASURES IN GENERAL] (The IDC mandate speaks of “trade obligations” , but this appears to be a typographical error)
 - **as Set out in MEAs**;
 - The negotiations shall:
 - **be limited in scope** to the applicability of such existing WTO Rules as among parties to the MEA in question
 - **not prejudice** the WTO Rights of any member that is not a party to the MEA in question

Accordingly, the pertinent questions here, in order to begin to fulfill the Doha Paragraph 31(i) mandate are the following:

- **How does one define the phrase “Set out in MEAs”?** In this regard, the EC view [TN/TE/W/31] suggests that not only the Multilateral Environmental Agreements in treaty form, but also certain subsequent Conference of the Parties (“COP”) decisions, where these introduce STOs into the MEAs, should be considered to be included in the definition of the phrase “set out in MEAs”.

However, there are public international law considerations to be had here, in that not every COP decision has the effect of becoming a binding obligation upon parties which have not formally agreed to become bound thereby. Thus there are varying degrees of interpretation of the phrase "set out in MEAs".

Furthermore, the EC also submits that while non-legally binding COP decisions do not qualify as STOs, they can play an important part in the interpretation on the implementation of STOs contained in MEAs.

Additionally, it is not certain that MEAs which have been adopted but which are not yet in force, can be considered MEAs for the purposes of this negotiation. The US view is that these MEAs ought to be included where they contain STOs, since they may very well be in force before the end of these negotiations. The more legally correct view is that only MEAs which are currently in force can create obligations, and thus the enquiry ought to end there.

Furthermore, the negotiation is to be limited in scope to between the parties to the MEAs. This raises the question as to whether a party which has not signed amendments to existing MEAs can be seen to be a party in respect of the amended portion of the MEA – this is particularly important from the South African perspective, as she has not adopted several amendments, for example the Gaberone Amendment to CITES.

Given South Africa's need to retain policy space in both the trade and environmental spheres, particularly due to the fact that the MEAs were negotiated without the requisite close cooperation of her trade and environment departments, it is suggested that South Africa hold a conservative position vis-à-vis her interpretation of this clause, and for that matter, the whole of the Paragraph 31(i) mandate.

Accordingly, support for the narrowest definition of the phrase "as set out in MEAs" would be advisable, in order to ensure that an automatic acceptance of wider and unintended consequences cannot inadvertently occur.

It appears that the manner in which the limiting statement of paragraph 31(i) "set out in MEAs" is interpreted will affect the decision as to whether a trade measure contained in the CTE Secretariat' Matrix falls within the Paragraph 31(i) mandate for negotiation or not.

The Korean submission cites the following example:

Articles 4.2.e and 8 of the Basel Convention contain the ambiguous words "environmentally sound way," which is not operational by itself. However, a COP decision elaborates it. Further, Article 18 of the Cartagena Protocol on Biosafety provides for basic elements of "behavioral obligation," while mandating the COP to elaborate more on those obligations."

The submission goes on to state that **"if Members follow a strict interpretation of "set out in MEAs," trade obligations stipulated in COP decisions should not be regarded as STOs. Yet COP decisions are playing an increasingly**

important role since most MEAs lay out only a basic framework and concrete rights and obligations of the Parties take shape through COP decisions. In addition, there are cases where the MEAs concerned declare that COP decisions are their integral part.”

With regards to the decisions made by COP, the authors concur with the submission of India, which holds that STOs set out in such decisions must each be assessed separately to determine whether they fall within the decisions that are treated as “set out in the MEAs” within the mandate of paragraph 31(i).

“The question is whether the COP decisions, resolutions and recommendations which generally help in directing the work of the COP, i.e. are more of internal procedures or are substantive in nature? However, it seems that,

- **exceptionally, COPs may have genuine law-making powers, such as the power to amend the Annexes attached to a MEA, as under Article XV of CITES, in that case, an amendment must be adopted by a specified majority of Parties. The amendment so adopted, shall enter into force after the lapse of a specified time-frame and will be binding on all Parties, except for those that made reservations.”**

Once one has agreed the extent of the phrase “set out in MEAs”, one must then look closer at what constitutes a Specific Trade Obligation or STO.

Again, there is little consensus on the definition of an STO, though the Norwegian submission correctly places the need for at least this definition to be agreed, at the forefront of the negotiation. The authors agree strongly with this position, particularly since close examination of the tables submitted by various Members indicate that the selection of even the most apparently obvious STO is not uniformly made.

- **What is a Specific Trade Obligation (“STO”)?**

There is far from sufficient consensus on exactly what constitutes an STO. However, the manner in which an STO is determined is viewed as an important mechanism by which each member may retain its policy space on environmental affairs.

For example, the Norwegian submission [TN/TE/W/25] holds that an STO needs to fulfill three criteria, namely: it has to be specific, relate to trade and it must be an obligation. The submission goes on to clarify their interpretation of specificity, trade and obligation. In terms of specificity they also allow for instances where well-defined alternative measures are provided for. In terms of trade, the measure must relate to imports and exports, thus excluding administrative measures. Norway also concludes that there is a “grey area” regarding some measures where there is no agreement as to whether these are or are not STOs.

According to the United States [TN/TE/W/20], STOs must:

"- Require an MEA party to take, or refrain from taking, a particular action. Such action must be mandatory and not simply permitted or allowed by a provision in an MEA. In other words, it cannot be discretionary.
- Be "set out" in an MEA."

In terms of the mandate the US submission identifies a further limit, i.e. the mandate only covers trade obligations *among parties*. **"Thus, it would include only those provisions in which parties to an MEA agree to bind themselves to trade obligations vis-à-vis each other. It would not include obligations requiring parties to take particular trade action in relation to non-parties.**

The state of the South African debate on the definition of an STO, surmised through the interview of experts interviewed, appears to have not yet gone further than to state the obvious: that an STO must be "specific", "trade-related" and "obligatory". Clearly then, any preference the authors may have for any particular definition of an STO would be a subjective recommendation, though it is our view that the Japanese interpretation was useful in permitting the differences in interpretation of the various phrases which constitute the mandate under paragraph 31(i) to be clearly noted during the exercise of separating STOs from trade measures/administrative measures in the Matrix.

The Japanese submission [TN/TE/W/26] provides a useful analysis here, where trade measures are categorized into four separate categories, in order to attempt to distill a predictable interpretation of various trade measures, and how to distill which of these might be STOs:

- "1) The trade measure in question is explicitly provided for as mandatory under an MEA;**
- 2) "*Obligation de résultat*" is explicitly provided for in an MEA and the trade measure in question is identified in that MEA as potential means to meet that obligation.**
- 3) "*Obligation de résultat*" is provided for in an MEA but the trade measure in question is not identified in that MEA, while the decision on the measure(s) to be taken to fulfill that obligation is left at the full discretion of each Party thereto;**
- 4) The trade measure in question is not mentioned in an MEA but the Parties to that MEA are obligated to take that measure in accordance with relevant decisions made under the framework of that MEA."**

Japan believes that category 1 would classify as STOs, category 2 would classify as STOs if "based on scientific principles and the scope of the trade measure was proportional in range and degree in the pursuit of the MEA objectives (Proportionality)", and Categories 3 and 4 are not considered STOs in terms of the DOHA mandate.

Japan further holds that **"each trade measure classified in these two categories [i.e. 1 and 2], should, if necessary, be deliberated on a case-by-case basis."**

The authors also note the usefulness of the Indian submission [TN/TE/W/23], particularly given their narrow approach, which may well suit South African policy makers, as follows:

The term "*specific trade obligation*" has three elements that must be considered together i.e. **"the provision must be *specific* with a *trade* element and should be in the nature of an *obligation*".**

"i) A trade measure that is both *mandatory and specific* in its entirety.

For Example: Article 4.1 (b), (c) of the Basel Convention according to which Parties are obliged to prohibit export of covered waste to Parties that have banned such imports or do not consent in writing to the specific import.

ii) A trade measure where *only the outcome to be achieved is identified with a list of appropriate measures that Parties could implement to achieve the desired outcome.*

Example: Article 6.2 of the Basel Convention requires the State of import to respond to the notifier in writing, by either consenting to the movement with or without conditions, or denying permission for the movement, or requesting additional information.

iii) A trade measure where the *outcome to be achieved is identified, however the measures which could be implemented to achieve that outcome are not specified.*

Example: Article 16 of the Cartagena Protocol dealing with "Risk Management" states that the Parties shall, taking into account Article 8 (g) of the Convention, establish and maintain appropriate mechanisms, measures and strategies to regulate, manage and control risks identified in the risk assessment provisions of this Protocol associated with the use, handling and trans-boundary movement of living modified organisms. India believes that the above provision is not specific, although it contains an obligation.

iv) Additional and more stringent measures to achieve the overall objectives of the MEA which are more in the form of a right granted to a Party as opposed to an obligation.

Example: Article XIV.1 of CITES states that the provisions of the Convention shall in no way affect the right of Parties to adopt stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species (whether included in the Appendices or not) or the complete prohibition thereof.

India believes that the mandate given under paragraph 31(i) of Doha Declaration refers to only the first category of trade measures that are both mandatory and specific in their entirety. In India's view, non-specific provisions cannot qualify as STOs.

However, as they point out the issue of specificity is not that clear-cut as some trade obligations contain both specific and non-specific elements:

Example: Article 13.1 of the Rotterdam Convention states that: "The Conference of the Parties shall encourage the World Customs Organization to assign specific Harmonized System customs codes to the individual chemicals or groups of chemicals listed in Annex III, as appropriate. Each Party shall require that, whenever a code has been assigned to such a chemical, the shipping document for that chemical bears the code when exported".

The first sentence is not specific and would not qualify as an STO whereas the second sentence could. Furthermore, several provisions have to be read with another provision containing a trade obligation to understand whether it is specific or not.

In order for a provision to qualify as an STO India believes it must be **"specific in its entirety"**.

It is important to note the title of "The Matrix of Trade Measures Pursuant to Selected Multilateral Environmental Agreements (TN/TE/S/5/Rev.1)" prepared by the WTO Secretariat dated 16 February 2005 which is used as the basis for this paper, namely "trade measures" as opposed to STOs, particularly in view of the fundamental disagreement between the members as to exactly what constitutes an STO. While their definitions may sound convergent, the results of their selections as displayed in Annexure B of the full report show a completely different outcome.

Furthermore, the free elevation of all manner of trade measures to STOs without further refinement being undertaken as to whether the latter in fact create obligations as envisaged under Paragraph 31(i) will, it is feared, increase the risk of a reduction of policy space relating to the environmental affairs of sovereign members. In the context of any agreed mechanism whereby a trade measure implemented under a MEA would be automatically assumed to be compliant with existing WTO Rules, as seems to be proposed by the EC and Switzerland, this would come in direct conflict with the stated intention of the WTO Committee on Trade and Environment that **"the most effective way to deal with international environment problems is through the environmental agreements [...thus...] using the provisions of an international environmental agreement is better than one country trying on its own to change other countries' environmental policies."**

The Matrix deals with the selected MEAs which contain trade measures (including Specific Trade Obligations), hence the authors' attempt under each treatment of these MEAs in the Report, to separate clear STOs and those where some element of disagreement exists and where South African Stakeholders possibly need to be "scoped" in order to reach consensus on a national view.

The authors are in agreement with the need to first reach agreement on the proper definition of the term STO (and, in fact, the definition of "set out in MEAs" as

discussed above), and concur with the view of the Norwegian submission in this regard:

“as pointed out by Peru, identifying STO by STO would imply individual interpretation only, and will not bring us any closer to fulfilling our mandate. This illustrates the importance of developing some sort of a definition rather than going through the various trade measures one after the other and decide whether they can be considered STOs.”

The US submission disagrees, stating that: “...the existence of the compilation in WT/CTE/W/160/Rev.1 [the Matrix] makes it unnecessary to debate in abstract the meaning of such terms as “MEA”, “obligation”, “trade”, etc. The sense of delegations regarding these terms will come to the surface through a concrete review of the examples they identify in the document[...] there appear to be specific trade obligations set out in six MEAs listed in WT/CTE/160/Rev.1[...] CITES, the Montreal Protocol, the Basel Convention, the Rotterdam (PIC) Convention, the Stockholm (POPs) Convention and the Cartagena (Biosafety) Protocol.”

The authors have found, however, that the submissions made on the purely “experience sharing” approach, tend to deal only with the MEAs and the domestic implementation thereof – very little is said about their interaction with existing WTO Rules, and little is actually gained from the exercise in terms of an elucidation of the relationship between these two international law systems other than to highlight the absence of conflict due to the success of the cooperation of their trade and environmental departments during the negotiation of the MEAs.

Furthermore, the divergence and arbitrariness in the necessarily subjective selection, in the absence of an agreed definition, of STO’s in each MEA from the Matrix as is shown in the various tables submitted by the Members, bears the concerns of Norway, Peru and the authors out extremely well. We are in agreement with the EC’s statement that the experience-based discussion on the negotiation and implementation of STOs set out in MEAs could not **“in itself constitute an outcome under the mandate.”**

Instead, the authors are of the view that a dual approach must be followed – while the experiential approach to sharing the domestic implementation of STOs set out in MEAs may assist in better highlighting areas of potential conflict in the two systems, it does not address the underlying question of the legal foundation for the relationship between existing WTO Rules and STOs as set out in MEAs, and thus provides little certainty as to what ought to occur if a conflict were ever to arise.

Switzerland’s submissions deal with the legal interpretation of International Law from which the general relationship between MEAs and WTO Rules, which are two independent but equal bodies of international law, must first be examined. While some members are of the opinion that this conceptual approach goes well outside of the mandate of Paragraph 31(i) in that it deals with the overall relationship between the WTO Agreements and MEAs, it is trite that the relationship between existing WTO Rules and STOs set out in MEAs as a subset of the latter relationship, cannot

be properly understood without reference to the international law principles of no hierarchy, mutual supportiveness and deference. The authors believe that the Canadian view that both aspects, namely the sharing of factual experiences in the negotiation and implementation of specific trade obligations and the laying of a solid theoretical basis upon which to analyse the relationship between these experiences and the existing WTO Rules, ought to be supported as the logical manner in which to proceed.

Switzerland is of the view that a discussion and clarification of these principles: **“Whether it is in order to improve international cooperation when devising a new STO, or in order to ensure that an STO is implemented in a manner consistent with international obligations, [such a discussion] is useful and necessary and in fact responds to the mandate that we were given by the Ministers in Doha.”**

The Swiss submission under **TN/TE/W/4** reminds the Members of the initial reasoning for this negotiation as follows:

“In accordance with the Note by the WTO Secretariat (TN/TE/S/1), several approaches were proposed prior to the Doha Ministerial Conference for clarifying the relationship between the rules and provisions of the WTO System and those of MEAs which were most likely to prove incompatible: (A) leave the issue to be settled by the dispute settlement mechanism; (B) amend Article XX of the GATT 1994 by introducing reference to the environment; (C) adopt an interpretative decision. These three options, then, can provide appropriate means of clarifying the relationship between WTO rules and MEAs.”

The above submission explores the option of leaving the determination of the relationship between WTO Rules and specific trade obligations set out in MEAs on a case by case basis to the dispute settlement mechanisms of the WTO, but rejects this option, as it feels that since the WTO Members agreed to negotiate on this issue, this **“underscored their determination to find a solution to this issue and not to leave it to dispute settlement bodies.”**

Additionally, the option of adopting an environmental clause which could **“explicitly define the relationship between WTO Rules and MEAs [...and...] the principles governing the coexistence of the two systems [...and requiring...] reviewing Article XX of the GATT 1994 [...] and inserting a new provision in that Article”**, was found to be in conflict with the duty not to add to or diminish the rights and obligations of Members under existing WTO Agreements.

Switzerland then comes to the conclusion that **“the only possible solution is to adopt an interpretative decision. Consequently, it recalls that MEAs and the WTO are equal legal entities and that the relationship between WTO Rules and specific trade obligations in MEAs can only be governed by the general principles of no hierarchy, mutual supportiveness and deference, for which purposes an interpretative decision is necessary.”**

Discussions with South African experts have suggested that the subsequent Swiss submission entitled "The Relationship Between WTO Rules And MEAs" (TN/TE/W/61), then goes too far.

In laying out the international law principles which govern the relationship between WTO Rules and MEAs, this submission lays out the principles which it views as central to the discussion in the Committee on Trade and Environment in Special Session, namely:

- (a) **..."no-hierarchy" is based on the idea, that both legal systems are equal and there is no hierarchy between trade and environment regimes...**

- (b) **..."mutual supportiveness" is based on the assumption that the overall objective of both environmental and trade regimes is the same, namely the promotion of wellbeing. The two sets of rules are concerned with different areas of policies, focus on different issues and have different competencies. However, in focusing on their own tasks and competencies, the trade and environmental regimes must ensure mutual supportiveness.**

- (c) [the above principle highlights] **the importance of maintaining the integrity of both sets of instruments [and] brings us to the third "principle of "deference" ...that each framework should remain responsible and competent for the issues falling within its primary area of competence and accept the competence and decisions of the other regime."** [TN/TE/W/58]

The subsequent Swiss submission [TN/TE/W/61] then attempts to clarify how the above principles, **"which should in our view govern the relationship between WTO Rules and MEAs, relate to the rules of international law...there exists no hierarchy between WTO Rules and MEAs. [and that] ...as long as different international rules can be interpreted in a compatible and consistent manner, there is no need to establish an artificial hierarchy between them. In that sense, WTO Rules should, according to international law, always be interpreted in a manner that they do not constitute a conflict with MEA Rules. And vice versa, MEAs rules should always be interpreted in a way that they do not create a conflict with WTO Rules. This is a reflection of the general principle *pacta sunt servanda*, that requires that states should try to fulfil their obligations resulting from one treaty without violating their other obligations...Thus, if in a specific situation [such as the application of an STO set out in a MEA and its interaction with existing WTO Rules] those of WTO and those of an MEA apply, the provisions of each instrument should be construed, IF POSSIBLE [authors' emphasis] - in a manner not creating conflicts with the applicable rules and principles of the other instruments."**

The authors and some of the members concur with the Swiss submission up to the above point. However, thereafter there is a serious difficulty in accepting the conclusions which this submission then draws from the above obvious principles of international law:

"This [the above rule of interpretation relating to avoiding conflicting interpretations between two bodies of international law] implies an approach according to which a measure provided for by an MEA should be held as WTO-compatible. And this also implies that in the context of the WTO, the word "necessity of a measure provided for in an MEA" should not be re-examined, thus questioning the fulfilment of obligations under an MEA but WTO should use deference with regard to this issue." (TN/TE/W/61)

In responding to Switzerland's submissions as outlined above, Australia (TN/TE/R/14) is noted as expressing the view that a **"treaty interpreter could not accept such conclusions** [as reached in the Swiss submission that i) all measures provided for by an MEA should be considered WTO consistent; or ii) all MEA measures should be considered necessary when analysed in a WTO context] **at the outset, but needed instead to follow the customary rules of interpretation of public international law, as reflected in Articles 31 to 33 of the Vienna Convention on the Law of Treaties."**

The Australian delegation is reported to state [TN/TE/R/14] that the latter rules of interpretation must be applied by the WTO Panels and the Appellate Body when the covered WTO agreements are to be clarified. Furthermore, the implementation of any measures by Member States in fulfilment of their WTO and MEA obligations must of necessity still be reviewable on the basis of their WTO consistency by the WTO Panel or Appellate Body. Any other interpretation would have the result of negating the Principle of no-hierarchy of the above rules of interpretation.

The authors concur with the above Australian view, as supported by the Argentine and the US, in that the international law principles of no-hierarchy, mutual supportiveness and deference indeed do govern the relationship between the WTO Rules and MEAs, but that they cannot be used to support an appeal for a presumption of necessity or consistency with WTO Rules.

The latter presumptions could bring about unexpected and unintended consequences, and in any event are clearly in conflict with the no-hierarchy principle. They would, for example, negate the need for Article XX of GATT 1994, which through its mechanisms contained in the necessity test, ensures the mutual supportiveness of trade and environment by ensuring that **"measures adopted for an environmental purpose do not have protectionist intent."**

In this context, it is useful to highlight what, in the authors' opinion, is the crux of the negotiation under Paragraph 31(i), and which has been eloquently put in the US-Gasoline case Panel Report pertaining to Article XX of the GATT, at paragraph 7.1: **"Under the General Agreement, WTO Members were free to set their own environmental objectives, but they were bound to implement these**

objectives through measures consistent with its provisions, notably those on the relative treatment of domestic and imported products.”

Further clarification on the paragraph 31(i) mandate, in the authors’ view, is provided by the Appellate Body in the above case as follows:

“WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements.”

However, the European Community has rather differing views on the scope of the paragraph 31(i) mandate, and her view, as reiterated in her submission on 4 July 2005, is **“that scrutiny on how MEAs are implemented is clearly outside of the mandate of paragraph 31(i) of the DDA.”**

With respect, the authors strongly disagree with this view – in fact, **the manner in which MEAs are implemented goes to the root of the discussion in Paragraph 31(i)**, since it is clear that it is in the implementation of STOs via domestically implemented trade measures which seek to assist with environmental conservation, that the closest scrutiny must occur of the mutually supportive relationship between existing WTO Rules and STOs set out in the MEAs. It is also the area in which conflict is most likely to occur.

Nevertheless, the authors do concur with the EC in that **a mere discussion of each Member’s experience of its cooperative mechanisms between its authorities responsible for trade and environment in the negotiation and implementation of STOs in MEAs in each Member State**, while useful in order to highlight the importance of ensuring that the negotiation is mutually supportive of both bodies of international law and thus acts to avoid future conflicts, **cannot be the only mechanism by which the mandate may be brought closer to completion**. This is so, in particular, since few of the submissions make the step of specifically analysing the existing WTO Rules during their contributions on the benefits of domestic intergovernmental and international cooperation in the successful negotiation and implementation of STOs set out in MEAs.

Of concern here, is the wording of paragraph 31(i) itself, particularly the exclusion from the negotiation of the more likely points of conflict between trade and environment, namely trade measures in general, or even STO’s to be imposed upon non-members to MEAs. One must question whether this is the reason that this debate is possibly subject to a lack of any real incentive to come to a clear decision. South Africa may wish to raise this point, more closely detailed in the full report, and may choose to open the debate to the possibility of a review of paragraph 31 as a whole, though as stated in the full report, this may be seen to take the negotiation onto an entirely new plane.

3. TOWARDS A SOUTH AFRICAN NATIONAL POSITION

As may be seen from the Matrix and from Members' submissions, Specific Trade Obligations appear in many guises. The manner in which an STO is determined is viewed as an important mechanism by which each member may retain its own policy space on environmental affairs.

Given South Africa's social delivery obligations concerning the environment as reflected in her Constitution, she is likely to value her domestic policy space extremely highly in these negotiations. Accordingly, a narrow definition of the mandate of paragraph 31(i), particularly vis-à-vis MEAs and the STOs "set out" in them, as well as the definition of a "party" to the MEAs, would more likely be acceptable to her, in order to ensure that an automatic acceptance of wider and unintended obligations cannot inadvertently occur.

In particular, whilst the current levels of intergovernmental and inter-stakeholder interaction are admittedly somewhat weak, and there is an acknowledged need to address the interface between the relevant national stakeholders responsible for and affected by the MEAs and those involved in trade to ensure, nationally, the best possible cooperation and mutual supportiveness between trade and environment, the authors have taken a cautionary approach, preferring in the context of the primacy of the need for policy space, to support similar conservative interpretative approaches of the Doha mandate until more effective and dynamic national decision-making bodies can be put in place.

Until this happens, and until the national strategy possibly dictates another position, South Africa would be wise to insist that there should always be scope for examination of particular trade measures implementing MEAs (including STO's in whatever defined form they might be found) for their compatibility with WTO Rules.

More importantly, South African stakeholders need to be fully involved in the process of determining South Africa's strategic approach to the negotiation under paragraph 31(i). The question must be asked: what is it that South Africa wants out of this negotiation?

Does she require legal certainty as to the relationship underpinning STOs as set out in MEAs and existing WTO Rules to the extent that she might support the EC's "Proposal for a Decision of the Ministerial Conference on Trade and Environment" [Tn/TE/W/68], or does she agree that this negotiation proceed on the experience-sharing basis, given the authors' view that this is a necessarily time consuming and subjective exercise which is not in itself sufficient to fully explore the mandate and to add real value to the discussion.

It is the authors' view that the South African position, in the absence of full national stakeholder dialogue and an overriding strategy on trade and environment, ought to remain conservatively middle-ground. To accept the EC's proposals on international governance which aims to put in place agreed principles and procedural decisions which will first refer disputes to the dispute settlement procedures in MEAs before resort can be had to the WTO may have the effect of negating the no-hierarchy principle of international law, and elevate the principle of deference to a superior position than the

former, resulting in the removal of the WTO from scrutinizing trade measures for discriminatory and/or protectionist intent.

Given that South African traders are regularly met with access restrictions of an environmental nature when seeking access to markets, whether these are within MEAs or not, South Africa needs to approach any attempt to install general acceptance or deemed compatibility of environmental trade measures (whether STOs or not) with the WTO Rules with great caution.

Accordingly, the authors have in this instance, followed the approach of the US and Australia in that we agree that the principles of mutual supportiveness, deference and no-hierarchy will be considerations in our dealing with the trade measures under each MEA, and we do not accept the expansion of the EC and Swiss argument that there should be any presumption of necessity or compatibility of such measures with existing WTO Rules.

Once the answer to the above questions is known, then it is hoped that the authors' report will provide policy makers with sufficient insight into the issues to be placed in a position to prepare the final South African submission on Paragraph 31(i) of the Doha Declaration.