
GENERAL NOTICE

NOTICE 1755 OF 2004

INVITATION TO COMMENT ON DRAFT COUNTERVAILING (ANTI-SUBSIDY) REGULATIONS

The International Trade Administration Commission's draft countervailing (anti-subsidy) regulations are herewith presented for public comment. The purpose of the regulations is to ensure transparency in countervailing proceedings, by creating a legal environment in which all parties are aware of the procedures to be followed. It also provides for strict deadlines for submitting information, which will assist the Commission to conclude proceedings more timeously.

All interested parties are hereby invited to comment on the International Trade Administration Commission's draft countervailing regulations. Any queries regarding and all comments on the draft regulations may be directed to the Director: Trade Remedies Policy of the International Trade Administration, Adv. Gustav Brink, at telephone (012) 428 7817, fax (012) 428 7736, or at gbrink@itac.org.za, until 31 August 2004, and thereafter to the Director: Trade Investigations 1, Ms. Carina Grové, at telephone (012) 428 7723, fax (012) 428 7736, or at cgrove@itac.org.za.

All comments have to reach the International Trade Administration Commission no later than 15h00 on 20 September 2004.

REPUBLIC OF SOUTH AFRICA

**THE INTERNATIONAL TRADE
ADMINISTRATION COMMISSION OF
SOUTH AFRICA**

DRAFT COUNTERVAILING REGULATIONS

20 August 2004

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DRAFT REGULATIONS

Part A – Definitions

1. Definitions

“Commission” means the International Trade Administration Commission of South Africa established in terms of section 7 of the International Trade Administration Act, 2002 (Act No. 71 of 2002).

“Countervailing measure” shall be understood to mean a special measure imposed for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise.

“Deadlines” shall be interpreted as the final date for submissions, responses, comments and requests and the like as envisaged by the different sections of these Regulations, and shall be deemed to be at 15h00 South African standard time on the deadline indicated, unless expressly otherwise indicated.

“Facts available” means the information that is available to the Commission at the time of making a determination, whether preliminary or final, and which has been verified or is verifiable, provided that all requirements regarding non-confidentiality and timely submission have been met.

“Good cause” for an extension of the submission of information, as referred to in sections 19.3, 30.1, 35.2, 37.3, 42.4 and 43.3, does not include merely citing insufficient time to complete a response to the Commission’s questionnaires;

“Government” includes government at any level, and any public body;

“Interested parties” are parties that have a direct interest in an investigation and may include known –

- (a) producers in SACU
- (b) exporters;
- (c) foreign producers;
- (d) importers;
- (e) trade or business associations whose members are SACU or foreign producers, exporters or importers; and/or
- (f) the governments of the countries of origin and of export;

of the product under investigation or the like product. This does not preclude the Commission from accepting other parties as interested parties at the behest of the Commission in a countervailing investigation.

“Investigation period for subsidies” is the period for which it is assessed whether the exports from the country under investigation benefited from subsidies. This period shall normally be 12 months, and may be more, but in no case less than 6 months, and shall normally be a period ending not more than 6 months before the initiation of the investigation. The investigation period for subsidies shall be clearly indicated in the initiation notice published in the *Government Gazette*.

“Investigation period for injury” is the period for which it is assessed whether the SACU industry experienced material injury. This period shall normally cover a period of three years plus information available on the current financial year at the date that the application was submitted, but may be determined by the Commission as a different period provided that the period is sufficient to allow for a fair investigation. The investigation period for injury shall be clearly indicated in the initiation notice published in the *Government Gazette*.

“Lesser duty” means the provisional payment or countervailing duty imposed at the lesser of the subsidy margin or the margin of injury, and which is deemed to be sufficient to remove the injury caused by the subsidised exports.

“Like product” means –

- (a) a product which is identical, i.e. alike in all respects to the product under consideration, or
- (b) in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

“Main Act” refers to the International Trade Administration Act, 2002 (Act No. 71 of 2002);

“Margin of subsidy” is the extent of the subsidies paid by or on behalf of the government in such exporting country or in the country of origin and related to the product under investigation or to an input used in the production of the product under investigation;

“Material injury”, unless the opposite is clear from the context, refers to actual material injury, a threat of material injury or the material retardation of the establishment of an industry;

- “Price depression”** takes place where the SACU industry’s ex-factory selling price decreases during the investigation period;
- “Price disadvantage”** is the extent to which the price of the imported product is lower than the unsuppressed selling price of the like product produced by the SACU industry, as measured at the appropriate point of comparison;
- “Price suppression”** takes place where the cost-to-price-ratio of the SACU industry increases, or where the SACU industry sells at a loss during the investigation period or part thereof;
- “Price undercutting”** is the extent to which the price of the imported product is lower than the price of the like product produced by the SACU industry, as measured at the appropriate point of comparison;
- “SACU”** means the Southern African Customs Union;
- “SACU industry”** means the domestic producers in the SACU as a whole of the like product or those of them whose collective output of the product constitutes a major proportion of the total domestic production of those products;
- “Unsuppressed selling price”** is the price at which the SACU industry would have been able to sell the like product in question in the absence of subsidised exports.

Part B – General Provisions

2. Confidentiality

- 2.1 Interested parties providing confidential information in any correspondence shall furnish non-confidential summaries thereof. These summaries shall –
- (a) indicate in each instance where confidential information has been omitted;
 - (b) indicate in each instance the reasons for confidentiality; and
 - (c) be in sufficient detail to permit other interested parties a reasonable understanding of the substance of the information submitted in confidence.
- 2.2 Where information does not permit summarisation reasons should be provided why the information cannot be summarised.
- 2.3 The following list indicates “information that is by nature confidential” as per section 33(1)(a) of the *Main Act*, read with section 36 of the *Promotion of Access to Information Act*, 2000 (Act 2 of 2000):
- (a) management accounts;
 - (b) financial accounts of a private company;

- (c) actual and individual sales prices;
- (d) actual costs, including cost of production and importation cost;
- (e) actual sales volumes;
- (f) individual sales prices;
- (g) information, the release of which could have serious consequences for the person that provided such information; and
- (h) information that would be of significant competitive advantage to a competitor;

provided that the party submitting such information indicates it to be confidential.

- 2.4 All correspondence not clearly indicated to be confidential shall be treated as non-confidential.
- 2.5 The Commission may disregard any information indicated to be confidential that is not accompanied by a proper non-confidential version and will return such information to the party submitting same, if this deficiency has not been addressed in accordance with the provisions of section 31.
- 2.6 The Commission will disregard any information indicated to be confidential that is not accepted as confidential by the Commission under section 34(1) of the *Main Act*.

3. Investigations

- 3.1 A countervailing investigation shall only be initiated upon acceptance of a written application by or on behalf of the SACU industry, except as provided for in subsection 3.
- 3.2 An interim, new shipper, anti-circumvention or sunset review shall be initiated upon a written application by or on behalf of an interested party, except as provided for in subsection 3.
- 3.3 The Commission may initiate an investigation mentioned in subsection 1 or a review mentioned in subsection 2 without having received a written application from the relevant interested party. In such cases the Commission shall proceed only if it has sufficient evidence of, or of a significant change in circumstances relating to, subsidised exports, material injury and a causal link to justify the initiation of such investigation or review. A non-confidential version of the information shall be made available to all known interested parties.

- 3.4 On receipt of a properly documented application a notification must be forwarded to the foreign country inviting it to consultations to discuss the alleged subsidies, to determine whether any other subsidies are applicable and to seek a mutually agreeable solution.

4. Representation

- 4.1 Should any of the interested parties wish to be represented by an outside party in an investigation or a review the interested party must provide the Commission with a letter of appointment of its representative, detailing the identity of the representative and the scope and duration of the representation.
- 4.2 Should any interested party wish to terminate a representation indicated in subsection 1, such party must provide the Commission with a letter to this effect.
- 4.3 Once an interested party has appointed a representative all communication between the Commission and the interested party will take place through the appointed representative.

5. Oral hearings

- 5.1 Any interested party may request an oral hearing during the preliminary and/or final investigation phases of an investigation, provided the party indicates reasons for not relying on written submissions only. The Commission may refuse an oral hearing if granting such hearing will unduly delay the finalisation of a preliminary or final determination.
- 5.2 No request for an oral hearing will be considered more than 30 days, and no oral hearing will be heard more than 60 days, after the publication of the Commission's preliminary finding.
- 5.3 All information presented during an oral hearing shall be reduced to writing and a non-confidential version will be placed on the public file.
- 5.4 Parties requesting an oral hearing shall provide the Commission with a detailed agenda for, and a detailed version, including a non-confidential version, of the information to be discussed at the oral hearing at the time of the request.
- 5.5 The Commission may limit the duration of the oral hearing. Any such limitation must be communicated to the party requesting a hearing at the same time that the Commission indicates the date for such hearing.

5.6 The Commission may limit or add to the agenda contemplated in subsection 4.

6. Adverse party meetings

- 6.1 Any interested party may request an adverse party meeting during the preliminary and/or final investigation phases of an investigation, provided the party indicates reasons for not relying on written submissions only. The Commission may refuse an adverse party meeting if granting such meeting will unduly delay the finalisation of a preliminary or final determination.
- 6.2 No request for an adverse party meeting will be considered more than 30 days, and no adverse party meeting will be held more than 60 days, after the publication of the Commission's preliminary finding.
- 6.3 All interested parties that have cooperated during the investigation shall be invited to attend the adverse party meeting. All parties so invited shall be granted 7 days to indicate whether they will attend the adverse party meeting.
- 6.4 All information presented during an adverse party meeting shall be reduced to writing and a non-confidential version will be placed on the public file.
- 6.5 Parties requesting an adverse party meeting shall provide the Commission with a detailed agenda for and a detailed version, including non-confidential version, of the information to be discussed at the adverse party meeting at the time of the request. The Commission will make the agenda available to other interested parties for comments and additions. The Commission will make the final agenda available in advance to all parties attending the adverse party meeting at least 7 days prior to such meeting taking place.
- 6.6 The Commission may limit or add to the topics to be covered during the oral hearing and may structure the meeting as it deems efficient.
- 6.7 The Commission may limit the duration of the adverse party meeting. Any such limitation must be communicated to all parties attending the meeting when the date for the meeting is finalised.
- 6.8 In adverse parties meetings account shall be taken of the need to preserve confidentiality and of convenience to the parties. Confidential information may be submitted in camera, but a non-confidential version of such confidential information shall be made available to other interested parties.
- 6.9 There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case.

Part C – Procedures

Sub-Part I – General

7. SACU industry

7.1 Other than investigations initiated in terms of section 3.3, any application for countervailing action shall be brought by or on behalf of the SACU industry.

7.2 Where a SACU producer is –

- (a) related to the importer, exporter or the foreign producer; or
- (b) itself an importer of the products under investigation,

the term “SACU industry” may be interpreted as referring to the rest of the SACU producers.

7.3 An application shall be regarded as brought by or on behalf of the SACU industry if –

- (a) at least 25 per cent of the SACU producers by domestic production volume support the application; and
- (b) of those producers that express an opinion on the application, at least 50 per cent by domestic production volume support such application.

7.4 In the case of industries involving an exceptionally large number of producers, the Commission may determine support and opposition by reference to the largest number of producers that can be reasonably included in the investigation or by using statistically valid sampling techniques based on the information available to the Commission at the time of its finding.

7.5 If a SACU producer withdraws the application or its support thereof after the investigation has been initiated, the Commission may –

- (a) terminate the investigation; or
- (b) disregard the withdrawal of support and continue with its investigation as if all requirements in subsections 1, 2 and 3 have been met.

8. Subsidies

8.1 For the purpose of these regulations, a subsidy shall be deemed to exist if –

- (a) there is a financial contribution by a government or any public body within the territory of an exporting country; i.e. where:

- (i) a government practice involves a direct transfer of funds, (e.g. grants, loans and equity infusion) potential direct transfers of funds or liabilities (e.g. loan guarantees);
 - (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);¹
 - (iii) a government provides goods or services other than general infrastructure, or purchases goods;
 - (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; or
- (b) there is any form of income or price support by government; and
- (c) a benefit is thereby conferred.
- 8.2 For the purposes of subsection 1, the territory of a country shall include any area set aside as an export processing or development zone and other similar areas.
- 9. Countervailability of subsidies**
- 9.1 A subsidy shall be countervailable only if:
- (a) such subsidy is specific, i.e. if the granting authority explicitly limits access to a subsidy to certain enterprises or industries; and
 - (b) it causes material injury to the SACU industry producing the like product.
- 9.2 An export subsidy shall be deemed to be a specific subsidy.
- 9.3 A countervailing measure may only be imposed if the subsidy is one per cent or more of the invoiced export price.
- 9.4 In the case of developing countries, the reference to "one per cent" in subsection 3 shall be understood to be "two percent".
- 9.5 All subsidies shall be cumulated before a determination whether the total subsidy exceeds the de minimis standard, as contemplated in subsections 3 and 4, is made.

¹ The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

10. Subsidies not alleged in application

The Commission shall be entitled to take into account and add up any or all subsidies found during the course of the investigation even if the SACU industry has not alleged the existence of such subsidy in the application.

11. Calculation of subsidy margin

11.1 The calculation of the subsidy margin shall take cognisance of the time value of money.

11.2 For the purposes of determining the margin of each individual subsidy, the Commission may take into account the following:

(a) Grants

Grants can be made in several different ways, including, but not limited to, equity infusion, the conversion of a loan into equity or by waiver of a debt due to agreement. The determination of the amount of subsidy countervailable in a particular year shall provide for the time value of money and shall include reference to the amount originally paid, the number of years that have lapsed since the grant was paid, the average life cycle of the plant or equipment and the interest rate payable in the country of origin.

(b) Loans

Loans by the government at market equivalent rates shall not be deemed to be a subsidy, but the advantage gained through loans made under circumstances that loans would not normally be granted, or the lesser amount of interest paid or payable if loans are made at preferential rates shall be deemed to be subsidy. In the determination of the amount of subsidy countervailable in a particular year the Commission shall consider the time value of money and include reference to the original amount of the loan, the number of years that have lapsed since the grant was paid, the average life cycle of the plant or equipment, the interest rate payable on the loan and the market interest rate applicable in the country of origin.

(c) Foregoing of revenue

In the determination of the amount of subsidy countervailable in a particular year the Commission shall take cognisance of any revenue due to the government of the exporting country that was foregone by such government and the products to which such revenue pertains.

(d) Tax holidays and rebates

Non-payment of corporate tax on export earnings is a prohibited subsidy and actionable except for developing countries listed in Annex VII of the Subsidies Agreement. In its determination of the margin of subsidy the Commission shall consider the company's export earnings for the period under review and the corporate tax rate in that country. In its determination of the margin of subsidy regarding a tax holiday the Commission shall take cognisance of the amount of tax paid vis-à-vis the amount payable in the absence of such tax holiday, and the products to which such tax holiday applies.

(e) Input subsidies

An input subsidy is a subsidy paid on an input cost of a product that is subsequently exported. In its determination of the margin of subsidy the Commission shall consider the effect of the input subsidy on the cost or price of the product under investigation.

(f) Over-reimbursement of customs duties

Over-reimbursement of customs duties occurs where a manufacturer imports raw materials that are used in the manufacture of final products that are exported and the duty paid on importation is over-reimbursed, or where the exporter cannot provide proof that the imported product, on which reimbursement was claimed, is actually incorporated in the exported product. In its determination of the margin of subsidy the Commission shall consider of the amount of customs duty payable and that rebated and/or refunded.

(g) Preferential interest rates for export purposes

If interest rates lower than those prevailing in the market are granted to a company by the government or a public body at the behest of the government it will be regarded as a subsidy. In its determination of the margin of subsidy the Commission shall consider the interest rate payable on domestic and export markets, the original amount of the loan and the value of the product exported.

(h) Other subsidies

The Commission will determine the margin or amount of subsidy for any subsidy not indicated under subparagraphs (a) through (f) with reference to the facts pertaining to each such subsidy, taking cognisance of –

- (i) the time value of money;
- (ii) the duration of the subsidy;
- (iii) whether the subsidy is linked to exports or to all sales or production;
and
- (iv) any other relevant information at the Commission's disposal.

12. Margin of subsidy

The Commission shall determine the margin of each individual subsidy, including those not listed under paragraph 2 of section 11, with reference to either the cost to government or the benefit to the recipient thereof.

13. Material injury

13.1 In determining material injury to the SACU industry the Commission shall consider whether there has been a significant depression and/or suppression of the SACU industry's prices.

13.2 In its determination of material injury the Commission shall further consider whether there have been significant changes in the domestic performance of the SACU industry in respect of the following potential injury factors:

- (a) sales volume;
- (b) profit and loss;
- (c) output;
- (d) market share;
- (e) productivity;
- (f) return on investments;
- (g) capacity utilisation;
- (h) cash flow;
- (i) inventories;
- (j) employment;
- (k) wages;
- (l) growth;
- (m) ability to raise capital or investments;

- (n) whether there has been an increased burden on the Government's support programmes; and
 - (o) any other relevant factors placed before the Commission.
- 13.3 The Commission may require any additional information on injury from the SACU industry at any stage during an investigation.
- 13.4 Each of the factors mentioned in subsections 1 and 2 shall be considered for the product under investigation only or, where such analysis is not possible, for the narrowest group of products for which such analysis can be made. Only if no such information is available will the Commission consider the information for the company as a whole, and then with special circumspection.

14. Threat of material injury

- 14.1 A determination of threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which subsidised exports would cause material injury must be clearly foreseen and imminent.
- 14.2 In considering a threat of material injury the Commission shall, in addition to the factors indicated under section 13, and where relevant information is available, consider such factors as:
- (a) The nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;
 - (b) a significant rate of increase of subsidised imports into the domestic market of the SACU;
 - (c) sufficiently freely available, or an imminent substantial increase in, capacity of the exporter;
 - (d) the availability of other export markets to absorb additional export volumes;
 - (e) whether products are entering or will be entering the SACU market at prices that will have a significant depressing or suppressing effect on SACU prices; and
 - (f) the exporter's inventories of the product under investigation.

15. Material retardation of the establishment of an industry

- 15.1 No investigation shall be initiated on the basis of the material retardation of the establishment of an industry unless the industry or proposed industry has supplied the Commission with a comprehensive plan indicating the establishment of such industry in the absence of subsidised exports.
- 15.2 The Commission may request a provisional payment or recommend a countervailing duty where the establishment of such industry is materially retarded by subsidised imports.
- 15.3 If significant progress has not been made to establish an industry as proposed in subsection 2 within one year following the imposition of a countervailing duty, the Commission may recommend that the countervailing duty be withdrawn.

16. Causality

- 16.1 In considering whether there is a causal link between the subsidised exports and the material injury the Commission shall consider all relevant factors, including, but not limited to:
- (a) the change in the volume of subsidised imports, whether absolute or relative to the production or consumption in the SACU market;
 - (b) the price undercutting experienced by the SACU industry vis-à-vis the imported products;
 - (c) the market share of the subsidised imports;
 - (d) the magnitude of the margin of subsidisation; and
 - (e) the price of fairly traded imports available in the market.
- 16.2 The volume of exports from a country shall normally be regarded as negligible if the volume of imports for the like product from that country is found to account for less than three per cent of the total imports of the like product into the SACU market, unless countries which individually account for less than three per cent of the total imports of the like product into the SACU market for the like product collectively account for more than seven per cent of the total imports of the like product into the SACU market.
- 16.3 The Commission may cumulatively assess the effect of the subsidised imports only if it finds that cumulation is appropriate in light of –
- (a) competition between imports from the different countries; and
 - (b) competition between the imported products and the SACU like products;

and if

- (c) the imports from the countries are not negligible as contemplated in subsection 3; and
- (d) the margin of subsidy is one per cent or more when expressed as a percentage of the export price.

16.4 Notwithstanding the provisions of subsection 3, the Commission may cumulate subsidised and dumped imports that are under investigation at the same time, provided the conditions contemplated in subsection 3 are met *mutatis mutandis*.

16.5 The Commission shall determine whether there is a causal link between subsidised exports and the material injury determined under section 13.

16.6 The Commission shall consider all relevant factors other than subsidised imports that may have contributed to the SACU industry's injury provided that an interested party has submitted, or the Commission otherwise has, information on such factor or factors. The injury caused by such other factors shall not be attributed to the subsidised imports. Factors that may be relevant in this respect include, but are not limited to –

- (a) the volume and prices of imports not sold at subsidised prices;
- (b) contraction in demand or changes in the patterns of consumption;
- (c) trade restrictive trade practices of and competition between the foreign and SACU producers;
- (d) developments in technology;
- (e) other factors affecting the SACU prices;
- (f) the industry's export performance; and
- (g) the productivity of the SACU industry.

17. Level of countervailing duty

17.1 The Commission shall consider applying the lesser duty rule if both the corresponding importer and exporter have cooperated fully.

17.2 The Commission, in determining the level of the countervailing duty, shall ensure that a product is not subject to both countervailing and anti-dumping duties to compensate for the same situation of dumping or export subsidisation.

18. Verifications

- 18.1 The Commission shall satisfy itself as to the accuracy of the information supplied by cooperating interested parties.
- 18.2 The Commission may conduct such verifications at the SACU producers and at cooperating importers, exporters, foreign producers and foreign governments as it may deem necessary.
- 18.3 In the event that an importer, exporter, foreign producer or foreign government refuses to receive a verification visit by the Commission, refuses the Commission access to relevant information or acts so as to significantly impede the investigation, the Commission may disregard the information submitted by that party.
- 18.4 Where a party -
- (a) fails to supply relevant substantiating evidence required by investigating officers during a verification;
 - (b) fails to explain any calculations contained in its submissions; or
 - (c) otherwise fails to cooperate during the investigation process;
- the Commission may terminate the verification proceedings and the Commission may disregard any or all information submitted by the party in question. The Commission may nevertheless consider information that was properly submitted and verified.
- 18.5 The Commission shall inform the government of the country concerned of the dates of the intended verification visit and shall conduct the verification on those dates unless that government objects to the verification.
- 18.6 Where the government of the country concerned objects to the Commission's verification the Commission may make a preliminary or final decision based on the facts available, and may exclude any information submitted by any party in that country.

19. Verification reports

- 19.1 Following an exporter, foreign producer or foreign government verification the Commission shall make a verification report available to the company or country in question, as the case may be, indicating all information verified. In cases where verification took place prior to the Commission's preliminary

determination, such verification report shall normally be made available before the Commission's preliminary finding.

19.2 The Commission will place a copy of the non-confidential verification report on the public file prior to its preliminary determination, if the verification took place prior to the preliminary determination.

19.3 Parties will receive 7 days to comment on the verification report. The Commission may grant an extension upon good cause shown.

20 Deadlines

All investigations and reviews shall be finalised within 18 months after initiation.

Sub-Part II – Pre-Initiation Procedure

21 Properly documented complaint

21.1 Written complaints shall be made by or on behalf of the SACU industry using the Commission's relevant questionnaire.

21.2 On receipt of a complaint the Commission's trade remedies unit shall liaise with the SACU industry to ensure that all required information has been submitted in the required format.

22 Properly documented application

22.1 In determining whether a complaint submitted in terms of section 21 constitutes a properly documented application the Commission shall determine whether the application includes such information as is reasonably available to the applicant relating to the prescribed information.

22.2 The Commission will return all applications that are not properly completed to the applicant.

23 Proof of subsidy standard for initiation purposes

23.1 The applicant shall submit such information as is reasonably available on each subsidy program alleged.

23.2 For the purpose of subsection 1, a copy of the official publication citing the relevant subsidy program, newspaper reports, a copy of a previous finding by

the Commission in respect of a particular subsidy, and the like, shall be considered a *prima facie* proof of the existence of a countervailable subsidy.

- 23.3 The applicant shall provide the Commission with a reasonable calculation of the extent of each alleged subsidy, as well as the alleged total margin of subsidisation.

24 Material injury standard for initiation purposes

In determining material injury to a SACU industry the Commission shall consider whether the information submitted in this regard and relating to the factors listed in section 13 indicates a *prima facie* case of material injury.

25 SACU industry verification

The Commission shall satisfy itself of the accuracy and adequacy of the information provided in the application. Deficiencies or inaccuracies that do not detract from the *prima facie* establishment of a case of injurious subsidised exports shall not result in any delay in initiating an investigation.

26 Merit Assessment

- 26.1 In its merit assessment the Commission shall determine whether there is sufficient information to establish a *prima facie* case that subsidised exports are causing material injury to the SACU industry.
- 26.2 In the event that the Commission makes a negative merit assessment it shall inform the applicant concerned accordingly and supply it with a full set of reasons for its decision.
- 26.3 The Commission may grant the SACU industry an oral hearing to discuss the reasons for rejecting an application if the applicant so requests.

27 Notification

- 27.1 The Commission shall notify the representative of the country of origin and of export, where applicable, that it has received a properly documented application in terms of section 22, after verification of the SACU industry's injury information, but prior to initiation, and shall provide such representative with a non-confidential version of the application.

- 27.2 Except as provided for in subsection 1, the Commission shall not publicise the application prior to the initiation of an investigation.
- 27.3 Following the notification contemplated in subsection 1, the Commission shall provide the foreign country with 14 days to consult with the Commission regarding the alleged subsidy programs.²
- 27.4 The Commission may grant a reasonable extension to the time contemplated in subsection 3 on good cause shown.

28 Initiation

- 28.1 An investigation shall be formally initiated through publication of an initiation notice in the *Government Gazette*.
- 28.2 The initiation notice shall contain the basis of the alleged subsidised exports, material injury and causality, and shall also indicate at least the following:
- (a) the identity of the applicant;
 - (b) a detailed description of the product under investigation, including the tariff subheading applicable to the product;
 - (c) the country or countries under investigation;
 - (d) the investigation periods for injury and subsidised exports;
 - (e) the basis of the allegation of subsidised exports;
 - (f) a summary of the factors on which the allegation of injury is based;
 - (g) the address to which representations by interested parties should be directed; and
 - (h) the time frame for responses by interested parties.
- 28.3 If the Commission, during its investigation, finds that the subject product is imported under a tariff subheading not initially indicated to be in the scope of the investigation, it may include the imports of such subject product in its injury analysis.
- 28.4 All interested parties shall be deemed to have received notice of the investigation once it has been duly initiated in terms of subsection 1 and no

² See the comments to subsection 3.5: Carina has commented that there is no duty on ITAC to stay an investigation for 30 days pending consultations and that its only obligation is to "invite" the country to consultations. The Commission will have to decide on the matter. See Art 13.1 of the SCMA.

extension for deadlines, as contemplated in section 30, shall be considered on the basis of ignorance of the investigation.

- 28.5 The Commission shall inform all known interested parties of the initiation of the investigation and supply them with all relevant documentation, unless the number of interested parties makes it impracticable.

Sub-Part III – Preliminary Investigation Phase

29 Responses by interested parties

- 29.1 Importers, exporters and foreign producers are required to use the relevant Commission questionnaires in their responses to the Commission.
- 29.2 Parties shall be deemed to have received the questionnaires 7 days after the dispatch of the questionnaires by the Commission.
- 29.3 From receipt of the questionnaires, as contemplated in subsection 2, parties shall receive 30 days to submit their responses to the Commission. Such responses must reach the Commission's trade remedies unit before 15h00 on the date indicated.
- 29.4 The deadline for submission by parties not directly informed of the investigation by the Commission will be 40 days from the date of the initiation of such investigation in the *Government Gazette*.
- 29.5 All submissions shall be made in both hard copy and in electronic format, unless the Commission has agreed otherwise in writing. Failure to comply with this provision may result in the submission being regarded as deficient.

30 Extensions for submissions

- 30.1 The Commission may grant parties an extension on good cause shown.
- 30.2 Any extension granted in terms of subsection 1 will apply only to the party to which such extension was granted, and will not apply to other interested parties.

31 Deficiencies

- 31.1 Submissions may be deemed deficient –
- (a) If any relevant information has not been submitted;
 - (b) If a proper non-confidential version has not been submitted; or

(c) In the circumstances contemplated in section 29.5.

- 31.2 Parties will receive 7 days from the date of the Commission's deficiency letter to address any deficiencies pointed out by the Commission in terms of subsection 1.
- 31.3 The Commission will not consider submissions that are deficient after the deadline contemplated in subsection 2 for the purpose of its preliminary finding.

32 Non-cooperation by exporters or foreign producers

- 32.1 In the event that no exporter or producer from a particular country cooperates in a countervailing investigation by the deadline contemplated in sections 29 or 30, the Commission may, subject to the requirements of section 33.1, immediately request the imposition of a provisional payment on the basis of the facts available.
- 32.2 In the event that one or more exporters or producers in a particular country cooperates while other exporters or producers do not cooperate, the Commission, for the purpose of the non-cooperating exporters producer or producers, may base its preliminary decision on the best information available, as provided for in subsection 5.
- 32.3 In order to expedite proceedings, the Commission may split investigations between cooperating and non-cooperating exporters.
- 32.4 In the event that an exporter has submitted an incomplete or otherwise deficient submission by the deadline contemplated in sections 29, 30 and 31, the Commission will disregard its information for the purpose of its preliminary finding.
- 32.5 In cases of non-cooperation by an exporter facts available may include, in any order, -
- (a) the information on subsidies obtained from or at another seller or sellers in that market;
 - (b) the information contained in the application; and/or
 - (c) any other information at the Commission's disposal;
- Provided the Commission has, where practicable, checked the information from other independent sources at its disposal.

33 Provisional measures

- 33.1 Provisional measures may not be imposed within less than 60 days after initiation of an investigation.
- 33.2 Provisional measures will be imposed for a period of not more than four months.
- 33.3 The Commission may determine the level of provisional payments against non-cooperating parties as set out in section 32.2.

34 Preliminary report

- 34.1 The Commission shall make available a non-confidential report within seven days of the publication of its preliminary finding.
- 34.2 The preliminary report shall contain at least the following information:
- (a) identity of the applicant;
 - (b) a full description of the product under investigation;
 - (c) date of the Commission's decision to initiate the investigation;
 - (d) initiation date and notice number;
 - (e) date of the Commission's preliminary findings on subsidisation and injury;
 - (f) the margin of subsidisation found in respect of each subsidy;
 - (g) the methodology used by the Commission to determine the margin of subsidisation;
 - (h) the injury factors considered;
 - (i) the causality factors considered;
 - (j) the Commission's finding; and
 - (k) while preserving the requirements of confidentiality, all relevant issues of fact and law considered by the Commission in reaching its preliminary determination.

Sub-Part IV – Final Investigation Phase**35 Comments on preliminary report**

- 35.1 All interested parties shall receive 14 days, from the date the preliminary report is made available, to comment in writing.
- 35.2 The Commission may grant parties an extension on good cause shown.

- 35.3 Any request for an extension to the deadline contemplated in subsections 1 and 2 shall be requested in writing at least 7 days prior to such deadline and shall contain a proper motivation for the request.
- 35.4 Other than as contemplated in subsection 5, the Commission will not accept new information following its preliminary finding.
- 35.5 Parties that have submitted deficient responses, as contemplated in section 31, and that have addressed the deficiencies prior to the deadline indicated in subsection 1 of this section, shall be deemed cooperating parties and the Commission will consider their information in its final finding, subject to the provisions of section 36 and the requirement to finalise an investigation timely.

36 Extension of validity of provisional measures

The validity of a provisional countervailing measure may not be extended.

37 Essential facts

- 37.1 All interested parties will be informed of the essential facts to be considered by the Commission, provided there has been a change in the facts to be considered since the Commission issued its preliminary determination.
- 37.2 All interested parties will receive 7 days to comment on the essential facts.
- 37.3 The Commission may grant parties an extension on good cause shown.
- 37.4 The Commission will take all relevant comments on the essential facts into consideration in its final finding.

38 Definitive countervailing duties

- 38.1 Definitive countervailing duties will remain in place for a period of five years from the date of the publication of the Commission's final recommendation unless otherwise specified or unless reviewed prior to the lapse of the five-year period.
- 38.2 Definitive countervailing duties may be imposed with retroactive effect as provided for in terms of the Customs and Excise Act, 1964 (Act No 91 of 1964).
- 38.3 Where parties have not properly cooperated in a investigation, the Commission may base its final finding for such parties on the facts available

and may determine the level of the countervailing measure on such facts available.

39 Price undertakings

39.1 Proceedings may be suspended or terminated following the receipt of a satisfactory price undertaking under which –

- (a) the government of the exporting country agrees to eliminate or limit the subsidy or take other measures concerning its effect; or
- (b) the exporter agrees to revise its prices or to cease exports to the SACU at subsidised prices so that the Commission is satisfied that subsidised exports or the injurious effect thereof is eliminated,

provided the Commission has made at least a preliminary determination in the matter.

39.2 The Commission may decide on the information to be submitted in respect of the offering and maintenance of undertakings and may terminate an undertaking if the conditions are not met.

39.3 Undertakings need not be accepted if the Commission considers their acceptance impractical, e.g. where the number of exporters is too great, or for other reasons, including reasons of general policy.

39.4 In cases where an undertaking is violated the Commission may take expeditious action against such exporter, including the immediate request to the Commissioner for the South African Revenue Service to impose provisional payments.

Part D – Reviews

Sub-Part I – General

40 Notification

40.1 Other than as provided for in section 55 in respect of sunset reviews, the government of the country concerned shall be notified of the review as soon as a properly documented review application has been received.

40.2 The government of the country concerned and all other known interested parties shall be supplied with all the relevant non-confidential information as

soon the review in question has been initiated through publication in the *Government Gazette*.

- 40.3 On receipt of a properly documented review application a notification must be forwarded to the foreign country inviting it to consultations to discuss the alleged subsidies, to determine whether any other subsidies are applicable and to seek a mutually agreeable solution.

41 Initiation

- 41.1 All reviews shall be initiated through notice in the *Government Gazette*. Such notice shall indicate the following minimum information:
- (a) the identity of the applicant;
 - (b) the product under consideration;
 - (c) the investigation periods for subsidisation and injury, respectively;
 - (d) the scope of the review;
 - (e) the current countervailing measures in place; and
 - (f) a summary indicating the basic information on which the review is based.
- 41.2 For sunset reviews the provisions regarding the initiation of sunset reviews as contemplated in section 56 shall apply in addition to the provisions indicated in subsection 1.

42 Responses by interested parties

- 42.1 All interested parties are required to use the relevant Commission questionnaires in their responses.
- 42.2 Parties shall be deemed to have received the questionnaires 7 days after the dispatch of the questionnaires by the Commission.
- 42.3 From receipt of the questionnaires, as contemplated in subsection 2, parties shall receive 30 days to submit their responses to the Commission.
- 42.4 The Commission may grant parties an extension on good cause shown.

43 Essential facts

- 43.1 All interested parties will be informed of the essential facts to be considered in the Commission's final determination.
- 43.2 All parties will receive 14 days from the dispatch of the essential facts letter to comment thereon.

- 43.3 The Commission may grant parties an extension on reasonable grounds shown.
- 43.4 In its final determination the Commission will consider all relevant comments on the essential facts letter made by cooperating interested parties, provided such comments are received by the deadline contemplated in subsections 2 and 3.

Sub-Part II- Interim reviews

44 Time frame

The Commission will not normally consider an application for an interim review sooner than 12 months after the publication of its final finding in the original investigation or the previous review.

45 Changed circumstances

- 45.1 The Commission will only initiate an interim review if the party requesting such interim review can prove significantly changed circumstances.
- 45.2 Where an importer, exporter or foreign producer has not cooperated in the Commission's investigation that led to the imposition of the countervailing duty and such importer, exporter or foreign producer is subsequently willing to supply such information, this change in disposition will not qualify as significantly changed circumstances.
- 45.3 No party shall be precluded from requesting an interim review simultaneously with a sunset review in order to expand or limit the scope of application.

46 Review procedure

- 46.1 An interim review shall consist of a single investigation phase, subject to the requirements of section 43.
- 46.2 The Commission may verify such information as it deems necessary to confirm the accuracy and the adequacy of the information submitted by any interested party.

47 Final recommendation

- 47.1 The Commission's final finding, in the form of a recommendation to the Minister, may result in an increase, decrease, the withdrawal or the reconfirmation of the existing countervailing duty.
- 47.2 The Commission may increase, decrease or confirm the scope of the application of such countervailing duty.

Sub-Part III – New Shipper Reviews**48 Eligibility**

- 48.1 Only exporters that did not export to SACU during the original investigation period for subsidisation may request a new shipper review.
- 48.2 The exporter requesting such review shall provide sufficient information to prove that
- (a) it is not and was not related to any party against which the countervailing duty was applied; and
 - (b) it did not export the subject product to SACU during the original investigation period.
- 48.3 The Commission shall not consider a request for a new shipper review before definitive countervailing duties have been imposed.

49 Information required

- 49.1 A new shipper shall provide the Commission with full information on subsidies and any other information deemed necessary by the Commission and shall submit such information in the prescribed format.
- 49.2 In the event that the new shipper has not exported any products to SACU during the period under review, it shall provide the Commission with the required information in the prescribed format.

50 Suspension of countervailing duties

- 50.1 The countervailing duties in respect of the new shipper shall be withdrawn simultaneously with the initiation of a new shipper review.
- 50.2 The Commission may request the Commissioner for the South African Revenue Service to impose provisional payments at the same level as the

countervailing duties simultaneously with the withdrawal of the countervailing duties in terms of subsection 1. Such provisional payments shall remain in force for the duration of the review.

51 Review procedure

- 51.1 A new shipper review shall consist of a single investigation phase.
- 51.2 The Commission may verify such information as it deems necessary to confirm the accuracy and the adequacy of any information submitted by any interested party.
- 51.3 The exporter's margin of subsidisation will normally be determined as the subsidy expressed as a percentage of the export price to South Africa. In the event that no export price to South Africa can be established, the Commission may determine the export price on any reasonable basis, including, but not limited to, with reference to the new shipper's export price to an appropriate third country.

52 Final recommendation

The Commission's final finding may result in a recommendation to—

- (a) impose a countervailing duty equal to or lower than the level of subsidisation; or
- (b) terminate the provisional payment.

Sub-Part IV – Sunset Reviews

53 Duration of countervailing duties

- 53.1 Countervailing duties shall remain in place for a period not exceeding 5 years from the imposition or the last review thereof.
- 53.2 If a sunset review has been initiated prior to the lapse of a countervailing duty, such countervailing duty shall remain in force until the sunset review has been finalised.

54 Initiation of sunset review

- 54.1 A notice indicating that an countervailing duty will lapse on a specific date unless a sunset review is initiated shall be published in the *Government Gazette* approximately 6 months prior to the lapse of such countervailing duty.
- 54.2 The Commission will directly inform interested parties known from the original investigation or last review of the subject product of the imminent lapse of the countervailing duties as soon as the notice contemplated in subsection 1 has been published.
- 54.3 Interested parties will receive 30 days from the publication of the notice contemplated in subsection 1 to request a sunset review.
- 54.4 In the event that the SACU industry requests that the countervailing duty be maintained, it shall provide the Commission with a proper application containing the necessary information to establish a prima facie case that the removal of the countervailing duty will be likely to lead to the continuation or a recurrence of injurious subsidised exports.
- 54.5 If the Commission decides to initiate a sunset review, it shall publish an initiation notice in the *Government Gazette* prior to the lapse of such duties. Such notice shall contain the information as contemplated in section 41.

55 Notification

- 55.1 The government of the country concerned shall be informed of the imminent lapse of the countervailing duty as contemplated in section 54.1.
- 55.2 The government of the country concerned and all other known interested parties shall be notified of –
- (a) the initiation of the investigation; or
 - (b) the termination of the proceeding;
- after the relevant notice has appeared in the *Government Gazette*.

56 Review procedure

- 56.1 A sunset review shall consist of a single investigation phase.
- 56.2 The Commission may verify such information as it deems necessary to confirm the accuracy and the adequacy of any information submitted by any interested party.

57 Information required

- 57.1 Following publication of the notice in terms of section 54.1 the SACU industry shall indicate whether it will request a sunset review to be undertaken.
- 57.2 The SACU industry shall provide the Commission with detailed information in the prescribed format indicating the likelihood of a continuation or recurrence of subsidised exports and injury in the event that the countervailing duty is removed.
- 57.3 Once a sunset review has been initiated in terms of section 54.4 the exporters and foreign producers shall be required to submit information in the required format to enable the Commission to make a finding on subsidisation. Exporters and foreign producers shall not be precluded from supplying any other information they may deem relevant.
- 57.4 The Commission may require importers to supply any information the Commission deems necessary. Importers shall not be precluded from supplying any other information they may deem relevant.

58 Non-cooperation

- 58.1 Where the SACU industry does not request a sunset review or does not supply the required information following a notice published in terms of section 54.1 within the deadline indicated in section 54.2, the Commission will recommend that the countervailing duty lapse on the date indicated in such notice.
- 58.2 Where the SACU industry has supplied the required information and the exporter or foreign producer does not cooperate within the time frames contemplated in section 42, the Commission may rely on the facts available to reach its final decision.

59 Final recommendation

The Commission's recommendation may result in the withdrawal, amendment or reconfirmation of the original countervailing duty.

Sub-Part V – Anti-Circumvention Reviews

60 Circumvention

- 60.1 Other than circumvention contemplated in subsections 2(a) and (d), circumvention shall be deemed to take place if one or more of the following conditions are met:
- (a) a change in the pattern of trade between third countries and South Africa or the common customs area of the Southern African Customs Union;
 - (i) which results from a practice, process or work;
 - (ii) for which there is no or insufficient cause or economic justification other than the imposition of the countervailing duty; and
 - (b) remedial effects of the countervailing duty are being undermined in terms of the volumes or prices of the products under investigation.
- 60.2 For purposes of anti-circumvention the following types of circumvention shall be treated separately:
- (a) improper declaration of –
 - (i) the value or value of the product;
 - (ii) the origin of the product; or
 - (iii) the nature or classification of the product.
 - (b) minor modifications to the product subject to countervailing duty;
 - (c) the export of parts, components and sub-assemblies with assembly in a third country or within the common customs area of the Southern African Customs Union;
 - (d) absorption of the countervailing duty by either the exporter or the importer;
 - (e) declaration under a different tariff heading, even where such different tariff heading does provide for the clearance of that product;
 - (f) any other form of circumvention as may be submitted for the Commission's consideration.
- 60.3 Any instance of circumvention as contemplated in subsection 2(a) shall be referred to the Commissioner for the South African Revenue Service for further investigation. This shall not preclude the Commission from taking countervailing action if the information at the Commission's disposal, including information obtained through submissions by interested parties, warrants such action.

- 60.4 Minor modifications of the product shall be deemed to have taken place if the subsequently exported product –
- (a) has materially the same production processes, uses the same raw materials and have basically the same physical appearance or characteristics; or
 - (b) is a substitute for the product on which countervailing duties have been imposed.
- 60.5 Assembly in a third country or within the common customs area of the Southern African Customs Union shall be deemed to take place if the value added in such third country or in the common customs area of the Southern African Customs Union does not exceed 25 per cent or does not constitute a major transformation process. Such assembly shall not be regarded as charging the country of origin.
- 60.6 The value added in terms of subsection 5 shall be determined with reference to the direct and indirect costs of production only and shall not include selling, general, administrative or packaging expenses or profit.
- 60.7 Absorption of the countervailing duty shall be deemed to take place if:
- (a) the exporter decreases its export price in any manner to compensate the importer or a third party for the extra burden imposed by the countervailing duties, unless there is a correspondent decrease in the normal value of the product;
 - (b) the importer does not increase its price in line with the countervailing duties, unless such importer can provide evidence indicating that it absorbed such countervailing duties without assistance from any other party and only from revenue generated by the specific product in question; or
 - (c) in cases involving tenders, the tender price is not increased by the effect of the countervailing duty.

61 Information required

- 61.1 The SACU industry or other interested party shall provide such information that is reasonably available to it to indicate that circumvention is taking place.
- 61.2 Any request for an anti-circumvention review shall include information of the specific type of circumvention that is alleged to take place.

- 61.3 The Commission may require any interested party to submit such information as it deems necessary to properly conduct the review.
- 61.4 In the event that the party against which the allegation is made does not respond properly within the stated deadline, the Commission may make a decision on the facts available to it.

62 Review procedure

- 62.1 An anti-circumvention review may consist of either a preliminary and final, or only of a single, investigation phase.
- 62.2 Provided an anti-circumvention complaint is lodged with the Commission within one year of the publication of the Commission's final determination, the SACU industry shall not be required to update its injury information.
- 62.3 Notwithstanding the provisions of subsection 2, no injury information shall be required in cases of circumvention as contemplated in section 60.2(b) or (c).
- 62.4 Provided an anti-circumvention complaint is lodged with the Commission within one year of the publication of the Commission's final finding, and in relation to any circumvention alleged in section 60.2(b), (c), (d), (e) or (f), the Commission may use the information previously established on the subsidies to determine the margin of subsidisation until such time as the exporter, foreign producer or foreign government has submitted proper information. Provisional payments and definitive countervailing duties may be imposed on the basis of the margin of subsidisation so determined.
- 62.5 In the event that the relevant interested parties have not submitted appropriate information before the deadline contemplated in section 42, the Commission may make a preliminary or final determination on the basis of the facts available.
- 62.6 In the event of an adverse preliminary finding as contemplated in subsection 4, and provided the relevant interested party had submitted at least a substantial, if deficient, response by the deadline contemplated in section 42, such party will receive the opportunity to address any deficiencies within a reasonable time and such additional information will be taken into consideration by the Commission in its final finding.

- 62.7 In anti-circumvention reviews involving absorption, the Commission may determine the level of the absorption with reference to the failure in movement in the resale price of the subsidised imported product.
- 62.8 The Commission may conduct such verifications as it deems necessary to confirm the accuracy and the adequacy of any information submitted by any interested party.

63 Final recommendation

If the Commission makes a finding that circumvention has taken place the Commission's final recommendation may result in

- (a) the increase of countervailing duties to compensate for absorption of countervailing duties; or
- (b) the extension of the scope of the countervailing duties to apply to parts, components or substitute like products, new models and the like.

Sub-Part VI – Judicial Review

64 Judicial review of preliminary determinations

Participating interested parties may challenge preliminary decisions or the Commission's procedures prior to the finalisation of an investigation in cases where it can be demonstrated that

- (a) the Commission has acted contrary to the provisions of the *Main Act* or these regulations;
- (b) the Commission's action or omission has resulted in serious prejudice to the complaining party; and
- (c) such prejudice cannot be made undone by the Commission's future final decision.

Sub-Part VII – Refunds

65 Applications for refunds

- 65.1 An importer or an exporter may request reimbursement of countervailing duties collected where it is shown that the margin of subsidisation, on the basis

of which countervailing duties were paid, has been eliminated or has been reduced to a level which is below the level of the duty in force.

- 65.2 Other than as contemplated in section 66, any request, containing all prescribed information, for a refund shall be submitted during the anniversary month of the countervailing duty and shall relate only to the preceding 12-month period.
- 65.3 An application for refund shall be considered as duly supported by evidence where it contains precise information on the amount of the refund of countervailing duties claimed and all customs documentation relating to the calculation and payment of such countervailing duties. It shall also include, for the relative period under review, information on normal values and export prices to the SACU for the producer or exporter to which the countervailing duty applies.
- 65.4 Regardless of whether the exporter and the importer are related parties, the exporter may supply any information contemplated in subsection 3 direct to the Commission.
- 65.5 The Commission may, at any time after receiving a refund application, decide to initiate an interim review, whereupon the information and findings from such interim review shall be used to determine whether a refund is justified.

66 Refunds following interim reviews

Where the Commission, following an interim review, recommends that the existing countervailing duty be decreased or withdrawn, the relevant importer or importers may request that countervailing duties be refunded in line with the Commission's findings.

Part E – Final Provisions

67 Delegation

Other than final decision-making powers the Commission may delegate any of its functions in respect of countervailing investigations to its investigation staff.

68 Transitional application

These regulations shall apply to all investigations and reviews initiated after the promulgation of the regulations.
