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## **GOVERNMENT NOTICE**

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**DEPARTMENT OF TRADE AND INDUSTRY**

**No. R. 662**

**8 July 2005**

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

**International Trade Administration Act, 2002**

**(Act No. 71 of 2002)**

### **AMENDED SAFEGUARD REGULATIONS**

**The Minister of Trade and Industry has, in terms of section 59 of the Act, made the regulations as set out in the Schedule hereto.**

**REPUBLIC OF SOUTH AFRICA**

**THE INTERNATIONAL TRADE  
ADMINISTRATION COMMISSION**

**AMENDED SAFEGUARD REGULATIONS**

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### PREAMBLE

Parties ~~are~~ reminded of the following basic characteristics of safeguard measures:

#### **GENERAL SAFEGUARD MEASURES :**

- (a) A ~~safeguard~~ measure may only be imposed in response to a rapid and significant increase in ~~imports~~ of a product ~~as~~ a result of an unforeseen development, where such increased ~~imports cause~~ or threaten to cause serious ~~injury~~ to the Southern African Customs Union industry producing the like or directly competitive product;
- (b) A ~~safeguard~~ measure may be applied ~~as a~~ customs duty and/or a quantitative ~~import~~ restriction;
- (c) If a quantitative ~~import~~ restriction is used, it should not normally reduce ~~imports~~ below a level lower ~~than~~ the average during the preceding three years;
- (d) safeguard measures shall be applied to ~~imports~~ from all countries even if the ~~imports~~, which cause serious harm, originate mainly or only ~~from~~ one ~~country~~;
- (e) A ~~safeguard~~ measure must ~~be~~ progressively liberalized ~~at~~ regular intervals throughout its period of validity;
- (f) A ~~safeguard~~ measure ~~can~~ only be in place for a period not exceeding 4 years, but the application thereof may be extended by up to 6 years under certain conditions, including that there must be a ~~further~~ liberalization of the measure;
- (g) Any ~~safeguard~~ measure ~~imposed~~ for a ~~period~~ exceeding 3 years must be reviewed ~~at~~ its halfway ~~term~~.
- (h) A safeguard measure may not be re-imposed for a ~~certain~~ period after a ~~safeguard~~ measure had been in place on the same product;
- (i) If SACU introduces a ~~safeguard~~ measure it may be forced to compensate its trading partners ~~affected~~ by such measure;
- (j) The investigation of the merits of a ~~safeguard~~ measure and the implementation of a ~~safeguard~~ measure ~~are~~ subject to prescribed notifications and consultations between SACU, its ~~trading~~ partners and the World Trade Organisation.

**SPECIAL SAFEGUARD MEASURES ON AGRICULTURAL PRODUCTS IN  
TERMS OF THE WTO AGREEMENT ON AGRICULTURE:**

- (a) A special safeguard measure may **only** be applied in **connection** with the importation of **an** agricultural product, in **respect** of which measures referred to in paragraph 2 of Article 4 of the Agreement on Agriculture (AoA) have been converted into an ordinary customs duty and which is designated in its Schedule with the **symbol "SSG" as being** the subject of a concession in respect of which the provisions of **this** Article may **be** invoked.
  - (b) Special safeguard measures shall be **applied** to **imports** from all countries;
  - (c) A special safeguard measure imposed in terms of Article 5 of AoA **can** only be in place **until** the end of the year in which it **has** been **imposed**, and may only be levied at a level which shall not **exceed** one third of the level of the **ordinary** customs duty in effect in the year in which the action is **taken**;
  - (d) **The** investigation of the merits of a special safeguard measure **and the** implementation thereof **are** subject to **prescribed** notifications **and** consultations between SACU, its **trading** partners and **the** World Trade Organisation.
- 1. Application of **regulations****
- 1.1** Safeguard investigations **are** conducted in **terms** of **section 16** and **26** of the Main Act.
- 1.2** A definitive general safeguard **measure** may be applied only **where**:
- (a) the Commission finds that the product under investigation is **being** imported into the Common Customs Area of SACU in such increased quantities, absolute or relative to SACU production, and under such conditions **as to cause** or threaten to cause **serious injury** to the SACU industry that produces like **or directly** competitive products, **and as a result** of unforeseen developments and of the effect of the obligations incurred by **the** Republic (or SACU) under the World Trade Organisation;
  - (b) such **measures** **are** required to facilitate adjustment in the SACU industry;  
and
  - (c) the SACU industry

- (i) ~~has~~ submitted a detailed plan indicating how it plans to **adjust** to meet ~~import~~ competition; or
- (ii) ~~has~~ submitted proof of restructuring ~~that~~ is being undertaken.
- 1.3 A definitive special safeguard measure **in** terms of Article 5 of the WTO Agreement on Agriculture may be applied **only** where:
- (a) the Commission finds that the volume of imports of that product entering the Common ~~Customs Area~~ of **SACU** during **any** year exceeds a trigger level which relates to the following schedule of existing market access opportunities ~~defined as imports as a percentage of~~ the corresponding domestic consumption ~~figure compiled by~~ the Department of Agriculture or **any** other relevant government institution during the three preceding **years** for which ~~data are~~ available:
- (i) where such ~~market access~~ opportunities for a product ~~are~~ less than or **equal** to **10 per cent**, the ~~base~~ trigger level shall equal **125 per cent**;
- (ii) where such market **access** opportunities for a product ~~are~~ greater than **10 per cent** but less than or **equal to 30 per cent**, the base trigger level shall **equal 110 per cent**;
- (iii) where such market **access** opportunities for a product ~~are~~ greater than **30 per cent**, the ~~base~~ trigger level shall equal **105 per cent**; or, but not concurrently:
- (b) the price ~~at~~ which ~~imports~~ of that product ~~may~~ enter the SACU ~~area~~, as determined on the basis of the c.i.f. ~~import~~ price of the shipment concerned ~~expressed in terms of its domestic currency, falls below a trigger price equal to the average 1986 to 1988 reference price~~ for the product concerned.
- 1.4 Imports under current and minimum **access** commitments established **as** part of **a** concession shall be **counted** for the purpose of determining the volume **of** **imports** required for invoking the provisions of Article 5 of the AoA, but

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The **reference price** used to invoke the provisions of this subparagraph shall, *in general*, be the **average c.i.f. unit value of the product concerned**, or otherwise shall be an **appropriate price in terms of the quality of the product and its stage of processing**. It shall, following its initial use, be publicly **specified** and available to the *extent necessary* to **allow other Governments to assess the additional duty that may be levied**.

imports under such commitment shall not be affected by any additional duty imposed under Article 5 of the AoA.

- 1.5 Any supplies of the product in question which were entered on the basis of a contract settled before the additional duty is imposed under Article 5 of the AoA shall be exempted from any such additional duty, provided that they may be counted in the volume of imports of the product in question during the following year for the purposes of triggering the provisions of Article 5 of the AoA in that year.
- 1.6 The Commission, in considering the recommendation of a definitive general safeguard measure, may take into consideration the requirement of compensation to countries whose exports will be substantially affected by any safeguard measure.
- 1.7 Nothing in these regulations prevents the industry producing products for which the Republic has reserved its right to apply a special safeguard measure contemplated in Article 5 of the AoA, to apply to the Commission for general safeguard action, in terms of the WTO agreement on Safeguards.
- 1.8 Nothing in these regulations shall preclude the Commission from taking safeguard action provided for in terms of a free trade agreement concluded between the Republic or the SACU and any other country or customs territory. Any safeguard action so taken shall be taken in line with the terms and conditions agreed upon in such free trade agreement.
- 1.9 Nothing in these regulations shall preclude the Commission from taking special safeguard action in terms of any country's Protocol of Accession to the World Trade Organisation. Any safeguard action so taken shall be taken in line with the terms and conditions stated in the Protocol of Accession.
- 1.10 All the provisions of these regulations, with the exception of sections 8;9;10;11.3 (d)-(g);12;13.1;14.2(d)-(g);14.4;15;16;17;18;19;20;21.1-21.20;22 shall apply *mutatis mutandis* to investigations by the Commission on agricultural goods in terms of which the Republic (or SACU) has reserved its right to apply a special safeguard measure contemplated in Article 5 of the WTO Agreement on Agriculture.



## 2 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);

**"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;

**"directly competitive product"** means a product, other than a like product, that competes directly with the product under investigation;

**"facts available"** means the information that is available to the Commission at the time of making a determination, whether preliminary or final provided that all requirements regarding non-confidentiality and timely submission have been met;

**"good cause"** relates to an occurrence outside the control of the participating interested party or the Commission and does not include merely citing insufficient time to submit information to the Commission;

**"investigation period for injury"** is the period for which it is assessed whether the SACU industry experienced serious injury. The investigation period for injury shall be clearly indicated in the initiation notice published in the *Government Gazette*. Information relating to a period subsequent to the investigation period shall not normally be taken into consideration;

**"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 that product under consideration.

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

**"participating interested parties"** ~~shall mean those parties that have indicated~~ their interest in participating in an investigation;

**"Related parties"** are parties deemed to be related for purposes of a safeguard investigation if:

- (a) one directly or indirectly **owns**, controls or holds five **per** cent or **more** of the equity **shares** of the other;
- (b) one has the power to directly or indirectly nominate **or** appoint a director **to** the board of the other;
- (c) one is **an** officer or director of the other's business;
- (d) they **are** legally recognised partners in **business**;
- (e) one is employed by the other;
- (f) they **are** both directly or indirectly controlled by a third **person**;
- (g) together they directly or indirectly **control** a third person;
- (h) they appear to be related by virtue of their conduct;
- (i) they **are** blood relatives or **are** related by marriage, **common-law** partnership or adoption; or
- (j) if their relationship is otherwise of such a **nature** that trade between **them** **cannot** be regarded to be at arm's length.

**"SACU"** means the Southern **African** Customs Union;

**"SACU industry"** means the domestic producers in the **SACU** as a whole **of** the like or directly competitive products or those of **them** whose collective **output** of the like or directly competitive products **constitutes** a major proportion of the **total** **SACU** production **of** those products.

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;

### **3 Confidentiality**

- 3.1** Interested parties providing confidential information in any correspondence **shall** be required to 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.

- 3.2 Non-confidential information supplied by interested parties, **as** set out in section 3.1, **and** all non-confidential correspondence between the Commission and participating interested parties during the investigation shall be kept in a public file.
- 3.3 ~~Interested~~ parties that have made themselves **known** may upon request ~~inspect~~ the public file and may ~~comment~~ thereon within **7** days ~~after~~ such information has been placed on the public file. The Commission will consider all substantiated comments.
- 3.4 Where information does not permit summarisation, reasons should be provided ~~why~~ the information cannot be summarised.
- 3.4.1 The following list indicates "information that is by nature confidential" **as** contemplated in 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.
- 3.5 All correspondence not clearly indicated to be confidential shall be treated **as** non-confidential.
- 3.6 The Commission may disregard **any** information indicated to be confidential **that** is not accompanied by a proper non-confidential version and may ~~return~~ such information to the party submitting **same**, if the non-confidential version remains deficient ~~after~~ such party had the opportunity to ~~rectify~~ any deficiencies.
- 3.7 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*.

#### 4 Investigations

- 4.1 Except ~~as~~ provided for in subsection 2, a general safeguard investigation shall only be initiated upon acceptance of a written application by or on behalf of the SACU industry, that contains sufficient evidence *to* establish a *prima facie* case that the product under investigation is ~~being imported~~ into the Republic or the Common Customs Area of SACU in such increased quantities, absolute or relative to SACU production, and under such conditions ~~as~~ to ~~cause~~ or threaten to ~~cause~~ serious injury to the SACU industry that produces like or directly competitive products.
- 4.2 The Commission may initiate a general safeguard investigation without having received a written application from the SACU industry. In such cases the Commission shall proceed only if it ~~has~~ sufficient evidence to establish *prima facie* case ~~that the~~ product under investigation is being ~~imported~~ into the Republic or the Common Customs Area of SACU in such increased quantities, absolute or relative to SACU production, and under such conditions ~~as~~ to ~~cause~~ or threaten to ~~cause~~ ~~serious injury~~ to the SACU industry that produces like or directly competitive products. A non-confidential version of the information the Commission relies on shall be made available to all participating interested parties.
- 4.3 A special safeguard investigation shall ~~only~~ be initiated upon acceptance of a written application by or on behalf of the SACU industry, that contains sufficient evidence to establish a *prima facie* case that the volume of ~~imports~~ of the product under investigation exceeds a ~~trigger~~ level which relates to existing market access opportunity ~~as set out~~ in Article 5 of the AoA; or, but not concurrently the price at which imports of that product may enter the SACU area, as determined on the basis of the c.i.f. import price of the shipment concerned expressed in terms of its domestic currency, falls below a trigger price ~~equal~~ to the average 1986 to 1988 reference price' for the product concerned.

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The reference price used to invoke the provisions of this subparagraph shall, in general, be the average c.i.f. unit value of the product concerned, or otherwise shall be an appropriate price in terms of the quality of the product and its stage of processing. It shall, following its initial use, be publicly specified and available to the extent necessary to allow other Governments to assess the additional duty that may be levied

**5 Oral hearings**

- 5.1** Any participating interested party may request an oral hearing during the 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. No request for an oral hearing will be considered more than 60 days after the initiation of the investigation.

**6 Consultations**

- 6.1** The Commission shall provide for consultations with the representatives of countries that have a substantial interest in a general safeguard investigation within 14 days after the imposition of a provisional payment.
- 6.2** Consultations entered into in terms of subsection 1 shall normally be concluded within 30 days after the publication of the Commission's preliminary report.
- 6.3** The Commission shall provide representatives of countries that have a substantial interest in a general safeguard investigation 30 days for consultations prior to the application or extension of a definitive safeguard measure with a view to, *inter alia*,
- (a) reviewing the information relating to
    - (i) evidence of serious injury or threat thereof caused by increased imports;
    - (ii) the precise description of the product involved;
    - (iii) the proposed measure;
    - (iv) the proposed date of introduction;
    - (v) the expected duration of the measure; and
    - (vi) the timetable for progressive liberalization;
  - (b) exchanging views on the measure; and
  - (c) discussing ways to maintain a substantially equivalent level of concessions and other obligations vis-à-vis that country.
- 6.4** In cases where it is proposed that a general safeguard measure be extended, the Commission shall, in addition to the factors contemplated under subsection 3, also provide evidence that the relevant SACU industry is adjusting.

**6.5** The Commission shall provide representatives of any **interested** country the opportunity to consult with it in respect of the conditions of application of a ~~special~~ safeguard measure.

**7** **SACU** industry

**7.1** Other than investigations initiated in terms of ~~section 4.2~~, any application for any safeguard action shall be brought **by** or on behalf of the SACU industry.

**7.2** ~~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.

**7.3** 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~~ reasonably be 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.

**7.4** 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** **Serious** injury

**8.1** Serious injury shall be understood to mean a significant overall impairment in ~~the~~ position of the SACU industry.

**8.2** In evaluating serious ~~injury~~ the Commission ~~shall~~ consider injury information pertaining to ~~a~~ major portion of the SACU industry.

**8.3** In determining serious ~~injury~~ or ~~a~~ threat thereof ~~to~~ the SACU industry the Commission shall ~~consider~~:

- (a) the rate and volume of the increase in ~~imports~~ of the product concerned
  - (i) in ~~absolute~~ terms; or
  - (ii) relative to the production and demand in SACU; ~~and~~

- (b) whether there have been significant changes in the performance of the SACU industry in ~~respect~~ of the following potential injury factors:
- (i) salesvolume;
  - (ii) profit and ~~loss~~;
  - (iii) ~~output~~;
  - (iv) market share;
  - (v) productivity;
  - (vi) capacity utilisation;
  - (vii) employment; and
  - (viii) any other relevant ~~factors~~ placed before the Commission.

8.4 The Commission may require any additional information on ~~injury~~ from any participating ~~interested party~~ at any ~~stage~~ during an investigation.

8.5 Each of the factors mentioned in subsection 3 shall be considered for the like and directly ~~competitive~~ products only or, where such analysis is not possible, for the ~~narrowest group~~ of products for which such analysis ~~can~~ be made.

## 9 Threat of ~~serious~~ injury

A determination of threat of ~~serious~~ injury ~~shall~~ be based on ~~facts~~ and not merely on allegation, conjecture or ~~remote~~ possibility. The change in circumstances that would ~~create~~ a situation in which ~~serious~~ injury would be caused must be clearly imminent.

## 10 Causality

10.1 In considering whether there is a causal link between the ~~imports~~ of the product ~~concerned~~ and the serious ~~injury~~ the Commission shall consider all relevant factors including ~~factors~~ other ~~than~~ the ~~imports~~ of the product concerned that may have ~~contributed to~~ the SACU ~~industry's~~ injury, provided that a participating interested party ~~has~~ submitted, or the Commission otherwise has, information on such factor or ~~factors~~.

10.2 The injury caused by other ~~factors~~ shall not be attributed to the increased ~~imports~~.

## 11 Properly ~~documented~~ application

11.1 Written complaints shall be made by or ~~on~~ behalf of the ~~SACU~~ industry in the required format.

- 11.2 In determining whether a complaint submitted in terms of subsection 1 constitutes a properly documented application, the Commission shall determine whether
- (a) the application includes such information ~~as~~ is reasonably available ~~to the~~ applicant on the issues Contemplated in subsection 3; ~~and~~
  - (b) ~~a~~ proper non-confidential version has been submitted.
- 11.3 The application shall ~~contain~~ the following information:
- (a) complete description of the ~~imported~~ product;
  - (b) complete description of ~~the~~ SACU like ~~and~~ directly competitive Product;
  - (c) ~~industry~~ standing;
  - (d) a summary of the factors ~~on~~ which the allegation of ~~serious~~ injury or threat thereof is ~~based~~;
  - (e) the unforeseen developments that led to the increased imports;
  - (f) relief sought;
  - (g) efforts taken or planned to compete with the ~~imports~~;
  - (h) ~~any~~ other information ~~required by~~ the Commission.
- 11.4 The Commission will ~~return~~ all applications ~~that~~ do not contain sufficient information, ~~as~~ required ~~under~~ subsection 3, to the applicant, ~~unless~~ such deficiencies ~~are~~ properly addressed within 7 days after the issue of ~~a~~ deficiency letter. This ~~shall~~ in ~~no~~ way prejudice the right of the SACU industry to submit ~~a new~~ application.
- 12 **Serious injury standard for initiation purposes**
- In determining serious injury to ~~a~~ SACU industry the Commission shall consider whether the information submitted in this ~~regard~~ and relating to the ~~factors~~ listed in section 8 establishes ~~prima facie~~ case of ~~serious~~ injury or threat thereof.
- 13 **Merit Assessment**
- 13.1 In its merit assessment for general ~~safeguards~~ the Commission ~~shall~~ determine whether there is sufficient information to establish ~~prima facie~~ case ~~that~~ the SACU industry is experiencing serious injury, or ~~a threat~~ of ~~serious~~ injury, as ~~a~~ result of ~~an~~ unforeseen surge of ~~imports~~.
- 13.2 In its merit assessment for special safeguards ~~the~~ Commission shall determine whether there is sufficient information ~~to~~ establish ~~prima facie~~ case ~~that the~~ volume of imports entering the SACU area exceeding the ~~trigger~~ level which relates ~~to~~



existing market access opportunity; or the price at which imports may enter the **SACU area**, as determined on the basis of the c.i.f. ~~import~~ price falls below the trigger price ~~for~~ the product concerned.

- 13.3 In ~~the~~ event that the Commission decides not to initiate an investigation it shall inform the applicant concerned accordingly and supply it with a **full** set of reasons for its decision.

**14 Initiation and notification**

- 14.1 **An** investigation shall be formally initiated through publication of an initiation notice in the *Government Gazette*.

- 14.2 The initiation notice shall contain at least the following information:

- (a) the identity of the applicant;
- (b) a detailed description of the product under investigation, including the ~~tariff~~ subheading applicable to the product;
- (c) **a** detailed description of the ~~like~~ or directly competitive SACU product;
- (d) **a summary** of the factors on which the allegation of serious injury or ~~threat~~ thereof is **based**;
- (e) the unforeseen developments that led to the increased ~~imports~~;
- (f) the **address** to which representations by interested parties should be directed; and
- (g) **the time frame** for responses by participating interested parties.

- 14.3 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 investigation.

- 14.4 Within **7** days after initiation the Commission shall

- (a) notify the representative of each **country** of origin and of export that may **be** significantly affected **by** a safeguard measure of the initiation of the investigation; and
- ~~—(b) supply each **country**~~ Contemplated in paragraph (a) with a copy of the non-confidential version of the application.

**15 Responses by interested parties**

- 15.1** All interested parties will receive **20 days** from the initiation of **an** investigation to comment on the application.
- 15.2** The Commission may grant **an** extension for the submission of comments on **good cause** shown.
- 15.3** The Commission may prescribe the format in which submissions should be **made**.
- 15.4** 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.
- 15.5** The Commission may request any additional information **from** any participating interested party **at** any stage of the investigation, and **may** prescribe a reasonable **deadline** for the submission of such information.

**16 Non-cooperation**

In the event that parties that could have been **participating** interested parties do not cooperate in the investigation, the Commission may rely on the facts available.

**17 Provisional measures**

- 17.1** The Commission may request the Commissioner for the South **African** Revenue Service, in terms of section **57A** of the Customs and Excise **Act, 91 of 1964**, to impose a provisional payment **as soon as** the Commission **has** made **a** preliminary **determination that**
- (a) there **are** critical **circumstances** where a delay would cause damage **that** would be difficult **to repair**; and
  - (b) there is clear evidence that increased **imports** have caused or **are** threatening serious **injury**.
- 17.2** Provisional payments may be imposed for a **maximum** period of **200** days.
- 17.3** The period for which provisional measures **are** in force shall be **regarded as** part of the total duration for which safeguard **measures are** in force.
- 17.4** The Commission will provide **an** opportunity for consultations with participating interested parties following **the** imposition of provisional measures.

**18 Preliminary report**

18.1 In ~~the~~ event that the Commission requests the imposition of a provisional safeguard measure, ~~as~~ contemplated in section 17, the Commission shall make available a public report within seven ~~days~~ of the publication of its preliminary ~~finding~~.

18.2 ~~The~~ preliminary ~~report~~ shall contain at least the following information:

- (a) identity of the applicant;
- (b) a full description of the product under investigation, ~~as well as~~ the ~~directly~~ competitive products, including the ~~tariff~~ classifications;
- (c) date of the Commission's decision to initiate the investigation;
- (d) initiation date and notice number,
- (e) date of the Commission's ~~p r e l i m i~~ i determination;
- (f) ~~an~~ evaluation of the ~~injury~~ factors considered;
- (g) ~~an~~ evaluation of the causality factors considered;
- (h) the unforeseen developments that lead ~~to~~ the increased imports;
- (i) the Commission's ~~finding~~, including the preliminary safeguard ~~measure~~ requested; and
- (j) while preserving the requirements of confidentiality, all relevant issues of ~~fact~~ and law considered ~~by~~ the Commission in reaching its preliminary determination.

18.3 The Commission shall forward the preliminary report direct to all participating interested parties unless the number of participating interested parties makes this impracticable.

**19 Comments on preliminary report**

19.1 All participating interested parties shall receive **14 days**, from the date a preliminary ~~report~~ is made available, to comment in writing.

19.2 The Commission may grant participating interested parties an extension on good ~~cause~~ shown.

**20 Final determination**

20.1 In its final determination the Commission shall consider whether

- (a) the **SACU** industry is experiencing serious injury or ~~threat~~ of **serious** injury, ~~as~~ contemplated in ~~sections~~ 8 and 9;
- (b) there were increased ~~imports~~;

- (c) any increase in imports ~~can~~ be attributed to unforeseen developments;
  - (d) the increased **imports** resulted in **serious** injury or threat thereof to the **SACU** industry;
  - (e) other factors contributed significantly to the **serious** injury; and
  - (f) the imposition of a safeguard measure would be in the public interest.
- 20.2** In determining whether a safeguard measure would be in the public interest the need to take note of the trade distorting effect of the surge in **imports** and the need to ~~restore~~ effective competition shall be given special consideration.
- 20.3** The Commission shall issue **a** public report indicating the **reasons** for its final determination within seven days of the publication of the final determination.
- 20.4** The public report referred to in subsection 3 shall reflect
- (a) all issues contemplated under section **82**;
  - (b) unforeseen developments;
  - (c) public interest; and
  - (d) the basis of its recommendation ~~for~~
    - (i) a definitive safeguard measure; or
    - (ii) terminating the investigation.
- 21 Definitive safeguard measures**
- 21.1** A safeguard measure shall be applied only –
- (a) to the extent necessary to prevent ~~or remedy~~ **serious** injury or threat thereof; and
  - (b) to facilitate adjustment of the **SACU** industry.
- 21.2** The **SACU** industry shall be required to submit a plan indicating how it will adjust to increase its competitiveness. Such adjustment plan should reach the Commission no later than **60** days after initiation of the investigation in the *Government Gazette*.
- 21.3** The Commission may grant ~~an~~ extension for the submission of ~~an~~ adjustment plan ~~on~~ **good cause shown**.
- 21.4** If the Commission proposes applying or extending a safeguard measure it shall provide the representatives of countries having a substantial interest as exporters of the product under investigation 30 days for consultations with a view to, *inter alia*
- (a) reviewing the information relating to the existence of **serious** injury or the threat thereof caused by increased ~~imports~~, the precise description of the product involved, the proposed **measure**, the proposed date of introduction,

the ~~expected~~ duration of the measure and the timetable for progressive liberalisation;

(b) exchanging views ~~on~~ the measure; and

(c) ~~reaching~~ an understanding on ways ~~to~~ maintain a substantially equivalent level of concessions and other obligations to that existing under GATT ~~1994~~ between SACU and the ~~exporting~~ countries which would be affected by such a measure.

**21.5** The Commission may recommend a definitive safeguard measure in the form of

(a) ~~a~~ customs duty;

(b) ~~a~~ quantitative restriction; or

(c) ~~a~~ combination of the measures contemplated under paragraphs (a) and (b).

**21.6** A definitive measure may remain in place for a period not exceeding ~~four years~~, unless extended in terms of subsection ~~7~~.

**21.7** A definitive measure may be extended by ~~a~~ period of up to ~~six~~ years where the Commission finds that

(a) the lapse of the safeguard measure imposed in terms of subsection ~~6~~ is likely to lead to the recurrence of ~~serious~~ injury; and

(b) there is evidence that ~~the~~ SACU industry is adjusting.

**21.8** Where a definitive safeguard measure is imposed for a period exceeding one year the Commission shall recommend how the measure should ~~be~~ liberalised at regular ~~intervals~~ over the period that the measure is applied.

**21.9** Where the application of ~~a~~ safeguard measure is extended in terms of subsection ~~8~~ the ~~safeguard~~ shall continue to be ~~further~~ liberalised over the period of its application.

**21.10** Where ~~a definitive~~ safeguard measure is imposed for a period exceeding three years, the Commission shall self-initiate a review of the measure at ~~the~~ halfway mark of the application of the safeguard measure to determine whether –

(a) the continued application of the safeguard measure is required;

(b) the safeguard measure cannot be liberalised at an increased pace; and

(c) the ~~SACU~~ industry is implementing its adjustment programme.

**21.11** If a quantitative ~~restriction is used, such a measure shall not reduce the quantity of~~ imports below the level of a recent ~~period~~ which shall be the average of ~~imports~~ in the ~~last three~~ representative ~~years~~ for which statistics ~~are~~ available, unless clear justification is ~~given that~~ a different level is necessary to prevent or remedy ~~serious~~ injury.

**21.12** In cases in which a quota is allocated among supplying countries, the Commission may seek agreement with respect to the allocation of shares in the quota with all such countries having a substantial interest in supplying the product concerned.

**21.13** In cases in which the method contemplated in subsection 12 is not reasonably practicable, the Commission shall allot to exporting countries having a substantial interest in supplying the product shares based upon the proportions supplied by such exporting countries during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product.

**21.14** The Commission may depart from the provisions of subsection 13 provided that

- (a) the Commission finds the presence of serious injury and not only a threat of serious injury;
- (b) consultations are conducted with such exporting countries;
- (c) clear demonstration is provided to the Commission that imports from certain countries have increased in disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period;
- (d) the reasons for the departure from the provisions in subsection 13 are justified; and
- (e) (i) the conditions of such departure are equitable to all suppliers of the product concerned; or
  - (ii) the suppliers failed to cooperate in the investigation.

**21.15** A safeguard measure imposed in terms of subsection 14 may not be extended beyond the initial period for which it was imposed.

**21.16** A safeguard measure may not be applied again to the import of a product that has been subject to a safeguard measure unless a period of time equal to half that during which such a measure had been previously applied, has lapsed, provided that the period of non-application is at least two years.

**21.17** Notwithstanding the provisions of subsection 16, a safeguard measure with a duration of 180 days or less may be applied again to the import of a product if:

- (a) at least one year has elapsed since the date of introduction of a safeguard measure on the import of that product; and

- (b) such a safeguard measure ~~has~~ not been applied on the same product ~~more than~~ twice in the five-year ~~period~~ immediately preceding the date of introduction of the measure.
- 21.18 *safeguard measures* shall not be applied ~~against~~ a product originating in a developing country as long as its share of imports of the product concerned in SACU does not exceed three per cent, provided that developing countries with less than three per cent ~~import share~~ collectively **account** for not ~~more~~ than nine per cent of ~~total imports~~ of the product concerned
- 21.19 Other ~~than as~~ contemplated in subsection 18 a *safeguard* measure shall be applied to all ~~imports of the~~ subject product irrespective of ~~its source~~.
- 21.20 A developing country exempted from the application of a safeguard measure in terms of subsection 18 may ~~become~~ subject to such safeguard measure without a new investigation ~~being~~ conducted **if**, subsequent to the imposition of the safeguard **measure**, its share of the imports increases to a level that exceeds three per cent of the total ~~import~~ volume in the original investigation **period**.
- 21.20.1 The additional duty ~~imposed~~ after a special safeguard investigation initiated under Article 5 of the AoA shall be ~~set~~ according to the following schedule:
- (a) if the difference between the c.i.f. ~~import~~ price of the shipment expressed in terms of the domestic currency (hereinafter referred to as the "import price") and the trigger price as defined under that subparagraph is less ~~than~~ or equal to 10 per cent of the trigger price, **no** additional duty shall be **imposed**;
  - (b) if the difference between the ~~import~~ price and the trigger price (hereinafter referred to as the "difference") is greater than 10 per cent but less than or equal to **40 per cent** of the trigger price, the additional duty shall equal 30 per **cent** of the amount by which the difference exceeds 10 per cent;
  - (c) if the difference is **greater** than 40 per cent but less than or equal to 60 per cent of the trigger price, **the** additional duty shall equal **50 per cent** of the amount by which the difference exceeds 40 per cent, plus the additional duty allowed under (b);
  - (d) if the difference is greater than 60 per cent but less ~~than~~ or equal to **75 per cent**, the additional duty shall equal **70 per cent** of the amount by

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which the difference exceeds 60 per cent of the trigger price, plus the additional duties allowed under (b) and (c);

- (e) if the difference is greater than **75** per cent of the trigger price, the additional duty shall equal 90 per cent of the amount by which the difference exceeds 75 per cent, plus the additional duties allowed under (b), (c) **and** (d).

## **22 Judicial reviews of preliminary decisions**

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.
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