

NOTICE 24 OF 2009**DRAFT AMENDED COUNTERVAILING REGULATIONS**

A draft version of the Amended Countervailing Regulations is hereby published for public comment. An explanatory document on the draft version of the Amended Countervailing Regulations is included in the publication.

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Written comments must be received no later than 16 February 2009.

REPUBLIC OF SOUTH AFRICA

**THE INTERNATIONAL TRADE
ADMINISTRATION COMMISSION**

DRAFT
AMENDED
COUNTERVAILING REGULATIONS

INTRODUCTION

The purpose of the *Amended Countervailing Regulations* of the International Trade Administration Commission of South Africa (“ITAC”) is, in broad terms, to offset injury caused to domestic producers in SACU by subsidised imports. Where injury from subsidised imports is alleged by domestic producers in an application and various other requirements set forth in the countervailing regulations are satisfied, ITAC may conduct an investigation to determine whether or not to impose a special duty, known as a countervailing duty, on subsidised imports. The countervailing duty imposed may equal the amount of the subsidy.

Subsidies are specific financial assistance provided by or on behalf of a foreign government to a company or group of companies in that country, which places the company or companies in a better financial position than would otherwise be the case. Subsidies thereby provide a price advantage to exports with which domestic producers producing identical or similar products have to compete. By imposing countervailing duties on subsidised imports, ITAC seeks to create a level playing field for competition among imports and domestic products.

The *Amended Countervailing Regulations* that follow are highly technical. This Introduction does not undertake to provide a comprehensive or authoritative interpretation of the *Amended Countervailing Regulations* and cannot be cited to establish Commission practice or interpret, in any manner, the *Amended Countervailing Regulations*.

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DRAFT REGULATIONS

Part A - Definitions

1. Definitions

“benefit” refers to the situation where a financial contribution places the recipient in a better financial position than it would be absent such contribution by the government.

“certain enterprises” means, in terms of determining whether a subsidy is specific, an enterprise or industry or group of enterprises or industries.

“Commission” means the International Trade Administration Commission established in terms of section 7 of the *Main Act*.

“country of origin” means the country from which the product under investigation is originally exported.

“deadline” 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 such date, unless expressly indicated otherwise.

“facts available” means the information that is available to the Commission at the time of making a finding, whether preliminary or final, and which the Commission has, where practicable, checked from other independent sources at its disposal. For export prices, for example, facts available may include, in any order:

- (a) the information contained in the application;
- (b) the information contained in the import statistics as provided by the Commissioner for the South African Revenue Service; and/or
- (c) any other information at the Commission’s disposal.

“good cause” for an extension of the submission of information, as referred to in sections 24.4, 34.1, 39.2, 40.3, 46.5 and 47.3 does not include merely citing insufficient time to complete a response.

“government” includes government at any level and any public body within the territory of the country of origin.

“granting authority” means the particular entity providing subsidies that are the subject of an investigation.

“interested parties” 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;
- (f) the governments of the countries of origin; and/or
- (g) labour unions whose members are employees of SACU producers;

of, as applicable, 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 an investigation.

“investigation” may refer to an original investigation and/or a review, or a distinct phase of either proceeding, depending on the context.

“like product” means:

- (a) a product which is identical, that is to say, alike in all respects to the product under investigation; 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 investigation.

In determining whether the product has characteristics closely resembling those of the product under investigation the Commission may consider any or all of the following factors, with no one or several of these factors necessarily giving decisive guidance -

- (i) the raw materials and other inputs used in producing the products;
- (ii) the production process;
- (iii) physical characteristics and appearance of the product;
- (iv) the end-use of the product;
- (v) the substitutability of the product with the product under investigation;
- (vi) tariff classification; and/or
- (vii) any other factor proven to the satisfaction of the Commission to be relevant.

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

“margin of subsidy” is the extent of the subsidies provided by the granting authority and related to the product under investigation or to an input used in

the production of the product under investigation.

“material injury” may refer to actual material injury, a threat of material injury or the material retardation of the establishment of an industry, depending on the context.

“Minister” means the member of the Cabinet responsible for trade and 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 product under investigation 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 product under investigation is lower than the price of the like product produced by the SACU industry, as measured at the appropriate point of comparison.

“product under investigation” means the product which is the subject of an investigation by virtue of having been entered for home consumption and for which a margin of subsidy may be determined.

“related parties” are parties deemed to be related for purposes of an investigation, and sales may be considered not to be at arm’s length, 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 management of the other;
- (c) one is an officer or director of the others 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.

"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 subsidisation, and can be determined with reference to -

- (a) the expected or required return of the SACU industry for the like product;
- (b) the profit margins of the industry for the like product before the entry of the subsidised imports;
- (c) the prices obtained for the like product by the industry directly before the entry of the subsidised imports; or
- (d) any other reasonable basis.

Part B - General Provisions

2. Applicability of regulations

The provisions of this Part relate generally to investigations conducted under Parts C and D. In case of an inconsistency between the provisions of Parts C and D related to a particular issue, the more specific provision shall apply. Where there is no provision governing a particular aspect of an investigation in Part C, but there is a provision governing this aspect of an investigation in Part D, such provision shall apply. Where there is no provision governing a particular aspect of an investigation in Part D, but there is a provision governing this aspect of an investigation in Part C, such provision shall apply.

3. Confidentiality

- 3.1 Parties providing confidential information in any correspondence shall furnish non-confidential summaries thereof. These summaries shall:
 - (a) indicate each instance where confidential information has been omitted;
 - (b) indicate, in each instance where confidential information has been omitted, 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 Where information does not permit non-confidential summarisation as contemplated in subsection 1, a sworn statement must be provided explaining why the information cannot be summarised.
- 3.3 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) information, the release of which could have serious consequences for the person that provided such information; and
 - (g) information that would be of significant competitive advantage to a competitor;
- provided that the party submitting such information indicates it to be confidential.
- 3.4 All correspondence not clearly indicated to be confidential shall be treated as non-confidential.
- 3.5 The Commission may disregard any information indicated to be confidential that is not accompanied by –
- (a) a proper non-confidential version, provided the Commission is of the opinion that such failure materially affects the ability of interested parties to defend their interests; or
 - (b) a sworn statement contemplated in subsection 2;
- and the deficiency has not been addressed in accordance with subsection 35.2.
- 3.6 The Commission will disregard any information indicated to be confidential that is not accepted as confidential by the Commission under section 34 of the *Main Act*.

4. Initiation of investigations

- 4.1 An original 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.

- 4.2 An interim, new shipper, sunset or anti-circumvention review shall only be initiated upon acceptance of a written application by or on behalf of an interested party, except that an interim review may be initiated as provided for in subsection 3.
- 4.3 The Commission may, in special circumstances, initiate an investigation provided for in subsection 1 or an interim review provided for in subsection 2 without having received a written application from the relevant interested party if:
- (a) in the case of an investigation it has *prima facie* evidence of a subsidy, material injury and a causal link; and
 - (b) in the case of an interim review, as provided for in section 49.

5. Termination based on negligibility and *de minimis* margins

- 5.1 An investigation shall not be initiated or an investigation shall be terminated where it is determined that the margin of subsidy is *de minimis*, or that the volume of subsidised imports, actual or potential, or the injury is negligible.
- 5.2 The margin of subsidy shall be considered to be *de minimis* in terms of subsection 1 if the margin is less than one per cent of the invoiced export price when expressed as a percentage of the export price.
- 5.3 All subsidies shall be cumulated before a finding whether the total subsidy exceeds the *de minimis* standard, as contemplated in subsection 2, is made.
- 5.4 The volume of subsidised imports shall normally be regarded as negligible in terms of subsection 1 if the volume of subsidised imports from a particular country is found to account for less than three per cent of the total imports of the product under investigation into SACU, unless countries which individually account for less than three per cent of the total imports of the product under investigation into SACU collectively account for more than seven per cent of the total imports of the product under investigation into SACU.

6. Cumulation

The Commission may cumulatively assess the effect of the subsidised imports from two or more countries only if it finds that:

- (a) the volume of subsidised imports from each country is not negligible as contemplated in section 5.4;
- (b) the margin of subsidy established in relation to the imports from each country to be cumulated is not *de minimis* as contemplated in section 5.2; and
- (c) Cumulative assessment of the effects is appropriate in light of:

- (i) the conditions of competition between the imports from the different countries; and
- (ii) the conditions of competition between the imports and the SACU like product.

7. Representation

- 7.1 Should an interested party wish to be represented by an outside party in an investigation, the interested party must provide the Commission with a letter of appointment of such representative, detailing the identity of the representative and the scope and duration of the representation, signed by its:
- (a) chief executive officer or other person having similar executive authority where there is no chief executive officer position, or
 - (b) a duly appointed and authorised representative of the interested party.
- 7.2 Where a letter of appointment is signed by a representative as provided for in subsection 1(b), written proof of the appointment and authorisation of the representative must also be provided.
- 7.3 Should an interested party wish to terminate a representation provided for in subsection 1, such party must provide the Commission with a letter to this effect.
- 7.4 Once an interested party has appointed a representative all communication between the Commission and the interested party will take place through the appointed representative. Notwithstanding the appointment of a representative, the Commission may contact an interested party directly if it deems this necessary.

8. Interested parties hearings

- 8.1 The Commission shall convene two interested parties hearings in an investigation, one prior to the Commission's preliminary finding and the other prior to the Commission's final finding, except that the Commission shall convene a single interested parties hearing in a review consisting of a single investigation phase. The Commission shall provide notice of the interested parties hearings in the initiation notice.
- 8.2 The Commission shall provide notice to interested parties of the date of a hearing contemplated in subsection 1 at least 21 days prior to the hearing date. At least 14 days prior to the date of a hearing, interested parties who wish to attend the hearing must provide the Commission with a list of attendees and a detailed agenda. At least 7 days prior to the date of a hearing, interested parties who wish to attend the hearing must provide the Commission with a detailed version, including where relevant a non-confidential version, of the information to be presented at the hearing. At least 7 days prior the date of the hearing, the Commission shall provide

interested parties who have provided the Commission with a list of attendees, the agenda for the hearing and the allocation of time among interested parties.

- 8.3 If no interested party provides the Commission with a list of attendees within the time limit specified in subsection 2, the Commission will not convene a hearing.
- 8.4 Unless otherwise provided for by the Commission, interested parties may not discuss or submit new information at a hearing, but may discuss and submit information on any aspect of the investigation on which interested parties have submitted information.
- 8.5 Written information provided to the Commission for purposes of an interested parties hearing, including the non-confidential version of any confidential information provided to the Commission, will be placed on the public file.
- 8.6 The Commission may limit or add to the agenda of a hearing and may structure a hearing as it deems efficient.
- 8.7 There shall be no obligation on any party to attend an interested parties hearing, and the failure to do so shall not be prejudicial to that party's case.

9. Oral hearings

- 9.1 An 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 would unduly delay the finalisation of a preliminary or final finding.
- 9.2 No request for an oral hearing will be considered more than 60 days, and no oral hearing will be heard more than 90 days, after the publication of the Commission's preliminary finding.
- 9.3 Parties requesting an oral hearing shall provide the Commission in writing at the time of the request with:
 - (a) a detailed agenda for the oral hearing; and
 - (b) a detailed version, including a non-confidential version, of the information to be presented at the oral hearing.
- 9.4 In terms of subsection 3(b), the non-confidential version of the information presented for an oral hearing will be placed on the public file.
- 9.5 The Commission may limit the duration of an 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.

- 9.6 The Commission may limit or add to the agenda of a hearing and may structure a hearing as it deems efficient.

10. Computation of periods of time

- 10.1 Computation of any period of time provided for in these regulations commences with the first day following the act, event or date initiating such period of time. The last day of the period of time is included in the computation unless such day is a Saturday, Sunday or public holiday, or such other day when the Commission is closed for business, in which case the deadline is the next business day.
- 10.2 Unless expressly otherwise provided for, a party shall be deemed to have received a written communication from the Commission -
- (a) in the case of transmission by facsimile or electronically, on the day the written communication is transmitted by the Commission;
 - (b) in the case of same-day, overnight or registered mail, on the day such written communication is delivered to a party; or
 - (c) in the case of regular mail, 5 working days after the written communication is placed in the post by the Commission.

11. Additional information

The Commission may request additional information at any stage of an investigation.

12. Accuracy of information

The Commission shall during the course of an investigation satisfy itself as to the accuracy of the information provided by an interested party upon which its preliminary and/or final findings are based unless the interested party is non-cooperating.

Part C - Procedures

Sub-Part I - General

13. SACU industry

- 13.1 Other than investigations initiated by the Commission in terms of section 4.3, an application for an investigation shall be brought by or on behalf of the SACU industry.
- 13.2 An application shall be regarded as brought "by or on behalf of the SACU industry" in terms of subsection 1 if :

- (a) at least 25 per cent of the SACU producers of the like product by domestic production volume support the application; and
 - (b) of those SACU producers of the like product that express an opinion on the application, at least 50 per cent by domestic production volume support such application.
- 13.3 In determining whether an application has been brought “by or on behalf of the SACU industry” in terms of subsection 2, the Commission may exclude from the required percentages the domestic production volume of a SACU producer of the like product where such producer is:
 - (a) related to the importer, exporter or the foreign producer of the product under investigation;
 - (b) itself an importer of the product under investigation; or
 - (c) performing operations in SACU in relation to the like product where less than 25 per cent of the production costs represent value added.
- 13.4 The value added in terms of subsection 3(c) shall be determined with reference to the direct and indirect costs of production only of the product under investigation and shall not include selling, general, administrative or packaging costs or profit.
- 13.5 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.
- 13.6 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.

14. Subsidies

- 14.1 A subsidy shall be deemed to exist if:
 - (a) there is a financial contribution by a government, that is to say, where -
 - (i) a government practice involves a direct transfer of funds, (for example grants, loans and equity infusion), potential direct transfers of funds or liabilities (for example loan guarantees);
 - (ii) government revenue that is otherwise due is foregone or not collected (for example fiscal incentives such as tax credits);

- (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 subparagraph (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 in the sense of Article XVI of the General Agreement on Tariffs and Trade 1994; and
 - (c) a benefit is thereby conferred.
- 14.2 For the purposes of subsection 1, a financial contribution by a government shall extend to any area set aside as an export processing or development zone and other similar areas.

15. Countervailability of subsidies

15.1 A subsidy shall be countervailable only if:

- (a) such subsidy is specific, that is to say –
 - (i) the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, or
 - (ii) if the Commission finds that the subsidy is specific in fact because –
 - (1) it is used by a limited number of certain enterprises;
 - (2) it is predominantly used by certain enterprises;
 - (3) a disproportionately large amount of the subsidy is granted to certain enterprises; or
 - (4) the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy, and in this regard, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall, in particular, be considered; and
- (b) such subsidy causes material injury to the SACU industry producing the like product.

15.2 Where a subsidy may be specific in fact under the provisions of paragraph (a)(ii) of subsection 1, the Commission shall take account of the extent of

economic diversification in the jurisdiction of the granting authority and the length of time during which the subsidy programme has been in operation.

- 15.3 Notwithstanding subsection 1, a subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. The setting or charging of generally applicable tax rates by all level of government entitled to do so shall not be deemed to be a specific subsidy.
- 15.4 Notwithstanding subsection 1, a subsidy shall be deemed to be a specific where:
- (a) the subsidy has explicitly or in fact, whether solely or as one of several other conditions, been made contingent upon export performance; or
 - (b) the subsidy has been made contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.
- 15.5 In terms of paragraph (a) of subsection 4, subsidies shall be considered to be contingent in fact upon export performance when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is accorded to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of such paragraph.

16. Calculation of benefit

For the purposes of determining the benefit conferred by a subsidy, the following rules shall apply:

- (a) The government provision of equity capital shall be considered as conferring a benefit where the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of the country of origin.
- (b) A loan by a government shall be considered as conferring a benefit where there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts.
- (c) A loan guarantee by a government shall be considered as conferring a benefit where there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial

loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees.

- (d) The provision of goods or services or the purchase of goods by a government shall be considered as conferring a benefit where the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

17. Material injury

- 17.1 The investigation period for injury, which is the period for which it is assessed whether the SACU industry experienced material injury, shall normally cover a period of three years plus 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. If injury information for the current financial year does not encapsulate a full calendar or fiscal year, information on injury covering the same calendar or fiscal period must also be submitted for each year of the three-year period for which injury information is provided. Such partial information is in addition to injury information for each year of the three-year period.
- 17.2 The investigation period for injury shall be clearly indicated in the initiation notice published in the *Government Gazette*.
- 17.3 With regard to the Commission's assessment of material injury, the information provided to the Commission by the SACU industry must comprise information on -
 - (a) SACU producers whose collective output of the like product constitutes more than 50 per cent of the total domestic production of that product; or, if such information is not available
 - (b) SACU producers whose collective output of the like product constitutes 50 per cent or less of the total domestic production of that product, provided the Commission accepts a detailed explanation from the applicant why information on 50 per cent or less of the total domestic production of that product is appropriate.
- 17.4 Where the Commission has accepted injury information from the SACU industry under subsection 3(a) and there is more than one domestic producer in the SACU of the like product who individually accounts for 35 per cent or more of domestic production of those products by volume, the Commission will require the submission of injury information by each such producer. If the Commission does not receive injury information

from each such producer, the Commission shall not initiate an investigation.

17.5 In determining material injury to the SACU industry, the Commission shall examine:

- (a) the volume of subsidised imports and the effect of the subsidised imports on prices in the domestic market for the like product; and
- (b) the consequent impact of these imports on the domestic producers of such products.

17.6 In determining material injury to the SACU industry in terms of subsection 5(a), the Commission shall consider the following factors:

- (a) with regard to the volume of subsidised imports, whether there has been a significant increase in the volume of imports under consideration, whether absolute or relative to the production or consumption in SACU; and
- (b) with regard to the effect of subsidised imports on prices, whether there has been significant price undercutting by the imports under consideration as compared with the like product of the SACU industry, and whether there has been a significant depression and/or suppression of the SACU industry's prices of the like product.

No one or several of these factors can necessarily give decisive guidance.

17.7 In determining material injury to the SACU industry in terms of subsection 5(b), the Commission shall consider whether there have been significant changes in the domestic performance of the SACU industry in respect of the following 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; and
- (n) any other relevant factors placed before the Commission.

This list of factors is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

- 17.8 Each of the factors provided for in subsection 7 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.

18. Threat of material injury

- 18.1 A finding 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 subsidisation would cause material injury must be clearly foreseen and imminent.
- 18.2 In considering a threat of material injury the Commission shall, in addition to the factors indicated under section 17, and where relevant information is available, consider such factors as:
- (a) nature of subsidy/subsidies in question and trade effects likely to arise therefrom
 - (b) a significant rate of increase of subsidised imports into the SACU;
 - (c) sufficiently freely available, or an imminent substantial increase in, capacity of the foreign producer;
 - (d) the availability of other export markets to absorb additional export volumes;
 - (e) whether products are entering or will be entering the SACU at prices that will have a significant depressing or suppressing effect on SACU prices, and would likely increase demand for further imports; and
 - (f) the foreign producer's inventories of the product under investigation.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further subsidised exports are imminent and that, unless protective action is taken, material injury would occur.

19. Material retardation of the establishment of an industry

- 19.1 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 business plan indicating the establishment of such industry in the absence of subsidised imports.
- 19.2 The Commission may request a provisional payment or recommend a countervailing duty where the establishment of such industry is materially retarded by subsidised imports.
- 19.3 If significant progress has not been made to establish an industry as proposed in subsection 1 within one year following the imposition of a countervailing duty, the Commission may recommend that the countervailing duty be withdrawn.

20. Causality

- 20.1 The Commission shall determine whether there is a causal link between the subsidised imports and material injury.
- 20.2 In considering whether there is a causal link between the subsidised imports and material injury the Commission shall consider all relevant factors, including, but not limited to -
- (a) the change in the volume of the subsidised imports, whether absolute or relative to the production or consumption in SACU ;
 - (b) the price undercutting experienced by the SACU industry vis-à-vis the subsidised imports;
 - (c) the market share of the subsidised imports;
 - (d) the magnitude of the margin of subsidy; and
 - (e) the price of unsubsidised imports available in SACU.
- 20.3 Notwithstanding subsection 2, the Commission shall consider all relevant factors other than the subsidised imports that may have contributed to the SACU industry's injury, and the injury caused by such other factors shall not be attributed to the subsidised imports, provided that an interested party has submitted, or the Commission otherwise has, information on such factor or factors. 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 practices of and competition among SACU producers and between the foreign and SACU producers;

- (d) developments in technology;
- (e) the export performance of the SACU industry;
- (f) the productivity of the SACU industry; and
- (g) other factors affecting the SACU prices.

21. Lesser duty rule

- 21.1 If a foreign producer has provided the Commission with all information necessary to calculate the margin of subsidy, a provisional payment or countervailing duty imposed in respect of the foreign producer shall not exceed the margin of subsidy established and shall be imposed at a level less than the margin of subsidy if such lesser payment or duty would be sufficient to remove the material injury to the SACU industry caused by the subsidised imports.
- 21.2 The lesser payment or duty provided for in subsection 1 shall be considered sufficient to remove the material injury to the SACU industry caused by the subsidised imports where such payment or duty eliminates any price disadvantage.
- 21.3 The margin of subsidy and the price disadvantage shall be expressed as a percentage of the F.O.B. export price for purposes of comparison.

22. Public interest

Upon the advice of the Commission that an investigation raises public interest considerations, the Minister may direct the Commission in terms of section 16(1)(d)(i) of the *Main Act*, subsequent to the submission of the Commission's recommendation contemplated in sections 41.1 and 67 to conduct an inquiry to determine whether, based on all information reviewed, there are reasonable grounds to conclude that the imposition, amendment or continuation of a countervailing duty, or the imposition, amendment or continuation of a countervailing duty in the amount determined in an original investigation or a sunset review, would not be in the public interest.

23. Verifications

- 23.1 To satisfy itself as to the accuracy of information provided to it by interested parties, the Commission may conduct on-the-spot verifications at the premises of such interested parties.
- 23.2 In the event that an interested party refuses to receive an on-the-spot verification by the Commission provided for in subsection 1, refuses the Commission access to relevant information, fails to provide information within an applicable deadline or acts otherwise so as to significantly impede the investigation, the Commission may regard the party as non-cooperating and resort to facts available.
- 23.3 Where an interested 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 verification 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.

- 23.4 The Commission shall inform the government of the country concerned of the dates of the intended on-the-spot verification and shall conduct the verification on those dates unless that government objects to the verification.
- 23.5 Where the government of the country concerned objects to the Commission's on-the-spot verification, the Commission may make a preliminary and/or final finding based on facts available, and may exclude any information submitted by any party in that country.

24. Verification reports

- 24.1 Following an on-the-spot verification, the Commission shall make a verification report indicating the information verified available to the party that was verified. The Commission may, subject to the requirement to protect confidential information, make the verification report available to other interested parties.
- 24.2 The purpose of a verification report related to an examination of information submitted by an interested party is to ensure that the Commission and the party verified agree on what was verified during the Commission's verification. The failure to reference in the verification report information that was verified shall not preclude the Commission from using such information in its findings.
- 24.3 The Commission shall make verification reports available before the Commission's preliminary finding and will place a copy of the non-confidential verification report on the public file prior to its preliminary finding.
- 24.4 The party verified will receive 7 days to comment on the verification report. The Commission may grant a single extension upon good cause shown.

25. Time limit

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

Sub-Part II - Pre-Initiation and Initiation Procedures

26. Applications

- 26.1 Written applications shall be made by or on behalf of the SACU industry using the appropriate Commission questionnaire.
- 26.2 On receipt of an application 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.

27. Properly documented applications

- 27.1 In determining whether an application submitted in terms of section 26 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.
- 27.2 The Commission will return an application that is not properly completed in terms of subsection 1 to the applicant.

28. Subsidy standard for initiation purposes

- 28.1 The applicant shall submit such information as is reasonably available on each subsidy programme alleged.
- 28.2 For the purpose of subsection 1, a copy of the official publication citing the relevant subsidy programme, a newspaper report, a copy of a previous finding by the Commission in respect of a particular subsidy and the like shall be considered *prima facie* proof of the existence of a countervailable subsidy.
- 28.3 The applicant shall provide the Commission with a reasonable calculation of the amount of each alleged subsidy, as well as the alleged total margin of subsidy.

29. Material injury standard for initiation purposes

- 29.1 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 17 indicates a *prima facie* case of material injury.
- 29.2 In determining threat of material injury to a SACU industry, the Commission shall consider whether the information submitted in this regard and relating to the factors referred to in section 18 and, where relevant, section 17, indicates a *prima facie* case of threat of material injury.
- 29.3 In determining material retardation of the establishment of an industry in SACU, the Commission shall consider whether the information submitted in this regard and relating, amongst others, to the requirements listed in

section 19, indicates a *prima facie* case of material retardation of the establishment of an industry in SACU.

30. Merit Assessment

- 30.1 In its merit assessment, the Commission shall determine whether there is sufficient information to establish a *prima facie* case that subsidised imports are causing material injury to the SACU industry.
- 30.2 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.

31. Notification

- 31.1 The Commission shall notify the representative of the country of origin that it has received a properly documented application in terms of section 27 after verification of the SACU industry's injury information, but prior to initiation.
- 31.2 Except as provided for in subsection 1, the Commission shall not publicise the application prior to the initiation of an investigation.
- 31.3 Following the notification contemplated in subsection 1 and prior to initiation of an investigation, the Commission shall invite the foreign country for consultations with the Commission regarding the alleged subsidy programmes.

32. Initiation

- 32.1 An investigation shall be formally initiated through publication of an initiation notice in the *Government Gazette*.
- 32.2 The initiation notice shall contain the basis of the alleged subsidy, 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 basis of the allegation of subsidisation;
 - (e) a summary of the factors on which the allegation of injury is based;
 - (f) the address to which representations by interested parties should be directed; and
 - (g) the time frame for responses by interested parties.

- 32.3 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.
- 32.4 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 request for an extension of a deadline, as contemplated in section 34, shall be considered on the basis of ignorance of the investigation.
- 32.5 Subsequent to the publication of the initiation notice in the *Government Gazette*, the Commission shall provide all known interested parties with a non-confidential version of the application, unless the number of interested parties makes this impracticable.

Sub-Part III - Preliminary Investigation Phase

33. Responses by interested parties

- 33.1 Importers, exporters and foreign producers are required to use the relevant Commission questionnaires in their responses to the Commission.
- 33.2 Parties shall be deemed to have received the questionnaires 7 days after the dispatch of the questionnaires by the Commission.
- 33.3 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 by the deadline indicated.
- 33.4 The deadline for submission by parties not directly informed of the investigation by the Commission will be 40 days from the date of the publication of the initiation notice of the investigation in the *Government Gazette*.
- 33.5 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.

34. Extensions for submissions

- 34.1 The Commission may grant parties up to two extensions on good cause shown.
- 34.2 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.

35. Deficiencies

- 35.1 Submissions may be deemed deficient -

- (a) if any required information has not been submitted;
- (b) if a proper non-confidential version or, where applicable, a sworn statement as contemplated in section 3.2, has not been submitted; or
- (c) in the circumstances contemplated in section 33.5.

35.2 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.

35.3 The Commission will not consider submissions that are deficient after the deadline contemplated in subsection 2 for the purpose of its preliminary and final findings.

36. Non-cooperation

36.1 In the event that one or more foreign producers in a particular country cooperate while other producers do not cooperate, the Commission, for the purpose of the non-cooperating producers, may base its preliminary and final findings on facts available.

36.2 In the event that an importer, exporter or foreign producer has submitted an incomplete or otherwise deficient submission by the deadline contemplated in sections 33, 34 and 35, as applicable, the Commission will disregard this information for the purpose of its preliminary and final findings.

37. Provisional payments

37.1 The decision whether or not to apply a provisional payment shall be permissive even where all requirements for the application of a provisional payment has been fulfilled.

37.2 Provisional payments may not be imposed within less than 60 days after initiation of an investigation.

37.3 Provisional payments will normally be imposed for a period of 4 months.

37.4 Where a final finding of injury but not a final finding of threat of injury or of a material retardation of the establishment of an industry is made or, in the case of a final finding of a threat of injury, where the effect of the subsidised imports would, in the absence of the provisional payment, have led to a finding of injury, provisional payments may be definitively levied for the period for which the provisional payments, if any, have been applied.

38. Preliminary report

38.1 The Commission shall make available a non-confidential report within 7 days of the publication of its preliminary finding.

38.2 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 subsidy;
- (g) the methodology used by the Commission to determine the margin of subsidy;
- (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 finding.

Sub-Part IV - Final Investigation Phase

39. Comments on preliminary report

- 39.1 All interested parties, except parties which did not submit responses as contemplated in section 33 or which did not correct deficient submissions as contemplated in section 35, shall receive 14 days from the date the preliminary report is made available to comment in writing on the preliminary report.
- 39.2 The Commission may grant cooperating interested parties in terms of subsection 1 up to two extensions of the deadline contemplated in subsection 1 on good cause shown, and any such extension will apply only to the party to which such extension was granted and will not apply to other cooperating parties.
- 39.3 Any request under subsection 2 for an extension of the deadline contemplated in subsection 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.
- 39.4 The Commission will not accept new information following its preliminary finding.

40. Essential facts

- 40.1 All interested parties will be informed of the essential facts to be considered by the Commission.
- 40.2 All interested parties will receive 7 days to comment on the essential facts.
- 40.3 The Commission may grant parties a single extension on good cause shown, and any such extension will apply only to the party to which such extension was granted and will not apply to other interested parties.
- 40.4 The Commission will take all relevant comments on the essential facts into consideration in its final finding.

41. Definitive countervailing duties

- 41.1 The Commission's final findings are forwarded in the form of a recommendation, whether or not and at what level to impose definitive countervailing duties, for decision by the Minister until the provisions of section 64(2) of the *Main Act* come into operation.
- 41.2 Definitive countervailing duties will remain in place as provided for in section 62.1.

42. Final report

- 42.1 The Commission shall make available a non-confidential report after the decision by the Minister contemplated in section 41.1.
- 42.2 The final report shall contain findings and conclusions reached on issues of fact and law considered material by the Commission.

43. Price undertakings

- 43.1 An investigation may be suspended or terminated following the receipt of a satisfactory price undertaking from any foreign producer that has cooperated during the investigation to revise its prices or to cease exports to the SACU at subsidised prices so that the Commission is satisfied that subsidisation or the injurious effect thereof is eliminated, provided the Commission has made a preliminary finding that there has been subsidisation and injury caused by such subsidised imports.
- 43.2 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.
- 43.3 Undertakings need not be accepted if the Commission considers their acceptance impractical, for example where the number of foreign producers is too great, or for other reasons, including reasons of general policy.

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

Part D - Reviews

Sub-Part I - General

44. Notification

- 44.1 The Commission shall notify the representative of the country of origin that it has received a properly documented application for review.
- 44.2 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*.
- 44.3 Following the notification contemplated in subsection 1 and prior to initiation of an investigation, the Commission shall invite the foreign country for consultations with the Commission regarding any alleged subsidy programme.

45. Initiation

All reviews shall be formally initiated through publication of an initiation notice in the *Government Gazette*. Such notice shall indicate the following minimum information -

- (a) the identity of the applicant;
- (b) the product under investigation;
- (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.

46. Responses by interested parties

- 46.1 All interested parties are required to use the relevant Commission questionnaires in their responses.
- 46.2 Parties shall be deemed to have received the questionnaires 7 days after the dispatch of the questionnaires by the Commission.
- 46.3 From receipt of the questionnaires, as contemplated in subsection 2, parties shall receive 30 days to submit their responses to the Commission.

- 46.4 The deadline for submission by parties not directly informed of the investigation by the Commission will be 40 days from the date of the publication of the initiation notice of the investigation in the *Government Gazette*.
- 46.5 The Commission may grant parties up to two extensions on good cause shown, and any extension will apply only to the party to which such extension was granted and will not apply to other interested parties.

47. Essential facts

- 47.1 All interested parties will be informed of the essential facts to be considered by the Commission.
- 47.2 All parties will receive 14 days from the dispatch of the essential facts letter to comment thereon.
- 47.3 The Commission may grant parties up to two extensions on good cause shown, and any extension will apply only to the party to which such extension was granted and will not apply to other interested parties.
- 47.4 In its final finding the Commission will consider all relevant comments on the essential facts letter made by cooperating interested parties in terms of section 46, provided such comments are received by the deadline contemplated in subsections 2 and 3.

Sub-Part II - Interim reviews

48. Time frame

- 48.1 The Commission may initiate an interim review -
- (a) upon the request by an importer, foreign producer or the SACU industry, provided that at least two years have elapsed since the publication in the *Government Gazette* of the notice giving effect to the final finding in the original investigation or the most recent interim or sunset review thereof; or
 - (b) on its own initiative.
- 48.2 The Commission shall only initiate an interim review of a countervailing duty under subsection 1(a) where the request is made more than one year prior to the last date on which interested parties may request a sunset review, as provided for in section 63.2.
- 48.3 The Commission shall only initiate an interim review of a countervailing duty under subsection 1(b) where the self-initiation occurs more than one year prior to the last date on which interested parties may request a sunset review, as provided for in section 63.2.

49. Changed circumstances

- 49.1 The Commission shall only initiate an interim review provided for in section 48.1(a) or 48.1(b) if, in the case of the former, the party requesting the interim review provides or, in the case of the latter, it has *prima facie* evidence of -
- (a) a significant change in circumstances that is ongoing in nature relating to subsidisation and/or material injury; and
 - (b) the change in the margin of subsidy and/or the lack of material injury.
- 49.2 A change in the margin of subsidy shall not constitute a significant change in circumstances contemplated in subsection 1(a).
- 49.3 Where an importer or foreign producer has not cooperated in the Commission's investigation that led to the imposition of a countervailing duty and such importer or foreign producer is subsequently willing to supply such information, this change in disposition shall not constitute a significant change in circumstances contemplated in subsection 1(a).

50. Review procedure

An interim review shall consist of a single investigation phase.

51. Final recommendation

The Commission's final finding is forwarded in the form of a recommendation for decision by the Minister until the provisions of section 64(2) of the *Main Act* come into operation, and may result in an increase, a decrease, the withdrawal or the confirmation of the existing countervailing duty.

Sub-Part III - New Shipper Reviews**52. Eligibility**

- 52.1 A new shipper review may be requested by a foreign producer which -
- (a) did not export to the SACU during the original period of investigation for subsidisation; and
 - (b) is not related to a foreign producer to which the countervailing duty was applied.
- 52.2 The Commission shall not consider a request for a new shipper review before definitive countervailing duties have been imposed.

53. Information required

The foreign producer requesting a new shipper review shall provide the Commission with information on subsidies and any other information deemed

necessary by the Commission and shall submit such information in the prescribed format.

54. Suspension of countervailing duties

- 54.1 The countervailing duties in respect of the party requesting a new shipper review shall be withdrawn simultaneously with the initiation of a new shipper review.
- 54.2 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.

55. Review procedure

A new shipper review shall consist of a single investigation phase.

56. Final recommendation

The Commission's final finding is forwarded in the form of a recommendation for decision by the Minister until the provisions of section 64(2) of the *Main Act* come into operation and may result in -

- (a) the imposition of a countervailing duty; and/or
- (b) the termination of any provisional payment.

Sub-Part IV – Expedited Reviews

57. Eligibility

An expedited review for the establishment of an individual countervailing duty rate may be requested by a foreign producer –

- (a) whose exports are subject to a definitive countervailing duty; and
- (b) which was not investigated during the original period of investigation for reasons other than a refusal to cooperate

58. Information required

The foreign producer requesting an expedited review shall provide the Commission with information on subsidies and any other information deemed necessary by the Commission and shall submit such information in the prescribed format.

59. Suspension of countervailing duties

- 59.1 The countervailing duties in respect of the party requesting an expedited review shall be withdrawn simultaneously with the initiation of an expedited review.
- 59.2 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.

60. Information required

An expedited review shall consist of a single investigation phase.

61. Final recommendation

The Commission's final finding is forwarded in the form of a recommendation for decision by the Minister until the provisions of section 64(2) of the *Main Act* come into operation and may result in –

- (a) an individual countervailing duty rate for the foreign producer which requested the review; and/or
- (b) the termination of any provisional payment.

Sub-Part V - Sunset Reviews**62. Duration of countervailing duties**

- 62.1 A definitive countervailing duty shall remain in place for -

- (a) five years from the date of publication in the *Government Gazette* of the notice imposing such duty in the original investigation; or
- (b) five years from the date of publication in the *Government Gazette* of the notice giving effect to the final finding in the most recent review of such duty if that review has covered subsidisation and injury;

unless a sunset review is commenced prior to the relevant expiry date above or if a shorter period is specified.

- 62.2 In terms of subsection 1, if a sunset review is initiated prior to the lapse of a countervailing duty, such countervailing duty shall remain in force until the sunset review has been finalised through the publication of a notice of final finding in the *Government Gazette*.

63. Initiation of sunset review

- 63.1 The Commission will publish on its website a list of countervailing duties with corresponding expiry dates.
- 63.2 The Commission shall only initiate a sunset review if –
- (a) it receives at least 6 months prior to the expiry of a countervailing duty a request by or on behalf of the SACU industry that such countervailing duty be maintained; and
 - (b) it receives at least 5 months prior to the expiry of such countervailing duty an application by or on behalf of the SACU industry containing *prima facie* evidence that the removal of the countervailing duty would be likely to lead to a continuation or recurrence of subsidisation and injury.
- 63.3 If the Commission decides to initiate a sunset review, it shall publish an initiation notice in the *Government Gazette* prior to the expiry of such duties. Such notice shall contain the information as contemplated in section 45.

64. Review procedure

- 64.1 A sunset review shall consist of a single investigation phase.
- 64.2 Where there were no exports to SACU during the period of investigation, the export price used to determine the ad valorem subsidy will be the comparable price of the like product when exported from the country of origin to a third country determined by the Commission.
- 64.3 In choosing the third country contemplated in subsection 2, the Commission may consider any relevant factor, including any or all of the following factors, with no one or several of these factors necessarily giving decisive guidance:
- (a) the similarity of the like product produced by the SACU industry and the product exported from the country of origin to the third country in terms of the criteria used by the Commission in its like product analysis;
 - (b) the similarity in the level of development of -
 - (i) the domestic industry in SACU and the third country producing the like product, including but not limited to, the existence and number of domestic producers of the like product; and
 - (ii) the domestic market in SACU and the third country in respect of the like product, including but not limited to, the volume of production, consumption, exports and imports of the like product;

- (c) the similarity in the volume of domestic sales of the like product in the country of origin and exports from the country of origin to the third country; and
- (d) sales in the domestic market of the country of origin and in the third country are at the same level of trade.

64.4 Where there are no exports to a third country as contemplated in subsection 2, the export price will be constructed.

64.5 A constructed export price contemplated in subsection 4 may be determined on any reasonable basis.

65. Information required

65.1 In the event that the SACU industry requests that a countervailing duty be maintained, it shall provide the Commission in its application with the required information that expiry of the duty would be likely to lead to continuation or recurrence of subsidisation and injury.

65.2 Once a sunset review has been initiated based on an application submitted by the SACU industry, the foreign producers shall be required to submit information in the required format to enable the Commission to make a finding on subsidisation. Foreign producers shall not be precluded from supplying any other information they may deem relevant.

65.3 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.

66. Non-cooperation

66.1 Where the SACU industry does not request a sunset review or does not submit the required information within the deadline indicated in section 63.2, the Commission will recommend that the countervailing duty expire on the relevant date.

66.2 Where the SACU industry has supplied the required information and the foreign producer does not cooperate within the time frames contemplated in section 46, the Commission may rely on the facts available in its final finding.

67. Final recommendation

The Commission's final finding is forwarded in the form of a recommendation for decision by the Minister until the provisions of section 64(2) of the *Main Act* come into operation, and may result in the withdrawal, amendment or confirmation of the existing countervailing duty.

Sub-Part VI - Anti-Circumvention Reviews

68. Circumvention

68.1 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 the SACU;
 - (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 measure are being undermined in terms of the volumes or prices of the product under investigation.

68.2 For purposes of anti-circumvention the following types of circumvention shall be treated separately -

- (a) improper declaration of -
 - (i) the value of the product;
 - (ii) the origin of the product; or
 - (iii) the nature or classification of the product.
- (b) minor modifications of the product subject to a countervailing duty;
- (c) the export of parts, components and sub-assemblies with assembly in a third country or within SACU;
- (d) absorption of the countervailing duty by either the exporter or the importer, as provided for in subsection 7;
- (e) country hopping, as provided for in subsection 8;
- (f) declaration under a different tariff heading, even where such different tariff heading does provide for the clearance of the product subject to a countervailing duty;
- (g) any other form of circumvention as may be submitted for the Commission's consideration.

68.3 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.

- 68.4 Minor modifications of the product subject to a countervailing duty 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 has basically the same physical appearance or characteristics; or
 - (b) is a substitute for the product on which countervailing duties have been imposed.
- 68.5 Assembly in a third country or within SACU shall be deemed to have taken place where less than 25 per cent of the production costs of the assembly in such third country or in SACU represents value added, as determined under subsection 6. Such assembly shall not be regarded as changing the country of origin.
- 68.6 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 costs or profit.
- 68.7 Absorption of the countervailing duty shall be deemed to take place if -
- (a) the foreign producer decreases its export price in any manner to compensate the importer or a third party for the extra burden imposed by the countervailing duty, unless there is a corresponding 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 duty 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.
- 68.8 Country hopping shall be deemed to take place if, following the imposition of countervailing duties or provisional payments or the initiation of an investigation, the importers or exporters of the product subject to a countervailing duty, a provisional payment, or an investigation, as the case may be, switch to a supplier related to the supplier against which an investigation has been or is being conducted and such new supplier is based in another country or customs territory.

69. Information required

- 69.1 The SACU industry or other interested party shall provide such information that is reasonably available to it to indicate that circumvention is taking place.

- 69.2 Any request for an anti-circumvention review shall include information of the specific type of circumvention that is alleged to take place.
- 69.3 The Commission may require any interested party to submit such information as it deems necessary to properly conduct the review.
- 69.4 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 finding on the basis of facts available.

70. Review procedure

- 70.1 An anti-circumvention review may consist of a single investigation phase or of a preliminary and a final investigation phase.
- 70.2 Provided an anti-circumvention complaint is lodged with the Commission within one year after the publication of the Commission's final finding in the original investigation, the Commission may use for any circumvention alleged under sections 68.2(b), (c), (e), (f) or (g) the injury information submitted by the SACU industry in such investigation for purposes of the preliminary finding and the imposition of provisional payments.
- 70.3 Provided an anti-circumvention complaint is lodged with the Commission within one year after the publication of the Commission's final finding in the original investigation, the Commission may use for any circumvention alleged under sections 68.2(b), (c), (e), (f) or (g) the benchmarks previously established on the subsidies in such investigation to determine the margin of subsidy for purposes of the preliminary finding and the imposition of provisional payments.
- 70.4 The relevant interested parties shall provide the Commission with updated information on injury and subsidies for circumvention alleged under sections 68.2(b), (c), (e), (f) or (g) within the time frames contemplated in section 46.
- 70.5 In the event that the relevant interested parties have not submitted the information contemplated in subsection 4 by the deadline contemplated in section 46, the Commission may make a preliminary or final finding on the basis of the facts available, except that where the SACU industry has not provided the updated information on injury contemplated in subsection 4 by such time frames, the Commission shall terminate the proceeding without the impositions of measures.
- 70.6 In anti-circumvention reviews involving absorption, the Commission may construct the export price from the first point of resale by subtracting such costs as were indicated in the original investigation.

71. Final recommendation

If the Commission makes a finding that circumvention has taken place, the Commission's final finding is forwarded in the form of a recommendation for

decision by the Minister until the provisions of section 64(2) of the *Main Act* come into operation and may result in -

- (a) the increase of countervailing duties to compensate for absorption of countervailing duties;
- (b) the imposition of countervailing duties on parts, components or sub-assemblies; or
- (c) the imposition of countervailing duties, at the required level, on the related supplier in the country from which the product under investigation has been exported subsequent to the imposition of the original provisional payments or countervailing duties or the initiation of the original investigation.

Sub-Part VII - Refunds

72. Applications for refunds

- 72.1 An importer may request reimbursement of countervailing duties collected where it is shown that the margin of subsidy, 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.
- 72.2 Other than as contemplated in section 73, any request for a refund shall be duly supported by evidence and shall be submitted during the anniversary month of the date of publication of the notice in the *Government Gazette* imposing the countervailing duty and shall relate only to the preceding 12-month period.
- 72.3 An application for refund shall be considered as duly supported by evidence in terms of subsection 2 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 export prices to the SACU for the foreign producer to which the countervailing duty applies.
- 72.4 Regardless of whether the foreign producer and the importer are related parties, the foreign producer may supply any information in terms subsection 3 directly to the Commission.
- 72.5 The Commission may, at any time after receiving a refund application, decide to initiate a refund review, whereupon the information and findings from such refund review shall be used to determine whether a refund is justified.

73. 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

74. Delegation

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

75. Transitional application

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



International Trade Administration Commission of South Africa

I. Introduction and Disclaimer

The International Trade Administration Commission of South Africa (“the Commission”) has drafted Amended Countervailing Regulations (“the *Amended CVRs*”) for publication in the *Government Gazette*. The *Amended CVRs* will replace the countervailing regulations currently in force, although a substantial portion of the current regulations are carried over into the *Amended CVRs*. The proposed amendments are informed by the Commission’s past and current practice in administering this trade remedy instrument, as well as the requirements of WTO *Agreement on Subsidies and Countervailing Measures*, decisions by panels and the Appellate Body under the auspices of the WTO Dispute Settlement Body and the policies of the Department of Trade and Industry (**the dti**).

To assist parties wishing to comment on the *Amended CVRs*, the Commission has drafted this explanatory document (“the Document”). It should be noted that the Document does not identify all of the amendments that have been incorporated into the *Amended CVRs*. For example, amendments to ensure the consistent use of terms, phrases or clauses are not discussed. Rather, the Document identifies amendments that are significant procedurally, substantively or otherwise, or amendments that require clarification to avoid confusion over their intended purpose. It should also be noted that many of the amendments discussed below have been incorporated into the Commission’s Amended Anti-dumping regulations (“the *Amended ADRs*”). Notwithstanding the limited focus of the Document, the Commission invites parties to comment on any aspect of the *Amended CVRs*.

The Document cannot be cited to establish Commission practice or interpret, in any manner, the final version of the *Amended CVRs*. The Document does not undertake to provide a comprehensive or authoritative interpretation of the amendments it identifies, which amendments are often highly technical. The Document merely identifies various amendments and seeks to focus comments on certain aspects of these amendments.

II. Identification of Amendments

To assist parties in their review, amendments are identified in the order they appear in the *Amended CVRs*, from which the headings below are drawn.

Part A - Definitions:

This Part has been modified through additions and deletions to clarify and/or simplify key terms or concepts.

1. “**Benefit**”: The terms “benefit” is one of several central concepts underlying this trade remedy instrument. Notwithstanding its importance, the term is not defined in the current regulations (or in the WTO *Agreement on Subsidies and Countervailing Measures*). The definition provides a general framework for the methodologies used to calculate the benefit.

2. “Country of origin”: Because of the peculiarities associated with the relevant regulatory regime (especially the Customs and Excise Act), the regulations focus on the country of origin and not, additionally, on the country of export.
3. “Government”: Inclusion of this definition is intended to simplify the wording of the various provisions to which it pertains.
4. “Granting authority”: This definition simply notes the difference between the government, from which financial contributions are ultimately derived, and the particular entity that directly provides such contributions.
5. “Product under investigation”: The definition clarifies which products form part of an investigation.

Part B – General Provisions:

6. Section 2 – Applicability of regulations: This new section was taken verbatim from the *Amended ADRs*, and addresses potential omissions in or inconsistencies among the different Parts of the *Amended CVRs*.
7. Section 3 - Confidentiality: The limited revisions to this section ensure consistency with various provisions in the *ITA Act* and the *Amended ADRs*.
8. Section 4 – Initiation of investigations: This section (including its title) has been slightly revised to achieve greater clarity, as well as greater consistency, with other related sections.
9. Section 5 – Termination based on negligibility and *de minimis* margins: Negligibility and *de minimis* margins are key issues in countervailing investigations, and it was felt they should be contained in a separate section. This new section, however, is based upon provisions in the current regulations (see section 16 on causality).
10. Section 6 – Cumulation: This new section was derived from provisions found elsewhere in the current regulations with some changes in wording. The change in wording was done, in part, to ensure greater conformity with the text of the *WTO Agreement on Subsidies and Countervailing Measures*.
11. Section 7 – Representation: This section has been reworded to clarify the requirements contained therein.
12. Section 8 – Interested parties hearing: The changes to this section reflect a new type of hearing common to countervailing and anti-dumping proceedings. The hearings are intended, among other things, to help focus the attention of the Commission on what interested parties believe are the most salient aspects of an investigation. The hearings are also an effort to rationalise and centralise the Commission’s interaction with interested parties, thereby easing administrative demands on the Commission.

13. Section 9 – Oral hearings: Several changes were made to this section to clarify requirements regarding the submission of written documents in connection with oral hearings.
14. Section 10 – Computation of time periods: This section specifies how time periods provided for in the *Amended CVRs* are calculated.
15. Section 11 – Additional information: This new section specifies when the Commission may request additional information.
16. Section 12 – Accuracy of information: This section was created to simplify the regulations by placing the requirements contained therein in a single provision. The requirements are based on the current regulations and reflect Commission practice.

Part C – Procedures:

17. Section 13 – SACU industry: This section has been reorganised to provide for greater clarity regarding the standing requirements for domestic parties to submit applications for the initiation of countervailing investigations. The amendments include a definition of “value added”, which is used to determine whether operations performed in SACU qualify a producer to be considered as part of the SACU industry.
18. Section 15 - Countervailability of subsidies: This section has been reorganised to delineate more clearly the various requirements contained therein and to conform it more closely to the provisions of the *WTO Agreement on Subsidies and Countervailing Measures*.
19. Section 16 – Calculation of benefit: This section replaces section 11 of the current regulations and is derived from Article 14 of the *WTO Agreement on Subsidies and Countervailing Measures*. A more straightforward and concise approach was preferred to deal with the issue of the calculation of a benefit.
20. Section 17 – Material injury: This section has been amended along the lines of the same section in the *Amended ADRs*. Subsection 1 has been amended to provide the Commission with additional information to assist in its injury determination, in particular to identify any trends in respect of injury information provided for a current financial year.

The section also incorporates a heightened requirement regarding the assessment of material injury. In determining the existence of injury to the domestic industry producing the like products, the Commission must examine and form an opinion as to the representative nature of injury data collected on the domestic industry. In this regard, underlying the current regulations and Commission practice is the concept of “a major proportion”. Given the somewhat vague concept of “a major proportion” (of total domestic production), spelling out what constitutes “a major proportion” would enhance the transparency and predictability of countervailing proceedings. However, because a domestic industry may be highly fragmented or without a national

association, the revised standard would provide Commission with the discretion to accept injury information on 50 per cent or less of the domestic industry, but only where it has been provided with an explanation as to why such a lower standard would be appropriate, and has accepted this explanation.

Further, the Commission will now require the submission of injury information from all producers accounting for 35 per cent or more of domestic production. This provision addresses the situation where there are 2 (or more) large domestic producers, and one of the producers fails to submit injury information. In such situations, the Commission has difficulty determining whether the alleged material injury was caused by domestic competition as opposed to subsidised imports, and therefore has proposed this requirement.

21. Section 18 – Threat of material injury: Subsection 2 has been revised to conform more closely with the text of the relevant provision in the *WTO Agreement on Subsidies and Countervailing Measures*.
22. Section 20 – Causality: This section has been reorganised to reflect the absence of the provisions that are now contained in section 5 on termination and section 6 on cumulation.
23. Section 21 – Lesser duty rule: Replacing current section 17, this section provides for the mandatory application of the lesser duty rule in investigations and reviews, provided the stated requirement has been met.
24. Section 22 – Public interest: Identical to the *Amended ADRs*, this section provides for the consideration of the public interest in Commission investigations or reviews.
25. Section 23 – Verifications: Mindful of the requirement in the *WTO Agreement on Subsidies and Countervailing Measures* that investigating authorities verify information on which their determination rests and the general provision that now exists in this regard in the form of section 12, the section has been amended to focus more closely on the principal manner in which the Commission satisfies itself as to the accuracy of information provided to it by interested parties, i.e. on-the-spot verifications.
26. Section 24 – Verification reports: Verification reports have been a contentious issue in past investigations. In light thereof, this section has been revised to clarify, among others, the purpose of verifications reports and to whom (and when) verifications reports will be made available.
27. Section 32 – Initiation: This section has been revised in part. Specifically, subsection 5 has been amended in part to reflect that interested parties are deemed to have received notice through publication of an initiation notice (see subsection 4), and that what the Commission provides to such parties is the non-confidential version of the application.

28. Section 34 – Extensions for submission: Based on this section, the Commission may grant up to two extensions (formerly one) for the submission of responses.
29. Section 35 – Deficiencies: The proposed amendments to this section provide, among other things, that deficient submissions that have not been remedied by a given deadline will not be considered in connection with a preliminary and final determination.
30. Section 36 – Non-cooperation: The Commission will no longer split investigations because of non-cooperation.
31. Section 37 – Provisional payments: An amendment to this section clarifies the Commission's discretion whether or not to impose provisional payments. Further, in conformity with Article 20.2 of the *WTO Agreement on Subsidies and Countervailing Measures*, the retroactive (definitive) levying of provisional payments.
32. Section 39 – Comments on preliminary report: This section reorganises and simplifies provisions about which interested parties may submit comments on preliminary reports. It also provides for up to two extensions of the deadline for submitting responses.
33. Section 41 – Definitive countervailing duties: The amendment to this section clarifies that the Commission's final finding is not a definitive decision, but only a recommendation to the Minister that can be accepted, rejected or remanded for further clarification. Further, the current section's (see section 38) discussion of the period that definitive duties remain in place has been consolidated in section 62.
34. Section 42 – Final report: This section was added to address the issue of the Commission's final report.
35. Section 43 – Price undertakings: The section has been amended to clarify when the Commission may accept price undertakings.

Part D – Reviews:

36. Section 48 – Timeframe: Various changes have been made to this section. This includes extending to two years the period during which the Commission will not entertain the submission of requests for interim reviews by interested parties. This amendment stems from several considerations: the frequency with which "changed circumstances" may occur; the Commission's limited resources to conduct investigations; and the Commission's ability under paragraph (b) of subsection 1 to initiate an interim review at any time.
37. Section 49 – Changed circumstances: This section was amended to clarify that changed circumstances requires submission of two types of evidence, and to clarify what constitutes a "significant change in circumstances".
38. Section 52 – Eligibility: This section has been amended for greater clarity as to the requirements for a new shipper review.

39. Section 52 – Section 61 (Expedited Reviews): In line with Article 19.3 of the WTO *Agreement on Subsidies and Countervailing Measures*, the *Amended CVRs* provide for expedited reviews. One important difference between expedited and new shipper reviews is that under the former a foreign producer may have exported to SACU during the original period of investigation.
40. Section 62 – Duration of countervailing duties: The section has been revised to provide for greater clarity as to the duration of definitive countervailing duties.
41. Section 63 – Initiation of sunset review: The section has been revised to reflect that the Commission will no longer provide notice of the lapse of a definitive anti-dumping duty to interested parties in an effort to lessen the Commission's administrative burdens. Parties will be able to consult the Commission's website for expiry dates, which should not represent an undue burden on parties.
42. Section 64 – Review procedures: The potential lack of exports to the SACU during a period of investigation, especially in the case of sunset reviews, is a significant issue in anti-dumping investigations. The issue of the lack of exports can also arise in countervailing investigations because subsidies are expressed as a percentage of the export price. Borrowing from the *Amended ADRs*, this section explains how the Commission will determine the export price where there were no exports to SACU during the period of investigation.
43. Section 68 – Circumvention: Regarding assembly operations, the focus of future investigations will be solely on the percentage of value added and not additionally on major transformation. The concept of country hopping as circumvention is also provided for in these regulations. The recommendations that can be made by the Commission have been revised.
44. Section 72 – Application for refunds: This section has been revised for greater clarity, in particular regarding evidentiary requirements.
45. (Previous) Section 61 – Judicial Reviews: This section has been deleted because the *Promotion of Administrative Justice Act*, 2000 (Act No. 3 of 2000) already addresses all issues regarding judicial reviews of administrative actions.