

REPUBLIC OF SOUTH AFRICA

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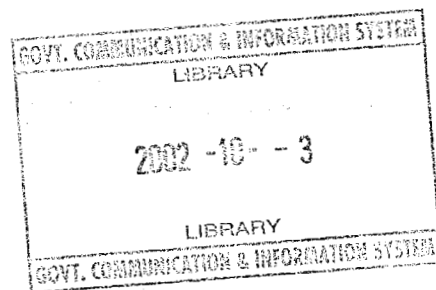
# INTERNATIONAL TRADE ADMINISTRATION BILL

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*(As amended by the Portfolio Committee on Trade and Industry (National Assembly))  
(The English text is the official text of the Bill)*

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(MINISTER OF TRADE AND INDUSTRY)



[B 38B—2002]

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# BILL

To establish a Commission for International Trade Administration; to provide for the functions of the Commission and for the regulation of its procedures; to provide for the implementation of certain aspects of the Southern African Customs Union (SACU) Agreement in the Republic; to provide, within the framework of the SACU Agreement, for continued control of import and export of goods and amendment of customs duties; and to provide for matters connected therewith.

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

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## CHAPTER 1

## DEFINITIONS, INTERPRETATION, OBJECT AND APPLICATION OF ACT

## Definitions and interpretation

1. (1) A reference in this Act to an Article by number is a reference to such Article in the SACU Agreement. 5
- (2) In this Act unless the context indicates otherwise—
- “Cabinet” means the body referred to in section 91 of the Constitution;
- “claimant” means a person who, or a firm that, has filed a claim in terms of Part D of Chapter 4, with regard to the confidentiality of information;
- “Commission” means the International Trade Administration Commission; 10
- “committee” means a committee of the Commission;
- “Common Customs Area” means the combined areas of the Member States of SACU;
- “confidential information” means information that is— 15
- (a) by nature, confidential; or
- (b) recognised in terms of Part D of Chapter 4, to be otherwise confidential;
- “Customs and Excise Act” means the Customs and Excise Act, 1964 (Act No. 91 of 1964);
- “customs duty” means customs duty as defined in section 1 of the Customs and Excise Act; 20
- “dumping” means the introduction of goods into the commerce of the Republic or the Common Customs Area at a price that is less than the normal value, as defined in section 32(2), of those goods;
- “export” means to take or send goods, or to cause them to be taken or sent, from the Republic to a country or territory outside the Republic; 25
- “firm” includes a juristic person, a trust or an association;
- “goods” includes—
- (a) all wares, articles, merchandise, animals, currency, material or objects of whatsoever nature; and
- (b) in relation to any particular goods, any other goods that are reasonably capable 30 of being substituted for them, taking into account ordinary commercial practice and geographical, technical and temporal constraints;
- “import” means to bring goods, or cause them to be brought, from outside the Republic into the Republic;
- “information that is by nature confidential” means trade, business or industrial 35 information that—
- (a) belongs to a person, firm or the State;
- (b) has a particular economic value; and
- (c) is not generally available to or known by others, and the disclosure of which 40 could—
- (i) result in a significant adverse effect on the owner, or on the person or firm that provided the information; or
- (ii) give a significant competitive advantage to a competitor of the owner;
- “member” means a member of the Commission;
- “Member State” means a member of SACU; 45
- “Minister” means the member of the Cabinet responsible for trade and industry;
- “Minister of Finance” means the member of the Cabinet responsible for national finance;
- “National Body” means a body or institution established or designated by a Member State, as contemplated in Article 14; 50
- “organ of state” has the meaning set out in section 239 of the Constitution;
- “person” means a natural person and, despite the provision of any other law, does not include a juristic person;
- “premises” includes land or any building, structure, vehicle, ship, boat, vessel, aircraft or container; 55
- “prescribed” means prescribed by regulation in terms of this Act;
- “Public Finance Management Act” means the Public Finance Management Act, 1999 (Act No. 1 of 1999);
- “regulation” means a regulation made under this Act;

“regulatory authority” means an entity established in terms of national or provincial legislation responsible for regulating an industry or a sector of an industry;

“SACU” means the Southern African Customs Union established by Article 3;

“SACU Agreement” means—

- (a) the agreement establishing SACU, and attached as Schedule 1 to this Act; and
- (b) any annex to that agreement developed by the SACU Council as contemplated in Article 42, once such an annex has become law in the Republic;

“SACU Commission” means the Customs Union Commission established by Article 7;

“SACU Council” means the Council of Ministers established by Article 7;

“SACU Tribunal” means the Tribunal established by Article 7;

“safeguard measure” means a remedy permitted in terms of Tariff Board Guidelines or procedures for use in response to dumping or other disruptive competition;

“Tariff Board” means the SACU Tariff Board established by Article 7; and

“this Act” includes the regulations and Schedules, other than Schedule 1.

(3) This Act must be interpreted—

- (a) in a manner that is consistent with the Constitution and gives effect to the object set out in section 2; and

- (b) in a manner that is consistent with the purposes and intent of the SACU Agreement.

## Object of Act

2. The object of the Act is to foster economic growth and development in order to raise incomes and promote investment and employment in the Republic and within the Common Customs Area by establishing an efficient and effective system for the administration of international trade subject to this Act and the SACU agreement.

## Application of Act

3. (1) Subject to subsection (2), this Act applies to all economic activity within, or having an effect within, the Republic.

(2) Sections 6, 26(1)(a) and 26(2)(a) and Part B of Chapter 4 do not apply to the export or import of goods in respect of which the Minister of Defence has issued a notice in terms of section 4C(1)(a) of the Armaments Development and Production Act, 1968 (Act No. 57 of 1968), prohibiting the—

- (a) export or import of those goods; or
- (b) export or import of those goods except under authority of and in accordance with the conditions stated in a permit referred to in section 4C(1)(a)(ii) or (vi) of that Act.

## CHAPTER 2

### TRADE POLICY

#### Implementation of SACU Agreement

4. (1) The Minister is the head representative of the Republic to the SACU Council.

(2) The Minister may—

- (a) assign representatives of the Republic to any institution constituted by or in terms of the SACU Agreement; and
- (b) exercise any right of the Republic in terms of the SACU Agreement to nominate or appoint persons to fill any office constituted by or in terms of the SACU Agreement.

(3) The Minister is the head representative of the Republic in any consultations with Member States individually or collectively as contemplated in the SACU Agreement and represents the Republic in any consultations arising in terms of Article 13(4) and (5) and Article 15.

(4) The Commission may, in accordance with this Act, exercise the right of the Republic to grant a rebate of customs duties, as contemplated in Article 20(3).

(5) SACU is recognised as a juristic person for all purposes of law within the Republic.

(6) The Minister may refer any decision of the SACU Council of Ministers that concerns customs duties to the Minister of Finance as a request contemplated in the Customs and Excise Act.

(7) The Minister must, by notice in the *Gazette*, publish—

- (a) for information any recommendation of the Tariff Board; and
- (b) any decision by the SACU Council of Ministers that directly affects the import of goods into, or export of goods from, the Republic.

(8) The Minister may, by notice in the *Gazette*, publish any policy mandate, procedure guideline formulated by the SACU Council of Ministers or application being dealt with by a SACU Member State.

### Trade policy statements and directives

5. The Minister may, by notice in the *Gazette* and in accordance with procedures established by the Constitution or any other relevant law, issue Trade Policy Statements or Directives.

### Minister's power to regulate imports and exports

6. (1) The Minister may, by notice in the *Gazette*, prescribe that no goods of a specified class or kind, or no goods other than goods of a specified class or kind, may be—

- (a) imported into the Republic;
- (b) imported into the Republic, except under the authority of and in accordance with the conditions stated in a permit issued by the Commission;
- (c) exported from the Republic; or
- (d) exported from the Republic, except under the authority of and in accordance with the conditions stated in a permit issued by the Commission.

(2) For the purpose of subsection (1) goods, may be classified according to—

- (a) their source or origin;
- (b) their intermediate or final destination;
- (c) the channels along which they are transported;
- (d) the manner in which they are imported or exported;
- (e) the purposes for which they are intended to be used; or
- (f) any other classification methods determined by the Minister.

(3) A notice issued in terms of this section applies to any person who or firm which, at the time of the import of particular goods into the Republic, or the export of particular goods from the Republic—

- (a) owns those goods;
- (b) carries the risk of those goods;
- (c) takes or attempts to bring those goods into, or take or attempt to take those goods from, the Republic;
- (d) in any manner whatsoever has a beneficial interest in those goods;
- (e) acts on behalf of a person or firm referred to in paragraph (a), (b), (c) or (d);
- (f) pretends to be a person or firm referred to in paragraph (a), (b), (c), (d) or (e);
- (g) the methods or processes by which they are produced; or
- (h) or the use of non-renewable natural resources in their production, and their life-cycle impact on the natural environment.

(4) Despite any other provision of this Act, a notice issued in terms of this section in respect of goods that are the subject of a notice issued by the Minister of Defence in terms of section 4C(1)(a) of the Armaments Development and Production Act, 1968, is deemed to have been revoked as from the date of the latter notice.

## CHAPTER 3

## COMMISSION FOR INTERNATIONAL TRADE ADMINISTRATION

## Part A

*Establishment and constitution***Establishment and independence of Commission**

5

7. (1) The International Trade Administration Commission is hereby established, and—

- (a) has jurisdiction throughout the Republic;
- (b) is a juristic person; and
- (c) must exercise its functions in accordance with this Act and any other relevant law. 10

(2) The Commission—

- (a) is independent and subject only to—
  - (i) the Constitution and the law;
  - (ii) any Trade Policy Statement or Directive issued by the Minister in terms of section 5; and 15
  - (iii) any notice issued by the Minister in terms of section 6; and
- (b) must be impartial and must perform its functions without fear, favour or prejudice.

(3) Each organ of state must assist the Commission to maintain its independence and impartiality, and to exercise its authority and carry out its functions effectively. 20

**Constitution of Commission**

8. (1) (a) The Commission consists of—

- (i) a full-time Chief Commissioner and a full-time Deputy Chief Commissioner; 25
- and
- (ii) not less than two but not more than 10 other Commissioners, each appointed to serve either full-time or part-time,

appointed by the President on the recommendation of the Minister, subject to section 9.

(b) The Minister must, by notice in the *Gazette* and in any national newspaper, invite nominations for appointment of persons as members of the Commission. 30

(c) The members of the Commission must, when viewed collectively, be representative of a broad cross-section of the population of the Republic, including women, and the President must endeavour to ensure participation by significant economic sectors.

(2) The President must, when making an appointment in terms of subsection (1)(a)(ii), determine— 35

- (a) whether the appointee is to be a full-time or part-time Commissioner; and
- (b) the term of the appointment, which may not exceed five years.

(3) If a vacancy arises as a result of the departure of a full-time Commissioner, the President may, on the recommendation of the Minister—

- (a) leave the position vacant; 40
- (b) if the member's term of office has expired, reappoint that member subject to section 9; or

(c) in any other case—

- (i) appoint a new member in accordance with subsection (2); or
- (ii) on the request of a part-time member, transfer that part-time member to fill that vacancy on a full-time basis either for— 45

(aa) the remainder of that member's term of office; or

(bb) a term determined by the President in accordance with subsection (2).

(4) If a vacancy arises as a result of the departure of a part-time Commissioner, the President may, on the recommendation of the Minister— 50

(a) leave the position vacant;

(b) if the member's term of office has expired, reappoint that member subject to section 9; or

(c) in any other case— 55

- (i) appoint a new member on a part-time basis in accordance with subsection (2); or



- (ii) on the request of a full-time member, transfer that member to fill that vacancy on a part-time basis either for—
  - (aa) the remainder of that member's term of office; or
  - (bb) a term determined by the President in accordance with subsection (2).

5

(5) A person may not serve as Chief Commissioner for more than 10 consecutive years.

(6) The Minister must, with the concurrence of the Minister of Finance, determine the remuneration, allowances, benefits and other terms and conditions of employment of the Chief Commissioner, Deputy Chief Commissioner and each other member of the Commission.

10

(7) During the term of office of a member of the Commission, the Minister may not reduce the member's salary, allowances or benefits.

(8) The Minister may determine any other conditions of appointment not provided for in this section, but any such conditions may not be of such a nature as to reduce the independence of the Commissioner concerned.

15

### Qualifications of members

9. (1) To be eligible for appointment and to continue to hold office as a member of the Commission, a person must—

- (a) be ordinarily resident in the Republic; and 20
- (b) have suitable qualifications and experience in economics, accounting, law, commerce, agriculture, industry or public affairs.

(2) A person may not be a member of the Commission if that person—

- (a) is an office-bearer of any party, movement, organisation or body of a partisan political nature; 25
- (b) is an unrehabilitated insolvent;
- (c) has been found mentally unfit by an order of a competent court; or
- (d) has been convicted of an offence committed after the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), took effect, and sentenced to imprisonment without the option of a fine. 30

### Conduct of members

10. (1) A member of the Commission, and a member of the staff of the Commission, must not—

- (a) engage in any activity that may undermine the integrity of the Commission;
- (b) participate in any investigation, hearing or decision concerning a matter in respect of which that person has a financial interest or any similar personal interest, as prescribed; 35
- (c) make private use of, or profit from, any confidential information obtained as a result of performing that person's official functions in the Commission; or
- (d) divulge any information referred to in paragraph (c) to any third party, except as required as part of that person's official functions within the Commission. 40

(2) If, at any time, it appears to a member of the Commission that a matter before the Commission concerns the financial or personal interest of that member, as prescribed, the member of the Commission must—

- (a) immediately and fully disclose the interest to the Chief Commissioner, or in the case of the Chief Commissioner, to the Deputy Chief Commissioner; and 45
- (b) withdraw from any further involvement in the matter to the extent required by regulation.

(3) A member of the Commission must comply with any prescribed code of conduct for members. 50

### Resignation and removal from office

11. (1) A member of the Commission may, on one month's written notice addressed to the President—

- (a) resign from the Commission; or
- (b) if he or she is a Chief or Deputy Chief Commissioner, resign from the post but remain as an ordinary member of the Commission. 55

(2) The President, on the recommendation of the Minister—

- (a) must remove a member of the Commission from office if the member—
  - (i) ceases to be ordinarily resident within the Republic; or
  - (ii) becomes subject to any of the disqualifications referred to in section 9(2); and
- (b) may remove a member from office only for—
  - (i) serious misconduct;
  - (ii) permanent incapacity;
  - (iii) engaging in any activity that may undermine the integrity of the Commission; or
  - (iv) failure to satisfy the prescribed standards of professionalism, attendance and participation in the functions of the Commission.

### Meetings and decisions of Commission

12. (1) The Chief Commissioner must convene the first meeting of the Commission and preside at that meeting.
- (2) A majority of the members of the Commission present at a meeting of the Commission forms a quorum. 15
- (3) The Chief Commissioner must appoint a member of the Commission as chairperson to preside at meetings of the Commission.
- (4) If the Chairperson is not present, the members present at the meeting must nominate a member to preside at that meeting. 20
- (5) The decision of a majority of the members of the Commission present and voting on a matter is the decision of the Commission on that matter.
- (6) In the case of an equality of votes, the person presiding at the meeting may cast a deciding vote in addition to his or her deliberative vote.
- (7) The Commission may make rules of order for its proceedings, but any such rules of order must be consistent with this Act. 25

### Chief Commissioner

13. (1) The Chief Commissioner is the Chief Executive Officer of the Commission, is responsible for the general administration of the Commission, and must—
- (a) perform the functions that are conferred on the Chief Commissioner by or in terms of this Act; 30
  - (b) manage and direct the activities of the Commission; and
  - (c) supervise the staff of the Commission.
- (2) The Deputy Chief Commissioner—
- (a) may perform any functions of the Chief Commissioner as assigned by the Chief Commissioner; and 35
  - (b) must perform the functions of the Chief Commissioner whenever the—
    - (i) Chief Commissioner is unable for any reason to perform the functions of the Chief Commissioner; or
    - (ii) office of Chief Commissioner is vacant. 40
- (3) The Chief Commissioner may assign another member of the Commission to perform any functions of the Chief Commissioner when the Chief Commissioner or the Deputy Chief Commissioner is unable to perform those functions.

### Committees

14. (1) The Minister may, by notice in the *Gazette* and at the request of the Commission— 45
- (a) establish one or more committees of the Commission for any purpose within or ancillary to the functions of the Commission; and
  - (b) appoint persons recommended by the Commission to be members of a committee. 50
- (2) A request to the Minister contemplated in subsection (1) to establish a committee must—
- (a) propose specific terms of reference for the committee;
  - (b) indicate whether the committee is a permanent committee or is established for a specific term; 55
  - (c) propose persons to be appointed to the committee and designate the proposed chairperson of the committee; and

- (d) set out time limits within which the committee must report to the Commission.
- (3) A committee may consist of persons who are not members of the Commission but—
  - (a) at least half of the members of each committee must be members of the Commission; and 5
  - (b) persons who are not members of the Commission may not vote.
- (4) If a committee is permanent, the Minister must determine the term of office for each person appointed to that committee.
- (5) A committee decision is effective only if—
  - (a) the notice establishing the committee expressly authorises the particular decision to be effective on an interim basis without ratification by the Commission; and 10
  - (b) the decision is subsequently ratified by the Commission.

## Part B

### *Functions of Commission* 15

#### **General functions of Commission**

- 15. (1) The Commission must carry out the functions assigned to it in terms of this Act, any other Act or by the Minister.
- (2) The Commission must carry out any function that arises out of an obligation of the Republic in terms of a trade agreement, if the Minister has assigned that function to the Commission. 20
- (3) The Commission may, to the extent required or permitted by the SACU Agreement, refer matters to any institution constituted by or in terms of the SACU Agreement, and may appear before such an institution.
- (4) The Commission may, subject to section 14(5), assign any of its functions to— 25
  - (a) a member of the Commission;
  - (b) a committee established in terms of section 14;
  - (c) a member of the staff of the Commission;
  - (d) a person referred to in section 23; or
  - (e) any combination of persons referred to in this subsection. 30

#### **Customs duties, anti-dumping duties, countervailing duties and safeguard measures**

- 16. (1) The Commission must investigate and evaluate—
  - (a) applications in terms of section 26 with regard to alleged dumping, or subsidised exports, in or into the Republic or the Common Customs Area; 35
  - (b) applications in terms of section 26 with regard to safeguard measures;
  - (c) applications in terms of section 26 with regard to amendment of customs duties in the Common Customs Area; and
  - (d) matters with regard to safeguard measures or amendment of customs duties in the Common Customs Area, that the— 40
    - (i) Minister directs the Commission to consider; or
    - (ii) Commission considers on its own initiative.
- (2) Sections 26 and 30(1)(a), each read with the changes required by the context, apply to an investigation undertaken by the Commission in terms of subsection (1)(d).
- (3) The Commission may, after evaluating a matter in terms of subsection (1), take appropriate steps in accordance with this Act and the SACU Agreement and inform the Minister and the Tariff Board of its evaluation. 45

#### **Issuing of permits or certificates**

- 17. The Commission may investigate, evaluate and determine applications and issue or recommend the issuing of permits or certificates, in terms of— 50
  - (a) the rebate and drawback provisions of the Customs and Excise Act; or
  - (b) Part A and B of Chapter 4.

#### **Monitoring trade and other matters**

- 18. The Commission—

- (a) must monitor, review, report to the Minister on and, when appropriate, advise the Minister in respect of, any matter referred to it by the Minister that affects or might affect trade and industry; and
- (b) may investigate matters relating to its functions in terms of this Act.

#### Information sharing with SACU institutions and Member States

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19. Subject to Part D of Chapter 4 and the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), the Commission—

- (a) must provide information to the SACU Secretariat or one or more Member States, as required in terms of this Act or the SACU Agreement;
- (b) may request such information from the SACU Secretariat or one or more Member States, as permitted in terms of the SACU Agreement; and
- (c) may exchange information with the National Body established by any Member State.

#### Relations with SACU and Member States

20. The Commission may—

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- (a) engage with an entity of SACU or the National Body of one or more Member States in co-operative activities of research, publication, education, staff development and training; or
- (b) in consultation with the Minister—
  - (i) engage with an entity of SACU or the National Body of any Member State in staff exchanges or secondment of staff; or
  - (ii) provide technical assistance or expertise to, or request such assistance from, an entity of SACU or the National Body of a Member State.

#### Relations with domestic agencies

21. (1) The Commission may—

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- (a) enter into an agreement with any regulatory authority or organ of state to co-ordinate and harmonise their respective functions with regard to international trade matters, in order to ensure the achievement of the objects of this Act; and
- (b) with regard to a particular matter within its jurisdiction—
  - (i) delegate its functions to such a regulatory agency or organ of state, as contemplated in section 238 of the Constitution; or
  - (ii) act in accordance with the agreement referred to in paragraph (a).

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(2) A regulatory authority or organ of state that, in terms of any law, has jurisdiction over international trade matters may—

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- (a) enter into an agreement referred to in subsection (1), with the Commission; and
- (b) with regard to a particular matter within its jurisdiction—
  - (i) delegate such matter to the Commission as contemplated in section 238 of the Constitution; or
  - (ii) act in accordance with the agreement referred to in paragraph (a).

40

(3) The Commission may—

- (a) participate in the proceedings of any regulatory authority or organ of state; and
- (b) advise, and receive advice from, any regulatory authority or organ of state.

45

#### Public information and reporting

22. (1) The Commission—

- (a) must implement measures to promote public awareness of the provisions of this Act; and
- (b) may provide advice to industry or interested persons or firms in the prescribed manner and form.

50

(2) The Commission must report to the Minister on—

- (a) any matter relating generally to the implementation of the objects of this Act; and
- (b) the results of any investigation, monitoring or review carried out in terms of section 18.

55

(3) The Chief Commissioner must within six months after the end of the financial year of the Commission, prepare and submit to the Minister an annual report in the prescribed form, containing—

- (a) the audited financial statements prepared in terms of section 24(8);
- (b) the auditor-general's report, prepared in terms of section 24(9); 5
- (c) a report on the performance of the Commission and of activities undertaken in terms of this Act; and
- (d) any other information that the Minister may require.

(4) The Minister must table the annual report in Parliament within 14 days of receipt thereof if Parliament is sitting or, if Parliament is not then sitting, within 14 days of the commencement of the next sitting. 10

(5) The Minister may table in Parliament any other report submitted regarding—

- (a) a statement of the progress achieved during the preceding year towards realisation of the objects of this Act; and
- (b) any other information determined by the Minister. 15

### Part C

#### *Staff, finances and administration of Commission*

##### **Staff of Commission**

23. (1) The Chief Commissioner may—

- (a) appoint staff or enter into contracts with other persons or firms to assist the Commission in carrying out its functions; and 20
- (b) in consultation with the Minister and with the concurrence of the Minister of Finance, determine the remuneration, allowances, benefits and other terms and conditions of appointment of each member of the staff.

(2) The Minister may, with the concurrence of the Minister of Finance, determine the remuneration paid to a person who is appointed in terms of subsection (1), but who is not in the full-time service of the Commission. 25

##### **Finances of Commission**

24. (1) The Commission is financed from—

- (a) money that is appropriated by Parliament; 30
- (b) prescribed fees;
- (c) income derived from the investment and deposit of surplus money in terms of subsection (6); and
- (d) money received from any other source.

(2) The financial year of the Commission is the period from 1 April in any year to 31 March in the following year, except that the first financial year begins on the date that this Act comes into operation, and ends on 31 March next following that date. 35

(3) Each year, at a time determined by the Minister, the Commission must submit to the Minister a statement of its estimated income and expenditure, and the requested appropriation from Parliament, in respect of the next ensuing financial year. 40

(4) The Commission must open and maintain an account in its name with a registered bank, or other registered financial institution, in the Republic, and—

- (a) deposit any money received into that account; and
- (b) every payment made on its behalf must be made from that account.

(5) Cheques drawn on the account of the Commission must be signed on its behalf by two persons authorised for that purpose by a resolution of the Commission. 45

(6) The Commission may invest or deposit money that is not immediately required for contingencies or to meet current expenditures in—

- (a) a call or short-term fixed deposit account with any registered bank or financial institution in the Republic; or 50
- (b) an investment account with the Corporation for Public Deposits established in terms of section 2 of the Corporation for Public Deposits Act, 1984 (Act No. 46 of 1984).

(7) The Chief Commissioner is the accounting authority of the Commission in terms of the Public Finance Management Act. 55

(8) The Chief Commissioner must prepare financial statements for the Commission within six months after the end of each financial year in accordance with established accounting practice, principles and procedures, consisting of—

- (a) a statement reflecting, with sufficient particulars, the income and expenditure of the Commission during the preceding financial year; and 5
- (b) a balance sheet showing the state of its assets, liabilities and financial position as at the end of that financial year.

(9) The Auditor-General must each year audit the financial records of the Commission.

## **Liability**

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25. The State Liability Act, 1957 (Act No. 20 of 1957), read with the changes required by the context, applies to the Commission, but a reference in that Act to “the Minister of the Department concerned” must be interpreted as referring to the Chief Commissioner of the Commission.

## **CHAPTER 4**

15

### **INVESTIGATION, EVALUATION AND ADJUDICATION PROCEDURES**

#### **Part A**

#### ***Applications***

#### **Applications**

26. (1) A person or firm may, in the prescribed manner and form, apply to the Commission for— 20

- (a) an import or export control permit, or an amendment of such a permit, in terms of Part B of this Chapter and the regulations;
- (b) a rebate permit or certificate in terms of the Customs and Excise Act;
- (c) the amendment of customs duties, including an amendment in respect of goods imported into the Common Customs Area from a country that is not a Member State, with regard to— 25
  - (i) anti-dumping duties;
  - (ii) countervailing duties; or
  - (iii) safeguard duties; or 30

(d) the imposition of safeguard measures other than a customs duty amendment.

(2) The Commission must, subject to section 30(1) and (2), evaluate the merits of every application received by it and dispose of each application—

- (a) received in terms of subsection (1)(a) or (b), in accordance with Part B of this Chapter; or 35
- (b) received in terms of subsection (1)(c) or (d), in accordance with Part C of this Chapter.

(3) (a) The Commission may, before considering an application, give notice of the application in the *Gazette*.

(b) If it does so, the Commission must— 40

- (i) allow interested parties the prescribed time to make written representations concerning the application; and
- (ii) ensure that notice of its decision or recommendation in the matter is subsequently published in the *Gazette*.

(4) The Commission may— 45

- (a) require an applicant to provide additional information in respect of the application; or
- (b) request further information from any person or firm which makes a representation in terms of subsection (3)(b).

(5) Any person or firm may voluntarily file with the Commission any document, affidavit or statement of the views of that person or firm with regard to the application, or other relevant information. 50

(6) The Commission may amend or revoke a decision or recommendation concerning an application if—

- (a) the decision or recommendation was based on incorrect information and the applicant or supplier of the information— 55

- (i) was responsible for the error in the information; and
- (ii) benefited or could have benefited, from the decision or recommendation;
- (b) the decision was obtained by deceit; or
- (c) a person or firm has breached an obligation attached to the decision or recommendation.

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## Part B

### *Import and export control permits and rebate permits*

#### **Authority of Commission to issue import and export permits and rebate permits**

27. (1) (a) The Commission must, after evaluating an application made in terms of section 26(1) (a) or (b)— 10
- (i) refuse the application; or
  - (ii) approve the application in whole or in part and with or without conditions.
- (b) If it approves the application, the Commission must take appropriate steps to give effect to its decision in accordance with this Act or the Customs and Excise Act.
- (2) A permit issued under subsection (1) may, with regard to the goods in question, 15 prescribe—
- (a) the quantity or value of goods which may be imported or exported;
  - (b) the price at which the goods may be imported or exported;
  - (c) the period during which the goods may be imported or exported;
  - (d) the port through or from which the goods may be imported or exported; 20
  - (e) the country or territory from or to which the goods may be imported or exported;
  - (f) the manner in which the goods may be imported or exported;
  - (g) conditions relating to the possession, ownership or disposal of the goods after they have been imported, or the use to which they may be put; or 25
  - (h) any other related conditions.
- (3) Despite any other provision of this Act, a permit issued in terms of this section with regard to goods that are the subject of a notice issued by the Minister of Defence in terms of section 4C(1)(a) of the Armaments Development and Production Act, 1968, is deemed to have been revoked as of the date of that notice. 30

#### **Authority of Commission to demand trade information**

28. The Commission may, in writing, direct a person who or firm that—
- (a) imports, exports, trades or manufactures any goods; or
  - (b) in the course of whose or its business or trade, handles or has control of any goods, to provide the Commission, within a specified time, with any 35 information relating to the import, export, manufacture, supply or storage of the goods in question.

#### **Authority of Commission to suspend or cancel permits**

29. The Commission may suspend or cancel a permit issued in terms of this Act in accordance with this Chapter and the regulations. 40

## Part C

### *Customs duty applications*

#### **Customs duty applications**

30. (1) The Commission must, upon receipt of an application in terms of section 26(1)(c) or (d)— 45
- (a) notify the SACU Secretariat of the application; and
  - (b) ascertain whether an application dealing with a substantially similar matter is pending before the relevant SACU institution or has been decided upon by the relevant SACU institution within the previous six months from the date of that application. 50

(2) If the Commission determines that an application before it deals with a substantially similar matter contemplated in subsection (1)(b), the Commission may—

- (a) advise the applicant in writing that the application will not be considered and inform the SACU Secretariat accordingly; or
- (b) investigate and evaluate the application and recommend to the Tariff Board that the application be approved or rejected. 5

(3) If the Commission determines that an application before it does not deal with a substantially similar matter contemplated in subsection (1)(b), the Commission must evaluate the merits of the application and recommend to the Tariff Board that the application be approved or rejected. 10

(4) The Commission must, when evaluating a matter in terms of this section, apply any relevant rules of analysis established by the SACU Council through the formulation of policy mandates, procedures or guidelines contemplated in Article 8(2).

(5) (a) The Commission may, when considering an application referred to in section 26(1)(c), request the Commissioner for the South African Revenue Service to impose a provisional payment contemplated in Chapter VI of the Customs and Excise Act. 15

(b) If the Commission has acted in terms of paragraph (a) it must make a final recommendation to the Tariff Board when it has completed its evaluation.

### Requests

31. (1) The Commission may receive requests from SACU to— 20

- (a) evaluate a recommendation made to the Tariff Board by another Member State; or
- (b) investigate and compile information available within the Republic concerning such a recommendation.

(2) The Commission may receive a request from the National Body of a Member State to— 25

- (a) evaluate an application for a customs duty amendment received by that Member State; or
- (b) investigate and compile information available within the Republic concerning such an application. 30

(3) The Commission must, upon receiving a request in terms of subsection (1)(a) or (2)(a), evaluate the application or recommendation, and make a recommendation to the Tariff Board concerning the matter.

(4) The Commission must, upon receiving a request in terms of subsection (1)(b) or (2)(b), conduct an investigation or compile the information requested and deliver a report concerning the matter to the Tariff Board or relevant National Body, as the case may be. 35

(5) Section 26, read with the changes required by the context, applies to a request received by the Commission in terms of subsection (1) or (2).

(6) The Commission may request the National Body of another Member State to— 40

- (a) evaluate—
  - (i) an application for customs duty amendment received by the Commission; or
  - (ii) a recommendation made to the Tariff Board by another Member State; or
- (b) investigate and compile information available within its jurisdiction concerning such an application or recommendation. 45

### Consideration of alleged dumping and subsidised exports

32. (1) Despite section 1, in this section—

- (a) “export” means to bring or send goods, or to cause them to be brought or sent, into the Common Customs Area from a country or territory outside the Common Customs Area; and 50
- (b) “exporter” means any person or firm referred to in section 6 (4) who brings or sends goods, or causes them to be brought or sent, into the Common Customs Area from a country or territory outside the Common Customs Area.

(2) For the purpose of considering an application alleging the dumping or subsidised export of goods into the Common Customs Area— 55

- (a) “export price”, subject to subsections (3) and (4), means the price actually paid or payable for goods sold for export, net of all taxes, discounts and rebates actually granted and directly related to that sale;



- (b) "normal value", in respect of any goods, means—
    - (i) the comparable price paid or payable in the ordinary course of trade for like goods intended for consumption in the exporting country or country of origin; or
    - (ii) in the absence of information on a price contemplated in subparagraph (i), either—
      - (aa) the constructed cost of production of the goods in the country of origin when destined for domestic consumption, plus a reasonable addition for selling, general and administrative costs and for profit; or
      - (bb) the highest comparable price of the like product when exported to an appropriate third or surrogate country, as long as that price is representative;
  - (c) "subsidised export" means goods exported into the Common Customs Area, in respect of which the government of, or a public body within, any country—
    - (i) has provided—
      - (aa) any form of financial aid;
      - (bb) any form of assistance with its production, manufacture, transportation or export; or
      - (cc) any similar assistance; or
    - (ii) has foregone any revenue that would otherwise be due to that government or public body; and
  - (d) "public body" includes a person, firm or body that acts on behalf of the government of, or another public body within, a country.
- (3) The Commission must, in determining the margin of dumping of goods, make reasonable allowance for differences in conditions and terms of sale, differences in taxation and other differences affecting price comparability.
- (4) If the Commission, when evaluating an application concerning dumping, concludes that the normal value of the goods in question is, as a result of government intervention in the exporting country or country of origin, not determined according to free market principles, the Commission may apply to those goods a normal value of the goods, established in respect of a third or surrogate country.
- (5) The Commission must, despite the definition of "export price" set out in subsection (2), when evaluating an application concerning dumping that meets the criteria set out in subsection (6), determine the export price for the goods in question on the basis of the price at which the imported goods are first resold to an independent buyer, if applicable or on any reasonable basis.
- (6) Subsection (5) applies to any investigation of dumping if, in respect of the goods concerned—
- (a) there is no export price as contemplated in the definition of dumping;
  - (b) there appears to be an association or compensatory arrangement in respect of the export price between the exporter or foreign manufacturer concerned and the importer or the third party concerned; or
  - (c) the export price actually paid or payable is unreliable for any other reason.

## Part D

### Confidential information

#### Right of informants to claim confidentiality

33. (1) A person or firm may, when submitting information to the Commission, identify information that the person or firm claims to be information that—
- (a) is confidential by its nature; or
  - (b) the person or firm otherwise wishes to be recognised as confidential.
- (2) A person or firm making a claim in terms of subsection (1) must support that claim with—
- (a) a written statement in the prescribed form—
    - (i) explaining, in the case of information that is confidential by its nature, how the information satisfies the requirements set out in the definition of "information that is by nature confidential" in section 1 (2); or
    - (ii) motivating, in the case of other information, why that information should be recognised as confidential; and
  - (b) either—

- (i) a written abstract of the information in a non-confidential form; or
- (ii) a sworn statement setting out the reasons why it is impossible to comply with subparagraph (i).

#### Determination by Commission

34. (1) If a person or firm makes a claim in terms of section 33, the Commission must— 5
- (a) in the case of information claimed to be confidential by nature, determine whether the information satisfies the requirements of the definition of “information that is by nature confidential” set out in section 1(2); or
  - (b) in the case of other information, determine whether the information should be recognised as confidential. 10
- (2) If, upon considering a claim in terms of subsection (1)(a), the Commission determines that the information is not, by nature, confidential—
- (a) the Commission must invite the claimant to submit a further motivation for the information to be recognised as otherwise confidential; and 15
  - (b) if the claimant submits such a motivation within the prescribed time, the Commission must reconsider the claim in terms of subsection (1)(b).
- (3) Upon making a final determination in terms of subsection (1) or (2)(b), the Commission—
- (a) must notify the claimant in writing of its determination; and 20
  - (b) may, if it has determined that the information is not, by nature, confidential or should not be recognised as being otherwise confidential, advise the claimant that the information will not be considered in determining the merits of an application or other matter in question.

#### Proceedings in contested claims

35. (1) A claimant affected by a determination of the Commission in terms of section 34(3) may appeal against that determination to a High Court, subject to its rules, in the prescribed manner and form.
- (2) A person who or a firm that seeks access to information which the Commission has determined is, by nature, confidential, or should be recognised as otherwise confidential, may— 30
- (a) first, request that the Commission mediate between the owner of the information and that person or firm; and
  - (b) failing mediation in terms of paragraph (a), apply to a High Court for— 35
    - (i) an order setting aside the determination of the Commission; or
    - (ii) any appropriate order concerning access to that information.
- (3) Upon appeal in terms of subsection (1), or an application in terms of subsection (2)(b), the High Court may—
- (a) determine whether the information— 40
    - (i) is, by nature, confidential; or
    - (ii) should be recognised as being otherwise confidential; and
  - (b) if it determines that it is confidential, make any appropriate order concerning access to that confidential information.

#### Disclosure of information

36. (1) The Commission must treat any information that is the subject of a claim in terms of this Part as confidential until a final determination has been made concerning such information. 45
- (2) Once a final determination has been made concerning any information, it is confidential only to the extent that the final determination has accepted it to be confidential information. 50
- (3) For the purposes of this section and section 37, “final determination” means a decision by—
- (a) the High Court, that in terms of the rules of court may not be appealed, or has not been appealed within the time allowed; or
  - (b) the Supreme Court of Appeal. 55

## Restricted use of information

37. (1) (a) When making any decision in terms of this Act, the Commission may take confidential information into account in making its decision.

(b) If the Commission's reasons for the decision would reveal any confidential information, the Commission must, after publishing its decision in the matter, provide a copy of the proposed reasons to the party concerned within the prescribed time before publishing those reasons. 5

(2) A party may apply to a High Court, subject to its rules, within the time period contemplated in subsection (1)(b) after receiving a copy of the proposed reasons, for an appropriate order to protect the confidentiality of the relevant information. 10

(3) If a party applies to the High Court in terms of subsection (2), the Commission must not publish the proposed reasons until a final determination in the matter has been made.

## Part E

### *Powers of investigative search and inspections*

15

#### Appointment of investigating officers

38. (1) The Chief Commissioner may appoint any person in the service of the Commission, or any other suitable person, as an investigating officer.

(2) An investigating officer must be provided with a certificate of appointment signed by the Chief Commissioner stating that the person has been appointed as an investigating officer in terms of this Act. 20

(3) When an investigating officer performs any function in terms of this Act or any other law, the investigating officer must—

(a) be in possession of a certificate of appointment issued in terms of subsection (2); and 25

(b) show that certificate to any person who—  
(i) is affected by the investigation; and  
(ii) requests to see the certificate.

#### Summons

39. (1) The Chief Commissioner may— 30

(a) direct the Commission, a committee or an investigating officer to question any person under oath or affirmation; or

(b) give directions prohibiting or restricting the publication of any evidence given to the Commission.

(2) The Chief Commissioner may, at any time during an investigation in terms of this Act, summon any person who can furnish any information on the subject of the investigation, or who has possession or control of any book, document or other object that has a bearing on that subject to— 35

(a) appear before the Chief Commissioner, the Commission, a committee or a person authorised by the Chief Commissioner to be questioned; or 40

(b) deliver or produce any book, document or other object referred to in the summons, to the Chief Commissioner, the Commission, a committee or a person authorised by the Chief Commissioner, at a time and place specified in the summons.

(3) The Commission or a committee may— 45

(a) accept oral submissions from any person;

(b) accept as evidence any relevant oral testimony, document or other thing, whether or not—

(i) it is given or proven under oath or affirmation; or

(ii) would be admissible as evidence in court; or 50

(c) refuse to accept any oral testimony, document or other thing that is unduly repetitious.

(4) When the Commission or a committee hears oral testimony in terms of subsection (3), the Commission or committee—

(a) may require the witness who testified to deliver a sworn statement of the evidence given, in the prescribed manner and form; and 55

- (b) must, after the witness has complied, disregard the oral testimony of that witness and consider only the written statement of evidence of the witness.

### Witnesses

40. (1) A person questioned or giving evidence in terms of section 39, must answer every relevant question truthfully and to the best of that person's ability. 5
- (2) The law regarding a witness' privilege in a criminal case in a court of law applies equally to a person who is giving evidence in terms of section 39.
- (3) A self-incriminating answer given or statement made to a person exercising powers in terms of this Act is not admissible as evidence against the person who gave that answer or made that statement in criminal proceedings, except for perjury or an offence contemplated in section 53 or 54(2)(d). 10

### Import and export control inspections

41. (1) An investigating officer may, subject to section 38(3), conduct an inspection to determine whether Part B of Chapter 4 or any notice issued in terms of section 6 are being or have been complied with, and for that purpose may at any reasonable time— 15
- (a) enter upon and inspect any place, premises or vehicle in or on which any goods to which section 6 applies are stored, manufactured, supplied, handled, sold, removed, transported or otherwise dealt with;
  - (b) request information about any article or document from the owner of, or person in control of, the premises or from any person who has control of the article or document or from any other person who may have the information; 20
  - (c) use any computer system on the premises, or require assistance of any person on the premises to use that computer system, to—
    - (i) search for any data contained in or available to that computer system; and
    - (ii) reproduce any record from that data; 25
  - (d) attach, and, if necessary, remove from the premises for examination and safekeeping, anything that has a bearing on the inspection.
  - (e) direct any person who, or firm that, manufactures, supplies, stores, handles, sells, removes, transports or otherwise deals with any goods to which section 6 applies, or who has done any of those things with regard to such goods, or the servant or agent of such a person or firm to— 30
    - (i) produce to the investigating officer any such goods or any book or other document in connection with such goods in the custody or under the control of that person; or
    - (ii) furnish the investigating officer with any information in relation to those goods that the investigating officer specifies; 35
  - (f) inspect any such goods, any book or document, or make extracts from or copies of any such book or document;
  - (g) seize any such goods, any book or document that may afford evidence of any offence in terms of this Act; and 40
  - (h) leave on such goods, book or document or the container in which they are located, any identification mark or seal.
- (2) Section 43 to 45 do not apply to an inspection in terms of this section.

### Conduct of entry and search

42. (1) A person who enters and searches any premises must conduct the entry and search with strict regard for decency and order, and with regard for each person's right to dignity, freedom, security and privacy. 45
- (2) During a search only a female investigating officer or female police officer may search a female person, and only a male investigating officer or male police officer may search a male person. 50
- (3) A person who enters and searches premises must, before questioning anyone—
- (a) advise that person of the right to legal representation; and
  - (b) allow that person to exercise that right.
- (4) A person who removes anything from premises being searched must—
- (a) issue a receipt for it to the owner, or person in control of, the premises; and 55
  - (b) return it as soon as practicable after achieving the purpose for which it was removed.

(5) Any person who has custody or control of goods, books or documents referred to in section 41, must, subject to subsection (6), give the investigating officer the necessary assistance to examine those goods, books or documents, when requested to do so by the investigating officer.

(6) During a search, a person may refuse to permit the inspection or removal of an article or document on the grounds that it contains confidential information. 5

(7) If the owner or person in control of an article or document refuses, in terms of subsection (6), to give that article or document to the person conducting the search, the person conducting the search may request the registrar or sheriff of a High Court that has jurisdiction to attach and remove the article or document for safe custody until that court determines whether or not the information is confidential. 10

(8) Section 40(3) applies to an answer given or statement made to an investigating officer in terms of section 41.

(9) A person authorised to conduct an entry and search may, be accompanied and assisted by a police officer. 15

(10) A police officer who is acting in terms of subsection (9), may, if entry and search is refused, overcome resistance to the entry and search by using as much force as is reasonably required, including breaking a door or window of the premises.

(11) The police officer must, before using force in terms of subsection (10), audibly demand admission and announce the purpose of the entry, unless it is reasonable to believe that doing so may induce someone to destroy or dispose of an article or document that is the object of the search. 20

(12) The Commission may compensate anyone who suffers damage because of a forced entry during a search when no one responsible for the premises was present.

#### **Power to enter and search under warrant** 25

43. (1) A judge of a High Court, regional magistrate or a magistrate may issue a warrant to enter and search any premises that are within the jurisdiction of that judge or magistrate, if, from information on oath or affirmation, there are reasonable grounds to believe that anything connected with an investigation in terms of this Act is in the possession of, or under the control of, a person who is on or in those premises. 30

(2) A warrant to enter and search may be issued at any time and must specifically—

- (a) identify the premises that may be entered and searched; and
- (b) authorise an investigating officer or a police officer to enter and search the premises and to do anything referred to in section 45. 35

(3) A warrant to enter and search is valid until the—

- (a) warrant is executed;
- (b) warrant is cancelled by the person who issued it or, in that person's absence, by a person with similar authority;
- (c) purpose for issuing it has lapsed; or
- (d) expiry of one month after the date that it was issued. 40

(4) A warrant to enter and search may be executed only during the day, unless the person who issued it authorises that it may be executed at night at a time that is reasonable in the circumstances.

(5) A person executing a warrant must before commencing with the execution of the warrant— 45

- (a) provide identification to the owner or person in control of the premises and explain to that person the purpose of the warrant; and
- (b) hand a copy of the warrant to that person or to the person named in it.

(6) If no one is present on the premises, affix a copy of the warrant to the premises in a prominent and visible place. 50

#### **Power to enter and search without warrant**

44. (1) An investigating officer may, without a warrant, enter and search premises other than a private dwelling.

(2) The investigating officer conducting the search must, before entering and searching— 55

- (a) believe on reasonable grounds that a warrant would be issued under section 43 if applied for, and that the delay in obtaining a warrant would defeat the object or purpose of the entry and search; and

- (b) provide identification to the owner or person in control of the premises and explain to that person the purpose of the search; or
  - (c) get permission from that person to enter and search the premises.
- (3) An entry and search without a warrant may be carried out only during the day, unless carrying it out at night is justifiable and necessary. 5

#### Power to enter and search

45. (1) Section 42, read with the changes required by the context, applies to an entry and search under section 43 or 44.
- (2) A person who is acting under section 43 or 44 may—
- (a) enter upon or into those premises; 10
  - (b) search those premises;
  - (c) search any person on those premises if there are reasonable grounds for believing that the person has personal possession of an article or document that has a bearing on the investigation;
  - (d) examine any article or document that is on or in those premises that has a 15 bearing on the investigation;
  - (e) request information about any article or document from the owner of, or person in control of, the premises or from any person who has control of the article or document, or from any other person who may have the information;
  - (f) take extracts from, or make copies of, any book or document that is on or in 20 the premises that has a bearing on the investigation;
  - (g) use any computer system on the premises, or require assistance of any person on the premises to use that computer system, to—
    - (i) search any data contained in or available to that computer system; and
    - (ii) reproduce any record from that data; and 25
  - (h) attach, and, if necessary, remove from the premises for examination and safekeeping, anything that has a bearing on the investigation.
- (4) Section 40(3) applies to an answer given or statement made to an investigating officer in terms of this section.

### Part F 30

#### *Reviews and appeals*

##### Reviews

46. (1) A person or firm affected by a determination, recommendation or decision of the Commission in terms of section 16 or 17 or this Chapter, may apply to a High Court for a review of that determination, recommendation or decision. 35
- (2) Subject to item 2(3) of Schedule 2, a person or firm affected by a decision of the SACU Council, arising in whole or in part out of a recommendation of the Commission in terms of this Act, may apply for a review of that decision only to an institution designated by or in terms of the SACU Agreement, and in accordance with the rules of that institution. 40
- (3) The High Court may, in a review in terms of subsection (1) or item 2(3) of Schedule 2, make an order for the payment of costs against any party, or against any person who represented a party in the proceedings, according to the requirements of the law and fairness.

##### Appeals 45

47. (1) An appeal against a decision of the High Court in respect of a matter within its jurisdiction in terms of section 46 lies to the Supreme Court of Appeal, or the Constitutional Court, only with leave to appeal, and subject to their respective rules.
- (2) The right to appeal in terms of subsection (1) is—
- (a) subject to any law that specifically grants, limits or excludes any right of 50 appeal; and
  - (b) not limited by the monetary or non-monetary value of the matter in dispute.
- (3) A court granting leave to appeal in terms of this section may attach any appropriate conditions, including a condition that the applicant provide security for the costs of the appeal. 55

(4) Section 21(1A) to (3)(e) of the Supreme Court Act, 1959 (Act No. 59 of 1959), read with the changes required by the context, applies to an application to the Supreme Court of Appeal for leave to appeal under this Act.

## CHAPTER 5

### ENFORCEMENT AND OFFENCES

5

#### Variation of order

48. The Commission may, of its own accord or on application by a person or firm affected by a determination, recommendation or decision of the Commission, vary or rescind that determination, recommendation or decision—

- (a) in which there is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission; or 10
- (b) erroneously sought in the absence of a party affected by it;
- (c) made as a result of a mistake common to all of the parties to the proceedings.

#### Standard of proof

49. In any proceedings in terms of this Act, other than criminal proceedings, the standard of proof is on a balance of probabilities. 15

#### Breach of confidence

50. (1) It is an offence to disclose any confidential information concerning the affairs of any person or firm obtained—

- (a) in carrying out any function in terms of this Act; or 20
- (b) as a result of initiating a complaint, or participating in any proceedings in terms of this Act.

(2) Subsection (1) does not apply to information disclosed—

- (a) for the purpose of the proper administration or enforcement of this Act;
- (b) for the purpose of the administration of justice; 25
- (c) at the request of an investigating officer or member of the Commission entitled to receive the information; or
- (d) within the terms of appropriate order of access made in terms of section 35(2).

#### Hindering administration of Act

51. It is an offence to hinder, obstruct or unduly influence any person who is exercising a power or performing a duty delegated to conferred or imposed on, that person by this Act. 30

#### Failure to attend when summoned

52. It is an offence, when summoned in terms of section 39, to—

- (a) fail, without sufficient cause, to appear at the time and place specified or to remain in attendance until excused; or 35
- (b) attend as required, but to—
  - (i) refuse to be sworn in or to make an affirmation; or
  - (ii) fail to produce a book, document or other item as ordered, if it is in the possession of, or under the control of, that person or firm. 40

#### Failure to answer fully or truthfully

53. It is an offence, having been sworn in or having made an affirmation to—

- (a) fail to answer any question fully and to the best of one's ability; or
- (b) give false evidence, knowing or believing it to be false.

#### Other offences

45

54. (1) It is an offence to fail to comply with—

- (a) a notice issued in terms of section 6;

- (b) a condition stated in a permit issued in terms of Part B of Chapter 4;
  - (c) a directive given in terms of section 28;
  - (d) an interim or final order made in terms of this Act.
- (2) It is an offence to—
- (a) improperly attempt to influence the Commission concerning any matter connected with an investigation; 5
  - (b) anticipate any findings of the Commission concerning an investigation in a way that is calculated to influence the proceedings or findings;
  - (c) do anything in connection with an investigation that would have been contempt of court if the proceedings had occurred in a court of law; 10
  - (d) knowingly provide false information to the Commission;
  - (e) wilfully interrupt the proceedings in the place where a hearing is being conducted;
  - (f) act contrary to a warrant to enter and search;
  - (g) falsely represent oneself as an investigating officer. 15

### Penalties

55. (1) Any person or firm convicted of an offence in terms of this Act, is liable—
- (a) in the case of a contravention of section 54(1), to a fine not exceeding R500 000,00 or to imprisonment for a period not exceeding ten years, or to both such fine and imprisonment; 20
  - (b) in case of a contravention of section 50, 53, 54(2)(c) or 54(2)(d), to a fine not exceeding R250 000,00 or to imprisonment for a period not exceeding five years, or to both such fine and imprisonment; or
  - (c) in any other case, to a fine not exceeding R20 000,00 or to imprisonment for a period not exceeding six months, or to both such fine and imprisonment. 25
- (2) A court convicting a person or firm of importing or exporting, or attempting to import or export, goods in contravention of a notice issued in terms of section 6, or failing to comply with a condition of a permit issued in terms of section 27, may declare the goods in question, or the right of that person or firm to those goods, forfeited to the State. 30
- (3) A declaration in terms of subsection (2) does not affect the rights to the goods in question of any person or firm other than the convicted person or firm, unless it is proved that the other person or firm should reasonably have known that the goods were being dealt with in contravention of the notice or condition in question.
- (4) Section 35 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), read with the changes required by the context, applies to a forfeiture under subsection (2). 35

### Magistrates' Court jurisdiction to impose penalties

56. Despite anything to the contrary contained in any other law, a Magistrates' court has jurisdiction to impose any penalty provided for in this Act.

### Serving of documents 40

57. Unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be served on or given to a person or firm, is regarded as properly served or given when it is—

- (a) delivered to that person or firm in the prescribed manner; or
- (b) sent by registered post to the last known address of that person or firm. 45

### Proof of facts

58. In any criminal proceedings in terms of this Act, upon proof that a statement, entry, record or information that appears in or on a book, document, plan, drawing or computer storage medium, is false—

- (a) the person who was in possession of, or in control of, such book, document, plan, drawing or computer storage medium; and 50
- (b) any person who knew or ought to have known about the entry, record or information,

must in the absence of evidence to the contrary which raises a reasonable doubt, be presumed to be responsible for the false statement, entry, record or information. 55



## CHAPTER 6

## GENERAL PROVISIONS

**Regulations**

59. The Minister may make regulations—
- (a) regarding the proceedings and functions of the Commission, after consulting the Commission; 5
  - (b) to give effect to the objects of this Act; and
  - (c) on any matter that may or must be prescribed in terms of this Act.

**Guidelines**

60. (1) The Commission may issue guidelines on the Commission's policy approach 10  
to any matter within its jurisdiction.
- (2) A guideline issued in terms of subsection (1)—
- (a) must be published in the *Gazette*; but
  - (b) is not binding on the Commission, any SACU institution or any Court.

**Official seal** 15

61. The President may, by proclamation in the *Gazette*, prescribe an official seal for the Commission.

**Act binds State**

62. This Act binds the State.

**Transitional arrangements and repeal of laws** 20

63. (1) Schedule 2 regulates transitional arrangements in respect of international trade administration within the Republic.
- (2) The laws specified in Schedule 3 are, subject to subsection (3) and Schedule 2, repealed to the extent indicated in the third column of that Schedule.
- (3) Despite subsection (2), a regulation promulgated in terms of the Import and Export Control Act, 1963 (Act No. 45 of 1963), and in force immediately before this Act came into operation, must be regarded as being a regulation made in terms of this Act. 25

**Short title and commencement**

64. (1) This Act is called the International Trade Administration Act, 2002, and comes into operation on a date fixed by the President by proclamation in the *Gazette*. 30
- (2) Sections 4, 15(3), 16, 19, 20, 30, 31 and 46(2) and item 2(3) of Schedule 2, may not come into operation until the SACU Agreement has become law in the Republic.

**SCHEDULE 1**

**SACU AGREEMENT**

The Sacu Agreement is to be inserted pursuant to its final conclusion and to the relevant constitutional requirements pertaining to international agreements having been met.

## SCHEDULE 2

### TRANSITIONAL PROVISIONS

#### Definitions

**1.** In this Schedule—

“Board” means the Board on Tariffs and Trade constituted in terms of the Board on Tariffs and Trade Act, 1986 (Act No. 107 of 1986); and

“matter pending” means any matter that had been received, but not disposed of, by the Board prior to its close of business on the day immediately before this Act came into operation.

#### Implementation of SACU Agreement

**2.** (1) Before the sections listed in section 64(2) come into operation, the Commission must investigate, and evaluate applications received by it in terms of section 26(1)(c) or (d) in accordance with section 32, read with the Board on Tariffs and Trade Act, as if that Act had not been repealed.

(2) For the purposes of this item—

(a) section 26(1)(c) must be regarded as if it read:

“(c) the amendment of customs duties, including an amendment in respect of any of the following matters arising in respect of goods imported into the Republic—

(i) anti-dumping duties;

(ii) countervailing duties; or

(iii) safeguard duties; or”;

(b) section 26(2)(b) must be regarded as if it read:

“(b) received in terms of subsection (1)(c) or (d), in accordance with the provisions of item 2 of Schedule 2”; and

(c) a reference in the Board on Tariffs and Trade Act to the Board must be regarded as referring to the Commission.

(3) Until the SACU Agreement provides for a review of decisions of the SACU Council, contemplated in section 46(2), a person or firm affected by such a decision may apply to a High Court for a review of that decision, unless that or a related person or firm has sought a review of the same decision in terms of the law of another Member State.

#### Composition of Commission

**3.** Despite section 8, a person who was, a member of the Board immediately before this Act came into operation, is, a member of the Commission, for a term that expires on the date that such appointment to the Board would have expired, had this Act not come into operation.

#### Pending applications and other Board business

**4.** (1) Any matter pending before the Board immediately before this Act came into operation and in respect of which the Board has not reported to the Minister in terms of section 4(1)(b) of the Board on Tariffs and Trade Act, 1986, must be proceeded with by the Commission in terms of this Act.

(2) Any matter on which the Board reported to the Minister in terms of section 4(1)(b) of the Board on Tariffs and Trade Act, 1986, before this Act came into operation must be proceeded with in terms of that Act as if it had not been repealed.

(3) Any summons issued by the Board in terms of section 12 of the Board on Tariffs and Trade Act, 1986, that is returnable after this Act comes into operation must be regarded—

(a) as a summons to appear before the Commission on the date and at the time and place shown on the summons; and

(b) as having been issued by the Chief Commissioner in terms of this Act.

(4) A permit issued or notice given in terms of the Import and Export Control Act, 1963, and valid immediately before this Act came into operation, must be regarded as a permit issued or notice given in terms of this Act.

### Statutory references

5. (1) Any reference in any law to—
- (a) the “Board on Tariffs and Trade Act, 1986”, must be regarded as a reference to this Act;
  - (b) the “Board on Tariffs and Trade established in terms of the Board on Tariffs and Trade Act, 1986”, must be regarded as a reference to the Commission for International Trade Administration established in terms of this Act;
  - (c) a “report and recommendation to the Minister referred to in section 4(1)(b) of the Board on Tariffs and Trade Act, 1986”, depending on the context, must be regarded as a reference to either—
    - (i) a “recommendation concerning a matter to the Tariff Board” in terms of section 30; or
    - (ii) the “determination” of a matter in terms of section 27(1)(a); and
  - (d) an “enquiry referred to in section 12 of the Board on Tariffs and Trade Act, 1986”, must be regarded as a reference to an “investigation” in terms of this Act.
- (2) A reference to the “Director-General: Trade and Industry” in section 48(2A) of the Customs and Excise Act, must be regarded as a reference to the Commission for International Trade Administration.

### Status of Board Employees and others

6. (1) An outstanding delegation to an officer or employee of the Department of Trade and Industry in terms of section 13 of the Board on Tariffs and Trade Act, 1986, may not be continued under this Act.
- (2) A person who, immediately before this Act came into operation, was designated in terms of section 14 of the Board on Tariffs and Trade Act, 1986, as an investigating officer, or was designated in terms of section 3A (2) of the Import and Export Control Act, 1963, as an inspector, is not an investigating officer in terms of this Act unless appointed in terms of section 38 of this Act.
- (3) An officer or employee appointed in terms of the Public Service Act, 1994 (Proclamation No 103 of 1994), to serve the Board immediately before this Act came into operation, continues to be an officer or employee under the Public Service Act, 1994.
- (4) If an officer or employee referred to in subitem (3) is appointed as an officer or employee of the Commission, the accumulated value of that person’s contributions to any pension fund, together with the accumulated value of the contributions made to that fund by the person’s employer, may be transferred to a pension fund established for the staff of the Commission.

## SCHEDULE 3

## REPEAL OF LAWS (SECTION 63(2))

No and year of Act	Short title	Extent of repeal
Act No. 107 of 1986	Board on Tariffs and Trade Act, 1986	The whole
Act No. 60 of 1992	Board on Tariffs and Trade Amendment Act, 1992	The whole
Act No. 39 of 1995	Board on Tariffs and Trade Amendment Act, 1995	The whole
Act No. 16 of 1997	Board on Tariffs and Trade Amendment Act, 1997	The whole
Act No. 45 of 1963	Import and Export Control Act, 1963	The whole
Act No. 61 of 1967	Import and Export Control Amendment Act, 1967	The whole
Act No. 8 of 1984	Import and Export Control Amendment Act, 1984	The whole
Act No. 44 of 1990	Import and Export Control Amendment Act, 1990	The whole

## **MEMORANDUM ON THE OBJECTS OF THE INTERNATIONAL TRADE ADMINISTRATION BILL, 2002**

### **1. INTRODUCTION**

The Bill creates a new body, namely the International Trade Administration Commission (ITAC). The establishment of an independent body to regulate and administer international trade instruments arises firstly out of the drive of the Department of Trade and Industry (DTI) to enhance its delivery capacity by separating implementation functions from administrative and regulatory functions. Secondly, the new SACU Agreement establishes among others a SACU Tariff Board (comprising of trade experts from member countries who will deliberate on tariff amendments and whose recommendations will then be forwarded to the SACU Council of Ministers for final decision) that will rely on national bodies for undertaking a number of functions to support it in formulating recommendations on the common external tariff and trade remedies.

### **2.1 THE BILL**

The Bill comprises of six chapters and three schedules which seek to—

- (a) provide a framework for carrying out the legal obligations of the Republic under the SACU Agreement, which will become part of the domestic law of the Republic in terms of section 49 of the Customs and Excise Act, 1964 (Act No. 91 of 1964);
- (b) establish ITAC to carry out the investigation and adjudication of international trade applications or complaints in the Republic;
- (c) repeal the present Board on Tariffs and Trade Act, 1986 (Act No. 107 of 1986) (BTT Act); and
- (d) repeal the present Import and Export Control Act, 1963 (Act No. 45 of 1963), re-enacting its substantive provisions and assigning to the ITAC the responsibility for issuing import and export permits.

### **2.2 Transitional concerns relating to SACU Agreement**

Although the SACU Agreement has been given ministerial approval by all the parties, it is generally recognised that further work will be required by SACU member states before the structures anticipated in the Agreement will be sufficiently developed to carry out their anticipated functions with respect to establishing customs duties.

The Bill has been drafted to prepare for the regime that will come into operation once SACU's institutions are fully developed. A transitional mechanism has been proposed to bridge the gap between the old order legislation and the coming to fruition of the policy of the Republic as reflected in this Bill and the SACU Agreement.

Under those provisions all sections of this Bill dealing with the implementation of the SACU Agreement are identified by number in the "Short title and commencement" provision.

These provisions will come into operation once the SACU Agreement becomes law in the Republic, and later if it is considered expedient to extend the transitional period. Until the identified sections come into operation, the ITAC will have authority to carry out its functions with respect to customs duty matters in terms of the relevant provisions of the BTT Act, despite its repeal.

2.3 In summary it is anticipated that the transformation from the old order to the new, with respect to customs duty matters, may be characterised by the following three phases:

- (a) Old order: Board on Tariffs and Trade (BTT) functioned in terms of the BTT Act.
- (b) Transition: ITAC functions in terms of this Bill and the residual effect of section 4 of the BTT Act.
- (c) New order: ITAC functions in terms of this Bill if it becomes law and the SACU Agreement.

## Chapter 1

Chapter 1 sets out the objects of the Bill, its scope of application, definitions and other interpretation rules to be applied in the Act. In general the Bill applies to all economic activity in the Republic, with only one exception. Re-enacting a provision from the Export and Import Control Act, 1963, section 3(2) exempts certain designated military goods from the application of the import and export control provisions of the Bill, because the import and export of those goods is regulated in terms of the Armaments Development and Production Act, 1968 (Act No. 57 of 1968).

## Chapter 2

In this Chapter SACU is recognised as a juristic person within the Republic and various provisions assign authority or responsibility to act for the Republic in relation to the SACU Agreement. The Chapter further assigns to the Minister of Trade and Industry (Minister) authority to issue Trade Policy Statements and Directives, which will be binding on the ITAC. Finally the Chapter re-enacts the provisions of the Import and Export Control Act, 1963, which allowed the Minister to prescribe import and export restrictions on specified goods.

## Chapter 3

This Chapter establishes the ITAC which replaces the BTT, which operated in terms of the BTT Act. The ITAC will continue to perform the functions assigned to the BTT in terms of any other laws, and in addition will have a new mandate to carry out the following functions:

- \* Investigation and evaluation of alleged dumping, subsidised exports and disruptive competition.
- \* Investigation and evaluation of applications for amendment of customs duties.
- \* Investigation, evaluation and determination of applications and issuing of permits in respect of rebates and certificates in terms of the Customs and Excise Act, 1964, or import and export control permits.
- \* Monitoring, review and reporting to the Minister on matters that may be assigned to it from time to time.

The ITAC as proposed will have a full-time Chief Commissioner and Deputy Chief Commissioner and up to ten additional full-time or part-time Commissioners. All Commissioners are to be appointed by the President for terms of up to five years. Although reappointment is provided for, no person may serve as Chief Commissioner for more than ten consecutive years. The independence of the ITAC is secured by a series of standard provisions in the Bill addressing matters of tenure, conditions of service, conduct in office and relationship with the public service.

The ITAC is authorised to engage with bodies established in terms of the SACU Agreement and to cooperate and engage in joint activities with comparable bodies established by other member states of SACU. Finally the Chapter sets out the ITAC's reporting responsibilities to the Minister and those of the Minister to Parliament.

## Chapter 4

Chapter 4, which is divided into six subparts, addresses general principles for the conduct of procedures established by the Bill.

**Part A:** Application procedures: provides for the right of persons or firms to lodge applications with the ITAC, imposes on the ITAC a general obligation (with few exceptions) to investigate and evaluate each application received and empowers the ITAC to seek information in respect of an application.

**Part B:** Import and export permits: essentially re-enacts the provisions of the Import and Export Control Act, 1963, that authorise ITAC to investigate, evaluate and determine applications for permits and to issue, suspend or cancel such permits.

**Part C:** Tariff applications: imposes on the ITAC rules for proceeding with customs duty applications, including provisions to report to the SACU Tariff Board, which will make final recommendations on customs duties to the SACU Council of Ministers. In

addition certain general standards are set out for ITAC to follow when considering an application concerning the dumping of goods. The inclusion of those standards brings the Bill within accepted international norms as set out in WTO protocols.

**Part D:** Confidential information: sets out general principles for handling trade secrets and other proprietary or personal information submitted to the ITAC in the course of an investigation. The principles meet and exceed the standards acceptable to the WTO as set out in its protocols.

**Part E:** Investigations and inspections: empowers the ITAC to issue summons in support of its investigative functions, to take statements under oath and to question witnesses. Furthermore, the Chapter sets out the conditions and authority for conducting searches in terms of the Bill, either with or without a warrant. The provisions in this Part are patterned after those of the Competition Act, 1998 (Act No. 89 of 1998), and in other legislation and as such are believed to satisfy all relevant constitutional law standards.

**Part F:** Reviews and appeals: establishes and limits the right to appeal to the High court or take matters on review to the High court and clarifies the scope of the court's jurisdiction and the excise of any right to appeal from a decision.

## Chapter 5

This Chapter provides for the enforcement of the Bill through standard offence provisions and a scale of penalties on conviction of any offence. Specifically:

- (a) failure to comply with an interim or final order is punishable by a fine not exceeding R500 000, imprisonment for up to ten years or both;
- (b) offences relating to unauthorised disclosure of confidential information, giving false evidence or acting in a manner equivalent to contempt of court are punishable by a fine not exceeding R250 000, imprisonment for a period of up to five years or both; and
- (c) all other offences are punishable by a fine not exceeding R20 000, imprisonment for up to six months or both.

## Chapter 6

This Chapter sets out general provisions, including the authority of the Minister to make regulations to give effect to the objects of the Bill. The DTI proposes to prepare draft regulations that will expand on the principles of the Bill, particularly as needed to give further detail relating to the procedural matters addressed in Chapter 4.

**Schedule 1** sets out the SACU Agreement.

**Schedule 2** provides for the rules for the effective transition from the current regime in terms of the BTT Act and the Import and Export Control Act, 1963, to that established in terms of this Bill.

**Schedule 3** lists the laws being repealed by this Bill.

## 3. FINANCIAL IMPLICATIONS FOR STATE

Regarding the new SACU Agreement, payments to the BLNS states for 2002/2003 have been calculated according to the 1969 formula and they are at present receiving their shares in quarterly payments. There will therefore be no financial implications for the current financial year. If, however, the new agreement enters into force before the end of 2002/2003 and the member states agree to implement the new formula in the 2003/2004 financial year, payments in that and all ensuing years will differ from those under the existing agreement. Although there is insufficient data to calculate the exact implications of the new formula in 2003/2004, preliminary estimates by the National Treasury indicate that the new formula will result in significant long-term savings for South Africa. In the short term South Africa may bear the cost of additional adjustment payments to the BLNS states to account for existing lags in the 1969 formula. However, this matter remains the subject of negotiations between the Ministers of Finance of the respective member states.



If the Bill becomes law during the current financial year, the ITAC will be autonomous from the DTI and will require a separate budget. This has been taken into account in the National Medium Term Expenditure Estimates of the DTI as a transfer payment.

#### **4. CONSTITUTIONAL IMPLICATIONS**

The new SACU Agreement will be submitted for ratification by Parliament in accordance with the provisions of section 231 of the Constitution. Amendments may also be required to other legislation governing the relationship with the other SACU states, e.g. the Customs and Excise Act, 1964. These amendments will be submitted to Parliament in due course.

#### **5. DEPARTMENTS/BODIES CONSULTED**

- \* National Treasury
- \* National Department of Agriculture
- \* Department of Foreign Affairs
- \* South African Revenue Service
- \* South African Reserve Bank
- \* Competition Commission
- \* NEDLAC

#### **6. PARLIAMENTARY PROCEDURE**

The Department of Trade and Industry and the State Law Advisers are of the opinion that the Bill should be dealt with in accordance with the procedure set out in section 76 of the Constitution since it deals with "Trade", which is a matter listed in Schedule 4 to the Constitution.