



International Trade Administration Commission of South Africa

DRAFT SAFEGUARD REGULATIONS

The International Trade Administration Commission (ITAC) hereby invites all interested parties to comment on the draft safeguard regulations. These draft regulations do not relate to safeguard measures provided for in the Agreement on Agriculture, safeguard measures in terms of preferential trade agreements and in terms of any country's Protocol of Accession to the WTO.

Interested parties are reminded of the following basic characteristics of safeguard measures:

- (a) A safeguard can be a customs duty and/or quantitative import restriction;
- (b) If a quantitative import restriction is used, it should not normally reduce imports below a level lower than the average during the preceding three years;
- (c) Safeguard measures are normally applied to imports from all countries even if the imports, which cause serious harm, originate mainly or only from one country;
- (d) A safeguard measure must be progressively liberalized at regular intervals throughout its period of validity;
- (e) A safeguard measure can only be in place for a period not exceeding 4 years, but the application thereof may be extended by up to 6 years under certain conditions, including that there must be a further liberalization of the measure;
- (f) Any safeguard measure imposed for a period of 2 years or longer must be reviewed at its halfway term.
- (g) A safeguard measure may not be re-imposed for a certain period after a safeguard measure had been in place on the same product;
- (h) If SACU introduces a safeguard measure its may be forced to compensate its trading partners affected by such measure;
- (i) The investigation of the merits of a safeguard measure and the implementation of a safeguard measure are subject to prescribed notifications and

consultations between SACU, its trading partners and the World Trade Organisation (WTO).

Interested parties are invited to submit their comments in writing to Adv. Gustav Brink, fax (012) 428 7736 or email gbrink@itac.org.za, on or before 15 March 2004.

REPUBLIC OF SOUTH AFRICA

THE INTERNATIONAL TRADE ADMINISTRATION COMMISSION

DRAFT SAFEGUARD REGULATIONS

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DRAFT REGULATIONS

1. Application of regulations

- 1.1 A safeguard measure may be applied only where:
- (a) the Commission finds that the product under investigation is being imported into the Common Customs Area of SACU in such increased quantities, absolute or relative to SACU production, and under such conditions as to cause or threaten to cause serious injury to the SACU industry that produces like or directly competitive products.³
 - (b) such measures are required to provide the SACU industry an opportunity to restructure; and
 - (c) the SACU industry has submitted a detailed plan indicating how it plans to adjust to meet international competition.
- 1.2 The Commission, in considering the recommendation of a definitive safeguard measure, may take into consideration the requirement of compensation to countries whose exports will be substantially affected by any safeguard measure.
- 1.3 Nothing in these regulations shall preclude the Commission from taking safeguard action in terms of a free trade agreement concluded between the Republic or the SACU and any other country or customs territory. Any safeguard action so taken shall be taken in line with the terms and conditions agreed upon in such free trade agreement.
- 1.4 Nothing in these regulations shall preclude the Commission from taking special safeguard action in terms of any country's Protocol of Accession to the World Trade Organisation. Any safeguard action so taken shall be taken in line with the terms and conditions stated in the Protocol of Accession.

2. Definitions

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

“deadlines” shall be interpreted as the final date for submissions, responses, comments and requests and the like as envisaged by the different sections of

these Regulations, and shall be deemed to be at 15h00 South African standard time on the deadline indicated, unless expressly otherwise indicated.

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

“good cause” for an extension of the submission of information does not include merely citing insufficient time to submit information to the Commission;

“investigation period for injury” is the period for which it is assessed whether the SACU industry experienced serious injury. The investigation period for injury shall be clearly indicated in the initiation notice published in the *Government Gazette*;

“like or directly competitive product” means a product that competes directly with the product under investigation;

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

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

“Related parties” are parties deemed to be related for purposes of a safeguard investigation if –

- (a) one directly or indirectly owns, controls or holds five per cent or more of the equity shares of the other;
- (b) one has the power to directly or indirectly nominate or appoint a director to the 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;

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

Where a SACU producer is –

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

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

3. Confidentiality

3.1 Interested parties providing confidential information in any correspondence shall be required to furnish non-confidential summaries thereof. These summaries shall –

- (a) indicate in each instance where confidential information has been omitted;
- (b) indicate in each instance the reasons for confidentiality; and
- (c) be in sufficient detail to permit other interested parties a reasonable understanding of the substance of the information submitted in confidence.

3.2 Where information does not permit summarisation reasons should be provided 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) individual sales prices;

(g) information, the release of which could have serious consequences for the person that provided such information; and

(h) information that would be of significant competitive advantage to a competitor;

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

3.4 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 proper non-confidential version and may return such information to the party submitting same, if the non-confidential version remains deficient after such party had the opportunity to rectify any deficiencies.

3.6 The Commission will disregard any information indicated to be confidential that is not accepted as confidential by the Commission under section 34(1) of the *Main Act*.

4. Investigations

4.1 Except as provided for in subsection 2, a safeguard investigation shall only be initiated upon acceptance of a written application by or on behalf of the SACU industry, that contains sufficient evidence to establish a *prima facie* case that the product under investigation is being imported into the Republic or the Common Customs Area of SACU in such unexpected increased quantities, absolute or relative to SACU production, and under such conditions as to cause or threaten to cause serious injury to the SACU industry that produces like or directly competitive products.

4.2 The Commission may initiate a safeguard investigation without having received a written application from the SACU industry. In such cases the Commission shall proceed only if it has sufficient evidence to establish a *prima facie* case that the product under investigation is being imported into the Republic or the Common Customs Area of SACU in such increased quantities, absolute or relative to SACU production, and under such conditions as to cause or threaten to cause serious injury to the SACU industry that produces like or directly competitive products. A non-confidential version of the

information the Commission relies on shall be made available to all participating interested parties.

5. Oral hearings

- 5.1 Any participating interested party may request an oral hearing during the preliminary and/or final investigation phases of an investigation, provided the party indicates reasons for not relying on written submissions only. The Commission may refuse an oral hearing if granting such hearing will unduly delay the finalisation of a preliminary or final determination.
- 5.2 No request for an oral hearing will be considered more than 60 days after the initiation of the investigation.

6. SACU industry

- 6.1 Other than investigations initiated in terms of section 4.2, any application for safeguard action shall be brought by or on behalf of the SACU industry.
- 6.2 An application shall be regarded as brought by or on behalf of the SACU industry if –
 - (a) at least 25 per cent of the SACU producers by domestic production volume support the application; and
 - (b) of those producers that express an opinion on the application, at least 50 per cent by domestic production volume support such application.
- 6.3 In the case of industries involving an exceptionally large number of producers, the Commission may determine support and opposition by reference to the largest number of producers that can 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.
- 6.4 If a SACU producer withdraws the application or its support thereof after the investigation has been initiated, the Commission may -
 - (a) terminate the investigation; or
 - (b) disregard the withdrawal of support and continue with its investigation as if all requirements in subsections 1, 2 and 3 have been met.

7. Serious injury

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

7.2 In determining serious injury to the SACU industry the Commission shall consider –

(a) the rate and amount of the increase in imports of the product concerned -

(i) in absolute terms; and

(ii) relative to the production and demand in SACU; and

(b) whether there have been significant changes in the performance of the SACU industry in respect of the following potential injury factors:

(i) sales volume;

(ii) profit and loss;

(iii) output;

(iv) market share;

(v) productivity;

(vi) capacity utilisation;

(vii) employment; and

(viii) any other relevant factors placed before the Commission.

7.3 The Commission may require any additional information on injury from the SACU industry at any stage during an investigation.

7.4 Each of the factors mentioned in subsection 2 shall be considered for the like and directly competitive products only or, where such analysis is not possible, for the narrowest group of products for which such analysis can be made.

8. Threat of serious injury

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

9. Causality

9.1 In considering whether there is a causal link between the imports of the product concerned and the serious injury the Commission shall consider all

relevant factors including factors other than the imports of the product concerned that may have contributed to the SACU industry's injury, provided that a participating interested party has submitted, or the Commission otherwise has, information on such factor or factors.

9.2 The injury caused by other factors shall not be attributed to the imports.

10. Properly documented application

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

10.2 In determining whether a complaint submitted in terms of subsection 1 constitutes a properly documented application, the Commission shall determine whether –

(a) the application includes such information as is reasonably available to the applicant; and

(b) a proper non-confidential version has been submitted.

10.3 The Commission will return all applications that are not properly completed to the applicant. This shall in no way prejudice the right of the SACU industry to submit a new application.

11. Serious injury standard for initiation purposes

In determining serious injury to a SACU industry the Commission shall consider whether the information submitted in this regard and relating to the factors listed in section 7 establishes a *prima facie* case of serious injury or threat thereof.

12. Merit Assessment

12.1 In its merit assessment the Commission shall determine whether there is sufficient information to establish a *prima facie* case that the SACU industry is experiencing serious injury, or a threat of serious injury, as a result of an unforeseen surge of imports.

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

13. Initiation and notification

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

13.2 The initiation notice shall contain at least the following information:

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

13.3 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.

13.4 Within 7 days after initiation the Commission shall –

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

14. Responses by interested parties

14.1 All interested parties will receive 20 days from the initiation of an investigation to comment on the application.

14.2 The Commission may grant an extension for the submission of comments on good cause shown.

14.3 The Commission may prescribe the format in which submissions should be made.

14.4 All submissions shall be made in both hard copy and in electronic format, unless the Commission has agreed otherwise in writing. Failure to comply with this provision may result in the submission being regarded as deficient.

14.5 The Commission may request any additional information from any participating interested party at any stage of the investigation, and may prescribe the necessary deadline for the submission of such information.

15. Non-cooperation

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

16. Provisional measures

16.1 The Commission may request the Commissioner for the South African Revenue Service, in terms of section 57A of the Customs and Excise Act, 91 of 1964, to impose a provisional measure as soon as the Commission has made a preliminary determination that –

- (a) a delay would cause damage that would be difficult to repair; and
- (b) there is clear evidence that increased imports have caused or are threatening serious injury.

16.2 Provisional measures may be imposed for a maximum period of 200 days.

16.3 The period for which provisional measures are in force shall be regarded as part of the total duration for which safeguard measures are in force.

16.4 The Commission will provide an opportunity for consultations with participating interested parties following the imposition of provisional measures.

17. Preliminary report

17.1 In the event that the Commission requests the imposition of a provisional safeguard measure, as contemplated in section 16, the Commission shall make available a public report within seven days of the publication of its preliminary finding.

17.2 The preliminary report shall contain at least the following information:

- (a) identity of the applicant;
- (b) a full description of the product under investigation, as well as the directly competitive products, including the tariff classifications;
- (c) date of the Commission's decision to initiate the investigation;

- (d) initiation date and notice number;
- (e) date of the Commission's preliminary determination;
- (f) the injury factors considered;
- (g) the causality factors considered;
- (h) the Commission's finding, including the preliminary safeguard measure requested; and
- (i) while preserving the requirements of confidentiality, all relevant issues of fact and law considered by the Commission in reaching its preliminary determination.

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

18. Comments on preliminary report

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

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

19. Final determination

19.1 In its final determination the Commission shall consider whether –

- (a) the SACU industry is experiencing serious injury or threat of serious injury, as contemplated in sections 7 and 8;
- (b) there was a surge of imports;
- (c) any surge of imports can be attributed to unforeseen developments;
- (d) other factors contributed significantly to the serious injury; and
- (e) the imposition of a safeguard measure would be in the public interest.

19.2 In determining whether a safeguard measure would be in the national interest the need to take note of the trade distorting effect of the surge in imports and the need to restore effective competition shall be given special consideration.

19.3 The Commission shall issue a public report indicating the reasons for its final determination within seven days of the publication of the final determination.

19.4 The public report referred to in subsection 3 shall reflect –

- (a) all issues contemplated under section 7.2; and

- (b) the basis of its recommendation for
 - (i) a definitive safeguard measure; or
 - (ii) terminating the investigation.

20. Definitive safeguard measures

- 20.1 A safeguard measure shall be applied only –
 - (a) to the extent necessary to prevent or remedy serious injury; and
 - (b) to facilitate adjustment of the SACU industry.
- 20.2 The SACU industry may be required to submit a plan indicating how it will adjust to increase its competitiveness. Such adjustment plan should reach the Commission no later than 60 days after initiation of the investigation in the *Government Gazette*.
- 20.3 The Commission may grant an extension for the submission of an adjustment plan on good cause shown.
- 20.4 If the Commission proposes applying or extending a safeguard measure it shall provide representatives of countries having a substantial interest as exporters of the product under investigation 30 days for consultations with a view to, *inter alia* –
 - (a) reviewing the information relating to the existence of serious injury or the threat thereof caused by increased imports, the precise description of the product involved, the proposed measure, the proposed date of introduction, the expected duration of the measure and the timetable for progressive liberalization;
 - (b) exchanging views on the measure; and
 - (c) reaching an understanding on ways to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between South Africa and the exporting countries which would be affected by such a measure.
- 20.5 Other than as contemplated in subsection 19 a safeguard measure shall be applied to all imports of the subject product irrespective of its source.
- 20.6 The Commission may recommend a definitive safeguard measure in the form of –
 - (a) A customs duty;
 - (b) a quantitative restriction; or

- (c) a combination of the measures contemplated under paragraphs (a) and (b).
- 20.7 A definitive measure may remain in place for a period not exceeding four years, unless extended in terms of subsection 8.
- 20.8 A definitive measure may be extended by a period of up to six years where the Commission finds that –
- (a) the lapse of the safeguard measure imposed in terms of subsection 7 is likely to lead to the recurrence of serious injury; and
 - (b) there is evidence that the SACU industry is adjusting.
- 20.9 Where a definitive safeguard measure is imposed for a period exceeding one year the Commission shall recommend how the measure should be liberalised over the period that the measure is applied.
- 20.10 Where the application of a safeguard measure is extended in terms of subsection 8 the safeguard shall continue to be further liberalised over the period of its application.
- 20.11 Where a definitive safeguard measure is imposed for a period exceeding two years, the Commission shall self-initiate a review of the measure at the halfway mark of the application of the safeguard measure to determine whether –
- (a) the continued application of the safeguard measure is required;
 - (b) the safeguard measure cannot be liberalised at an increased pace; and
 - (c) the SACU industry is implementing its adjustment programme.
- 20.12 If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury.
- 20.13 In cases in which a quota is allocated among supplying countries, the Commission may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned.
- 20.14 In cases in which the method contemplated in subsection 13 is not reasonably practicable, the Commission shall allot to exporting countries having a substantial interest in supplying the product shares based upon the proportions supplied by such exporting countries during a previous representative period, of

the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product.

- 20.15 The Commission may depart from the provisions of subsection 14 provided that –
- (a) the Commission finds the presence of serious injury;
 - (b) consultations are conducted with such exporting countries; and
 - (c) clear demonstration is provided to the Commission that –
 - (i) imports from certain countries have increased in disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period,
 - (ii) the reasons for the departure from the provisions in subsection 14 are justified, and
 - (iii) the conditions of such departure are equitable to all suppliers of the product concerned.
- 20.16 A safeguard measure imposed in terms of subsection 15 may not be extended beyond the initial period for which it was imposed.
- 20.17 A safeguard measure may not be applied again to the import of a product that has been subject to a safeguard measure unless a period of time equal to half that during which such a measure had been previously applied, has lapsed, provided that the period of non-application is at least two years.
- 20.18 Notwithstanding the provisions of subsection 17, a safeguard measure with a duration of 180 days or less may be applied again to the import of a product if:
- (a) at least one year has elapsed since the date of introduction of a safeguard measure on the import of that product; and
 - (b) such a safeguard measure has not been applied on the same product more than twice in the five-year period immediately preceding the date of introduction of the measure.
- 20.19 Safeguard measures shall not be applied against a product originating in a developing country as long as its share of imports of the product concerned in SACU does not exceed three per cent, provided that developing countries with less than three per cent import share collectively account for not more than nine per cent of total imports of the product concerned.

20.20 A developing country exempted from the application of a safeguard measure in terms of subsection 19 may become subject to such safeguard measure without a new investigation being conducted if, subsequent to the imposition of the safeguard measure, its share of the imports increases to a level that exceeds three percent of the total import volume in the original investigation period.

21. Judicial reviews

21.1 Without limiting a court of law's jurisdiction to review final decisions of the Commission, participating interested parties may challenge preliminary decisions or the Commission's procedures prior to the finalisation of an investigation in cases where it can be demonstrated that –

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

21.2 Participating interested parties must give the Commission at least 30 days' notice prior to filing any judicial review relating to preliminary or final determinations.