

Report No. 457

Investigation into remedial action in the form of a safeguard against the increased imports of frozen potato chips: Final determination

The International Trade Administration Commission of South Africa herewith presents its
**Report No. 457: INVESTIGATION INTO REMEDIAL ACTION IN THE FORM OF A
SAFEGUARD AGAINST THE INCREASED IMPORTS OF FROZEN POTATO CHIPS:
FINAL DETERMINATION**



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PRETORIA

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INTERNATIONAL TRADE ADMINISTRATION COMMISSION OF SOUTH AFRICA

REPORT NO. 457

INVESTIGATION INTO REMEDIAL ACTION IN THE FORM OF A SAFEGUARD AGAINST THE INCREASED IMPORTS OF FROZEN POTATO CHIPS: FINAL DETERMINATION

SYNOPSIS

On 08 March 2013, the Commission initiated an investigation for remedial action in the form of a safeguard against the increased imports of frozen potato chips through *Notice No. 175 of Government Gazette No. 36207* dated 08 March 2013.

The Application was lodged on behalf of the Southern African Customs Union (SACU) industry by McCain Foods (SA) (Pty) Ltd (the Applicant). The Application was supported by Nature's Choice Products (Pty) Ltd and Lamberts Bay Foods, the other producers of frozen potato chips in the SACU.

The investigation was initiated after the Commission considered that there was sufficient evidence to show that there was a surge in imports of the subject product, causing serious injury to the SACU industry.

On initiation of the investigation, the Embassies of the countries with a significant interest in the exports of the subject product were notified.

The Commission made a preliminary determination that there were unforeseen developments which resulted in the increased imports. The Commission further made a preliminary determination that there was a surge in imports of the subject product, causing serious injury to the SACU industry.

The Commission decided that critical circumstances existed that justified the imposition of provisional measures. The Commission therefore decided to request the Commissioner for the South African Revenue Service to impose provisional measures for a period of 200 days.

The Commission issued Report No. 436 containing its preliminary determination and invited interested parties to comment on its preliminary determination.

On 04 September 2013 a public hearing was held where interested parties could address the Commission on whether a safeguard measure would be in public interest.

Based on the details as contained the Commission's preliminary report and the comments received, the Commission made a final determination before "essential facts" that it was considering that there was a surge in the volume of imports of the subject product into the SACU market that was as a result of unforeseen circumstances and that the increase in imports was causing serious injury to the SACU industry and indicated that it was considering making a final determination to recommend to the Minister of Trade and Industry that definitive duties be imposed on the subject product.

The Commission sent out letters to all interested parties informing them of the "essential facts" which were being considered by the Commission and invited comments from interested parties on these "essential facts" being considered.

Taking all the information available to it into account, including all comments received during the investigation, the Commission made a final determination that there was a surge in the volume of imports of the subject product into the SACU market as a result of unforeseen circumstances and that the increase in imports was causing serious injury to the SACU industry.

The Commission therefore decided to recommend to the Minister of Trade and Industry that the following safeguard measures be imposed on imports of frozen potato chips for a period of 2 years and 11 months:

Period	Rate of safeguard measure
05 July 2013-04 July 2014	61.42%
05 July 2014-04 July 2015	40.92%
05 July 2015-04 June 2016	20.45%

1. APPLICATION AND PROCEDURE

1.1 LEGAL FRAMEWORK

This investigation was conducted in accordance with the International Trade Administration Act, 2002 (ITA Act) and the International Trade Administration Commission Safeguard Regulations (SGR), read with the World Trade Organization Agreement on Safeguards (the Safeguard Agreement).

1.2 APPLICANT

The application was lodged on behalf of the SACU industry by McCain Foods (SA) (Pty) Ltd (the Applicant), a major producer of frozen potato chips (subject product) in the SACU, supported by Nature's Choice Products (Pty) Ltd and Lamberts Bay Foods.

1.3 ALLEGATIONS BY THE APPLICANT

The Applicant alleged that the subject product was being imported into the SACU market in such increasing quantities relative to SACU production and under such conditions, to be causing serious injury to the SACU industry.

The Applicant indicated that the expansion of the capacity by the producers of frozen potato chips in the European Union, the absence of sufficient duty protection as a result of the Agreement on Trade, Development and Co-operation between the European Community and its member states and the Republic of South Africa (the TDCA) and the proliferation of quick service restaurants , were unforeseen developments which resulted in the increased imports of frozen potato chips.

1.4 INVESTIGATION PROCESS

- 1.4.1 The information submitted by the applicant was verified on the 27th and the 28th of September 2012.

1.4.2 The following countries were identified as having a substantial interest as exporters of the subject products to SACU:

- Egypt
- Belgium
- Netherlands
- France
- The United States of America (USA)
- Argentina
- Germany

1.4.3 Four importers established a non-incorporated body called Affected Potato Importers (API) to represent their interests in this investigation. The importers are K&M International Trading (Pty) Ltd, Lamb Weston/ Meijer Vof, Merlog foods (Pty) Ltd and Agristo NV.

1.4.4 Comments in response to the initiation of the investigation were received from API, the European Commission, the European Potato Processors Association (EUPPA), Yum Restaurants International(YIR), the Embassy of Arab Republic of Egypt and the Embassy of Argentina.

1.5 INVESTIGATION PERIOD

The Commission considered information with regard to increased quantities of imports and serious injury information for the period 1 July 2008 to 30 June 2012.

Comments by Affected Potato Importers

Affected Potato Importers (API) indicated that “although the anti-dumping and countervailing regulations provide that no investigation can normally be initiated if the information is more than 6 months old there is no such requirement in the safeguard regulations, this is specifically so as the

safeguard is an urgent measure – note the title of “Emergency action” of Article XIX of GATT – and therefore information should be more recent in safeguard investigations than in anti-dumping and countervailing regulations and not the other way around. API further stated that the Safeguard Agreement is clear in that it requires that increasing imports must be causing serious injury – in the present tense. Considering that information has only been supplied for the period ending June 2012 and that the investigation was only initiated on 8 March 2013, it follows, according to API, that the information was more than 8 months old at initiation, providing sufficient basis for the investigation to be terminated.

Commission’s analysis

The Commission noted the absence of statutory requirement relating to recentness of the injury information and in this regard the Commission noted the following ruling by the panel in a decision in the US-line pipe safeguard investigation, that was not reviewed by the appellate body: “We note that the Agreement contains no requirements as to how long the period of investigation in safeguards investigation should be, nor how the period should be broken down for purposes of analysis. Thus the period of investigation and its breakdown is left to the discretion of the investigating authorities”.

The investigation involved the evaluation of data for the period 01 June 2008 to 30 June 2012 which coincides with the financial period of the Applicant.

- 1.6** The Commission considered comments received from interested parties with regard to the application and procedure. Non-confidential versions of these comments are available on the public file.

1.7 PRELIMINARY DETERMINATION

The Commission made a preliminary determination that there were unforeseen developments which resulted in the increased imports. The Commission further made a preliminary determination that there was a surge in imports of the subject product, causing serious injury to the SACU industry.

The Commission decided that critical circumstances existed that justified the imposition of provisional measures. The Commission therefore decided to request the Commissioner for the South African Revenue Service to impose provisional measures for a period of 200 days.

On 18 November 2013 essential facts letters were sent to all interested parties informing them of the “essential facts” which were being considered by the Commission and invited comments from interested parties on these “essential facts” being considered. Comments were received from the Applicant, the European Union, Affected Potato Importers, the Arab Republic of Egypt and EUPPA.

1.8 FINAL DETERMINATION

The Commission made a final determination that there was a surge in the volume of imports of the subject product into the SACU market as a result of unforeseen circumstances, and that the increase in imports was causing serious injury to the SACU industry and that these imports were causally linked to the serious injury to the SACU industry.

The Commission made a final determination to recommend to the Minister of Trade and Industry that the following safeguard measures applicable to “chips or French fries” classifiable under tariff subheading 2004.10.20 published in November 2013 be imposed for a period of 2 years and 11 months:

Period	Rate of safeguard measure
05 July 2013-04 July 2014	61.42%
05 July 2014-04 July 2015	40.92%
05 July 2015-04 June 2016	20.45%

2. PRODUCTS, TARIFF CLASSIFICATION AND DUTIES

2.1 IMPORTED PRODUCT

2.1.1 Description

The subject product is described as “frozen potato chips” and is commonly known (in South Africa) as slap chips or French fries/pommes frites/chips.

2.1.2 Tariff classification

The subject product is currently classified as follows:

Tariff subheading	Description	Statistical Unit	General	EU	EFTA	SADC	Rebate provision item number
2004.10.20	Chips and French fries	Kg	20%	FREE	20%	FREE	N/A

Prior to September 2013 during the period of investigation, the subject product was classifiable under:

Tariff subheading	Description	Statistical Unit	General	EU	EFTA	SADC	Rebate provision item number
2004.10.90	Other	Kg	20%	FREE	20%	FREE	N/A

2.1.3 Production process

Raw potatoes are washed, steam peeled, cut , blanched in cold water, dried, partly cooked in vegetable oil, cooled, frozen, weighed, placed in poli-bag packaging, cased in corrugated board packaging, palletized and cold stored at minus 18 degrees Celsius.

2.2 SACU PRODUCT

2.2.1 Description

The SACU product is described as frozen potato chips, commonly known (in South Africa) as slap chips or French fries/Pommes frites/chips.

2.2.2 Production process

Raw potatoes are washed, steam peeled, cut , blanched in cold water, dried, partly cooked in vegetable oil, cooled, frozen, weighed, placed in poli-bag packaging, cased in corrugated board packaging, palletized and cold stored at minus 18 degrees Celsius.

2.2.3 Application or end use

The product is a frozen food product fit for human consumption.

2.2.4 Categories of users

The subject product, frozen chips, is distributed to quick service restaurants and food service outlets (including Retail Hot Deli's) that prepare the subject product for "out of home" consumer consumption. The subject product is also distributed to retail stores, to be bought by consumers for "in the home" consumption.

2.3 LIKE OR DIRECTLY COMPETITIVE PRODUCTS ANALYSIS

In determining the likeness or direct competitiveness of the product, the Commission used the following criteria:

	Imported product	SACU product
Tariff Heading	2004.10.90	2004.10.90
Raw materials	i. Potatoes ii. Vegetable Oil	i. Potatoes ii. Vegetable Oil
Production process	Raw potatoes are: <ul style="list-style-type: none">• washed• steam peeled• cut• blanched in cold water• dried• partly cooked in vegetable oil	Raw potatoes are: <ul style="list-style-type: none">• washed• steam peeled• cut• blanched in cold water• dried• partly cooked in vegetable oil

	<ul style="list-style-type: none"> • cooled • frozen • weighed • Poli-bag packaging • Cased corrugated board packaging • Palletized • Cold storage minus 18 degrees Celsius 	<ul style="list-style-type: none"> • cooled • frozen • weighed • Poli-bag packaging • Cased corrugated board packaging • Palletized • Cold storage minus 18 degrees Celsius
Application or end use	For human consumption	For human consumption

The Commission decided that the SACU product and the imported product were like products for purposes of comparison, and therefore also directly competitive products in terms of Section 2 of the Safeguard Regulations.

3. INDUSTRY STANDING

3.1 SACU INDUSTRY

The application was lodged on behalf of the SACU industry by McCain Foods (SA) (Pty) Ltd (the Applicant), a major producer of frozen potato chips (subject product) in the SACU, supported by Nature's Choice Products (Pty) Ltd and Lamberts Bay Foods.

The Commission considered comments received from interested parties with regard to the industry standing. Non-confidential versions are available on the public file.

Comments by Embassy of the Arab Republic of Egypt

The Arab Republic of Egypt indicated that “the Applicant did not include the other producer, namely, Genadendal Frozen”. “Therefore, the information submitted by the Applicant and accepted by the Commission, on which allegation of serious injury was made, were not in accordance with the provision of Article 4.1 c of Agreement on Safeguards, due to the susceptibility of the domestic industry representativeness”.

The Egyptian Government furthermore indicated that “the period during which the Applicant and supporting companies represent the domestic industry, namely November 2010 to October 2011 precedes last period during which serious injury is analysed (until 30 June 2012) and therefore, the period during which industry considered to be represented should have covered the period of determining the serious injury”.

Comments from API

API stated that “only the Applicant has submitted information, which makes it impossible to determine whether the industry as a whole has suffered serious injury. No indication is provided as to the relative importance or size of the Applicant vis-à-vis the other producers”.

Comments by the Applicant

The Applicant indicated that “it has identified this player in section B2 of the application. The Applicant stated that its market intelligence leads to a continued view that this is a micro enterprise and that its volumes are immaterial in assessing the size of the SACU market. The Applicant estimates these volumes at less than a tenth of one per cent of the SACU market. There is no business relationship between the applicant and this micro enterprise and as such the Applicant is not in a position to provide any actual figures for the said entity”.

Commission’s analysis

The application was brought by McCain Foods (Pty) Ltd which represents over 70% of the SACU industry and supported by Lamberts Bay and Natures Choice. The Commission also decided that injury information for McCain represents a major proportion of the SACU industry in terms of section 4.1 of the ASGR.

The Commission decided that the application can be regarded as being made “by or on behalf of the domestic industry” in terms of Section 7.2 of the Safeguard Regulations.

4. UNFORESEEN DEVELOPMENTS

4.1 Requirements of Article XIX of GATT

Article XIX of the GATT provides as follows:

“If, as a result of unforeseen developments and of the effect of obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.”

In terms of the WTO this is interpreted to mean that the developments in the market should have been unforeseen at the time of negotiation of the relevant tariff concessions.

4.2 Information submitted by the Applicant

The Applicant stated that in 1994 when South Africa became a signatory to the WTO Agreement and made tariff commitments with respect to frozen potato chips, the following developments were not foreseen:

4.2.1 Proliferation of Quick Service Restaurants

The Applicant stated that the SACU market for frozen potato chips at that time was in its infancy and imports of frozen potato chips were negligible. South Africa was just coming out of isolation under the Apartheid era sanctions with little exposure to global supply chains. In the period between 1994 and the present, household purchasing patterns have developed into a more convenience food (ready prepared) market. In addition, since 1994 there has been a proliferation of quick service restaurants (colloquially called “take-aways”) in the SACU market. The Applicant gave McDonalds as an example and stated that McDonalds entered the market in November 1995. These developments led to opportunities for investment and job creation in

an industry barely existing in 1994. The Commission noted the fact that there was only one McDonald outlet in 1995 while currently there are 170 McDonald outlets countrywide.

4.2.2 Excess production capacity of frozen potato chips in the European Union

The Applicant stated that in the period following 1994 excessive investment in the frozen potato chip industry in the European Union (EU) took place. The financial crisis that dampened demand for frozen potato chips in the EU since 2008 created surplus capacity. This encouraged EU producers to follow an aggressive export strategy to dispose of their surplus capacity into the world market thereby depressing the world price and forcing local manufacturers to compete with imports at that price level.

To substantiate its allegation of excess production capacity of the frozen potato chips in the European Union, the Applicant obtained the following extract from a report dated 4 November 2011 by PotatoPro.com on a presentation made by the Chair of the Dutch Potato Association, Mr. Kees van Arendonk, speaking about the Dutch and Belgian French fry industry at the opening of the trading year of the Dutch Potato markets. The Applicant stated that Mr. van Arendonk highlighted the increasing market share of the French fry manufacturers in the Netherlands and Belgium in the global market of frozen French fries and also that Belgium was increasing their production rapidly and passed the 3 million tons of potatoes processed in the previous year, while French fries production in the Netherlands also set another record the previous season of almost 3.5 million tons.

The Applicant stated that Mr van Arendonk mentioned the following statistics: “if you would draw a circle with a radius of 500 km around Utrecht (Let’s say the center of the Netherlands for those not from the area) you get an area that processes 10 million tons of potatoes each year. To put that figure into perspective: The total amount of potatoes processed into French fries in the entire United States is also about 10 million tons”!

The Applicant stated that Mr. van Arendonk said “although the Dutch and the Belgians like their fries, there is no way they can eat all these French fries themselves: about 90% is exported”.

The Applicant stated that this raises the question: where do they go? Not all French fries produced in that area travel far, but increasingly they go to all corners of the world.

The Applicant further stated that Mr van Arendonk said: “I find it an amazing achievement that the [Dutch and Belgium] French fry industry can export to places such as Australia and South America and be able to compete there with local suppliers”.

The Applicant stated that the report concluded with the following warning to producers of frozen potato chips in countries to which Dutch and Belgium exports find their way: “... if you are in one of those far-away countries competing against the Dutch and Belgian French fry producers: Beware: ... they might have some extra fries to sell! Their market share in the global French fry market is unlikely to go down this season ...”

The Commission noted that in terms of the Global Agricultural Information Network report dated 9/12/2012 (GAIN Report), there has been a substantial increase in exports of the subject product from the EU to the rest of the world.

The Applicant further stated that all these unforeseen developments in the EU took place while duties on imports of frozen potato chips from the EU into the SACU were being phased out under the TDCA, which entered into force in 2000, leaving the local industry exposed to the surge in the volume of imports from the EU which consequently resulted in serious injury being inflicted on the local producers of frozen potato chips.

Lastly the Applicant stated that it is very clear that in accordance with Article XIX of the GATT 1994 that the “developments” being the expansion of

capacity in the EU, the financial crisis which resulted in the oversupply of frozen potato chips in the world market, an aggressive export strategy by the EU producers of frozen chips augmented by the absence of sufficient duty protection as a result of the TDCA culminated in circumstances that occurred after the negotiation of the relevant tariff concessions that “could not have been foreseen at the time the concessions were negotiated”.

4.3 Other factors considered by the Commission

In 1995, during the Uruguay Round of Multilateral Trade Negotiations under the category “fruit, vegetables processed” the EU committed to reducing export subsidies, which enabled the developing countries to make commitments to tariff liberalisation.

In terms of schedule LXXX submitted to WTO under the “fruit, vegetables processed” category, the EU committed to reduce export subsidies from 14.5 million Euros to 9.9 million Euros in the year 2000. It should be noted that in terms of notification G/AG/N/EU/6 of subsidised exports, the EU made budgetary commitments under “fruit, vegetables processed” of 114.3 million Euros. It can be concluded that the EU did not keep up with its commitment to reduce export subsidies in this sector as it had committed in 1995 and that this development could not be foreseen by the negotiators of developing countries when commitments were made to liberalise tariffs in 1995.

4.4 Comments by interested parties

Proliferation of quick service restaurants

The Commission considered comments received from interested parties with regard to unforeseen developments. Non-confidential versions of these comments are available on the public file. Some of the comments that are considered substantial are discussed below:

API indicated that “the Commission took into consideration the comment with regard to the proliferation of quick service restaurants that any increase in the number of quick service restaurants before 2009 would be completely

irrelevant as restaurants established in 2008 or earlier could not conceivably have been the reason for increasing imports in 2010. Analysis of McDonald's shows that by 9 September 2008, there had already been 107 McDonald's outlets. Accordingly, 63% of all currently existing McDonald's restaurants existed by 2008. As is clear from the import statistics, imports decreased significantly in 2009. There were 145 McDonald's outlets by 17 March 2011 (and 153 by 14 June 2011), i.e. after the increase had occurred and at a time that imports were already decreasing again. Thus, ITAC effectively argues that the increase from 107 restaurants in 2008 to 145 in 2011 led to the increase in imports. It is submitted that 38 McDonald's restaurants could not have been responsible for the increase in imports from 14,892 tons in 2008/09 to 33,039 tons in 2009/10. That would mean that each of those 38 outlets had to have imported on average 477.5 tons of frozen chips, equivalent to more than 1,300 kg per day. McDonald's outlets simply do not have the capacity to deal with these types of volumes on a daily basis for a full year. In addition, this is despite the fact that McDonald's is on record indicating that it sources more than 95% of all its raw materials domestically.

It is stated that there is no positive proof that:

- there has been any proliferation in the number of fast-food restaurants in the country in the period 2008-2012; or*
- any such unproven increase in quick service restaurants could have led to the increase in imports as many of these restaurants have been operating in the country for decades.*

The Commission also considered the comment that an increase in quick service restaurants that has occurred over 18 years is foreseen and normal especially with the natural increase in population. Such increase in the number of restaurants could not have caused a significant increase in the volume of imports”.

Commission's analysis

The Commission noted that according to API there has been an increase in the number of outlets of McDonalds from 107 in 2008 to 153 in mid-2011, a period that coincides with the surge in imports.

The Commission further determined that in terms of GAIN Report Number NP1015, dated 10/03/2011 it is stated amongst others that: "Given the good size and quality of potatoes this year, the industry is expected to produce excellent and competitive fries for export markets. Export opportunities are primarily determined by developments of the HRI sector (mainly fast food) in export markets". Additionally the Commission concluded from the aforementioned statement that exports increased as a result of the proliferation of quick service outlets.

Excess production capacity in the EU

API indicated that "although there may be excess production in the EU, and even if it could be argued that this excess production was unforeseen in 1994, this does not remove the requirement that it must be shown that this unforeseen development caused the increase in imports. It was stated that no information has served before the Commission, and there is no information available on the public file in this regard, to show that production in the EU increased significantly in 2010 to cause such an increase in exports. Thus, if there had been excess production in the EU since 2000, there is no correlation between this excess production and any increase in exports".

API further stated that Article XIX of GATT, the Agreement on Safeguard and WTO jurisprudence are clear that it has to be established that the unforeseen development caused the surge of imports. No such proof has been established in the frozen chips investigation. No facts have been presented to show when the excess production in the EU started or what the extent thereof is. There is no information on file to show whether the excess capacity was any higher in 2010, 2011 and 2012 than in, for instance, 2008 or 2009. Without such information, the Commission is not in a position to

evaluate whether the excess production had caused a surge in imports. It was stated that this allegation has to be rejected and the excess production in the EU cannot be regarded as an unforeseen development.

The EU stated that “the Commission claims to qualify ‘excess production capacity’ as an unforeseen development, this goes against the basic principles of modern economics. Belgium and the Netherlands have traditionally been the centre of potato processing in Europe, driven by favourable growing conditions for potatoes in this area. It was stated that it makes no sense to try and grow potatoes in Southern Europe on an industrial scale. Obviously, it is not an option either to grow potatoes in Northern Europe and then transport them to Southern Europe for processing. It is a reality, and it has been a reality for many many years, that the Netherlands and Belgium supply large parts of the world with French fries and many other products from agricultural origin just like it is a reality that large quantities of apples and wine are exported from South Africa to Belgium and the Netherlands, which is also an evolution and not unforeseen. Conservation methods (freezing) have become more sophisticated, and longer distances can be covered. This is not a recent or sudden development. The Commission seems to imply that South Africa has been targeted by the Dutch and Belgian potato processing industry. But French fries are exported to countries all over the world. South Africa is just one of many countries to which exports are made from the EU, and although volumes are very limited compared to exports to other countries, South Africa is the only country in the entire world that has closed its borders. It should be noted that the Commission’s statement about overcapacity is an assumption, not a fact. The Commission offers no arguments to support its assumptions and we contest that significant overcapacity exists”.

Commission’s analysis

The Commission found that in terms of the Global agricultural information network report dated 9/12/2012 (GAIN Report) there has been a substantial increase of exports of the subject product from the EU in 2009/2010 from

4 971 tons to 35 337 tons. The exports to the rest of the world in terms of the GAIN Report (GAIN Report Number: NL2028) are indicated as follows:

“EU trade in frozen potato products, mainly fries, is still dominated by trade between the EU member states. Export to third markets continues to grow and represented almost a quarter of total exports during MY 2011/2012. EU-27 exports of frozen potato products to non-EU countries doubled in past three years. The main markets outside the EU-27 include Saudi Arabia, Brazil, Russia and Australia covering over 40 per cent of total exports to third markets. Other growth markets are to be found in the Middle East, Latin America and Asia”.

Table 11: EU-27 Exports of Frozen Potato Products, MT

	MY 08/09	MY 09/10	MY10/11	MY11/12
World	3,086,302	3,365,946	3,671,710	3,771,491
EU-27	2,646,292	2,729,423	2,964,967	2,884,674
Non-EU 27	440,010	636,523	706,743	886,817
-Saudi Arabia	73,994	75,255	108,417	133,579
-Brazil	34,788	113,011	109,479	125,261
-Russia	57,631	59,710	66,758	75,811
-Australia	28,676	22,201	29,972	54,400
-Chile	13,223	22,556	27,275	34,033
-United Arab Emirates	18,017	25,568	27,372	32,555
-Malaysia	15,358	20,895	23,183	27,615
-South Africa	4,971	35,337	30,156	24,605
-Kuwait	10,653	17,765	18,235	23,679
-Japan	13,605	16,481	14,913	18,167
-Other	169,094	227,744	250,983	337,112

European Union subsidy commitments

The EU stated that “the analysis of the EU export subsidy commitments regarding frozen potatoes is not correct. First, export subsidy commitment level and the real use of subsidies have to be looked at separately. Indeed, there was a change in the EU annual export subsidy commitment level for processed fruits and vegetables which was due to the EU-enlargement. In the below mentioned notification it is clearly specified that the notification concerns EU-27 (i.e. 27 Member States) whereas the original commitment the Commission refers to was made for EU-12 (i.e. 12 Member States). As notified to the WTO, since 2008 the EU has not paid any export subsidies for fruits and vegetables as also mentioned in the notification referred to by the Commission (G/AG/N/EU/6). Second and more importantly, processed potatoes are not covered by the EU's annual export subsidy commitment for processed fruits and vegetables. Therefore there can be no export subsidies for frozen potatoes in the EU”.

API stated that “this document refers to processed fruit and vegetables in general and does not contain any reference to frozen potato chips or, indeed, to any potato products. Accordingly, there is no proof that there had been any subsidies on potatoes or products thereof. It has already been submitted that none of the exporters received any subsidies on their raw materials, production/processing or their exports. Accordingly, there is no basis on which to find that subsidies on potato products had increased.

In addition, if there had been subsidized exports, this should be addressed through a countervailing investigation and not through safeguards, as countervailing investigations were specifically designed to deal with subsidized imports”.

The Egyptian Competent Authority considers that “the failure of the European Union to fulfil the obligation thereof to reduce export subsidy to the sector of processed fruits and vegetables in addition to the privilege of custom exemption on the product concerned imported from the European Union is not considered one of the unforeseen developments because the

European Union subsidized the exports of the product concerned to all countries of the world regardless of the importing country. Moreover, the privilege of custom exemption granted to the European Union is considered one of the causes of the increase in imports as they represent 80% of SACU total imports of the product concerned”.

Furthermore the Egyptian Competent Authority stated that “the Commission mixes up the EU WTO annual export subsidy commitment level and the real use of subsidies. They further stated that ITAC is therefore of the opinion that the EU did not keep its commitment to reduce export subsidies in this sector as it had committed to in 1995, the EU has not paid any export subsidies for fruits and vegetables since 2008. The EU has also notified this to the WTO, including in the notification G/AG/N/EU/6 which ITAC refers to. Moreover, the change in the EU annual export subsidy outlays commitment level for processed fruits and vegetables (from €9.9 to €141.3 million) was solely due to the enlargement of the European Union. In the notification G/AG/N/EU/6 it is clearly specified that the notification concerns an EU composed of 27 Member States, whereas the original commitment to which the Commission refers was made for EU-12 (meaning only 12 Members). The facts clearly show that the EU did keep its commitment.

EUPPA also indicated that “the entire discussion about EU annual export subsidy commitment for processed fruits and vegetables is completely irrelevant for this case, because none of the subsidies even concern processed potatoes. EUPPA stated that potatoes are not included, and thus i.e. there can be no export subsidies for potatoes in the EU”.

Commission's analysis

The Commission noted that, in terms of notification G/AG/N/EU/6 of subsidized exports, wherein the EU made budgetary commitments under ‘fruit, vegetables processed’ of €114.3 million, the EU did not specify the product types covered therein and that the EU has not provided proof of how the commitments increased other than mentioning that the increase was due to the enlargement of the EU membership from 12 then to 27 now.

Furthermore the Commission noted that, in terms of the GAIN Report, (Report Number: NL2028) fruits and vegetables were incorporated in the Single Common Market Organization (CMO) (Regulation 361/2008) during the reform of the Common Agricultural Policy (CAP). However, potatoes for human consumption are only covered by the Single Common Market Organization (CMO) with regard to the standard rules on state aids which is evidence of the fact that states in the EU are still subsidizing potatoes which are an input in the manufacturing of frozen potato chips.

The Commission also considered the comment “the failure by the EU to keep its subsidy commitments to reduce export subsidies in this sector could not have been foreseen”. The Commission noted that the EU did not submit evidence explaining its failure to adhere to the official notification it submitted to the WTO under the ‘fruit, vegetables processed’ category, wherein the EU committed to reduce export subsidies from €14.5 million to €9.9 million in the year 2000. It was noted that, in terms of notification G/AG/N/EU/6 of subsidized exports, the EU made budgetary commitments under ‘fruit, vegetables processed’ of €114.3 million. The Commission is therefore of the opinion that the EU did not keep its commitment to reduce export subsidies in this sector as it had committed to it in 1995 and that this development could not have been foreseen when commitments were made to liberalise tariffs in 1995.

4.4 CONCLUSION: UNFORESEEN DEVELOPMENTS

The Commission made a final determination that the expansion of production capacity in the EU and the resultant excess production capacity, proliferation of quick service restaurants and the failure by EU to adhere to its commitment to reduce export subsidies in this sector as it had committed in 1995 represent unforeseen developments in accordance with Article XIX of the General Agreement on Tariffs and Trade (GATT).

5. RECENT, SUDDEN, SHARP AND SIGNIFICANT INCREASE IN IMPORTS

For purposes of the final determination, the Commission considered the following analysis of imports of the subject product for purposes of determining a surge in import volumes:

IMPORT VOLUMES

	July 08- June 09	July 09- June10	July 10- June 11	July 11- June 12
Total imports (tons)	14 892	33 039	47 706	28 555
10% Adjustment	(1 489)	(3 303)	(4 770)	(2 855)
Imports (tons)	13 403	29 736	42 936	25 700
*Total Production (tons)	100	103	86	115
*Imports as a % of the Applicant's output	100	216	370	166

*These figures were indexed due to confidentiality using the 2008/09 year as the basis.

In calculating net total imports above, 10% was deducted from the total imports within 2004.10.90 tariff heading as per the estimate provided by the Applicant indicating that the subject product constitutes 90% of the imports made under the tariff subheading which includes other frozen potatoes products.

The Applicant stated that based on the small demand for formed specially manufactured potato products in the local market, which is directly reflected in the small volume imported by the applicant, it is of the view (supported by both of the two other manufacturers mentioned above) that it would be a fair estimate to state that frozen potato chips constitute in excess of 90% of total imports of frozen potato products under tariff heading 2004.10.90, which forms the subject product of this application.

In comparing the 2009 and 2010 financial periods, the rate of increase in imports in absolute terms is 121.86 per cent. The imports increased by 44.40 per cent for the 2011 financial period compared to the 2010 financial period and decreased by 40.10 per cent in 2012 compared to 2011. The rate of increase in imports relative to the production for the financial years 2009 to

2010 was 116 index points and for the financial years 2010 to 2011 the rate of the increase was 154 index points. There was a decrease in net imports relative to production between the 2011 and 2012 financial periods of 204 index points.

The Commission considered comments received from interested parties with regard to the recent, sudden, sharp and significant increase in imports. Non-confidential versions of these comments are available on the public file. Some of the substantial comments with regard to the recent, sudden, sharp and significant increase in volume of imports are discussed below:

Comments by API

API stated that “although it is clear that imports decreased between 2008 and 2009 and then increased significantly in 2010, it is clear that the applicant own imports follow a similar trend, while it has also been acknowledged (at the end of section D) that the other SACU producers have also imported the product. It is imperative that a complete analysis be undertaken and made available to all parties to indicate the volume of imports excluding SACU industry own imports, as own imports cannot be the cause of any injury to the industry. It must therefore be determined whether imports by parties other than the industry caused serious injury”.

Comments from Embassy of the Arab Republic of Egypt

The Government of Egypt indicated that “with regard to the imports allegedly increased in recent, sudden and significant quantities:

- Quantities and indices of imports indicate a decline of 30 per cent during 2012 compared to 2011 (from 43 to 30 million kg), therefore, there is no sudden, sharp or significant increase as mentioned in the Safeguard Agreement.*
- To consider that there is a sudden and recent increase during 2012 compared to 2009 as a base year, is not applicable due to the conditions of the existence of a recent and sudden increase”.*

It further stated that taking into consideration that the complainant was importing during the whole period of investigation.

Comments by the Embassy of Argentina

The Embassy of Argentina indicated that “according to the statistics shown by the Official South African import statistics the annual variation rate of imports into South Africa in connection with the product is negative for the period 2008-2012 (except for the inter-annual rate 2009 -2010). Moreover, should the year previous to the period under investigation be considered, imports decreased 13,71% during the period 2007-2011”.

The Embassy of Argentina further stated that, “taking in account the above-mentioned figures, it would like to stress that the requirements established under Article 2. 1 of the Safeguards Agreement are not met since it considers that a sudden and recent growth in imports is an essential condition for the application of a safeguard measure. In that sense, we would like to recall the findings of the Appellate Body in “Argentina-Footwear” (DS 121) according to which:

“...the ‘increased quantities’ of imports cannot be just any increase; we do not agree with the Panel that it is reasonable to examine the trend in imports over a five-year period. In our view the use of the present tense of the verb phrase ‘is being imported’ in both Article 2.1 of the Agreement of Safeguards and Article XIX: 1(a) of the GATT 1994 indicates that it is necessary for the competent authorities to examine recent imports, and not simply trends in imports during the past five years...In our view, the phrase ‘is being imported’ implies that the increase in imports must have been sudden and recent.

“It is evident that since 2010 no increases on imports have taken place considering the imports figures of the last years of the period under Investigation. Between 2010 and 2011 imports decreased by 37% and between 2011 and 2012 (inter annual January-June) they decreased by 17,64%”.

“The condition of an increase of imports is the essential requirement for the adoption of a safeguard measure in conformity with the WTO. Its requirement has not been in place in the last 18 months of the period under Investigation. Since such requirement –namely the increase of imports- is not fulfilled cannot be analyzed”.

“The information supplied by the Applicant (Annual import statistics- as obtained from SARS, calendar year) in E.3.1 of the “Non Confidential Version” Requested update of injury Only-Sections E, F, G – (hereinafter, the “Presentation”) proves the above mentioned fact since the Product’s volume of imports (kilograms) shows a decrease in 2009 by comparison with 2008 (from 23.611.967 kg to 16165.379 kg); a sharp growth in 2010 by comparison with 2009 (from 16.165.379 kilograms to 48.262.458 kilograms). Then, import volume decreases again in 2011 to 30.312.626 kg., and it decreased again in the first semester of 2012 compared to the first semester of 2011”.

“The above mentioned data reflects that no “sudden and recent” increase of the volume of the product has taken place, and therefore the basic requirement for the adoption of a safeguard measure is not present. The trend neither reflects an increase of the imports”.

“Exports from Argentina are also decreasing during the period under investigation. The principal element in which the Applicant based on its presentation, the supposed Product’s imports increment, does not exist so the requirements for applying a safeguard measure are not met”.

Comments by API

API stated that the present tense use of “such increased imports cause or threaten to cause serious injury” is clear evidence that a rapid and significant increase in imports must be proven at the time the investigation is initiated. It is clear that imports decreased significantly in 2011. Whereas 48,262 tons of products were imported in 2010, only 30,312 tons were imported in 2011, a decrease of 37.19%. This is clearly not a situation that provides for the use of a safeguard or that even justifies the initiation of an

investigation, as there is simply no rapid and significant increase in imports. ITAC is therefore requested to immediately terminate the investigation.

API further stated that it is proposed that the data of imports for the investigation period be made available as part of the Commission's preliminary determination.

Commission's analysis

The Commission decided that the period of investigation for considering the recentness, suddenness, sharpness and significant increase in imports would be based on data for the period 01 July 2008 to 30 June 2012.

Although imports decreased in the financial period 2012, the imports in the said period remained at a level significantly higher than the 2009 financial period. Imports need not be increasing up to the point the authorities make a finding as illustrated in the Panel decision involving the US-steel safeguard case.

In the U.S steel products safeguard investigation, the panel made the following decision regarding instances where imports declined after increasing sharply and suddenly.

"In U.S. – Steel Products, the Panel noted that the increase must indicate a degree of recentness, suddenness and sharpness, the increase need not continue up to the period immediately preceding the investigating authority's determination nor up to the very end of the investigation period, although the increase still had to be recent. (p. 10.162) The Panel noted that whether a decrease in imports at the end of the POI prevented a finding of increased imports would depend on the duration and the degree of the decrease at the end of the POI, as well as the nature of the increase that intervened beforehand. (Para. 10.163). The Panel reviewing the US's decision product by product also held that for certain products the decreasing import trend towards the end of the POI, particularly a significant drop in the interim period, meant that the increase in imports

was not recent enough.”

Comments by API

API stated that “it had already indicated that the information provided by the applicant is completely erroneous as it does not state the actual market share of the imports as required by the application questionnaire, but expressed the imports as a percentage of a single producer’s sales. In addition, the information is out-dated, for the applicant itself indicates in the most recent period for which it had supplied information, that imports have decreased vis-à-vis the applicant’s sales (from 5.28 index points to 5.10 index points). This reconfirms the complete lack of any basis for the initiation of an investigation”.

Comments by the EU

The EU indicated that “in the preliminary report the imports are analysed on the level of “Net imports”, i.e. excluding from the analysis the domestic industry’s own imports. This methodology is clearly biased and also obviously contrary to WTO standards. Indeed, this appears to be a clear violation of the parallelism principle which, as confirmed by the WTO jurisprudence, is required for the imposition of safeguard measures. Since safeguard measures are applied to all countries of origin (Art 2.2 SA), all imports should necessarily be included in the determination of serious injury, thus also the analysis of the development of imports. This was however not the case in the ITAC analysis which, by excluding the (significant) imports made by the domestic industry, did not take into consideration the development of all imports”.

“The ITAC analysis should thus instead have taken into account the total imports, and this would have led to totally different conclusions since on that basis it would have been impossible to determine that there was a sudden and recent increase of imports”.

Comments by EUPPA

EUPPA stated that “they dispute that there is an increase in imports. As the data presented by the applicant confirm, imports of frozen potato chips decreased from 2008 to 2009. Although they increased in 2010 (as anticipated by the South African government), the most recent data confirm that the trend has since reversed, and imports have decreased again. Even more – the January-June 2012 figures show that imports stayed stable in 2012. There is no question of any recent, sudden and sharp increase in imports. In fact, apart from the temporary peak around the FIFA World Cup, there has been no increase at all”.

“It again referred to the data it obtained from the most important independent source available (World Potato Market), which clearly prove that imports of frozen potato chips to South Africa during the whole year 2012 remained stable in comparison to 2011”.

Comments by YIR

YIR indicated that “imports have also met an increasingly significant proportion of YRI’s demand, growing from 1% in 2010 to 23% in 2012. That said, this does not mean that YRI does not continuously explore availability of best prices (both locally and internationally) for the product that adheres to YRI’s specifications and standards. In fact, due to its high standards and brand specifications that it requires, which in itself adds cost to the product, it has been able thus far to procure local product at a competitive price from the local producers”.

Comments by the Government of Egypt

The Government of Egypt indicated that:

- “The data provided shows that the imports declined by 16% during 2011/2012 compared to 2010/2011 which coincides with the decrease of the domestic producer’s own imports.*
- Even assuming that there was indeed a sudden surge in imports, it was due to the increase in demand and the domestic industry reached its maximum*

capacity, which indicates that the entrance of imports was to meet the market needs.

- In this regard, both Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of that GATT 1994 requires that the increase in imports must have been recent enough, sudden enough, significant enough, both quantitatively and qualitatively, to cause or threat to cause “serious injury”, which is supported by the appellate body in *Argentina Footwear (EC)*.

Thus, ITAC has failed in assessing the reasons why there was such an increase”.

Comments by Government of Argentina

“South Africa’s investigation for remedial action in the form of a safeguard is allegedly intended against the increased imports of frozen potato chips. Nevertheless, according to the statistics shown by the Official South African import statistics the annual variation rate of imports into South Africa in connection with the Product is negative for the period 2008-2012 (except for the inter-annual rate 2009 -2010). Moreover, should the year previous to the period under Investigation be considered, imports decreased 13,71% during the period 2007-2011.

The Government of Argentina stressed that the requirements established under Article 2.1 of the Safeguards Agreement were not met since it considers that a sudden and recent growth in imports is an essential condition for the application of a safeguard measure. In that sense, we would like to recall the findings of the Appellate Body in *“Argentina-Footwear”* (DS 121) according to which:

“...the ‘increased quantities’ of imports cannot be just any increase, we do not agree with the Panel that it is reasonable to examine the trend in imports over a five-year period. In our view the use of the present tense of the verb phrase ‘is being imported’ in both Article 2.1 of the Agreement of Safeguards and Article XIX: 1(a) of the GATT 1994 indicates that is necessary for the competent authorities to examine recent imports, and not simply trends in imports during the past five years...In our view, the phrase ‘is being imported’ implies that the increase in imports must have been sudden and recent.

It is evident that since 2010 no increases on imports have taken place considering the import figures of the last years of the period under Investigation. Between 2010 and 2011 imports decreased by 37% and between 2011 and 2012 (inter annual January-June) they decreased by 17.64%.

Exports from Argentina are also decreasing during the period under investigation. The principal element in which the Applicant based on its presentation, the supposed Product's imports increment, does not exist so the requirements for applying a safeguard measure are not met".

Commission's analysis

The Commission decided that the period of investigation (POI) was to be for financial periods from July 2008 to June 2012. Although net imports decreased in the financial period 2012, the net imports in the said period remained at a level significantly higher than the 2010 financial period at 25 700 tons compared to 13 403 tons. Furthermore, although there was a decrease in net imports relative to production of 41.00 percentage points in 2012 compared to 2011, the net imports relative to production was still higher than in 2012 at 33.40 per cent compared to the 20.10 per cent.

Furthermore the trend of imports still show a surge in 2009 to 2010 and that although imports decreased in 2011/2012, imports still remain at significantly higher levels than in 2008/2009.

CONCLUSION: RECENT, SUDDEN, SHARP AND SIGNIFICANT INCREASE IN VOLUME OF IMPORTS

In conclusion, the recent, sudden, sharp and significant increase in imports of the subject product occurred in the period 2009 to 2010 and the subject product continued to be imported in increased quantities both in absolute terms and relative to production. The imports in 2010 compared to 2009 increased in absolute terms by 121,86 per cent and in 2012 compared to 2009 the imports remained at high levels and were 91,74 per cent higher in

2012 compared to 2009. The imports relative to production increased by 116 index points in 2010 compared to 2009 and remained at a high level in 2012 at 166 index points compared to 100 index points in 2009.

In making its determination, the Commission took note of the Panel decision involving the US steel safeguard case. The Panel made the following decision regarding instances where imports decline after increasing sharply and suddenly.

“In U.S. – Steel Products, the Panel noted that the increase must indicate a degree of recentness, suddenness and sharpness, the increase need not continue up to the period immediately preceding the investigating authority’s determination nor up to the very end of the investigation period, although the increase still had to be recent. (Para. 10.162) The Panel noted that whether a decrease in imports at the end of the POI prevented a finding of increased imports would depend on the duration and the degree of the decrease at the end of the POI, as well as the nature of the increase that intervened beforehand. (Para. 10.163). But also note that the Panel, reviewing the US’s decision, product by product, found that for certain products the decreasing import trend towards the end of the POI, particularly a significant drop in the interim period did not consider the increase in imports to be recent enough.”

The Commission was therefore of the opinion that, although imports decreased in the financial period 2012, the imports in the said period remained at levels significantly higher than in the 2010 financial period.

The Commission made a final determination that there was a recent, sudden, sharp and significant increase in the volume of imports both in absolute terms and relative to production from the 2009 financial period and that the imports continued to be imported at increased levels both absolute and relative to production in 2011 and 2012.

6. SERIOUS INJURY

6.1 DOMESTIC INDUSTRY – MAJOR PROPORTION OF PRODUCTION

The following injury analysis relates to McCain (SA) (Pty) Ltd, the Applicant, which constitutes 70,45 per cent of the total domestic production of the subject product.

The Commission decided that this constitutes “a major proportion” of the total domestic production, in accordance with Article 4.1 of the Safeguard Agreement.

6.2 THE RATE AND VOLUME OF THE INCREASE IN IMPORT VOLUMES

The following table shows the volume of the imports from 01 July 2008 to 30 June 2012.

Table 6.2.1

Country (tons)	2009	2010	2011	2012	Total imp	% of total imports
Egypt	792	1036	4374	3009	9221	7.42
Ghana	0	0	0	0	0	
Denmark	0	0	49	0	49	0.04
UK	915	0	357	0	1273	1.02
Belgium	1390	14660	22317	4816	43226	34.77
Netherlands	1228	5464	11246	1660	19617	15.78
Germany	0	0	267	12279	12559	10.10
France	1501	9824	2427	5034	18805	15.13
Italy	0	0	0	0	0	
Canada	175	144	0	1240	1561	1.26
USA	4962	99	3701	56	8827	7.10
Brazil	0	0	0	0	0	
Argentina	3463	1146	2409	131	7156	5.76
Cyprus	0	0	0	0	0	
India	248	597	556	135	1539	1.24
Bangladesh	0	0	1	0	1	
Philippines	0	0	0	186	186	0.15
Hong Kong	0	0	0	0	0	
Taiwan	0	0	0	8	8	0.01
China	0	0	0	0	0	

Japan	0	0	0	0	0	
Australia	168	0	0	0	168	0.14
New Zealand	50	69	0	0	118	0.10
Total	14892	33039	47706	28555	124 314	100
SACU own imports	13221	17811	18051	3517	53	
Imports excluding own	1671	15228	29655	25038		
10%adjustment	167	1523	2965	2504		
Total Net imports	1504	13705	26689	22534		

The Commission calculated the net imports by subtracting the Applicant's own imports from the total imports. An amount of 10 % was deducted from the total imports under tariff subheading 2004.10.90 as per the estimate provided by the Applicant, indicating that the subject product constitutes 90% of the imports made under the relevant tariff subheading which includes frozen potato-based products, other than frozen potato chips.

The Applicant stated that based on the small demand for formed specially manufactured potato products in the local market, which is directly reflected in the small volume imported by the applicant, it is of the view (supported by both of the two other manufacturers) that it would be a fair estimate to state that in excess of 90% of total imports of frozen potato products under tariff heading 2004.10.90 constitutes frozen potato chips, which forms the subject product of this application.

The imports in 2010 compared to 2009 increased by 811.23 per cent and in 2012 compared to 2009 from 1504 tons to 13 705 tons. The imports remained in 2012 at high levels and were 1 398 per cent more in 2012 compared to 2009, increasing from 1504 tons in 2009 to 22 534 tons in 2012.

The information in the table above indicates that the countries with a substantial interest as exporters of frozen potato chips to the SACU are Egypt, Belgium, the Netherlands, France, the USA, Germany and Argentina.

In comparing the 2009 and 2010 financial periods, the increase in net imports in absolute terms amounts to 811 index points. The net imports increased by 864 index points for the 2011 financial period compared to the 2010 financial period and decreased by 27 index points in 2012 compared to 2011.

6.3 Effects on domestic prices

6.3.1 Price undercutting

The following table compares the Applicant's ex-factory prices with the landed cost of the subject product.

Table 6.3.1

	July 08- June 09	July 09- June10	July 10- June 11	July 11- June 12
Applicant's average gross selling price / kg	100	108	118	112
FOB Rand/kg (Imports)	100	80	88	99
Duty (Rands/kg)	100	60	35	13
Insurance, Freight +Handling Charges/kg	100	100	103	75
Total Average Landed Cost/kg	100	84	88	88
Undercutting	100	238	275	239

This table was indexed due to confidentiality using the year ending 2009 as the base year.

The Applicant experienced an increase in price undercutting in the financial periods 2009 to 2012 of 139 index points.

The Applicant stated that this level of undercutting has serious competitiveness implications for the local industry. This trend has been further exacerbated by the advantages brought by the relatively stronger Rand against international currencies over this period.

The Applicant further stated that these advantages of price and exchange rate has persuaded the end user to continue sourcing imported frozen potato chips, thereby negatively impacting on the Applicant's potato chip sales volumes and profitability.

Comments by EUPPA

EUPPA indicated that “the serious injury to the local economy, which is also required to justify the imposition of any safeguard measure, is not obvious at all. The new provided injury indicators prove positive developments for the domestic industry: growing production volume, growing employment, growing investments and growing capacity utilization”.

API Comments

API indicated that “it noted that the applicant has not submitted any proof of its calculation of the landed cost of the imported product and this information should therefore be disregarded. Furthermore, API indicates that there is no basis for claiming confidentiality of import prices, as these are in the public domain. All information contained in the table in rows “Average FOB cost per kg (SARS”, “Duty R/kg”, “Insurance/freight” and “Total Landed Cost” should therefore be made available”.

API also indicated that “the fact that the total landed cost has decreased is not an unforeseen development, but a natural result of the trade agreement with the EU. This is especially clear from the fact that the average FOB price has actually increased over the period, while the rate of duty has decreased. It was clearly envisaged that decreased duties for the product from the EU would lead to increased trade in the product”.

Commission's analysis

The Commission determined that the Applicant submitted proof of its landed cost and was calculated based on fob value using import statistics after adding freight, insurance and clearing costs based on costs that the Applicant incurred when importing the subject product. In this regard the Applicant claimed confidentiality in the calculation of the landed cost as it includes estimates at arriving at the landed cost based on its own actual cost it incurred when importing the subject product.

Price undercutting was calculated based on landed cost of total net imports irrespective of their origin as required in terms of the Safeguard Agreement.

Comments by API

“The calculation of the undercutting percentage does not make sense. It is indicated that undercutting per unit increased from a factor of 1.00 to 2.04, while McCain’s prices increased from a factor of 1.00 to 1.12. When the undercutting is then expressed as a percentage of the selling price, one would expect a value of 1.00 (undercutting divided by price times 100). In 2012, one would then expect a value of $(2.04/1.12)$ 1.82, yet the figure is 2.18. This indicates that the non-confidential version is incorrect. ITAC is requested to provide us with the correct information or to require the applicant to supply the correct information and we should be provided an opportunity to comment on the correct information”.

Commission’s analysis

The Commission determined that the Applicant has experienced significant increased price undercutting in the financial periods 2010 and 2011. The price undercutting in 2012 decreased compared to 2010 and 2011, however, still remained significantly higher than in 2009. API is not taking the landing costs into account when making its comments. Own import volumes and values are excluded in the in the calculation of the landed cost.

Comments by YIR

YIR indicated that, “due to its high standards and brand specifications that it requires, which in itself adds cost to the Product, it has been able thus far to procure Local Product at a competitive price from the Local Producers. Furthermore YIR stated that the total cost for the imported Product (which includes off-site storage and distribution cost but excludes the import tariffs in place) is 1.32% more expensive than Local Product price and it thus indeed confirms that the average pricing for supply of imported Product is more than the quoted domestic market price. This price does not as yet account for the material exchange rate fluctuation, as YRI agreed a contracted price until end of April 2014 with the Importers. Moreover should the import tariff be included on current import price, this would mean that the imported Product will be on average 63.55% more than the local Product price, this not taking into account

any exchange rate fluctuation. This has the effect of totally excluding the importers from the competitive set in South Africa.

The recent contractions in the global production of raw potatoes and the material depreciation of the Rand to the Euro have led to significantly higher import prices in 2013. This will impact YRI early in 2014 as current contract pricing with Importers have been set at a lower exchange rate at the time of contracting”.

Moreover, YRI stated that “it estimates the current difference between local and import Product to be significantly lower than that reported by the Local Producers, amounting to around 20% in 2012 (as compared to over 40% as reported), with the weighted average price YRI paid for imports and Local Product in 2012 amounting to R9.35/kg and R11.36/kg respectively”.

“Furthermore, as indicated above, YRI can confirm that the estimated landed product import prices for the next contract season increased to levels closer to R11/kg due to the depreciation of the Rand relative to the Euro, and a decrease in international raw potato production. Accordingly, even if such undercutting was to have existed previously, it will not persist going forward especially should the exchange remain as volatile as it has been in the past 6 month period”.

Commission’s analysis

The Commission determined the landed cost based on the weighted average FOB value of the net imports as obtained from the SARS’ statistics and, after adding the freight and insurance and clearance costs. The imported product is undercutting the price of the locally produced product. The level of price undercutting in the financial year ending 2012 is 33.99 % and not 40 % as estimated by YIR. The alleged estimated increase in the price of the imported subject product in 2013 to 2014 does not fall within the POI and the Commission initiated the investigation on the basis of serious injury and not threat of serious injury.

6.3.2 Price depression

Price depression occurs when the domestic industry experiences a decrease in its selling prices over time. The table below shows the domestic industry's selling prices:

Table 6.3.2

Rand	July 08- June 09	July 09- June10	July 10- June 11	July 11- June 12
Average gross selling prices per kg	100	108	118	112

This table was indexed due to confidentiality using the year ending 2009 as the base year.

The above table shows that the Applicant's average selling prices increased for the financial period 2009 compared to the financial period 2012 by 12 index points. This therefore indicates that the Applicant did not experience price depression.

6.3.3 Price suppression

Price suppression is the extent to which increases in the cost of production of the subject product, cannot be recovered in selling prices.

The following table shows the Applicant's costs of production and its actual selling prices for the subject product:

Table 6.3.3

Rand per kg	July 08- June 09	July 09- June10	July 10- June 11	July 11- June 12
Selling prices R/kg	100	108	118	112
Total Product cost (COG + Variable)	100	109	106	88
Total Cost	100	109	109	92
Total COS (Total Spend + Dist) Ex. Factory	100	108	123	108
Total cost % of Selling Price	100	100	104	97

This table was indexed due to confidentiality using the year ending 2009 as the base year.

The table above indicates that the Applicant was suffering price suppression.

The Applicant stated that there has been a significant change to cost and price structures during the last 18 months, taking into consideration the impact of

imports, the market recessionary conditions, and inflation. Selling prices have been reduced to retain market share. The Applicant indicated that it had to focus more on tighter controls, input costs, as well as the contractual conditions pertaining to raw potato supply. The Applicant indicated that this was necessary as raw material contracts are fixed in advance for the season and that the factory needs to be kept operational 'at volume' in order to retain overhead cost recovery rates. It indicated that it also has a policy of avoiding retrenchments, and labour cost forms part of costs to be recovered. Moreover, the Applicant calculates a Bill of Materials/Cost price for each year. Any variance in raw material, oil costs etc. are accounted for in variances for the month.

Comments by API

API indicated that "it is notable that the applicant confirms that no price suppression is taking place as it indicates its unsuppressed selling price to be exactly the same as its actual price. This invalidates its allegations that its prices were decreased or under pressure from the imported products. In addition, it is notable that its prices have increased over the investigation period".

Commission's analysis

The applicant did not experience price depression. However there is significant price suppression which increased in the 2010 and 2011 financial period compared to the 2009 financial period and decreased in 2012 to a level below that of 2009.

Comments by YIR

"It is in fact illustrated in the table below that the price of local supply had indeed drastically declined from 2009 with a slight increase in 2013.

By contrast, it appears that potato production across Europe seemed to have declined in the 2012 production season due to extreme weather conditions and variable yields, sizes, quality and availability of product. For instance, the North-Western European Potato Growers ("NEPG") estimated the North

Western Europe harvest to be 14.5% lower in the 2012 production season compared to the 2011 production season.

Moreover, the available evidence suggests this is likely to place upwards pressure on the international price of raw potatoes, with one of YRI's European Producers, Farm Frites, having informed YRI that its raw potato price is likely to increase with € 0.02 - € 0.04/kg in 2013 due to lost crops, and that this will have an impact on the imported Product price".

Commission's analysis

The Applicant did not experience price depression however there is significant price suppression which increased in 2010 and 2011 financial period compared to 2009 financial period and decreased in 2012 to a level below that of 2009. The alleged estimated increase in the price of the imported subject product in 2013 to 2014 does not fall within the POI and the Commission found that it initiated the investigation on the basis of serious injury and not threat of serious injury.

6.4 SIGNIFICANT CHANGES IN THE PERFORMANCE OF THE SACU INDUSTRY

6.4.1 Sales volume

The following table shows the Applicant's sales volume for their total potato business:

Table 6.4.1

	July 08- June 09	July 09- June10	July 10- June 11	July 11- June 12
Applicant's sales volume (Tons)	100	98	87	97

This table was indexed due to confidentiality using the year ending 2009 as the base year.

The information in the table indicates that the Applicant's sales volumes decreased by 13 index points in the financial period ending 2011 compared to the financial period ending 2009 and it increased by 10 index points for the financial period ending 2012 compared to the financial period ending 2011.

The Applicant stated that the advantages of price and foreign exchange persuaded the end user to continue sourcing imported potato chips, thereby negatively impacting on the applicant's potato chip sales volumes and profitability.

Comments by API

API stated that "it is specifically noted that the Applicant sales increased from a factor of 0.87 to 0.97 over the final year, an increase of nearly 13%. Furthermore, API stated that the WTO Dispute Settlement Body has held in a number of recent disputes, including China – GOES and China – X-rays, that particular emphasis must be placed not on end-point analyses but on the evaluation of trends, including, specifically, where a trend is different closer to the end of an investigation period. The latest trend therefore clearly indicates that McCain's sales are increasing and imports are decreasing, confirming the complete lack of basis for a safeguard investigation. It again calls on ITAC to immediately terminate the investigation".

Commission's analysis

The Applicant's sales in the 2010 financial period decreased by 1.8% compared to 2009 and in 2011 decreased by 11% compared to 2010. In 2012 financial period sales increased by 10.62% compared to 2011. However the sales in 2012 were still lower than in 2009 by 3.35%.

Comments by the EU

The EU indicated that, "the sales figures of the Applicant suggest that own imports were included in the analysis of sales while the analysis of domestic sales should only cover the domestic sales related to own production. Based on real (and not indexed) market share figures presented under section 8.2, it can easily be concluded that instead of declining sales volume, the relevant domestic sales (i.e. sales of the own production) actually followed an increasing trend. Indeed, sales volume (own production) is 7.7% higher in 2012 than the level of 2009".

Commission's analysis

The Commission noted that the Applicant indicated that it could not separate its sales volumes between sales made from imports and that from own production as imports form part of finished stock after importation. Furthermore, Applicant's own production as a percentage of sales during the POI, on average, constituted 91 %. The market share analysis excluded own imports from total imports by the three domestic producers.

6.4.2 Profit and Loss

The following table shows the Applicant's profit and loss situation for the total potato business:

Table 6.4.2

	July 08- June 09	July 09- June10	July 10- June 11	July 11- June 12
Tons	100	98	87	97
KG's Sold	100	98	87	97
Total Rand Net Sales	100	106	95	63
Net Loss (000's)	100	111	154	64

This table was indexed due to confidentiality using the year ending 2009 as the base year

The table above indicates that the Applicant's net loss increased by 54 index points from the 2009 financial period compared to the 2011 financial period.

The Applicant stated that the prime contributor to the decline in profits previously experienced stemmed from the continued "cheap" pricing of imported chips in the local market. The Applicant further stated that also impacting the decline in profits were the negative impact of recessionary conditions in the market place affecting consumer buying behaviour, the unusual local weather conditions negatively impacting on supply and demand leading to rising market prices of raw potatoes, supported by the strong Rand'.

Comments by YIR

YIR stated that "comparing 2009 figures with those in the remaining subsequent years, namely 2010 and 2011, it appeared that both measures of

net gross profit exhibited increases over the period. From this, YRI can only infer that net profit margins would have fallen simply as a result of fixed costs (not reflected in measures of gross profits) being spread over fewer volumes. However, if this was the case then it would appear to be at odds with McCain's claim of threatened on-going viability, since Lamberts Bay Foods has been active for a number of years, despite operating a significantly lower scale of production and sales.

Moreover, even though the non-confidential data submitted by McCain show a decline in net profits, this does not necessarily imply that McCain will not be viable going forward”.

Commission's analysis

The Applicant's net loss increased by 54 index points from the 2009 financial period compared to the 2011 financial period and that its net loss decreased by 90 index points from 2011 to 2012 as a result of the following cost reduction strategy implemented by the Applicant.

Furthermore, overheads form part of the total cost which is taken into account in determining profits or losses incurred. Lamberts Bay Foods is one of the local producers that have supported the application.

Due to a cost reducing strategy which is in the Applicant's adjustment plan, the following were put into place:

- Access to sufficient raw material for local production*
- Diversification of raw material input*
- Efforts to reduce administrated costs (water and energy)*
- Increasing productivity; and*
- Increasing production capacity*

After the implementation of the above the Applicant's net loss decreased by 90 index points from the 2011 to the 2012 financial periods.

6.4.3 Output

The following table shows the Applicant's output:

Table 6.4.3

	July 08- June 09	July 09- June10	July 10- June 11	July 11- June 12
Applicant's total production of frozen potato chips (Tons)	100	103	86	115

This table was indexed due to confidentiality using the year ending 2009 as the base year.

The table above indicates that production declined by 14 index points in the period 2009 to 2011. Output increased by 29 index points in the 2011 to 2012 financial periods.

The Applicant stated that the prime contributor to the decline in output stemmed from the continued "cheap" pricing of imported chips in the local market. The Applicant further stated that also impacting the decline in output were the negative impact of recessionary conditions in the market place affecting consumer buying behaviour, the unusual local weather conditions negatively impacting on supply and demand leading to rising market prices of raw potatoes, supported by the strong Rand'.

6.4.4 Market share

The following table shows the market share for frozen chips:

Table 6.4.4

Percentage held by:	July 08- June 09	July 09- June10	July 10- June 11	July 11- June 12
Applicant's market share	100	86	73	78
Net imports	100	930	2 036	1 554

This table was indexed due to confidentiality using the year ending 2009 as the base year.

The table above indicates a decrease in the Applicant's market share of 14 index points for the financial year ending 2010 compared to the financial year ending 2009 and in the 2011 financial period the market share decreased by 13 index points compared to 2010. The market share of the applicant

increased in 2012 by 5 index points compared to 2011. However the market share in 2012 is lower than that in 2009 by a significant 22 index points.

The market share held by net imports increased from 100 index points in 2009 to 930 index points in 2010 and increased to 2 036 index points in 2011 compared to the 100 index points in 2009. In 2012 the market share of net imports decreased to 1 554 index points compared to the 2 036 index points in 2011. However, the net imports market share was still significantly higher than in 2009.

Comments by API

API stated that “the assumption that “the Applicant is presumed to be the SACU market” is completely erroneous and unfounded. In addition, if these market shares were computed on the basis of expressing the imports as a percentage of the applicant sales only (in which case the calculations would still be incorrect), it would show that the imports’ actual market share is considerably lower than that indicated in the application and the presentation can, at best, be described as misleading. API concluded that the question also has to be asked as to what market share was achieved by non-industry imports, i.e. the imports other than those made by the applicant and the rest of the SACU industry. It is submitted that if these industry imports were removed from the calculation, the remaining imports’ market share would be insignificant and decreasing”.

Commission’s analysis

The net imports were calculated after subtracting own imports not only by the Applicant but also the other known two local producers that supported the application.

Comments by the EU

The EU indicated that, “concerning the development of market shares, according to ITAC’s own analysis, the domestic industry held a market share of 98% in 2009. Under these circumstances it is unavoidable that in the context of an increasing consumption (+25% in 4 years) such a high level of

market share would decrease”.

Commission’s analysis

There was a decrease in the Applicant’s market share of 14 index points for the financial year ending 2010 compared to the financial year ending 2009, and that in the 2011 financial year, the market share decreased by 13 index points compared to 2010. Although the market share of the applicant increased in 2012 by 5 index points compared to 2011, the market share in 2012 is lower than that in 2009 by a significant 22 index points. The Commission also noted that the gain in market share by the imports corresponds to the loss in market share by the Applicant.

Comments by API

API furthermore indicated that “whilst the Commission had originally (as per its preliminary report) sought to exclude industry’s own imports in the determination of whether there had been a surge of imports, ITAC has failed to get clarification from the industry as to why its own imports had increased to the extent it did until 2010. Clearly, if the industry had to import such significant quantities as it did in 2010, well over half of all subject imports, there must have been a reason. It is submitted that the reason for the high volume of own imports was the industry’s inability to supply the market as its capacity was simply insufficient. This is confirmed by the fact that at present industry is again unable to supply the market demand as it has insufficient capacity. In this regard, all three local producers have indicated to buyers that they are unable to supply until at least January 2014 and that they would then have to determine whether they would be in a position to supply. The increased imports are therefore the result of the industry’s inability to supply the market demand”.

Commission’s analysis

The Commission found that from the letter that was provided to the Commission with regard to the Applicant’s ability to supply the subject product to the customers, it is not mentioned that the Applicant does not have the

capacity to supply. The Applicant was merely informing its customers that there will be a temporary surcharge of R2.00 per kg.

6.4.5 Productivity

The following table shows the productivity of the Applicant:

Table 6.4.5

	July 08- June 09	July 09- June10	July 10- June 11	July 11- June 12
Total production volume (tons) for all frozen potato chips	100	103	86	115
Number of employees (manufacturing only)	100	101	101	112
Units per employee	100	102	86	103
Total employment	100	106	105	92
Total investment (Rands)	100	108	110	111
Output ratio	100	105	128	96

This table was indexed due to confidentiality using the year ending 2009 as the base year

From the table above, productivity increased by 2 index points in 2010 compared to 2009 and decreased by 16 index points in 2011 compared to 2010. In the 2012 financial period the applicant's productivity increased by 17 index points compared to 2011.

6.4.6 Utilization of production capacity

The following table provides the Applicant's capacity and production:

Table 6.4.6

Tons	July 08- June 09	July 09- June10	July 10- June 11	July 11- June 12
Capacity	100	100	100	100
Applicant's output	100	103	86	115
Utilisation of capacity	100	102	86	114

This table was indexed due to confidentiality using the year ending 2009 as the base year.

The table above indicates that utilization of production capacity increased by 2 index points in 2010 compared to 2009 and decreased by 16 points in the financial period ending 2011 compared to the financial year ending 2010.

However, productivity increased by 28 index points in the financial period ending 2012 compared to the financial period ending 2011.

Comments by API

API stated that it is noted that “although the Applicant indicates that capacity has remained stable throughout the investigation period, it started operating a fourth production shift in 2012, which is indicative both of increased capacity and of a healthy economic performance which does not show injury”.

Commission’s analysis

The Commission noted that total capacity remained the same over the investigation period, however utilisation thereof has increased.

Comments by YIR

YIR stated that “it appears that the local supply of the product is highly concentrated and that the Applicant will be the primary benefactor should all domestic demand be channelled to the local producers due to unaffordability of the imported product. To this extent, YRI can confirm that Natures Choice have not been able to provide product that complies with YRI specification and standards and Lamberts Bay have indicated that they will not be able to accommodate any further volume requirements for the YRI system. The aforesaid shortage is not surprising, as South Africa remains a net exporter of potatoes in the long-run, with 82 0000 tons of potatoes being exported currently, this amount may obviously increase due to the current exchange rate which presently supports the increase of exports and will limit local supply and raise local prices of potatoes in general”.

Commission’s analysis

The analysis of the Applicant utilisation rate of capacity in the period of investigation is on average 57.25%, a factor which indicates that the local industry has capacity to supply the subject product

6.4.7 Employment

The following table provides the Applicant's employment figures for frozen chips production:

Table 6.4.7

	July 08- June 09	July 09- June10	July 10- June 11	July 11- June 12
Number of employees (manufacturing only)	100	101	101	112

This table was indexed due to confidentiality using the year ending 2009 as the base year.

The table above indicates that direct employment for the 2009 to 2012 period increased by 12 index points.

Comments by API

API indicated that "there is clearly no injury whatsoever as regards employment. In fact, total employment increased during the entire period including 2012, as well as in 2010, when imports increased. Total employment decreased in 2011 when imports decreased, and then increased in 2012 when imports remained stable. API concluded that there is clearly no link between the applicant employment levels and the import volumes".

Comments by YIR

YIR stated that "it is important to appreciate that the local producers indicated on page 34 of its submission that the employment figures reported by it represents employment figures for "McCain Foods as a whole" and as such, appears to represent employment by the firm's whole business and not only by its frozen potato business. This fact in any event is dwarfed by those employed in the fast food industry (estimated at 22 000)."

Commission's analysis

The employment figures in the table above are the employment of the Applicant in the frozen potato chips factory only. The employment in the raw potato industry, which relies on procurements from, amongst others, the local producers of the subject product as reported by Potato S.A during the public hearings, stands at approximately 80 000 people.

6.5 Any other relevant factors

The Applicant stated that the European products have been marketed by a cross section of importers: traditional frozen importers, as well as importers who have taken advantage of the low pricing from Europe and good exchange rates. It stated that these types of importers have targeted the larger areas of the food-service business and initially had success with the smaller food-service wholesalers. As the consistency of supply and pricing was noticed by the trade, these imports then moved into the larger wholesalers which distributed to restaurants, coffee shops etc. as well as into the retail delis (such as Shoprite, Pick 'n Pay and Spar).

The Applicant further stated that imports have been basically of the European retail packs (not food-service packs), and as such, these products found their way into the retail trade and sold to end consumers. All of the imports achieved their current sales volumes based on pricing levels that are substantially below that at which the applicant is able to market and sell locally produced product. In some cases, the pricing being offered to the food-service wholesalers by importers has been below that at which the Applicant is able to produce and distribute the product. The Applicant stated that it is also notable that imports are not complying with the requirements of the Consumer Protection Act or South African food labelling requirements.

In 2011, upgrading of the applicant's packaging plant to meet with domestic legislation cost approximately R7 million. The Applicant stated that importers are seemingly not making this investment in meeting regulatory requirements.

Lastly, the Applicant stated that the clients which it has lost and those putting its pricing under pressure confirmed that this was due to substantially cheaper imports. Those clients made no mention of competition from other SACU manufacturers as a reason for not buying the Applicant's product.

6.6 Comments by interested parties

The Commission considered comments received from interested parties with regard to serious injury. Non-confidential versions of these comments are available on the public file.

Comments by the EU

The Commission would like to underline that “according to the provisions of Article 4.1(a) of WTO SA, the serious injury required for the imposition of any safeguard measure should be understood as a significant overall impairment in the position of the domestic industry.

The analysis of the injury indicators in the report does however not indicate the presence of serious injury. In fact, most of the injury indicators show a positive development between the financial years 2009 and 2012: production volume increased by 15%, production capacity increased by 14%, employment increased by 12%, investments increased by 11% and there was no price depression (prices increased by 12%)”.

Comments by API

API, amongst others, indicated that “the Commission claims that the gain in market share by the imports corresponds to the loss in market share by the Applicant. This claim is indeed true. However, it is stating the obvious and does not add anything to the injury analysis in a safeguard case. Given that in case of safeguards the domestic industry's market share is analysed against the market share of all imports together, the conclusion cannot be anything different than that the gain in the market shares of imports is replacing the losses of the domestic industry's share”.

Commission's analysis

The Commission considered that the subject product is imported at increased levels and the SACU industry's market share has decreased whilst the market share of the imports increased significantly during the period of investigation. The Commission also noted that safeguard measures are temporary

measures that are aimed at allowing the domestic industry to compete with imports.

6.7 CONCLUSION: SERIOUS INJURY

The Commission made a final determination that the SACU industry is experiencing serious injury in that:

- the volume of imports increased significantly;
- the sales volume declined;
- the loss situation increased; and
- the market share declined.

The Applicant competed with imports on price which led to the price suppression experienced by the Applicant. The Applicant consequently, experienced increased losses in the financial years 2010 and 2011 compared to 2009, coupled with a loss in market share. The Applicant increased production in 2012 compared to 2011 following the implementation of its adjustment plan, although the domestically produced product was still experiencing significant price undercutting in 2012 compared to 2009 and continued losses as a result.

7. CAUSAL LINK

7.1 VOLUME OF IMPORTS AND MARKET SHARE

An indication of causality is the extent of the increase in volume of imports and the extent to which the market share of the domestic industry has decreased since the commencement of injury, with a corresponding increase in the market share of the imported subject product.

The following table compares the market share of the SACU industry with that of the alleged increased imports:

Table 7.1.1

Percentage held by:	July 08- June 09	July 09- June10	July 10- June 11	July 11- June 12
Applicant's market share	100	86	73	78
Net imports	100	930	2 036	1 554

This table was indexed due to confidentiality using the year ending 2009 as the base year.

The table above indicates a decrease in the Applicant's market share of 14 index points for the financial year ending 2010 compared to the financial year ending 2009. In the 2011 financial period the market share decreased by 13 index points compared to 2010. The market share of the applicant increased in 2012 by 5 index points compared to 2011. However, the market share in 2012 is lower than that in 2009 by a significant 22 index points.

The market share held by net imports increased from 100 index points in 2009 to 930 index points in 2010 and increased to 2 036 index points in 2011 compared to the 100 index points in 2009. In 2012 the market share of net imports decreased to 1 554 index points compared to the 2 036 index points in 2011. However, the net imports market share was still significantly higher than in 2009.

Table 7.1.2

Import volumes (Tons)	July 08- June 09	July 09- June10	July 10- June 11	July 11- June 12
Net imports	1 504	13 705	26 689	22 534

This table was indexed due to confidentiality using the year ending 2009 as the base year.

In comparing the 2009 and 2010 financial periods, the increase in net imports in absolute terms is 811 index points. The net imports increased by 864 index points for the 2011 financial period compared to the 2010 financial period and decreased by 27 index points in 2012 compared to 2011. The rate of increase in net imports relative to the domestic production for the financial years 2009 to 2010 was 789 index points and for the financial years 2010 to 2011 the rate of the increase 1167 index points. There was a decrease in net imports relative to production between the 2011 and 2012 financial periods of 756 index points.

The Applicant stated that the European products have been marketed by a cross section of importers: traditional frozen importers, as well as importers who have taken advantage of the low pricing from Europe as well as favourable exchange rates.

The Applicant stated that these types of importers have targeted the larger areas of the food-service business and initially had success with the smaller food-service wholesalers. As the consistency of supply and pricing was noticed by the trade, these imports then moved into the larger wholesalers which distributed to restaurants, coffee shops etc. as well as into the retail delis (such as Shoprite, Pick 'n Pay and Spar).

7.2 CONSEQUENT IMPACT OF SURGE OF IMPORTS

Serious injury indicator	Analysis (July 2008 – June 2012)
Sales volume	Decrease
Loss	Decrease
Market share	Decrease

7.3 FACTORS OTHER THAN THE INCREASE IN IMPORTS CAUSING INJURY

7.3.1 Contraction in demand for the product

The Applicant stated that there was an increase in demand for the subject product for the period 2009 to 2011. However, the Applicant's market share and sales volumes decreased over the same period as a consequence of the increase in imports.

The Applicant stated that it has experienced a contraction in demand and that this contraction in demand was caused by imports and also that it is further exacerbated by the current recessionary circumstances which are impacting the buying patterns in the local market place for foodstuffs generally.

The Applicant further stated that, despite the contraction in demand for its product, demand generally is growing and consumption has not declined. The logical conclusion is that local demand is being satisfied through imports which are substantially more aggressively priced to meet local demand under recessionary conditions.

7.3.2 Developments in technology

The Applicant stated that in 2007, it spent R700 million to upgrade its Delmas Plant. Delmas is an exclusive potato processing facility. This upgrade, through the installation of a second potato chip processing line, represents the latest technology.

The Applicant further stated that continuous improvement projects are undertaken by its Centre of Excellence (the McCain Center of Excellence) focusing on developing and implementing new technology which would further enhance productivity. On a regular basis, Kaizen & Six Sigma workshops are conducted, led by on-site specialists, with a view to improve productivity, enhance Best Operating Practices (BOP's), and evaluate waste management practices. Extensive training and skills upgrading was done for staff operating the potato chip factory at the Delmas Plant.

7.3.3 Productivity of the domestic industry

The Applicant stated that continuous improvement activities conducted in its local processing plants including the Delmas Plant contribute towards better productivity levels.

The Applicant stated that comparative analysis against Global Best Operating Practices forms part of its Foods Global Manufacturing Strategy to identify areas of 'investigation and analysis' with the focus on improving processes.

The Applicant also stated that the European potato market is more readily supplied by raw material as a result of more favourable and conducive agricultural conditions for producing the primary product. The local processing industry does not have the accessibility to many processing potato varieties as have the European Processors, because in Europe there is a much larger pool of table potato varieties, with fewer processing varieties for the SACU processors.

7.3.4 View of the Applicant's clients regarding quality, delivery times, service and after sales service

- **Quality**

The Applicant stated that it is perceived to be the Industry Standard "Benchmark";

- **Delivery times**

The Applicant stated that customers are satisfied with the its delivery times as indicated by its customer service level reports, which are available upon request.

- **Service and after sales**

The Applicant stated that customers are satisfied with its service as indicated by its customer service level reports, which are available upon request.

The Applicant further stated that it is the Industry Standard “Benchmark” and that its after-sales service is a ‘given’ supported with product demonstrations and technical training given to its customers. The Applicant also stated that these value added services are neither provided for by importers nor reflected in the landed costs of imports. To the extent that customers switch partially to imported product from that of the applicant, imports “free-ride” on the technical training and support provided by the applicant.

7.3.5 Attitude of the workforce towards the company

The Applicant as a company employs approximately 890 permanent employees and approximately 350 seasonal employees. Recent employee surveys indicated that locally staff satisfaction is amongst the best in its Group of companies as measured globally. The company negotiates pay and conditions of employment with the Food and Allied Workers Union (FAWU) which represents bargaining unit staff at the company’s three manufacturing plants on an annual basis.

7.4 Comments received

The Commission considered comments received from interested parties with regard to the causal link. Non-confidential versions of these comments are available on the public file.

Comments by EUPPA

EUPPA indicated that “it would like to stress that there is no objective evidence of the existence of a causal link between increased imports of the product concerned and serious injury to the South African economy, or even a threat thereof. In this case, firstly, the market shares held by importers decreased between 2011 and 2012, secondly there is no correlation between the trend of imports, which are presented for calendar years, and injury indicators, which are presented for fiscal years (July-June)”.

Commission's analysis

Information with regard to both imports and all injury indicators is given for the financial years in order to ensure comparability of the information.

Comments by the European Union

The European Commission stated that "as far as causality is concerned, it is recalled that pursuant to Article 4.2(b) of the WTO SA, the determination whether increased imports have caused serious injury "shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports".

In this respect, the Panel in *Argentina – Footwear (EC)*, in a finding upheld by the Appellate Body, stated that a proper approach that could be adopted by a Panel in order to evaluate whether a Member has complied with the provisions of Article 4.2(a) and 4.2(b) of the SA with regard to a causal link would consist of examining, first, whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether an adequate, reasoned and reasonable explanation is provided as to why, nevertheless, the data show causation.¹

The European Commission indicated that "in this case it should first be noted that market shares held by imports decreased between 2011 and 2012. Furthermore, it is simply impossible on the basis of the data included in the complaint to establish any correlation between the trend of imports which are presented for calendar years (and, it is recalled, in any event decreased in the most recent period presented), and injury indicators which are presented for fiscal years (July-June).

¹ Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 145. See also the Panel Report, *US – Wheat Gluten*, paragraph 8.91.

Finally, the investigating authorities should also look at other known factors which could also have caused injury, if any. For example, the complainant seems to have suffered losses during the overall period and that must have been caused by reasons other than imports. Furthermore, it seems that the complainant in this case is one of the most (if not the most) significant importers of frozen chips, and therefore any injury caused by imports would be self-inflicted. Restricting imports with the imposition of measures will undoubtedly have a significant impact on South African interest overall. These aspects need to be carefully taken into consideration during the remainder of the investigation”.

Commission’s analysis

For purposes of determining injury, all imports by the SACU industry were excluded, therefore ensuring that injury caused by own imports, is not attributed to the surge in imports.

Comments by the Embassy of Argentina

The Embassy of Argentina indicated that “the Applicant has not demonstrated the causal link.

In Section G, G1 of its presentation the Applicant argues that the alleged “serious injury” is caused by the imports. Although, those arguments are not enough supported with evidence as required by Article 4. 2. b) of the Agreement on Safeguards.

On the other hand, the Applicant supports the idea that there are other reasons, different from imports volume growth, that contribute to provoke a serious injury in its domestic industry, such as “the market recessionary conditions and inflation...”[...] “the forex factor of “a Strong Rand in the initial periods put downward pressure on the ex-factory price”.[...] “Also impacting the decline in profits were the negative impact of recessionary conditions in the market place affecting consumer buying behaviour, the unusual local weather conditions negatively impacting on supply and demand leading to rising market prices of

raw potatoes and supported in the earlier periods by the currency advantage of a strong Rand”.

In this regard, it is important to remark that those arguments must be considered pursuant to Article 4.2. b) of the Agreement on Safeguards which specifies:

“When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.”

In no case does the Applicant identify separately the injury that it alleges as an effect of the increase of imports. In that sense, in connection with the price, the Applicant argues that the effects of imports is “exacerbated by the advantages of the foreign exchange regarding the stronger Rand against international currencies over this period”.

Regarding the changes alleges in “cost or prices” during the last 18 months, the Applicant invokes a supposed injury provoked by other causal factors such as “the impact of imports, the market recessionary conditions and inflation.” In this sense, the Applicant includes imports as a causal link without specifying separately the injury caused by the factors different from imports.

Also, the fall of imports in 2009, a key year in the context of the global financial crisis, does not allow that year as a reference year in order to analyse the market share.

In addition, the Applicant refers again to other causal link different from increased imports to support his claim of “serious injury” contrary to Article 4. 2. b) of the Agreement on Safeguards as follows: “The trend has been further exacerbated by the advantages of the foreign exchange regarding the stronger Rand against international currencies over the initial part of this period”.

The Panel in Korea — Dairy set forth the basic approach for determining “causation”:

“In performing its causal link assessment, it is our view that the national authority needs to analyze and determine whether developments in the industry, considered by the national authority to demonstrate serious injury, have been caused by the increased imports. In its causation assessment, the national authority is obliged to evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry. In addition, if the national authority has identified factors other than increased imports which have caused injury to the domestic industry, it shall ensure that any injury caused by such factors is not considered to have been caused by the increased imports”

The Appellate Body in US — Wheat Gluten concluded that the incidence of increased imports must be sufficiently clear so as to establish the existence of “the causal link” required, but rejected the Panel’s conclusion that the serious injury must be caused by the increased imports alone and that the increased imports had to be sufficient to cause “serious injury”:

“In essence, the Panel has read Article 4.2(b) of the Agreement on Safeguards as establishing that increased imports must make a particular contribution to causing the serious injury sustained by the domestic industry. The level of the contribution the Panel requires is that increased imports, looked at ‘alone’, ‘in and of themselves’, or ‘per se’, must be capable of causing injury that is ‘serious’. It seems to us that the Panel arrived at this interpretation through the following steps of reasoning: first, under the first sentence of Article 4.2(b), there must be a ‘causal link’ between increased imports and serious injury; second, the non-‘attribution’ language of the last sentence of Article 4.2(b) means that the effects caused by increased imports must be distinguished from the effects caused by other factors; third, the effects caused by other factors must, therefore, be excluded totally from the determination of serious injury so as to ensure that these effects are not ‘attributed’ to the increased imports;

fourth, the effects caused by increased imports alone, excluding the effects caused by other factors, must, therefore, be capable of causing serious injury.²

In US — Lamb, the Appellate Body concluded that Article 4.2(b) requires a “demonstration” of the “existence” of a causal link, and it requires that this demonstration must be based on “objective data”.

Also in US — Lamb, the Appellate Body again stressed the importance of the separation of injurious effects caused by increased imports on the one hand and other factors on the other hand:

“Article 4.2(b) states expressly that injury caused to the domestic industry by factors other than increased imports ‘shall not be attributed to increased imports.’ In a situation where several factors are causing injury ‘at the same time’, a final determination about the injurious effects caused by increased imports can only be made if the injurious effects caused by all the different causal factors are distinguished and separated. Otherwise, any conclusion based exclusively on an assessment of only one of the causal factors — increased imports — rests on an uncertain foundation, because it assumes that the other causal factors are not causing the injury which has been ascribed to increased imports. The non-attribution language in Article 4.2(b) precludes such an assumption and, instead, requires that the competent authorities assess appropriately the injurious effects of the other factors, so that those effects may be disentangled from the injurious effects of the increased imports. In this way, the final determination rests, properly, on the genuine and substantial relationship of cause and effect between increased imports and serious injury.”

“Furthermore the Government of Argentina indicated that the causal link has not been adequately analysed by the Applicant since imports are considered per se and separately as the causal link for the serious injury but just as an element of a variety of causes for the injury alleged”.

The effects of the alleged increase of the imports are not being considered in a separate way, and the effects of the other factors mentioned by the Applicant are attributed in a non-differentiated manner to the increased imports. As a consequence, ITAC cannot attribute the “injuries effects” alleged to imports in this investigation.

²United States — Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities. DS166 paragraph 66.

The Government of Argentina concluded that the requirements of “serious injury” and the “causal link” pursuant by the Agreement on Safeguard are not met.

On the other hand, the threat of serious injury is attributed to imports from the European Union and not from Argentina”.

Commission’s analysis

Information with regard to both imports and all injury indicators is given for the financial years in order to ensure comparability of the information.

Comments by the European Union

The European Commission stated that “as far as causality is concerned, it is recalled that pursuant to Article 4.2(b) of the WTO SA, the determination whether increased imports have caused serious injury “shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports”.

In this respect, the Panel in Argentina – Footwear (EC), in a finding upheld by the Appellate Body, stated that a proper approach that could be adopted by a Panel in order to evaluate whether a Member has complied with the provisions of Article 4.2(a) and 4.2(b) of the SA with regard to a causal link would consist of examining, first, whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether an adequate, reasoned and reasonable explanation is provided as to why, nevertheless, the data show causation.³

The European Commission indicated that in this case it should first be noted

³ Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 145. See also the Panel Report, *US – Wheat Gluten*, paragraph 8.91.

that market shares held by imports decreased between 2011 and 2012. Furthermore, it is simply impossible on the basis of the data included in the complaint to establish any correlation between the trend of imports which are presented for calendar years (and, it is recalled, in any event decreased in the most recent period presented), and injury indicators which are presented for fiscal years (July-June).

Finally, the investigating authorities should also look at other known factors which could also have caused injury, if any. For example, the complainant seems to have suffered losses during the overall period and that must have been caused by reasons other than imports. Furthermore, it seems that the complainant in this case is one of the most (if not the most) significant importers of frozen chips, and therefore any injury caused by imports would be self-inflicted. Restricting imports with the imposition of measures will undoubtedly have a significant impact on South African interest overall. These aspects need to be carefully taken into consideration during the remainder of the investigation.

Commission's analysis

For purposes of determining injury, all imports by the SACU industry were excluded, therefore ensuring that injury caused by own imports, is not attributed to the surge in imports.

Comments by API

API indicated that the applicant indicates that it spent R700 million on its plant in 2007. This necessarily means significant additional depreciation costs and ITAC is requested to determine the effect of these costs on the overall profit/loss situation of McCain. Such injury should not be attributed to the effect of the declining imports. This appears to be a spurious application by the applicant in order to maximise a return on this massive investment. Furthermore API indicate that the given the applicant intimate knowledge of the domestic market and South Africa's low level of chip exports, it cannot understand why the applicant would invest so heavily in producing chips, if they did not have a clear export strategy.

Commission's analysis

The Applicant continued to suffer losses during the period of investigation, with increased losses made in the 2010 financial period compared to the 2009 financial period; the 2011 financial period compared to the 2010 financial period and the 2012 financial period compared to the 2011 financial period. As the Applicant reduced its costs significantly as result of implementing its adjustment plan from 2008, the losses were smaller. The gross profit in 2012 increased to 7.43 % compared to the gross profit the applicant realised in 2009 (2.1%), 2010 (1.8%) and 2011(-6.09%).

On the issue of 2009 being a key year in the context of the global financial crisis it was found that, in terms of Statistical release P6420, Food and Beverages July 2009 which compares sales in that sector for June 2008 to July 2009 the world economic crisis did not affect this sector.

Based on the comments received, the following factors, other than the surge in imports, were considered by the Commission for purposes of its final determination.

- **Black frost and late rains in 2010**

Comments by API

API stated that "the Applicant itself has indicated that the crop failure had a major impact on its ability to source potatoes locally and that it forced McCain to import a significant volume of frozen chips. ITAC cannot therefore simply disregard this comment. It should be noted that frozen chips cannot be produced from just any type of potato and therefore crop failure of the particular type of potato used for chips can have a significant impact on local production, even if such crop failure is small in comparison to the overall potato crop. Since this was a single occurrence, i.e. the crop failure did not recur, any imports caused by this crop failure should be deducted from any increase in imports as it indicated the domestic

industry's inability to produce sufficient volumes to service the market. The additional imports therefore could not have caused any injury as industry itself had to import".

Commission's analysis

In the public hearings presentation by Potato S.A, it indicated that the size of the harvest of the potatoes from 2009 increased substantially from 180 million bags (10 kilogram bags) to 209 million bags in 2010 and 220 million bags in 2011. It can thus be concluded that the black frost and the late rains did not have a significant impact on the total harvest of the raw potatoes in 2010 as supported by the **The Department of Agriculture, Forestry and Fisheries** report issued for the 12 months ending June 2011 (actual as opposed to forecast report).

Evidence submitted from Potato S.A in the public hearing indicate that the prices of raw potatoes declined from 2009 to 2012 further evidencing that the black frost and late rains did not have a significant, if any, impact on the Applicant.

- **World Cup Soccer 2010**

In terms of the food and beverages report (P6420) released by Statistics South Africa, there was a very moderate 5.2 per cent increase in the sales income of the take-away and fast-food outlets for the second quarter of 2010 (April to June 2010) compared with the second quarter of 2009 (April to June 2009). The Commission is of the opinion that the 2010 World Cup was not a major contributor to the significant increase in imports of the subject product.

- **Exchange rate fluctuations;**

The exchange rate between the Rand and the Euro in 2008 fluctuated between R10 to the Euro to about R13 to the Euro in 2009 and declined to below R10 to the Euro after January 2010. It should be noted that for the period 01 July 2008 to 30 June 2009 the average exchange rate between the

Rand and Euro was R12.30, with highs of R13.93 and lows of R11.17. For the period 01 July 2009 to 30 June 2010 the average exchange rate was R10.54 with highs of R11.44 and lows of R9.31. The average exchange rate for the entire period of investigation was R10.68 with highs of R13.93 and lows of R8.81. From this information it can be concluded that the exchange rate fluctuated and thus could not be linked to the surge in imports from 2009 and the increased continued importation of the product subsequent to the period ending 30 June 2010, which is from 01 July 2010 to 30 June 2012.

7.5 CONCLUSION: CAUSAL LINK

After taking the above factors into consideration, the Commission made a final determination that there was a causal link between the recent, sudden, sharp and significant surge in imports of the subject products and the serious injury experienced by the Applicant.

8. PUBLIC INTEREST

8.1 Section 20.2 of the SGR provides as follows:

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

8.2 On 26 June 2013, the Commission, through Notice No. 757 of *Government Gazette* No. 36682, invited interested parties to attend and address the Commission on whether it will be in the public interest to impose definitive safeguard measures on the subject product, in accordance with Section 20.2 of the SGR.

8.3 Interested parties submitted written comments which formed the basis of their oral presentations during public interest hearings which were held on 04 September 2013. Non-confidential versions are contained in the public file.

Comments by API

API indicated that "the Commission is required to undertake an investigation into whether it would be in the public interest to impose a safeguard measure. It is submitted that public interest should also play a role in the determination of the extent of any measure. Imposing a provisional measure and proposing to impose a definitive measure of 61.42% without meeting any of the requirements for imposing a safeguard measure is not in the public interest. We consider below some specific issues pertaining to public interest which ITAC has not taken into consideration despite specific submissions in this regard".

Commission's analysis

On 04 September 2013, the Commission invited the public to make presentations into whether it is in the public's interest to impose safeguard duties on frozen potato chips. Interested parties made oral presentations and it is from this fact that the Commission considered making a final determination to impose safeguard measures.

Comments by API

(a) Inflationary effect

API stated that since the imposition of the provisional measure, the domestic industry has pushed up prices by more than 30% and in some cases by as much as 50%. Evidence of this has already been submitted. There is no basis for such an increase.

Most recently, the Applicant has indicated that it will charge a surcharge of R2.00/kg as potato prices are high. It indicates that it cannot source potatoes for less than R6,000/ton. This follows despite the Applicant being one of the biggest potato producers in the country and benefitting from bulk purchase prices. However, even a preliminary search will show that potatoes are sold on the Johannesburg fresh produce market at a price of less than R4,000 per ton – without buyers having to purchase even 1 ton at a time. Clearly, the Applicant and the other producers are abusing the safeguard measure and this is clearly not in the public interest.

The effect of prices that have increased by up to and beyond 50% is directly impacting on the consumer that has to pay more for his chips, whether along with a take-away meal or in the supermarket. Considering the already high levels of food inflation, such additional costs are completely unwarranted.

Commission's analysis

The increase in raw material i.e. potatoes might have forced the domestic industry to increase its prices. According to the letter that API provided the surcharge increase of R2.00 per ton is a temporary means to recover a portion of the increase in raw material potato input cost and is not a permanent measure.

Comments by API

(b) Competition

The SGR specifically indicates that “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”. However, the existing safeguard measure has already completely destroyed all competition in the

market. The Applicant is completely dominant and the other players merely follow it. The safeguard measure has effectively removed all import competition, which is not the intention of a safeguard measure. Accordingly, the Commission has lost sight of its own regulations that instruct it specifically to take competition issues into consideration in the determination of public interest. It is submitted that for effective competition to exist in the market, if all requirements for imposition of a safeguard have been met, any safeguard measure should be set at such a level as to still permit competition from imported products, albeit at prices that have removed the serious injury, and not at prices that allow the industry to reap super profits.

Commission's analysis

Regarding the need to restore competition, the Commission determined that the measure is put into place to temporarily allow the domestic industry to adjust and be internationally competitive. It is also noted that with time the duties will be liberalized.

Comments by API

(c) Inability of industry to supply

All three domestic producers have informed their clients their inability to supply. Clearly, the provisional safeguard measure has been so punitive that imports have all but ceased and consumers now face a shortage of chips in the market. Clearly, industry cannot complain about imports if industry is not in a position to supply. It is therefore submitted that if the Commission insists, despite all proof to the contrary, that a safeguard measure should be imposed, it should impose a quota that allows imports into the market in order to supply the shortage created by industry's inability to supply.

It is submitted that this inability to supply should be of serious concern to the Commission in the determination of whether to impose any safeguard measure and the level and form thereof (provided all other requirements have been met).

Commission's analysis

The Commission furthermore determined that the SACU industry is currently operating at an average capacity utilization of 55%, given a platform it could increase its capacity utilization and meet the demand.

8.4 CONCLUSION: PUBLIC INTEREST

The Commission decided that based on the submissions and presentations made during the public hearing, the safeguard measure will be in the public interest in addressing the various social challenges. In this regard the Commission found that the industry provides employment and revenue to the local municipalities which enables the municipalities to render the necessary services to the communities. The industry is involved in skills development of its employees and the local communities.

The industry further promotes emerging farmers as well as empowers women in agriculture.

9. SUMMARY OF FINDINGS

9.1 Unforeseen Developments

The Commission decided that the unforeseen developments are the following:

- Proliferation of quick service restaurants;
- Increased and excess production capacity of the frozen potato chips in the EU; and
- The EU not adhering to its export subsidy commitments made in 1995.

9.2 Serious injury

The Commission made a final determination that there was sufficient evidence that the SACU industry was suffering serious injury in that:

- the volume of imports increased significantly;
- the loss situation increased;
- the sales volume declined; and
- the market share declined.

9.3 Recent, sudden, sharp and significant increase in imports

The Commission made a final determination that there is sufficient information to indicate that there has been a recent, sudden, sharp and significant increase in imports.

Although imports decreased in the financial period 2012, the imports in the said period remain at a level significantly higher than in the 2010 financial period at 22 534 tons compared to 1 504 tons. Furthermore, although there was a decrease in net imports relative to production of 1 300 index points percentage points in 2012 compared to 2011 the net imports, relative to production are still higher than in 2010 at 2 056 index points compared to 889 index points.

9.4 Causal link

The Commission made a final determination that there is sufficient information to indicate that there was a causal link between the serious injury experienced by the SACU industry and the recent, sudden, sharp and significant surge in the volume of imports.

9.5 Public interest

The Commission decided that based on the submissions and presentations made during the public hearing, the safeguard measure will be in the public interest in addressing the various social challenges. In this regard the Commission found that the industry provides employment and revenue to the local municipalities which enables the municipalities to render the necessary services to the communities. The industry is involved in skills development of its employees and the local communities.

The industry further promotes emerging farmers as well as empowers women in agriculture.

10. APPLICANT'S DEVELOPMENT PLAN

Pursuant to Section 21 of the SGR, a safeguard measure shall, amongst others, only be applied to facilitate adjustment of the SACU Industry.

It is therefore required that the Applicant submit a plan indicating how it will adjust to increase its competitiveness.

10.1 Applicant's development plan

The adjustment plan submitted by the Applicant indicated that its agricultural division has done extensive work to ensure that the applicant would be supplied consistently with potatoes for processing on a year round basis, without any dependence on the open potato market, or on the importation of finished goods product. Furthermore, it is noted that the adjustment plan commenced from 2008 and it is expected to be fully implemented by 2013.

10.2 CONCLUSION

The Commission made a final determination that the Applicant submitted sufficient information in its development plan to indicate that it will adjust to increase its competitiveness.

11. SAFEGUARD MEASURES

- 11.1 For the purposes of the safeguard measure, the Commission calculated the measures based on price undercutting experienced by the Applicant. The price undercutting is the extent to which the price of the imported product (landed cost) is lower than the verified ex-factory selling price of the SACU product.

Comments by the Applicant

The Applicant indicated that the potato chips division has been incurring losses for the duration of the period of investigation as well as the company as a whole. The Applicant requested relief in the form of an increase in the customs duty via a Safeguard Duty in terms of section 11 (f) and 21.5 (a) of the Amended Safeguard Regulations as published in Government Notice R662 of 8 July 2005. The Applicant indicated that the quantum of relief required is such so as to equate the price of imported frozen potato chips to the unsuppressed local sales price of the Applicant.

The unsuppressed price estimates reflect the expected or required return of the SACU industry for the like or similar products as indicated by the applicant. The calculation is thus based on the premise that sales prices need to rise by at least 25% to effect a reasonable return on investment (RoI). The "unsuppressed price estimate" is thus calculated by increasing the "ex-factory selling price" by 25%.

Comments by API

API stated that "the applicant indicates that it is requesting relief in the form of an increase in the customs duty which it has not disclosed. API indicates that this has a material impact on how interested parties respond".

Commission's analysis

The Commission noted that the applicant sought a relief of an 80.05 % ad valorem duty based on the difference between the applicant's unsuppressed selling price and the landed cost expressed as a percentage of the FOB price. The applicant has claimed confidentiality on the calculation based on the fact that the landed cost includes actual costs it incurred on freight, insurance and clearing charges. However the Commission's calculation is based on the Applicant's verified ex-factory selling price.

Comments by the EU

The EU indicated that "it would like to remind the investigating authority of the obligations under the Trade, Development and Cooperation Agreement (TDCA) with the European Union. Namely, according to Article 26 of the TDCA, any safeguard measure shall be immediately notified to the Cooperation Council and shall be subject to consultations – providing 30 days for finding a satisfactory solution.

Furthermore the EU indicated that, according to Article 6 of the WTO Agreement on Safeguards the existence of critical circumstances is necessary for the imposition of provisional safeguard measures. However, as detailed above neither the existence of serious injury nor a recent increase of imports are supported by the figures provided. Therefore, in the lack of one of the main requirements, it is difficult to establish that critical circumstances would exist".

Comments by EUPPA

EUPPA stated that "it would like to remind the South African government of the existence of South Africa's free trade agreement with the European Union, the Trade, Development and Cooperation Agreement (TDCA). It provides for the application of safeguard measures on imports from the other party under the conditions provided for in the WTO Agreement on Safeguards and in accordance with the procedures laid down in Article 26 of the TDCA".

Comments by YRI

It is further requested that "ITAC considers implementing a "grace period" before the implementation of the increased preliminary tariffs take effect, so as to give YRI, and surely other import buyers, an opportunity to honour its current commitments and source as far as possible local supply of the product. However, YRI has confirmed that the local producers may not be able to supply total quantity and quality that YRI requires for its South African KFC system. Local producers have also indicated that the prices of the Product will increase, thus clearly illustrating the fact that the preliminary tariffs provides the local producers no incentive to remain competitive in the market.

The most immediate effect of the imposition of import protection is higher end user prices of the product; this is detrimental to YRI's customers as YRI will have to pass on most, if not all, of the current cost of the preliminary tariffs.

As indicated, YRI has current obligations with the importers and the importers have indicated that the tariffs will immediately be passed onto YRI. The sudden publication of the preliminary determination without due warning or a "grace period" for implementation has caused that the imported prices are not equal but materially more than the local producers' pricing. So not only will YRI's customers, this may also naturally affect any marginal investment decisions by YRI and its Franchisee, and hence potentially have adverse employment implications.

Again, YRI has examined the likely effects of the protection of the Local Producers on competition. Based on the information at YRI's disposal, it appears likely that imports provide an important source of competition on Local producers, keeping prices and product quality at competitive levels. Accordingly, it seems more than likely that domestic prices would increase and/or domestic product quality would decline in the event that the competitive constraint posed by imports is weakened, as would be the case under import protection. This is again illustrated per the current facts and impact that the preliminary tariffs will have on YRI. The approach of ITAC should be to even

out the playing field between local producers and Importers which should enhance competition in the industry and not to increase tariffs to such an extent that exclusivity is created to a few local producers.

Indeed, YRI confirmed that the import protection has and will further materially result in higher prices and that there is a risk that neither McCain nor any other local producers will have the incentive, desire or capability to meet its required specifications and quality levels in the absence of the competitive constraints of imports

This in turn again would create no incentive for any local dominant supplier to remain competitive in a market. YRI submits that the current playing field between local producers and importers should be equalised but not to the extent that it creates exclusivity to the local market and more over to one specific producer, this will ensure that healthy competition is maintained”.

Comments by the Government of Egypt

The Government of Egypt indicated that “according to the Agreement on Safeguard, Article 6 states that “In critical circumstances where delay would cause damage, which it would be difficult to repair, a Member may take a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that the increased imports have caused or are threatening to cause serious injury...”

In this regard the Government of Egypt stated that “there was no clarification mentioned regarding the following points:

- Critical Circumstances which states that where delay would cause damage, which it would be difficult to repair, whereas there are improvements in almost economic factors of the domestic industry.*
- The Investigating Authority did not provide adequate explanation of the fact that the imposition of provisional duties shall lead to the adjustments stipulated for in Article 7 of the Agreement on Safeguard”.*

Commission's analysis

The Commission decided that the provisional payments are imposed in terms of Article 6 of the Safeguard Agreement which allows the imposition of provisional payments if critical circumstances exist that would cause damage to the domestic industry that would be difficult to repair.

The investigation was initiated by the Commission on the basis of the WTO safeguard multilateral agreements and not in terms of the bilateral agreement with the EU. The Commission is therefore not under obligation to act in terms of the provisions of the TDCA.

Furthermore the Commission made a preliminary determination that there were critical circumstances warranting the imposition of provisional payments. The proposed safeguard duty will be phased down over the period of implementation as the Applicant progressively implements its development plan.

Comments by Government of Chinese Taipei

Chinese Taipei stated that "it exported only 0.039 tons of frozen potato chips to South Africa in 2010, 8.072 tons in 2011 and zero in 2012, which accounted only 0.0000808%, 0.026643% and 0% of SA's total imports during the years respectively. In other similar cases, Chinese Taipei has been exempted from safeguard measures imposed by Japan, Brazil and EU with the application of the Article 9.1 of the Agreement on Safeguards".

Commission's analysis

The Commission found that in terms of Article 9.1 of the safeguard agreement provides that developing countries are excluded from safeguard measures provided their share of imports, amongst others, does not exceed 3 per cent of the total imports. Chinese Taipei is not regarded as a developing country and no other provision exists to exclude it from the definitive safeguard measures.

11.2 Definitive safeguard measure

The Commission calculated the safeguard measure based on price undercutting experienced by the Applicant. The price undercutting is the extent to which the price of the imported product (landed cost) is lower than the verified ex-factory selling price of the SACU product.

Although the Applicant indicated that the calculation of the safeguard measure should be based on the unsuppressed selling price, the Commission made a final determination to use the Applicant's ex-factory selling price as verified. The Commission decided on this course of action as it was argued that the purpose of the measure is to curb volumes, but not to exclude all competition.

The Commission therefore determined the safeguard measure to be 61,42 per cent *ad valorem*.

11.3 Liberalization of the safeguard measure

Section 21.8 of the SGR provides as follows:

"Where a definitive measure is imposed for a period exceeding one year the Commission shall recommend how the measure should be liberalized at regular intervals over the period that the measure is applied"

The Commission decided to recommend that the measure be liberalized as follows:

Period	Rate of safeguard measure
05 July 2013-04 July 2014	61.42%
05 July 2014-04 July 2015	40.92%
05 July 2015-04 June 2016	20.45%

12. FINAL DETERMINATION

The Commission made a final determination that:

- there was a surge in the volume of imports of the subject product into the SACU market;
- the increase in the volume of imports was as a result of unforeseen circumstances;
- the SACU industry was experiencing serious injury; and
- there is a causal link between the increase in imports and the serious injury experienced by the SACU.

The Commission made a final determination to recommend to the Minister of Trade and Industry that the following safeguard measures applicable to “chips or French fries” classifiable under tariff subheading 2004.10.20 created in September 2013 be imposed for a period of 2 years and 11 months:

The Commission made a final determination to liberalize the safeguard measure as follows:

Period	Rate of safeguard measure
05 July 2013-04 July 2014	61.42%
05 July 2014-04 July 2015	40.92%
05 July 2015-04 June 2016	20.45%

The provisional measures should be imposed against all countries, except the following developing countries that should be excluded from the safeguard measure:

Country	Country
Afghanistan	Fiji
Albania	Gabon
Algeria	Gambia, The
American Samoa	Georgia
Angola	Ghana
Antigua and Barbuda	Grenada
Armenia	Guatemala
Azerbaijan	Guinea
Bangladesh	Guinea-Bissau
Belarus	Guyana
Belize	Haiti
Benin	Honduras
Bhutan	India
Bolivia	Indonesia
Bosnia and Herzegovina	Iran, Islamic Rep.
Botswana	Iraq
Brazil	Jamaica
Bulgaria	Jordan
Burkina Faso	Kazakhstan
Burundi	Kenya
Cambodia	Kiribati
Cameroon	Korea, Dem Rep.
Cape Verde	Kosovo
Central African Republic	Kyrgyz Republic
Chad	Lao PDR
Chile	Latvia
China	Lebanon
Colombia	Lesotho
Comoros	Liberia
Congo, Dem. Rep.	Libya
Congo, Rep.	Lithuania
Costa Rica	Macedonia, FYR
Côte d'Ivoire	Madagascar
Cuba	Malawi
Djibouti	Malaysia
Dominica	Maldives
Dominican Republic	Mali
Ecuador	Marshall Islands
Egypt, Arab Rep.	Mauritania
El Salvador	Mauritius
Eritrea	Mexico
Ethiopia	Micronesia, Fed. Sts.
Nicaragua	Moldova
Niger	Mongolia
Nigeria	Montenegro
	Morocco

Country	Country
Pakistan	Mozambique
Palau	Myanmar
Panama	Namibia
Papua New Guinea	Nepal
Paraguay	South Sudan
Peru	Sri Lanka
Philippines	St. Lucia
Romania	St. Vincent and the
Russian Federation	Grenadines
Rwanda	Sudan
Samoa	Suriname
São Tomé and Príncipe	Swaziland
Senegal	Syrian Arab Republic
Serbia	Tajikistan
Seychelles	Tanzania
Sierra Leone	Thailand
Solomon Islands	Timor-Leste
Somalia	Togo
Uganda	Tonga
Ukraine	Tunisia
Uruguay	Turkey
Uzbekistan	Turkmenistan
Vanuatu	Tuvalu
Venezuela, RB	
Vietnam	
West Bank and Gaza	
Yemen, Rep.	
Zambia	
Zimbabwe	