

WORLD TRADE ORGANIZATION

G/SG/N/1/ZAF/2
27 September 2004

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Committee on Safeguards

Original: English

NOTIFICATIONS OF LAWS, REGULATIONS AND ADMINISTRATIVE PROCEDURES RELATING TO SAFEGUARD MEASURES

SOUTH AFRICA

The following communication, dated 22 September 2004, is being circulated at the request of the Delegation of South Africa.

Further to the requirement under the Agreement on Safeguards Article 12.6 and in accordance with the related decision under document G/SG/N/1 adopted by the Committee established under this Agreement, I have the honour to provide a copy of the full text of the International Trade Administration Act, No. 71 of 2002, relevant extracts from the Customs and Excise Act, No. 91 of 1964, as amended, and a copy of the Safeguard Regulations prescribed by the Minister of Trade and Industry on 27 August 2004. This notification replaces South Africa's notification circulated under document G/SG/N/1/ZAF/1 of 6 December 1995.

THE PRESIDENCY

No. 123

22 January 2003

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:

NO. 71 OF 2002: INTERNATIONAL TRADE ADMINISTRATION ACT, 2002

(English text signed by the President.)
(Assented to 30 December 2002.)

ACT

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

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:

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CHAPTER 1

DEFINITIONS, INTERPRETATION, OBJECT AND APPLICATION OF ACT

1. Definitions and interpretation

1. (1) A reference in this Act to an Article by number is a reference to such Article in the SACU Agreement.

(2) In this Act unless the context indicates otherwise:

"Cabinet" means the body referred to in section 91 of the Constitution;

"claimant" means a person who has filed a claim in terms of Part D of Chapter 4, with regard to the confidentiality of information;

"Commission" means the International Trade Administration Commission established by section 7;

"committee" means a committee of the Commission;

"Common Customs Area" means the combined areas of the Member States of SACU;

"confidential information" means information that is:

- (a) by nature, confidential; or
- (b) recognised in terms of Part D of Chapter 4, to be otherwise confidential;

"countervailing duty" means a customs duty imposed to off-set the benefit conferred by a subsidy;

"Customs and Excise Act" means the Customs and Excise Act, 1964 (Act No. 91 of 1964);

"customs duty" means customs duty as defined in section 1 of the Customs and Excise Act;

"dumping" means the introduction of goods into the commerce of the Republic or the Common Customs Area at an export price contemplated in section 32(2)(a) that is less than the normal value, as defined in section 32(2), of those goods;

"export" means to take or send goods, or to cause them to be taken or sent, from the Republic to a country or territory outside the Republic;

"goods" includes:

- (a) all wares, articles, merchandise, animals, currency, material or objects of whatsoever nature; and
- (b) in relation to any particular goods, any other goods that are reasonably capable of being substituted for them, taking into account ordinary commercial practice and geographical, technical and temporal constraints;

"import" means to bring goods, or cause them to be brought, from outside the Republic into the Republic;

"information that is by nature confidential" means trade, business or industrial information that:

- (a) belongs to a person or the State;
- (b) has a particular economic value; and
- (c) is not generally available to or known by others, and the disclosure of which could:
 - (i) result in a significant adverse effect on the owner, or on the person that provided the information; or
 - (ii) give a significant competitive advantage to a competitor of the owner;

"member" means a member of the Commission;

"Member State" means a member of SACU;

"Minister" means the member of the Cabinet responsible for trade and industry;

"Minister of Finance" means the member of the Cabinet responsible for national finance;

"National Body" means a body or institution established or designated by a Member State, as contemplated in Article 14;

"organ of state" has the meaning set out in section 239 of the Constitution;

"person" includes, among other things, a trust;

"premises" includes land or any building, structure, vehicle, ship, boat, vessel, aircraft or container;

"prescribed" means prescribed by regulation in terms of this Act;

"Public Finance Management Act" means the Public Finance Management Act, 1999 (Act No. 1 of 1999);

"regulation" means a regulation made under this Act;

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

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

"SACU Agreement" means:

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

"SACU Commission" means the Customs Union Commission established by Article 7;

"SACU Council" means the Council of Ministers established by Article 7;

"SACU Tribunal" means the Tribunal established by Article 7;

"safeguard measure" means a remedy or procedure for use in response to disruptive competition;

"Tariff Board" means the SACU Tariff Board established by Article 7; and

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

- (3) This Act must be interpreted:
- (a) in a manner that is consistent with the Constitution and gives effect to the object set out in section 2; and
 - (b) in a manner that is consistent with the purposes and intent of the SACU Agreement.

2. Object of Act

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

3. Application of Act

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

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

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

CHAPTER 2

TRADE POLICY

4. Implementation of SACU Agreement

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

(2) The Minister may:

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

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

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

- (5) SACU is recognised as a juristic person for all purposes of law within the Republic.
- (6) The Minister may refer any decision of the SACU Council of Ministers that concerns customs duties or other measures to the Minister of Finance as a request contemplated in the Customs and Excise Act.
- (7) The Minister must, by notice in the Gazette, publish:
 - (a) for information any recommendation of the Tariff Board; and
 - (b) any decision by the SACU Council of Ministers that directly affects the import of goods into, or export of goods from, the Republic.
- (8) The Minister may, by notice in the Gazette, publish any policy mandate, procedure, guideline formulated by the SACU Council of Ministers or application being dealt with by a SACU Member State.

5. Trade policy statements and directives

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

6. Minister's power to regulate imports and exports

6. (1) The Minister may, by notice in the Gazette, prescribe that no goods of a specified class or kind, or no goods other than goods of a specified class or kind, may be:
 - (a) imported into the Republic;
 - (b) imported into the Republic, except under the authority of and in accordance with the conditions stated in a permit issued by the Commission;
 - (c) exported from the Republic; or
 - (d) exported from the Republic, except under the authority of and in accordance with the conditions stated in a permit issued by the Commission.
- (2) For the purpose of subsection (1) goods may be classified according to:
 - (a) their source or origin;
 - (b) their intermediate or final destination;
 - (c) the channels along which they are transported;
 - (d) the manner in which they are imported or exported;
 - (e) the purposes for which they are intended to be used;
 - (f) the methods or processes by which they are produced;
 - (g) the use of non-renewable natural resources in their production, and their life-cycle impact on the natural environment; or

- (h) any other classification methods determined by the Minister.
- (3) A notice issued in terms of this section applies to any person who, at the time of the import of particular goods into the Republic, or the export of particular goods from the Republic:
- (a) owns those goods;
 - (b) carries the risk of those goods;
 - (c) takes or attempts to bring those goods into, or takes or attempts to take those goods from, the Republic;
 - (d) in any manner whatsoever has a beneficial interest in those goods;
 - (e) acts on behalf of a person referred to in paragraph (a), (b), (c) or (d); or
 - (f) pretends to be a person referred to in paragraph (a), (b), (c), (d) or (e).
- (4) Despite any other provision of this Act, a notice issued in terms of this section in respect of goods that are the subject of a notice issued by the Minister of Defence in terms of section 4C(1)(a) of the Armaments Development and Production Act, 1968, is deemed to have been revoked as from the date of the latter notice.

CHAPTER 3

INTERNATIONAL TRADE ADMINISTRATION COMMISSION

Part A

Establishment and constitution

7. Establishment and independence of Commission

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

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

(2) The Commission:

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

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

8. Constitution of Commission

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

(i) a full-time Chief Commissioner and a full-time Deputy Chief Commissioner; and

(ii) not less than two but not more than 10 other Commissioners, each appointed to serve either full-time or part-time, appointed by the President on the recommendation of the Minister, subject to section 9.

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

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

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

(a) whether the appointee is to be a full-time or part-time Commissioner; and

(b) the term of the appointment, which may not exceed five years.

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

(a) leave the position vacant;

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

(c) in any other case:

(i) appoint a new member in accordance with subsection (2); or

(ii) on the request of a part-time member, transfer that part-time member to fill that vacancy on a full-time basis either for:

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

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

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

(a) leave the position vacant;

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

- (c) in any other case:
 - (i) appoint a new member on a part-time basis in accordance with subsection (2);
or
 - (ii) on the request of a full-time member, transfer that member to fill that vacancy on a part-time basis either for:
 - (aa) the remainder of that member's term of office; or
 - (bb) a term determined by the President in accordance with subsection (2).
- (5) A person may not serve as Chief Commissioner for more than 10 consecutive years.
- (6) The Minister must, with the concurrence of the Minister of Finance, determine the remuneration, allowances, benefits and other terms and conditions of employment of the Chief Commissioner, Deputy Chief Commissioner and each other member of the Commission.
- (7) During the term of office of a member of the Commission, the Minister may not reduce the member's salary, allowances or benefits.
- (8) The Minister may determine any other conditions of appointment not provided for in this section, but any such conditions may not be of such a nature as to reduce the independence of the Commissioner concerned.

9. Qualifications of members

- 9. (1) To be eligible for appointment and to continue to hold office as a member of the Commission, a person must:
 - (a) be ordinarily resident in the Republic; and
 - (b) have suitable qualifications and experience in economics, accounting, law, commerce, agriculture, industry or public affairs.
- (2) A person may not be a member of the Commission if that person:
 - (a) is an office-bearer of any party, movement, organisation or body of a partisan political nature;
 - (b) is an unrehabilitated insolvent;
 - (c) has been found mentally unfit by an order of a competent court; or
 - (d) has been convicted of an offence committed after the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), took effect, and sentenced to imprisonment without the option of a fine.

10. Conduct of members

- 10. (1) A member of the Commission, and a member of the staff of the Commission, must not:
 - (a) engage in any activity that may undermine the integrity of the Commission;

- (b) participate in any investigation, hearing or decision concerning a matter in respect of which that person has a financial interest or any similar personal interest, as prescribed;
 - (c) make private use of, or profit from, any confidential information obtained as a result of performing that person's official functions in the Commission; or
 - (d) divulge any information referred to in paragraph (c) to any third party, except as required as part of that person's official functions within the Commission.
- (2) If, at any time, it appears to a member of the Commission that a matter before the Commission concerns the financial or personal interest of that member, as prescribed, the member of the Commission must:
- (a) immediately and fully disclose the interest to the Chief Commissioner, or in the case of the Chief Commissioner, to the Deputy Chief Commissioner; and
 - (b) withdraw from any further involvement in the matter to the extent required by regulation.
- (3) A member of the Commission must comply with any prescribed code of conduct for members.

11. Resignation and removal from office

11. (1) A member of the Commission may, on one month's written notice addressed to the President:
- (a) resign from the Commission; or
 - (b) if he or she is a Chief or Deputy Chief Commissioner, resign from the post but remain as an ordinary member of the Commission.
- (2) The President, on the recommendation of the Minister:
- (a) must remove a member of the Commission from office if the member:
 - (i) ceases to be ordinarily resident within the Republic; or
 - (ii) economies subject to any of the disqualifications referred to in section 9(2); and
 - (b) may remove a member from office only for:
 - (i) serious misconduct;
 - (ii) permanent incapacity;
 - (iii) engaging in any activity that may undermine the integrity of the Commission; or
 - (iv) failure to satisfy the prescribed standards of professionalism, attendance and participation in the functions of the Commission.

12. Meetings and decisions of Commission

12. (1) The Chief Commissioner must convene the first meeting of the Commission and preside at that meeting.

(2) A majority of the members of the Commission present at a meeting of the Commission forms a quorum.

(3) The Chief Commissioner must appoint a member of the Commission as Chairperson to preside at meetings of the Commission.

(4) If the Chairperson is not present, the members present at the meeting must nominate a member to preside at that meeting.

(5) The decision of a majority of the members of the Commission present and voting on a matter is the decision of the Commission on that matter.

(6) In the case of an equality of votes, the person presiding at the meeting may cast a deciding vote in addition to his or her deliberative vote.

(7) The Commission may make rules of order for its proceedings, but any such rules of order must be consistent with this Act.

13. Chief Commissioner

13. (1) The Chief Commissioner is the Chief Executive Officer of the Commission, is responsible for the general administration of the Commission, and must:

- (a) perform the functions that are conferred on the Chief Commissioner by or in terms of this Act;
- (b) manage and direct the activities of the Commission; and
- (c) supervise the staff of the Commission.

(2) The Deputy Chief Commissioner:

- (a) may perform any functions of the Chief Commissioner as assigned by the Chief Commissioner; and
- (b) must perform the functions of the Chief Commissioner whenever the:
 - (i) Chief Commissioner is unable for any reason to perform the functions of the Chief Commissioner; or
 - (ii) office of Chief Commissioner is vacant.

(3) The Chief Commissioner may assign another member of the Commission to perform any functions of the Chief Commissioner when the Chief Commissioner or the Deputy Chief Commissioner is unable to perform those functions.

14. Committees

14. (1) The Minister may, by notice in the Gazette and at the request of the Commission:

- (a) establish one or more committees of the Commission for any purpose within or ancillary to the functions of the Commission; and
 - (b) appoint persons recommended by the Commission to be members of a committee.
- (2) A request to the Minister contemplated in subsection (1) to establish a committee must:
- (a) propose specific terms of reference for the committee;
 - (b) indicate whether the committee is a permanent committee or is established for a specific term;
 - (c) propose persons to be appointed to the committee and designate the proposed chairperson of the committee; and
 - (d) set out time limits within which the committee must report to the Commission.
- (3) A committee may consist of persons who are not members of the Commission but:
- (a) at least half of the members of each committee must be members of the Commission; and
 - (b) persons who are not members of the Commission may not vote.
- (4) If a committee is permanent, the Minister must determine the term of office for each person appointed to that committee.
- (5) A committee decision is effective only if the decision is subsequently ratified by the Commission, unless the notice establishing the committee expressly authorises the particular decision to be effective without such ratification.

Part B

Functions of Commission

15. General functions of Commission

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

- (d) a person referred to in section 23; or
- (e) any combination of persons referred to in this subsection.

16. Customs duties, anti-dumping duties, countervailing duties and safeguard measures

16. (1) The Commission must investigate and evaluate:

- (a) applications in terms of section 26 with regard to alleged dumping, or subsidised exports, in or into the Republic or the Common Customs Area;
- (b) applications in terms of section 26 with regard to safeguard measures;
- (c) applications in terms of section 26 with regard to amendment of customs duties in the Common Customs Area; and
- (d) matters with regard to safeguard measures or amendment of customs duties in the Common Customs Area, that the:
 - (i) Minister directs the Commission to consider; or
 - (ii) Commission considers on its own initiative.

(2) Sections 26 and 30(1)(a), each read with the changes required by the context, apply to an investigation undertaken by the Commission in terms of subsection (1)(d).

(3) The Commission may, after evaluating a matter in terms of subsection (1), take appropriate steps in accordance with this Act and the SACU Agreement and inform the Minister and the Tariff Board of its evaluation.

17. Issuing of permits or certificates

17. The Commission may investigate, evaluate and determine applications and issue or recommend the issuing of permits or certificates, in terms of:

- (a) the rebate and drawback provisions of the Customs and Excise Act; or
- (b) Part A and B of Chapter 4.

18. Monitoring trade and other matters

18. The Commission:

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

19. Information sharing with SACU institutions and Member States

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

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

20. Relations with SACU and Member States

20. The Commission may:

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

21. Relations with domestic agencies

21. (1) The Commission may:

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

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

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

(3) The Commission may:

- (a) participate in the proceedings of any regulatory authority or organ of state; and

- (b) advise, and receive advice from, any regulatory authority or organ of state.

22. Public information and reporting

22. (1) The Commission:

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

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

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

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

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

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

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

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

Part C

Staff, finances and administration of Commission

23. Staff of Commission

23. (1) The Chief Commissioner may:

- (a) appoint staff or enter into contracts with other persons to assist the Commission in carrying out its functions; and

- (b) in consultation with the Minister and with the concurrence of the Minister of Finance, determine the remuneration, allowances, benefits and other terms and conditions of appointment of each member of the staff.

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

24. Finances of Commission

24. (1) The Commission is financed from:

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

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

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

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

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

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

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

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

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

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

- (a) a statement reflecting, with sufficient particulars, the income and expenditure of the Commission during the preceding financial year; and
 - (b) a balance sheet showing the state of its assets, liabilities and financial position as at the end of that financial year.
- (9) The Auditor-General must each year audit the financial records of the Commission.

25. Liability

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

CHAPTER 4

INVESTIGATION, EVALUATION AND ADJUDICATION PROCEDURES

Part A

Applications

26. Applications

26. (1) A person may, in the prescribed manner and form, apply to the Commission for:
- (a) an import or export control permit, or an amendment of such a permit, in terms of Part B of this Chapter and the regulations;
 - (b) a rebate permit or certificate in terms of the Customs and Excise Act;
 - (c) the amendment of customs duties, including an amendment in respect of goods imported into the Common Customs Area from a country that is not a Member State, with regard to:
 - (i) anti-dumping duties;
 - (ii) countervailing duties; or
 - (iii) safeguard duties; or
 - (d) the imposition of safeguard measures other than a customs duty amendment.
- (2) The Commission must, subject to section 30(1) and (2), evaluate the merits of every application received by it and dispose of each application:
- (a) received in terms of subsection (1)(a) or (b), in accordance with Part B of this Chapter; or
 - (b) received in terms of subsection (1)(c) or (d), in accordance with Part C of this Chapter.
- (3) (a) The Commission may, before considering an application, give notice of the application in the Gazette.

- (b) If it does so, the Commission must:
 - (i) allow interested parties the prescribed time to make written representations concerning the application; and
 - (ii) ensure that notice of its decision or recommendation in the matter is subsequently published in the Gazette.
- (4) The Commission may:
 - (a) require an applicant to provide additional information in respect of the application; or
 - (b) request further information from any person who makes a representation in terms of subsection (3)(b).
- (5) Any person may voluntarily file with the Commission any document, affidavit or statement of the views of that person with regard to the application, or other relevant information.
- (6) The Commission may amend or revoke a decision or recommendation concerning an application if:
 - (a) the decision or recommendation was based on incorrect information and the applicant or supplier of the information:
 - (i) was responsible for the error in the information; and
 - (ii) benefited or could have benefited, from the decision or recommendation;
 - (b) the decision was obtained by deceit; or
 - (c) a person has breached an obligation attached to the decision or recommendation.

Part B

Import and export control permits and rebate permits

- 27. Authority of Commission to issue import and export permits and rebate permits**
27. (1) (a) The Commission must, after evaluating an application made in terms of section 26(1) (a) or (b):
- (i) refuse the application; or
 - (ii) approve the application in whole or in part and with or without conditions.
- (b) If it approves the application, the Commission must take appropriate steps to give effect to its decision in accordance with this Act or the Customs and Excise Act.
- (2) A permit issued under subsection (1) may, with regard to the goods in question, prescribe:
- (a) the quantity or value of goods which may be imported or exported;
 - (b) the price at which the goods may be imported or exported;
 - (c) the period during which the goods may be imported or exported;

- (d) the port through or from which the goods may be imported or exported;
- (e) the country or territory from or to which the goods may be imported or exported;
- (f) the manner in which the goods may be imported or exported;
- (g) conditions relating to the possession, ownership or disposal of the goods after they have been imported, or the use to which they may be put; or
- (h) any other related conditions.

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

28. Authority of Commission to demand trade information

28. The Commission may, in writing, direct a person who:

- (a) imports, exports, trades or manufactures any goods; or
- (b) in the course of whose or its business or trade, handles or has control of any goods,

to provide the Commission, within a specified time, with any information relating to the import, export, manufacture, supply or storage of the goods in question.

29. Authority of Commission to suspend or cancel permits

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

Part C

Customs duty applications

30. Customs duty applications

30. (1) The Commission must, upon receipt of an application in terms of section 26(1)(c) or (d):

- (a) notify the SACU Secretariat of the application; and
- (b) ascertain whether an application dealing with a substantially similar matter is pending before the relevant SACU institution or has been decided upon by the relevant SACU institution within the previous six months from the date of that application.

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

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

- (3) If the Commission determines that an application before it does not deal with a substantially similar matter contemplated in subsection (1)(b), the Commission must evaluate the merits of the application and recommend to the Tariff Board that the application be approved or rejected.
- (4) The Commission must, when evaluating a matter in terms of this section, apply any relevant rules of analysis established by the SACU Council through the formulation of policy mandates, procedures or guidelines contemplated in Article 8(2).
- (5) (a) The Commission may, when considering an application referred to in section 26(1)(c), request the Commissioner for the South African Revenue Service to impose a provisional payment contemplated in Chapter VI of the Customs and Excise Act.
- (b) If the Commission has acted in terms of paragraph (a) it must make a final recommendation to the Tariff Board when it has completed its evaluation.

31. Requests

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

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

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

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

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

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

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

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

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

32. Consideration of alleged dumping and subsidised exports

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

- (a) "export" means to bring or send goods, or to cause them to be brought or sent, into the Common Customs Area from a country or territory outside the Common Customs Area; and
- (b) "exporter" means any person who brings or sends goods, or causes them to be brought or sent, into the Common Customs Area from a country or territory outside the Common Customs Area.

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

- (a) "export price", subject to subsections (3) and (5), means the price actually paid or payable for goods sold for export, net of all taxes, discounts and rebates actually granted and directly related to that sale;
- (b) "normal value", in respect of any goods, means:
 - (i) the comparable price paid or payable in the ordinary course of trade for like goods intended for consumption in the exporting country or country of origin; or
 - (ii) in the absence of information on a price contemplated in subparagraph (i), either:
 - (aa) the constructed cost of production of the goods in the country of origin when destined for domestic consumption, plus a reasonable addition for selling, general and administrative costs and for profit; or
 - (bb) the highest comparable price of the like product when exported to an appropriate third or surrogate country, as long as that price is representative;
- (c) "subsidised export" means goods exported into the Common Customs Area, in respect of which the government of, or a public body within, any country:
 - (i) has provided:
 - (aa) any form of financial aid;
 - (bb) any form of assistance with its production, manufacture, transportation or export; or
 - (cc) any similar assistance; or
 - (ii) has foregone any revenue that would otherwise be due to that government or public body; and
- (d) "public body" includes a person or body that acts on behalf of the government of, or another public body within, a country.

- (3) The Commission must, in determining the margin of dumping of goods, make reasonable allowance for differences in conditions and terms of sale, differences in taxation and other differences affecting price comparability.
- (4) If the Commission, when evaluating an application concerning dumping, concludes that the normal value of the goods in question is, as a result of government intervention in the exporting country or country of origin, not determined according to free market principles, the Commission may apply to those goods a normal value of the goods, established in respect of a third or surrogate country.
- (5) The Commission must, despite the definition of "export price" set out in subsection (2), when evaluating an application concerning dumping that meets the criteria set out in subsection (6), determine the export price for the goods in question on the basis of the price at which the imported goods are first resold to an independent buyer, if applicable, or on any reasonable basis.
- (6) Subsection (5) applies to any investigation of dumping if, in respect of the goods concerned:
- (a) there is no export price as contemplated in the definition of dumping;
 - (b) there appears to be an association or compensatory arrangement in respect of the export price between the exporter or foreign manufacturer concerned and the importer or the third party concerned; or
 - (c) the export price actually paid or payable is unreliable for any other reason.

Part D

Confidential information

33. Right of informants to claim confidentiality

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

- (ii) a sworn statement setting out the reasons why it is impossible to comply with subparagraph (i).

34. Determination by Commission

34. (1) If a person makes a claim in terms of section 33, the Commission must:

- (a) in the case of information claimed to be confidential by nature, determine whether the information satisfies the requirements of the definition of "information that is by nature confidential" set out in section 1(2); or
- (b) in the case of other information, determine whether the information should be recognised as confidential.

(2) If, upon considering a claim in terms of subsection (1)(a), the Commission determines that the information is not, by nature, confidential:

- (a) the Commission must invite the claimant to submit a further motivation for the information to be recognised as otherwise confidential; and
- (b) if the claimant submits such a motivation within the prescribed time, the Commission must reconsider the claim in terms of subsection (1)(b).

(3) Upon making a final determination in terms of subsection (1) or (2)(b), the Commission:

- (a) must notify the claimant in writing of its determination; and
- (b) may, if it has determined that the information is not, by nature, confidential or should not be recognised as being otherwise confidential, advise the claimant that the information will not be considered in determining the merits of an application or other matter in question.

35. Proceedings in contested claims

35. (1) A claimant affected by a determination of the Commission in terms of section 34(3) may appeal against that determination to a High Court, subject to its rules, in the prescribed manner and form.

(2) A person who seeks access to information which the Commission has determined is, by nature, confidential, or should be recognised as otherwise confidential, may:

- (a) first, request that the Commission mediate between the owner of the information and that person; and
- (b) failing mediation in terms of paragraph (a), apply to a High Court for:
 - (i) an order setting aside the determination of the Commission; or
 - (ii) any appropriate order concerning access to that information.

(3) Upon appeal in terms of subsection (1), or an application in terms of subsection (2)(b), the High Court may:

- (a) determine whether the information:

- (i) is, by nature, confidential; or
 - (ii) should be recognised as being otherwise confidential; and
- (b) if it determines that it is confidential, make any appropriate order concerning access to that confidential information.

36. Disclosure of information

36. (1) The Commission must treat any information that is the subject of a claim in terms of this Part as confidential until a final determination has been made concerning such information.

(2) Once a final determination has been made concerning any information, it is confidential only to the extent that the final determination has accepted it to be confidential information.

(3) For the purposes of this section and section 37, "final determination" means a decision by:

- (a) the High Court, that in terms of the rules of court may not be appealed, or has not been appealed within the time allowed; or
- (b) the Supreme Court of Appeal.

37. Restricted use of information

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

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

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

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

Part E

Powers of investigative search and inspections

38. Appointment of investigating officers

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

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

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

- (a) be in possession of a certificate of appointment issued in terms of subsection (2); and
- (b) show that certificate to any person who is affected by the investigation, or if no one is present on the premises, affix a copy of the certificate to the premises in a prominent and visible place and proceed with the execution of the relevant function.

39. Summons

39. (1) The Chief Commissioner may:

- (a) direct the Commission, a committee or an investigating officer to question any person under oath or affirmation; or
- (b) give directions prohibiting or restricting the publication of any evidence given to the Commission.

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

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

(3) The Commission or a committee may:

- (a) accept oral submissions from any person;
- (b) accept as evidence any relevant oral testimony, document or other thing, whether or not:
 - (i) it is given or proven under oath or affirmation; or
 - (ii) would be admissible as evidence in court; or
- (c) refuse to accept any oral testimony, document or other thing that is unduly repetitious.

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

- (a) may require the witness who testified to deliver a sworn statement of the evidence given, in the prescribed manner and form; and
- (b) must, after the witness has complied, disregard the oral testimony of that witness and consider only the written statement of evidence of the witness.

40. Witnesses

40. (1) A person questioned or giving evidence in terms of section 39, must answer every relevant question truthfully and to the best of that person's ability.

(2) The law regarding a witness' privilege in a criminal case in a court of law applies equally to a person who is giving evidence in terms of section 39.

(3) A self-incriminating answer given or statement made to a person exercising powers in terms of this Act is not admissible as evidence against the person who gave that answer or made that statement in criminal proceedings, except for perjury or an offence contemplated in section 53 or 54(2)(d).

41. Import and export control inspections

41. (1) An investigating officer may, subject to section 38(3), conduct an inspection to determine whether Part B of Chapter 4 or any notice issued in terms of section 6 are being or have been complied with, and for that purpose may at any reasonable time:

- (a) enter upon and inspect any place, premises or vehicle in or on which any goods to which section 6 applies are stored, manufactured, supplied, handled, sold, removed, transported or otherwise dealt with;
- (b) request information about any article or document from the owner of, or person in control of, the premises or from any person who has control of the article or document or from any other person who may have the information;
- (c) use any computer system on the premises, or require assistance of any person on the premises to use that computer system, to:
 - (i) search for any data contained in or available to that computer system; and
 - (ii) reproduce any record from that data;
- (d) attach, and, if necessary, remove from the premises for examination and safekeeping, anything that has a bearing on the inspection.
- (e) direct any person who manufactures, supplies, stores, handles, sells, removes, transports or otherwise deals with any goods to which section 6 applies, or who has done any of those things with regard to such goods, or the servant or agent of such a person to:
 - (i) produce to the investigating officer any such goods or any book or other document in connection with such goods in the custody or under the control of that person; or
 - (ii) furnish the investigating officer with any information in relation to those goods that the investigating officer specifies;
- (f) inspect any such goods, any book or document, or make extracts from or copies of any such book or document;
- (g) seize any such goods, any book or document that may afford evidence of any offence in terms of this Act; and

(h) leave on such goods, book or document or the container in which they are located, any identification mark or seal.

(2) Section 43 to 45 do not apply to an inspection in terms of this section.

42. Conduct of entry and search

42. (1) A person who enters and searches any premises must conduct the entry and search with strict regard for decency and order, and with regard for each person's right to dignity, freedom, security and privacy.

(2) During a search only a female investigating officer or female police officer may search a female person, and only a male investigating officer or male police officer may search a male person.

(3) A person who enters and searches premises must, before questioning anyone:

(a) advise that person of the right to legal representation; and

(b) allow that person to exercise that right.

(4) A person who removes anything from premises being searched must:

(a) issue a receipt for it to the owner, or person in control of, the premises; and

(b) return it as soon as practicable after achieving the purpose for which it was removed.

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

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

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

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

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

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

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

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

43. Power to enter and search under warrant

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

- (2) A warrant to enter and search may be issued at any time and must specifically:
- (a) identify the premises that may be entered and searched; and
 - (b) authorise an investigating officer or a police officer to enter and search the premises and to do anything referred to in section 45.
- (3) A warrant to enter and search is valid until the:
- (a) warrant is executed;
 - (b) warrant is cancelled by the person who issued it or, in that person's absence, by a person with similar authority;
 - (c) purpose for issuing it has lapsed; or
 - (d) expiry of one month after the date that it was issued.
- (4) A warrant to enter and search may be executed only during the day, unless the person who issued it authorises that it may be executed at night at a time that is reasonable in the circumstances.
- (5) A person executing a warrant must before commencing with the execution of the warrant:
- (a) provide identification to the owner or person in control of the premises and explain to that person the purpose of the warrant; and
 - (b) hand a copy of the warrant to that person or to the person named in it.
- (6) If no one is present on the premises, affix a copy of the warrant to the premises in a prominent and visible place.

44. Power to enter and search without warrant

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

- (2) The investigating officer conducting the search must, before entering and searching:
- (a) believe on reasonable grounds that a warrant would be issued under section 43 if applied for, and that the delay in obtaining a warrant would defeat the object or purpose of the entry and search; and
 - (b) provide identification to the owner or person in control of the premises and explain to that person the purpose of the search; or
 - (c) get permission from that person to enter and search the premises.

(3) An entry and search without a warrant may be carried out only during the day, unless carrying it out at night is justifiable and necessary.

45. Power to enter and search

45. (1) Section 42, read with the changes required by the context, applies to an entry and search under section 43 or 44.

(2) A person who is acting under section 43 or 44 may:

- (a) enter upon or into those premises;
- (b) search those premises;
- (c) search any person on those premises if there are reasonable grounds for believing that the person has personal possession of an article or document that has a bearing on the investigation;
- (d) examine any article or document that is on or in those premises that has a bearing on the investigation;
- (e) request information about any article or document from the owner of, or person in control of, the premises or from any person who has control of the article or document, or from any other person who may have the information;
- (f) take extracts from, or make copies of, any book or document that is on or in the premises that has a bearing on the investigation;
- (g) use any computer system on the premises, or require assistance of any person on the premises to use that computer system, to:
 - (i) search any data contained in or available to that computer system; and
 - (ii) reproduce any record from that data; and
- (h) attach, and, if necessary, remove from the premises for examination and safekeeping, anything that has a bearing on the investigation.

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

Part F

Reviews and appeals

46. Reviews

46. (1) A person affected by a determination, recommendation or decision of the Commission in terms of section 16 or 17 or this Chapter, may apply to a High Court for a review of that determination, recommendation or decision.

(2) Subject to item 2(3) of Schedule 2, a person affected by a decision of the SACU Council, arising in whole or in part out of a recommendation of the Commission in terms of this Act, may apply for a review of that decision only to an institution designated by or in terms of the SACU Agreement, and in accordance with the rules of that institution.

(3) The High Court may, in a review in terms of subsection (1) or item 2(3) of Schedule 2, make an order for the payment of costs against any party, or against any person who represented a party in the proceedings, according to the requirements of the law and fairness.

47. Appeals

47. (1) An appeal against a decision of the High Court in respect of a matter within its jurisdiction in terms of section 46 lies to the Supreme Court of Appeal, or the Constitutional Court, only with leave to appeal, and subject to their respective rules.

(2) The right to appeal in terms of subsection (1) is:

- (a) subject to any law that specifically grants, limits or excludes any right of appeal; and
- (b) not limited by the monetary or non-monetary value of the matter in dispute.

(3) A court granting leave to appeal in terms of this section may attach any appropriate conditions, including a condition that the applicant provide security for the costs of the appeal.

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

CHAPTER 5

ENFORCEMENT AND OFFENCES

48. Variation of order

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

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

49. Standard of proof

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

50. Breach of confidence

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

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

- (2) Subsection (1) does not apply to information disclosed:
- (a) for the purpose of the proper administration or enforcement of this Act;
 - (b) for the purpose of the administration of justice;
 - (c) at the request of an investigating officer or member of the Commission entitled to receive the information; or
 - (d) within the terms of appropriate order of access made in terms of section 35(2).

51. Hindering administration of Act

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

52. Failure to attend when summoned

52. It is an offence, when summoned in terms of section 39, to:
- (a) fail, without sufficient cause, to appear at the time and place specified or to remain in attendance until excused; or
 - (b) attend as required, but to:
 - (i) refuse to be sworn in or to make an affirmation; or
 - (ii) fail to produce a book, document or other item as ordered, if it is in the possession of, or under the control of, that person.

53. Failure to answer fully or truthfully

53. It is an offence, having been sworn in or having made an affirmation to:
- (a) fail to answer any question fully and to the best of one's ability; or
 - (b) give false evidence, knowing or believing it to be false.

54. Other offences

54. (1) It is an offence to fail to comply with:
- (a) a notice issued in terms of section 6;
 - (b) a condition stated in a permit issued in terms of Part B of Chapter 4;
 - (c) a directive given in terms of section 28;
 - (d) an interim or final order made in terms of this Act.
- (2) It is an offence to:
- (a) improperly attempt to influence the Commission concerning any matter connected with an investigation;

- (b) anticipate any findings of the Commission concerning an investigation in a way that is calculated to influence the proceedings or findings;
- (c) do anything in connection with an investigation that would have been contempt of court if the proceedings had occurred in a court of law;
- (d) knowingly provide false information to the Commission;
- (e) wilfully interrupt the proceedings in the place where a hearing is being conducted;
- (f) act contrary to a warrant to enter and search;
- (g) falsely represent oneself as an investigating officer.

55. Penalties

55. (1) Any person convicted of an offence in terms of this Act, is liable:

- (a) in the case of a contravention of section 54(1), to a fine not exceeding R500 000,00 or to imprisonment for a period not exceeding ten years, or to both such fine and imprisonment;
- (b) in case of a contravention of section 50, 53, 54(2)(c) or 54(2)(d), to a fine not exceeding R250 000,00 or to imprisonment for a period not exceeding five years, or to both such fine and imprisonment; or
- (c) in any other case, to a fine not exceeding R20 000,00 or to imprisonment for a period not exceeding six months, or to both such fine and imprisonment.

(2) A court convicting a person of importing or exporting, or attempting to import or export, goods in contravention of a notice issued in terms of section 6, or failing to comply with a condition of a permit issued in terms of section 27, may declare the goods in question, or the right of that person to those goods, forfeited to the State.

(3) A declaration in terms of subsection (2) does not affect the rights to the goods in question of any person other than the convicted person, unless it is proved that the other person should reasonably have known that the goods were being dealt with in contravention of the notice or condition in question.

(4) Section 35 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), read with the changes required by the context, applies to a forfeiture under subsection (2).

56. Magistrates' Court jurisdiction to impose penalties

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

57. Serving of documents

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

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

58. Proof of facts

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

- (a) the person who was in possession of, or in control of, such book, document, plan, drawing or computer storage medium; and
- (b) any person who knew or ought to have known about the entry, record or information, must in the absence of evidence to the contrary which raises a reasonable doubt, be presumed to be responsible for the false statement, entry, record or information.

CHAPTER 6

GENERAL PROVISIONS

59. Regulations

59. The Minister may make regulations:

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

60. Guidelines

60. (1) The Commission may issue guidelines on the Commission's policy approach to any matter within its jurisdiction.

(2) A guideline issued in terms of subsection (1):

- (a) must be published in the Gazette; but
- (b) is not binding on the Commission, any SACU institution or any Court.

61. Official seal

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

62. Act binds State

62. This Act binds the State.

63. Transitional arrangements and repeal of laws

63. (1) Schedule 2 regulates transitional arrangements in respect of international trade administration within the Republic.

(2) The laws specified in Schedule 3 are, subject to subsection (3) and Schedule 2, repealed to the extent indicated in the third column of that Schedule.

(3) Despite subsection (2), a regulation promulgated in terms of the Import and Export Control Act, 1963 (Act No. 45 of 1963), and in force immediately before this Act came into operation, must be regarded as being a regulation made in terms of this Act.

64. Short title and commencement

64. (1) This Act is called the International Trade Administration Act, 2002, and comes into operation on a date fixed by the President by proclamation in the Gazette.

(2) Sections 4, 15(3), 16(3), 19, 20, 30, 31 and 46(2) and item 2(3) of Schedule 2, may not come into operation until the SACU Agreement has become law in the Republic.

SCHEDULE 1

SACU AGREEMENT

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

SCHEDULE 2

TRANSITIONAL PROVISIONS

1. Definitions

1. In this Schedule:

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

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

2. Implementation of SACU Agreement

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

(2) For the purposes of this item:

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

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

- (i) anti-dumping duties;
 - (ii) countervailing duties; or
 - (iii) safeguard duties; or";
- (b) section 26(2)(b) must be regarded as if it read:
- "(b) received in terms of subsection (1)(c) or (d), in accordance with the provisions of item 2 of Schedule 2"; and
- (c) a reference in the Board on Tariffs and Trade Act to the Board must be regarded as referring to the Commission.

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

3. Composition of Commission

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

4. Pending applications and other Board business

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

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

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

- (a) as a summons to appear before the Commission on the date and at the time and place shown on the summons; and
- (b) as having been issued by the Chief Commissioner in terms of this Act.

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

5. Statutory references

5. (1) Any reference in any law to:

- (a) the "Board on Tariffs and Trade Act, 1986", must be regarded as a reference to this Act;

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

6. Status of Board Employees and others

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

SCHEDULE 3

REPEAL OF LAWS (SECTION 63(2))

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

**CUSTOMS AND EXCISE ACT
NO. 91 OF 1964**

ACT

To provide for the levying of customs and excise duties and a surcharge; for a fuel levy, the prohibition and control of the importation, export or manufacture of certain goods; and for matters incidental thereto.

CHAPTER I

DEFINITIONS

1. Definitions

(1) In this Act, unless the context otherwise indicates, any reference to customs and excise or matters relating thereto shall be deemed to include a reference to surcharge and fuel levy or matters relating thereto, and:

'agricultural distiller' means any owner or occupier of a farm in the Republic who

- (a) is licensed to keep a still on such farm; and
- (b) is licensed to distil spirits exclusively from prescribed fresh fruit grown by him on such farm;

'Commissioner' means the Commissioner for the South African Revenue Service;

'common customs area' means the combined area of the Republic and territories with the governments of which customs union agreements have been concluded under section 51;

'container depot' means any container depot contemplated in section 6 (1)(hB);

'container operator' means any person providing international transportation of containerized goods, and approved by the Commissioner, under section 96A, for operating containers in the Republic;

'container terminal' means any container terminal contemplated in section 6 (1)(hA);

'Controller', in relation to any area or any matter, means the officer designated by the Commissioner to be the Controller of Customs and Excise in respect of that area or matter and includes an officer acting under the control or direction of any officer so designated by the Commissioner;

'crew' includes every person (except the master or pilot) employed in any capacity on board any ship or aircraft;

'customs duty' means, subject to the provisions of subsection (3), any duty leviable under Schedule 1 (except Parts 4 and 5 thereof) or 2 on goods imported into the Republic;

'degrouing depot' means any degrouing depot for air cargo contemplated in section 6(1)(hC) and licensed under the provisions of this Act; and

'degrouing operator' means the licensee of a degrouing depot;

'depot operator' means the person having charge of any container depot;

'**duty**' means any duty leviable under this Act and subject to:

- (a) section 47B, any air passenger tax leviable under that section; and
- (b) Chapter VA, any environmental levy leviable under that Chapter.

'**entry for home consumption**' includes entry under any item in Schedule 3, 4 or 6;

'**environmental levy**' means any duty leviable under Part 3 of Schedule No. 1 on any goods which have been manufactured in or imported into the Republic; and

'**environmental levy goods**' means any goods specified in Part 3 of Schedule No. 1 which have been manufactured in or imported into the Republic.;

'**excisable goods**' means any goods specified in Part 2 of Schedule 1 which have been manufactured in the Republic;

'**excise duty**' means, subject to the provisions of subsection (3), any duty leviable under Part 2 of Schedule 1 on any goods manufactured in the Republic

'**excise value**' means value as defined in section sixty-nine;

'**exporter**' includes any person who, at the time of exportation;

- (a) owns any goods exported;
- (b) carries the risk of any goods exported;
- (c) represents that or acts as if he is the exporter or owner of any goods exported;
- (d) actually takes or attempts to take any goods from the Republic;
- (e) is beneficially interested in any way whatever in any goods exported;
- (f) acts on behalf of any person referred to in paragraph (a), (b), (c), (d) or (e), and, in relation to imported goods, includes the manufacturer, supplier or shipper of such goods or any person inside or outside the Republic representing or acting on behalf of such manufacturer, supplier or shipper;

'**fuel levy**' means any duty leviable under Part 5 of Schedule 1 on any goods which have been manufactured in or imported into the Republic;

'**fuel levy goods**' means any goods specified in Part 5 of Schedule 1 which have been manufactured in or imported into the Republic;

'**goods**' includes all wares, articles, merchandise, animals, currency, matter or things:

'**home consumption**' means consumption or use in the Republic;

'**illicit goods**' in relation to imported or excisable goods, surcharge goods or fuel levy goods, means any such goods in respect of which any contravention under this Act has been committed, and includes any preparation or other product made wholly or in part from spirits or other materials which were illicit goods;

'**importer**' includes any person who, at the time of importation;

- (a) owns any goods imported;
- (b) carries the risk of any goods imported;
- (c) represents that or acts as if he is the importer or owner of any goods imported;
- (d) actually brings any goods into the Republic;
- (e) is beneficially interested in any way whatever in any goods imported;
- (f) acts on behalf of any person referred to in paragraph (a), (b), (c), (d) or (e);

'International Trade Administration Commission' means the International Trade Administration Commission established by section 7 of the International Trade Administration Act, 2002 (Act No. 71 of 2002);

'land' includes off-loading from any vehicle;

'L.C.L. container' means any container containing goods consigned from one or more exporters to more than one importer;

'manufacture', when used as a noun, includes, in the discretion of the Commissioner any process:

- (a) in the manufacture or assembly of any excisable goods or fuel levy goods;
- (b) in the conversion of any goods into excisable goods or fuel levy goods;
- (c) whereby the dutiable quantity or value of any imported goods specified in Section B of Part 2 of Schedule 1, excisable goods or fuel levy goods is increased in any manner;
- (d) in the recovery of excisable goods or fuel levy goods from excisable goods or any other goods; or
- (e) in the packing or measuring off of any imported goods specified in Section B of Part 2 of Schedule 1, excisable goods or fuel levy goods, and, when used as a verb, has a corresponding meaning; and

'manufacturer' has a corresponding meaning;

'master', in relation to any ship, means any person (other than a pilot) having charge of such ship;

'Minister' means the Minister of Finance;

'Office' means the Office of the Commissioner for Customs and Excise mentioned in section 1A;

'officer' means a person employed on any duty relating to customs and excise by order or with the concurrence of the Commissioner, whether such order has been given or such concurrence has been expressed before or after the performance of the said duty;

'owner' includes any person lawfully acting on behalf of the owner;

'package' means any container, wrapping or outer cover and its contents, or any bundle or single piece in the case of unpacked goods;

'**pilot**', in relation to any aircraft, means any person having charge of such aircraft;

'**plant**' includes vessels, utensils, appliances and fittings;

'**prescribed**' means prescribed by this Act;

'**regulation**' means a regulation made by the Minister under this Act;

'**rule**' means a rule made by the Commissioner under this Act;

'**ship**' means any ship, vessel or boat (including a flying boat) of any kind whatsoever;

'**South African Revenue Service**' means the South African Revenue Service established by section 2 of the South African Revenue Service Act, 1997;

'**State warehouse**' means any premises provided by the State for the deposit of goods for the security thereof and of the duties due thereon, or pending compliance with the provisions of any law in respect of such goods;

'**still**' means any apparatus for, or capable of, distilling spirits and includes any part thereof;

'**still maker**' means a person who manufactures or imports stills for sale and includes a person who repairs stills for reward;

'**surcharge**' means any duty leviable under Part 4 of Schedule 1 on any goods which have been imported into the Republic;

'**surcharge goods**' means any goods specified in Part 4 of Schedule 1 which have been imported into the Republic;

'**this Act**' includes any proclamation, government notice, regulation or rule issued or made or agreement concluded or deemed to have been concluded thereunder, or any taxation proposal contemplated in section 58 which is tabled in the House of Assembly;

'**vehicle**' means any aircraft, train, motor car, van, truck, cart, barrow or other conveyance of any kind whatsoever, and includes the fittings, furnishings and equipment thereof, and also pack animals and their harness and tackle;

'**Wine and Spirit Board**' means the board referred to in section 2 of the Liquor Products Act, 1989;

'**wine grower**' means a farmer who cultivates vines on land in his own occupation and who produces on such land wine from grapes grown on such vines or delivers grapes grown on such vines to a wine-growers' co-operative agricultural society for the manufacture of wine;

'**worts**' means any liquid substance containing saccharine matter before fermentation has commenced.

CHAPTER VI

ANTI-DUMPING, COUNTERVAILING AND SAFEGUARD DUTIES (ss 55-57A)

55. General provisions regarding anti-dumping, countervailing and safeguard duties

(1) The goods specified in Schedule 2 shall, upon entry for home consumption, be liable, in addition to any other duty payable in terms of the provisions of this Act, to the appropriate

anti-dumping, countervailing or safeguard duties provided for in respect of such goods in that Schedule at the time of such entry, if they are imported from a supplier, or originate in a territory, specified in that Schedule in respect of those goods.

- (2) (a) The imposition of any anti-dumping duty in the case of dumping as defined in the International Trade Administration Act, 2002 (Act 71 of 2002), a countervailing duty in the case of subsidized export as so defined or a safeguard duty in the case of disruptive competition as so defined and the rate at which or the circumstances in which such duty is imposed in respect of any imported goods shall be in accordance with any request by the Minister of Trade and Industry and for Economic Co-ordination under the provisions of the International Trade Administration Act, 2002.
- (b) Any such anti-dumping, countervailing or safeguard duty may be imposed in respect of the goods concerned in accordance with such request with effect from the date on which any provisional payment in relation to anti-dumping, countervailing or safeguard duty is imposed in respect of those goods under section 57 A.
- (3) (a) Whenever any anti-dumping, countervailing or safeguard duty is imposed on any goods under the provisions of this Chapter, the owner of any such goods stored in a customs and excise warehouse shall produce the invoice and other documents relating to such goods to the Controller not later than the time of entry of all or any part of such goods for removal from such warehouse.
- (b) The provisions of paragraph (a) shall not apply in the case of such goods entered for export from a customs and excise warehouse.
- (4) An anti-dumping, countervailing or safeguard duty imposed under the provisions of this Chapter shall not apply to any goods entered under the provisions of any item specified in Schedule 3 or 4 unless such item is specified in Schedule 2 in respect of such goods.
- (5) Notwithstanding the provisions of section 56, 56A or 57, the Commissioner may, subject to such conditions as he may impose in each case, exempt from payment of any anti-dumping, countervailing or safeguard duty, any goods which are imported in such circumstances or in such quantities that the importation of such goods does not, in his opinion, constitute regular importation of such goods for trade purposes.

56. Imposition of anti-dumping duties

- (1) The Minister may from time to time by notice in the Gazette amend Schedule 2 to impose an anti-dumping duty in accordance with the provisions of section 55 (2).
- (2) The Minister may, in accordance with any request by the Minister of Trade and Industry and for Economic Co-ordination, from time to time by notice in the Gazette withdraw or reduce, with or without retrospective effect and to such extent as may be specified in the notice, any anti-dumping duty imposed under subsection (1).
- (3) The provisions of section 48 (6) shall mutatis mutandis apply in respect of any amendment, withdrawal or reduction made under the provisions of subsection (1) or (2) of this section.

56A Imposition of countervailing duties

- (1) The Minister may from time to time by notice in the Gazette amend Schedule 2 to impose a countervailing duty in accordance with the provisions of section 55 (2).

(2) The Minister may, in accordance with any request by the Minister of Trade and Industry and for Economic Co-ordination, from time to time by notice in the Gazette withdraw or reduce, with or without retrospective effect and to such extent as may be specified in the notice, any countervailing duty imposed under subsection (1).

(3) The provisions of section 48 (6) shall mutatis mutandis apply in respect of any amendment, withdrawal or reduction made under the provisions of subsection (1) or (2) of this section.

57. Imposition of safeguard duties

(1) The Minister may from time to time by notice in the Gazette amend Schedule 2 to impose a safeguard duty in accordance with the provisions of section 55 (2).

(2) The Minister may, in accordance with any request by the Minister of Trade and Industry and for Economic Co-ordination, from time to time by notice in the Gazette withdraw or reduce, with or without retrospective effect and to such extent as may be specified in the notice, any safeguard duty imposed under subsection (1).

(3) The provisions of section 48 (6) shall mutatis mutandis apply in respect of any amendment, withdrawal or reduction made under the provisions of subsection (1) or (2) of this section.

57A Imposition of provisional payment

(1) Whenever the International Trade Administration Commission publishes a notice in the Gazette to the effect that it is investigating the imposition of an anti-dumping, countervailing or safeguard duty on goods imported from a supplier or originating in a territory specified in that notice, the Commissioner shall, in accordance with any request by the said Commission, by notice in the Gazette impose a provisional payment in respect of those goods for such period and for such amount as the Commission may specify in such request.

(2) The Commissioner shall, in accordance with any request by the said Commission, by further notice in the Gazette extend the period for which the provisional payment mentioned in subsection (1) is imposed or withdraw or reduce it with or without retrospective effect and to such extent as may be specified in the request.

(3) Such provisional payment shall be paid on goods subject thereto, at the time of entry for home consumption thereof, as security for any anti-dumping, countervailing or safeguard duty which may be retrospectively imposed on such goods under section 56, 56A or 57 and may be set off against the amount of the retrospective anti-dumping, countervailing or safeguard duty payable.

(4) If no anti-dumping, countervailing or safeguard duty is imposed before expiry of the period for which a provisional payment in relation to the goods concerned has been imposed, the amount of such payment shall be refunded.

(5) If the amount of any such provisional payment on the said goods:

(a) exceeds the amount of any anti-dumping, countervailing or safeguard duty retrospectively imposed on such goods under section 56, 56A or 57, the amount of the difference shall be refunded; or

(b) is less than the amount of the anti-dumping, countervailing or safeguard duty so imposed, the amount of the difference shall not be collected.

REPUBLIC OF SOUTH AFRICA

THE INTERNATIONAL TRADE ADMINISTRATION COMMISSION

SAFEGUARD REGULATIONS

I, MANDISI MPAHLWA, IN MY CAPACITY AS MINISTER OF TRADE AND INDUSTRY, ACTING UNDER THE POWERS VESTED IN ME BY SECTION 59 OF THE INTERNATIONAL TRADE ADMINISTRATION ACT (ACT 71 OF 2002) HEREBY PRESCRIBE THAT –

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PREAMBLE

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

1. Application of regulations

- 1.1 Safeguard investigations are conducted in terms of section 16 and 26 of the *Main Act*.
- 1.2 A definitive safeguard measure may be applied only where:
 - (a) the Commission finds that the product under investigation is being imported into the Common Customs Area of SACU in such increased quantities, absolute or relative to SACU production, and under such conditions as to cause or threaten to cause serious injury to the SACU industry that produces like or directly competitive products, and as a result of unforeseen developments and of the effect of the obligations incurred by the Republic (or SACU) under the World Trade Organization;
 - (b) such measures are required to facilitate adjustment in the SACU industry; and
 - (c) the SACU industry:

- (i) has submitted a detailed plan indicating how it plans to adjust to meet import competition; or
- (ii) has submitted proof of restructuring that is being undertaken.

1.3 The Commission, in considering the recommendation of a definitive safeguard measure, may take into consideration the requirement of compensation to countries whose exports will be substantially affected by any safeguard measure.

1.4 Nothing in these regulations shall preclude the Commission from taking safeguard action provided for in terms of a free trade agreement concluded between the Republic or the SACU and any other country or customs territory. Any safeguard action so taken shall be taken in line with the terms and conditions agreed upon in such free trade agreement.

1.5 Nothing in these regulations shall preclude the Commission from taking special safeguard action in terms of any country's Protocol of Accession to the World Trade Organization. Any safeguard action so taken shall be taken in line with the terms and conditions stated in the Protocol of Accession.

1.6 These regulations do not apply to agricultural goods in terms of which the Republic (or SACU) has reserved its right to apply a special safeguard measure contemplated in Article 5 of the WTO Agreement on Agriculture.

2. Definitions

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

“deadlines” shall be interpreted as the final date for submissions, responses, comments and requests and the like as envisaged by the different sections of these Regulations, and shall be deemed to be at 15h00 South African standard time on the deadline indicated, unless expressly otherwise indicated;

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

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

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

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

“like product” means:

- (a) a product which is identical, i.e. alike in all respects to the product under consideration; or

- (b) in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of that product under consideration.

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

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

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

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

“**SACU**” means the Southern African Customs Union;

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

Where a SACU producer is

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

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

3. Confidentiality

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

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

3.2 Non-confidential information supplied by interested parties, as set out in section 3.1, and all non-confidential correspondence between the Commission and participating interested parties during the investigation shall be kept in a public file.

3.3 Interested parties that have made themselves known may upon request inspect the public file and may comment thereon within 7 days after such information has been placed on the public file. The Commission will consider all substantiated comments.

3.4 Where information does not permit summarisation, reasons should be provided why the information cannot be summarised.

3.5 The following list indicates “information that is by nature confidential” as contemplated in section 33(1)(a) of the *Main Act*, read with section 36 of the *Promotion of Access to Information Act*, 2000 (Act 2 of 2000):

- (a) management accounts;
- (b) financial accounts of a private company;
- (c) actual and individual sales prices;
- (d) actual costs, including cost of production and importation cost;
- (e) actual sales volumes;
- (f) individual sales prices;
- (g) information, the release of which could have serious consequences for the person that provided such information; and
- (h) information that would be of significant competitive advantage to a competitor;
- (i) provided that the party submitting such information indicates it to be confidential.

3.6 All correspondence not clearly indicated to be confidential shall be treated as non-confidential.

3.7 The Commission may disregard any information indicated to be confidential that is not accompanied by a proper non-confidential version and may return such information to the party submitting same, if the non-confidential version remains deficient after such party had the opportunity to rectify any deficiencies.

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

4. Investigations

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

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

5. Oral hearings

5.1 Any participating interested party may request an oral hearing during the investigation, provided the party indicates reasons for not relying on written submissions only. The Commission may refuse an oral hearing if granting such hearing will unduly delay the finalisation of a preliminary or final determination.

5.2 No request for an oral hearing will be considered more than 60 days after the initiation of the investigation.

6. Consultations

6.1 The Commission shall provide for consultations with the representatives of countries that have a substantial interest in a safeguard investigation within 14 days after the imposition of a provisional payment.

6.2 Consultations entered into in terms of subsection 1 shall normally be concluded within 30 days after the publication of the Commission's preliminary report.

6.3 The Commission shall provide representatives of countries that have a substantial interest in a safeguard investigation 30 days for consultations prior to the application or extension of a definitive safeguard measure with a view to, *inter alia*,

- (a) reviewing the information relating to
 - (i) evidence of serious injury or threat thereof caused by increased imports;
 - (ii) the precise description of the product involved;
 - (iii) the proposed measure;
 - (iv) the proposed date of introduction;
 - (v) the expected duration of the measure; and
 - (vi) the timetable for progressive liberalization;

- (b) exchanging views on the measure; and
- (c) discussing ways to maintain a substantially equivalent level of concessions and other obligations vis-à-vis that country.

6.4 In cases where it is proposed that a safeguard measure be extended, the Commission shall, in addition to the factors contemplated under subsection 3, also provide evidence that the relevant SACU industry is adjusting.

7. SACU industry

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

7.2 An application shall be regarded as brought by or on behalf of the SACU industry if

- (a) at least 25 per cent of the SACU producers by domestic production volume support the application; and
- (b) of those producers that express an opinion on the application, at least 50 per cent by domestic production volume support such application.

7.3 In the case of industries involving an exceptionally large number of producers, the Commission may determine support and opposition by reference to the largest number of producers that can reasonably be included in the investigation or by using statistically valid sampling techniques based on the information available to the Commission at the time of its finding.

7.4 If a SACU producer withdraws the application or its support thereof after the investigation has been initiated, the Commission may

- (a) terminate the investigation; or
- (b) disregard the withdrawal of support and continue with its investigation as if all requirements in subsections 1, 2 and 3 have been met.

8. Serious injury

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

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

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

- (a) the rate and volume of the increase in imports of the product concerned:
 - (i) in absolute terms; or
 - (ii) relative to the production and demand in SACU; and
- (b) whether there have been significant changes in the performance of the SACU industry in respect of the following potential injury factors:

- (i) sales volume;
- (ii) profit and loss;
- (iii) output;
- (iv) market share;
- (v) productivity;
- (vi) capacity utilisation;
- (vii) employment; and
- (viii) any other relevant factors placed before the Commission.

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

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

9. Threat of serious injury

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

10. Causality

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

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

11. Properly documented application

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

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

- (a) the application includes such information as is reasonably available to the applicant on the issues contemplated in subsection 3; and
- (b) a proper non-confidential version has been submitted.

11.3 The application shall contain the following information:

- (a) complete description of the imported product;
- (b) complete description of the SACU like and directly competitive product;
- (c) industry standing;
- (d) a summary of the factors on which the allegation of serious injury or threat thereof is based;
- (e) the unforeseen developments that led to the increased imports;
- (f) relief sought;
- (g) efforts taken or planned to compete with the imports;
- (h) any other information required by the Commission.

11.4 The Commission will return all applications that do not contain sufficient information, as required under subsection 3, to the applicant, unless such deficiencies are properly addressed within 7 days after the issue of a deficiency letter. This shall in no way prejudice the right of the SACU industry to submit a new application.

12. Serious injury standard for initiation purposes

In determining serious injury to a SACU industry the Commission shall consider whether the information submitted in this regard and relating to the factors listed in section 8 establishes a *prima facie* case of serious injury or threat thereof.

13. Merit Assessment

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

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

14. Initiation and notification

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

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

- (a) the identity of the applicant;
- (b) a detailed description of the product under investigation, including the tariff subheading applicable to the product;
- (c) a detailed description of the like or directly competitive SACU product;
- (d) a summary of the factors on which the allegation of serious injury or threat thereof is based;

- (e) the unforeseen developments that led to the increased imports;
- (f) the address to which representations by interested parties should be directed; and
- (g) the time frame for responses by participating interested parties.

14.3 If the Commission, during its investigation, finds that the subject product is imported under a tariff subheading not initially indicated to be in the scope of the investigation, it may include the imports of such subject product in its investigation.

14.4 Within 7 days after initiation the Commission shall:

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

15. Responses by interested parties

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

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

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

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

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

16. Non-cooperation

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

17. Provisional measures

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

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

- 17.2 Provisional payments may be imposed for a maximum period of 200 days.
- 17.3 The period for which provisional measures are in force shall be regarded as part of the total duration for which safeguard measures are in force.
- 17.4 The Commission will provide an opportunity for consultations with participating interested parties following the imposition of provisional measures.

18. Preliminary report

- 18.1 In the event that the Commission requests the imposition of a provisional safeguard measure, as contemplated in section 17, the Commission shall make available a public report within seven days of the publication of its preliminary finding.
- 18.2 The preliminary report shall contain at least the following information:
- (a) identity of the applicant;
 - (b) a full description of the product under investigation, as well as the directly competitive products, including the tariff classifications;
 - (c) date of the Commission's decision to initiate the investigation;
 - (d) initiation date and notice number;
 - (e) date of the Commission's preliminary determination;
 - (f) an evaluation of the injury factors considered;
 - (g) an evaluation of the causality factors considered;
 - (h) the unforeseen developments that lead to the increased imports;
 - (i) the Commission's finding, including the preliminary safeguard measure requested; and
 - (j) while preserving the requirements of confidentiality, all relevant issues of fact and law considered by the Commission in reaching its preliminary determination.
- 18.3 The Commission shall forward the preliminary report direct to all participating interested parties unless the number of participating interested parties makes this impracticable.

19. Comments on preliminary report

- 19.1 All participating interested parties shall receive 14 days, from the date a preliminary report is made available, to comment in writing.
- 19.2 The Commission may grant participating interested parties an extension on good cause shown.

20. Final determination

- 20.1 In its final determination the Commission shall consider whether:

- (a) the SACU industry is experiencing serious injury or threat of serious injury, as contemplated in sections 8 and 9;
- (b) there were increased imports;
- (c) any increase in imports can be attributed to unforeseen developments;
- (d) the increased imports resulted in serious injury or threat thereof to the SACU industry;
- (e) other factors contributed significantly to the serious injury; and
- (f) the imposition of a safeguard measure would be in the public interest.

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

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

20.4 The public report referred to in subsection 3 shall reflect

- (a) all issues contemplated under section 8.2;
- (b) unforeseen developments;
- (c) public interest; and
- (d) the basis of its recommendation for
 - (i) a definitive safeguard measure; or
 - (ii) terminating the investigation.

21. Definitive safeguard measures

21.1 A safeguard measure shall be applied only:

- (a) to the extent necessary to prevent or remedy serious injury or threat thereof; and
- (b) to facilitate adjustment of the SACU industry.

21.2 The SACU industry shall be required to submit a plan indicating how it will adjust to increase its competitiveness. Such adjustment plan should reach the Commission no later than 60 days after initiation of the investigation in the *Government Gazette*.

21.3 The Commission may grant an extension for the submission of an adjustment plan on good cause shown.

21.4 If the Commission proposes applying or extending a safeguard measure it shall provide the representatives of countries having a substantial interest as exporters of the product under investigation 30 days for consultations with a view to, *inter alia*:

- (a) reviewing the information relating to the existence of serious injury or the threat thereof caused by increased imports, the precise description of the product involved, the proposed measure, the proposed date of introduction, the expected duration of the measure and the timetable for progressive liberalisation;
- (b) exchanging views on the measure; and
- (c) reaching an understanding on ways to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between SACU and the exporting countries which would be affected by such a measure.

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

- (a) a customs duty;
- (b) a quantitative restriction; or
- (c) a combination of the measures contemplated under paragraphs (a) and (b).

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

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

- (a) the lapse of the safeguard measure imposed in terms of subsection 6 is likely to lead to the recurrence of serious injury; and
- (b) there is evidence that the SACU industry is adjusting.

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

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

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

- (a) the continued application of the safeguard measure is required;
- (b) the safeguard measure cannot be liberalised at an increased pace; and
- (c) the SACU industry is implementing its adjustment programme.

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

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

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

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

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

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

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

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

- (a) at least one year has elapsed since the date of introduction of a safeguard measure on the import of that product; and
- (b) such a safeguard measure has not been applied on the same product more than twice in the five-year period immediately preceding the date of introduction of the measure.

21.18 Safeguard measures shall not be applied against a product originating in a developing country as long as its share of imports of the product concerned in SACU does not exceed three per cent, provided that developing countries with less than three per cent import share collectively account for not more than nine per cent of total imports of the product concerned.

21.19 Other than as contemplated in subsection 18 a safeguard measure shall be applied to all imports of the subject product irrespective of its source.

21.20 A developing country exempted from the application of a safeguard measure in terms of subsection 18 may become subject to such safeguard measure without a new investigation being

conducted if, subsequent to the imposition of the safeguard measure, its share of the imports increases to a level that exceeds three percent of the total import volume in the original investigation period.

22. Judicial reviews of preliminary decisions

Participating interested parties may challenge preliminary decisions or the Commission's procedures prior to the finalisation of an investigation in cases where it can be demonstrated that

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