



Government Gazette Staatskoerant

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID-AFRIKA

Vol. 470

Pretoria, 27 August
Augustus 2004

No. 26715



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GENERAL NOTICE

Trade and Industry, Department of

General Notice

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GENERAL NOTICE

NOTICE 1808 OF 2004

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 –

REPUBLIC OF SOUTH AFRICA

THE INTERNATIONAL TRADE ADMINISTRATION COMMISSION

SAFEGUARD REGULATIONS

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PREAMBLE

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 Organisation.

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 Organisation;
 - (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 Organisation. 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;
- 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.
-

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