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NOTICE TO:

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GENERAL NOTICE

NOTICE 1606 OF 2006

DRAFT AMENDED ANTI-DUMPING REGULATIONS

The draft Amended Anti-dumping Regulations, is hereby published for public comment. An explanatory document on draft amendments to the Anti-dumping Regulations is included in the publication. Comments should be submitted in writing to:

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Written comments must be received no later than 4 December 2006.



Explanatory document on draft amendments to the Anti-dumping Regulations

I. Introduction and Disclaimer

The International Trade Administration Commission of South Africa ("the Commission") has drafted Amended Anti-Dumping Regulations ("the ADRs") that are being published in the *Government Gazette*. The proposed amendments to the ADRs are informed by the Commission's past and current experience in administering this trade remedy instrument, the *Draft International Trade Administration Amendment Bill*, the requirements of WTO Agreements, in particular the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (commonly known as the *Anti-Dumping Agreement*), decisions by the WTO Appellate Body, as well as the policies of **the dti** (Department: Trade and Industry).

To assist parties wishing to comment on the ADRs, the Commission has drafted this explanatory document ("the Document"). The Commission has previously received comments in connection with the proposed revisions to the *International Trade Administration Act, 2002, Act No. 71 of 2002* ("the *ITA Act*") and its body of regulations. The Commission is of the opinion that an explanation of certain amendments may assist in focusing the comments it receives from outside parties.

It should be noted that the Document does not identify all of the amendments that have been incorporated into the ADRs. For example, amendments regarding the consistent use of terms are not discussed. Rather, the Document identifies amendments that are significant procedurally, substantively or otherwise, or amendments that require clarification to avoid confusion over their intended purpose. Notwithstanding the narrow focus of the Document, the Commission invites parties to comment on any aspect of the ADRs.

The Document cannot be cited to establish Commission practice or interpret, in any manner, the final version of the ADRs. The Document does not undertake to provide a comprehensive or authoritative interpretation of the amendments it identifies, which amendments are often highly technical. The Document merely identifies certain amendments and seeks to focus comments on certain aspects of these amendments.

II. Identification of Amendments

To assist parties in their review, changes are identified in the order they appear in the ADRs. The headings provided in this section identify the Part of the ADRs in which the amendments can be found.

Part A - Definitions:

1. "Constructed export price": to simplify the structure of the ADRs, the definition has been incorporated into section 12 of the ADRs dealing with the constructed export price.

2. "Constructed normal value": to simplify the structure of the ADRs, the definition has been incorporated into section 9 of the ADRs dealing with normal value.
3. "Exporter": This definition, derived from the *ITA Act*, was inserted to clarify that the Commission does not investigate exporters who do not also produce subject goods (e.g. trading companies).
4. "Investigation period for dumping": To simplify the structure of the ADRs, the definition has been incorporated into section 14 of the ADRs dealing with the margin of dumping.
5. "Investigation period for injury": To simplify the structure of the ADRs, the definition has been incorporated into section 15 of the ADRs dealing with material injury.
6. "Lesser duty": To simplify the structure of the ADRs, the definition has been incorporated into section 19 of the ADRs dealing with the lesser duty rule.

Part B – General Provisions:

7. Section 2 - Confidentiality: The section has been revised for greater clarity and to achieve consistency with the same provision in the *ITA Act*.
8. Section 3 – Investigations: The section has been revised for greater clarity by specifying the proceedings and the conditions that must be satisfied for the Commission to initiate *ex officio*.
9. Section 4 – Termination based on negligibility and *de minimis* margins: The section has been added to clarify when the Commission will terminate an investigation based on negligibility or *de minimis* margins.
10. Section 6 – Interested parties hearing: The changes to this section reflect a new type of hearing in anti-dumping proceedings. The hearings are intended, among other things, to help focus the attention of the Commission on what interested parties believe are the most salient aspects of an investigation. The hearings are also an effort to rationalise and centralise the Commission's interaction with interested parties, thereby easing administrative demands on the Commission.

Part C – Procedures:

11. Section 8 – SACU industry: This section includes a definition in respect of "assembly operations".
12. Section 9 – Normal value: This section has been amended to provide greater precision and clarity.
13. Section 11 – Export price: If there were no exports to SACU during the period covered by a review (in investigations there will either be exports or a tender), the Commission proposes to determine the export price by examining exports to a single third country. To ensure an appropriate comparison, the Commission may consider various factors, including any of those set forth in subsection 3.

14. Section 14 – Margin of dumping: This section has been amended to explain when and how the Commission will calculate residual duties.
15. Section 15 – Material injury: Various amendments are proposed in this section. The definition of material injury, now in subsection 1, has been amended to provide the Commission with additional information to assist in its injury determination, in particular to identify any trends in respect of injury information provided for a current financial year.

The section also incorporates a heightened requirement regarding the assessment of material injury. In determining the existence of injury to the domestic industry producing the like products, investigating authorities, such as the Commission, must examine and form an opinion as to the representative nature of injury data collected on the domestic industry. In this regard, the ADRs currently use the concept of a “major proportion”, which is also the relevant standard set forth in Article 4.1 of the *Anti-Dumping Agreement*. Given the relatively vague concept of “a major proportion” of total domestic production, spelling out what constitutes “a major proportion” would enhance the transparency and predictability of anti-dumping proceedings. However, because a domestic industry may be highly fragmented or without a national association, the revised standard would provide Commission with the discretion to accept injury information on 50 per cent or less of the domestic industry, but only where it has been provided with an explanation as to why such a lower standard would be appropriate, and has accepted this explanation.

Further, the Commission will now require the submission of injury information from all producers accounting for 35 per cent or more of domestic production. This provision addresses the situation where there are 2 (or more) large domestic producers, and one of the producers fails to submit injury information. In such situations, the Commission has difficulty determining whether the alleged material injury was caused by domestic competition as opposed to dumped imports and therefore has proposed this requirement.

16. Section 19 – Lesser duty rule: Pursuant to the amendment to this section, application of the lesser duty rule in investigations and reviews will become mandatory.
17. Section 20 – Public interest: This section provides for the consideration of the public interest in Commission investigations or reviews.
18. Section 21 – Verifications: Mindful of the requirement in the *Anti-dumping Agreement* that investigating authorities verify information on which a determination rests, the amendment in this section reflects that it is not always feasible for the Commission to verify all information submitted by interested parties, given the Commission’s limited resources.

Section 33 – Deficiencies: The proposed amendments to this section provide, among other things, that deficient submissions that have not

been remedied by a given deadline will not be considered in connection with a preliminary or a final determination.

19. Section 34 – Non-cooperation by exporters or foreign producers: The Commission will no longer split investigations because of non-cooperation by exporters or producers.
20. Section 35 – Provisional measures: An amendment to this section clarifies the Commission's discretion whether or not to impose provisional measures. Further, in conformity with the requirements of Article 7.4 of the *Anti-Dumping Agreement*, the section reflects that an extension of provisional payments is predicated on a request by exporters representing a significant part of the trade involved
21. Section 39 – Definitive anti-dumping duties: The amendment to this section clarifies that the Commission's final determination is not a definitive decision, but only a recommendation that can be accepted, rejected or remanded for further clarification.
22. Section 40 – Price undertakings: The section has been amended to clarify when the Commission may accept price undertakings.

Part D – Reviews:

23. Section 46 – Changed circumstances: An amendment to this section clarifies that the evidence that must be submitted in regards to an interim review is twofold.
24. Section 49 – Eligibility: This section has been amended for greater clarity as to the requirements for new shipper reviews. A requirement has been added that the party requesting a new shipper review must have exported subject goods prior to requesting a review. This change conforms the Commission's practice to that of other investigating authorities, and more importantly, would relieve the Commission with its limited administrative resources from providing what can amount to an advisory opinion, i.e. parties requesting a review could decide based on the margin of dumping found whether or not to export.

Section 54 – Duration of anti-dumping duties: The section has been revised for greater clarity as to the parameters of the duration of definitive anti-dumping duties.

25. Section 55 – Initiation of sunset review: The section has been revised to reflect that the Commission will no longer provide notice of the lapse of a definitive anti-dumping duty to interested parties in an effort to lessen the Commission's administrative burdens. Parties will be able to consult the Commission's website for expiry dates, which should not represent an undue burden on parties.
26. Section 56 – Likelihood of dumping: This section introduces a new methodology to allow the Commission to determine the likelihood of a continuation or recurrence of dumping. Where a foreign producer's landed cost of a product (i.e. the domestic price plus certain additional costs) is lower than the SACU producer's ex-factory price, it is, as a

general proposition, unlikely that the foreign producer will have to sell its products into the SACU market at a dumped price.

27. (Previous) Section 61 – Judicial Reviews: This section has been deleted because the *Promotion of Administrative Justice Act, 2000* (Act No. 3 of 2000) already addresses all issues regarding judicial reviews of administrative actions

REPUBLIC OF SOUTH AFRICA

**THE INTERNATIONAL TRADE
ADMINISTRATION COMMISSION**

**DRAFT AMENDED
ANTI-DUMPING REGULATIONS**

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DRAFT REGULATIONS

Part A - Definitions

1. Definitions

“Commission” means the International Trade Administration Commission established in terms of section 7 of the *Main Act*.

“Deadline” 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 such date, unless expressly otherwise indicated.

“Exporter” means any person who produces and brings or sends such goods into the SACU from a country or territory outside the SACU.

“Facts available” means the information that is available to the Commission at the time of making a determination, whether preliminary or final, and which has been verified or is verifiable. Facts available may include, in any order –

(a) For normal value:

- (i) the prices of another seller or sellers in that market;
- (ii) the information contained in the application; and/or
- (iii) any other information at the Commission’s disposal.

(b) For export prices:

- (i) the information contained in the application;
- (ii) the information contained in the import statistics as provided by the Commissioner for the South African Revenue Service; and/or
- (iii) any other information at the Commission’s disposal.

provided the Commission has, where practicable, checked the information from other independent sources at its disposal.

“Good cause” for an extension of the submission of information, as referred to in sections 22.4, 32.1, 37.2, 38.3 and 43.4 does not include merely citing insufficient time to complete a response.

“Interested parties” may include known –

- (a) producers in SACU;
- (b) exporters;
- (c) foreign producers;
- (d) importers;

(c) trade or business associations whose members are SACU or foreign producers, exporters or importers; and/or

(f) the governments of the countries of origin and of export;

of the product under investigation or the like product. This does not preclude the Commission from accepting other parties as interested parties at the behest of the Commission in an anti-dumping investigation.

“Like product” means –

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

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

In determining whether the product has characteristics closely resembling those of the product under investigation the Commission may consider –

(i) the raw materials and other inputs used in producing the products;

(ii) the production process;

(iii) physical characteristics and appearance of the product;

(iv) the end-use of the product;

(v) the substitutability of the product with the product under investigation;

(vi) tariff classification; and/or

(vii) any other factor proven to the satisfaction of the Commission to be relevant.

No one or several of these factors can necessarily give decisive guidance.

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

“Margin of dumping” is the extent to which the normal value is higher than the export price, after adjustments have been made for comparative purposes.

“Material injury”, unless the opposite is clear from the context, refers to actual material injury, a threat of material injury or the material retardation of the establishment of an industry.

“Minister” means the member of the Cabinet responsible for trade and industry.

“Price depression” takes place where the SACU industry’s ex-factory selling price decreases during the investigation period.

“Price disadvantage” is the extent to which the price of the imported product is lower than the unsuppressed selling price of the like product produced by the SACU industry, as measured at the appropriate point of comparison.

“Price suppression” takes place where the cost-to-price-ratio of the SACU industry increases, or where the SACU industry sells at a loss during the investigation period or part thereof.

“Price undercutting” is the extent to which the price of the imported product is lower than the price of the like product produced by the SACU industry, as measured at the appropriate point of comparison.

“Related parties” are parties deemed to be related for purposes of an anti-dumping investigation, and sales may be considered not to be at arm’s length, if –

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

“SACU” means the Southern African Customs Union.

“Unsuppressed selling price” is the price at which the SACU industry would have been able to sell the like product in question in the absence of dumping, and can be determined with reference to –

- (a) the expected or required return of the SACU industry for the like product; or
- (b) the profit margins of the industry for the like product before the entry of the dumped imports; or
- (c) the prices obtained for the like product by the industry directly before the entry of the dumped imports; or

, (d) any other reasonable basis.

Part B – General Provisions

2. Confidentiality

2.1 Parties providing confidential information in any correspondence shall furnish non-confidential summaries thereof. These summaries shall –

- (a) indicate in each instance where confidential information has been omitted;
- (b) indicate, in each instance where confidential information has been omitted, 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.

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

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

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

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

- 2.4 All correspondence not clearly indicated to be confidential shall be treated as non-confidential.
- 2.5 The Commission may disregard any information indicated to be confidential that is not accompanied by a proper non-confidential version or, where applicable, a statement of reasons contemplated in subsection 2, provided such failure materially affects the ability of interested parties to defend their interests and this deficiency has not been addressed in accordance with section 33.2.
- 2.6 The Commission will disregard any information indicated to be confidential that is not accepted as confidential by the Commission under section 34(1) of the *Main Act*.

3. Investigations

- 3.1 An anti-dumping investigation shall only be initiated upon acceptance of a written application by or on behalf of the SACU industry, except as provided for in subsection 3.
- 3.2 An interim, new shipper, sunset or anti-circumvention review shall only be initiated upon acceptance of a written application by or on behalf of an interested party, except as provided for in subsection 3.
- 3.3 The Commission may initiate an investigation mentioned in subsection 1 or a review mentioned in subsection 2 without having received a written application from the relevant interested party if –
- (a) in the case of an anti-dumping investigation it has *prima facie* evidence of dumping, material injury and a causal link; and
 - (b) in the case of an interim review, it has *prima facie* evidence of –
 - (i) a change in circumstances relating to dumping and/or material injury; and
 - (ii) the change in the margin of dumping and/or the lack of material injury.
- 3.4 A non-confidential version of the information that served as the basis for the initiation shall be made available to all known interested parties.

4. Termination based on negligibility and *de minimis* margins

- 4.1 An investigation shall not be initiated or an investigation shall be terminated where it is determined that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury is negligible.
- 4.2 The margin of dumping shall be considered to be *de minimis* in terms of subsection 1 if the margin is less than two per cent when expressed as a percentage of the export price.
- 4.3 The volume of dumped imports shall normally be regarded as negligible in terms of subsection 1 if the volume of dumped imports from a particular country is found to account for less than three per cent of the total imports of the product under investigation into the SACU market, unless countries which individually account for less than three per cent of the total imports of the product under investigation into the SACU market collectively account for more than seven per cent of the total imports of the product under investigation into the SACU market

5. Representation

- 5.1 Should an interested party wish to be represented by an outside party in an investigation or a review, the interested party must provide the Commission with a letter of appointment of its representative, detailing the identity of the representative and the scope and duration of the representation.
- 5.2 Should an interested party wish to terminate a representation indicated in subsection 1, such party must provide the Commission with a letter to this effect.
- 5.3 Once an interested party has appointed a representative all communication between the Commission and the interested party will take place through the appointed representative.

6. Interested parties hearings

- 6.1 The Commission shall normally convene two interested parties hearings in an investigation or a review, one prior to the Commission's preliminary determination and the other prior to the Commission's final determination, except that the Commission shall convene a single interested parties hearing in

a review consisting of a single investigation phase. The Commission shall provide notice of the interested parties hearings in the initiation notice.

- 6.2 The Commission shall provide notice to interested parties of the date of a hearing contemplated in subsection 1 at least 21 days prior to the hearing date. At least 14 days prior to the date of a hearing, interested parties who wish to attend the hearing must provide the Commission with a list of attendees and a detailed agenda and a detailed version, including where relevant a non-confidential version, of the information to be presented at the hearing. At least 7 days prior the date of the hearing, the Commission shall provide interested parties who have provided the Commission with a list of attendees and an outline, the agenda for the hearing and the allocation of time among interested parties
- 6.3 Interested parties may not discuss or submit new information at a hearing, but may discuss and submit information on any aspect of the investigation on which interested parties have submitted information.
- 6.4 Written information provided to the Commission in terms of subsection 3, including the non-confidential version of any confidential information submitted to the Commission, will be placed on the public file.
- 6.5 The Commission may limit or add to the agenda of a hearing and may structure a hearing as it deems efficient.
- 6.6 There shall be no obligation on any party to attend an interested parties hearing, and the failure to do so shall not be prejudicial to that party's case.

7. Computation of periods of time

- 7.1 Computation of any period of time provided for in these regulations commences with the first day following the act or event initiating such period of time. The last day of the period of time is included in the computation unless such day is a Saturday, Sunday or public holiday, or such other day when the Commission is closed for business, in which case the deadline is the next business day.
- 7.2 Unless expressly otherwise provided for, a party shall be deemed to have received a written communication from the Commission –
- (a) in the case of transmission by facsimile or electronically, on the day the written communication is transmitted by the Commission;

- (b) in the case of same-day, overnight or registered mail, on the day such written communication is delivered to a party; or
- (c) in the case of regular mail, 5 working days after the written communication is placed in the post by the Commission.

Part C – Procedures

Sub-Part I – General

8. SACU industry

8.1 Other than investigations initiated in terms of section 3.3, any application for anti-dumping action shall be brought by or on behalf of the SACU industry.

8.2 Where a SACU producer is --

- (a) related to the importer, exporter or the foreign producer;
- (b) itself an importer of the product under investigation; or
- (c) performing assembly operations;

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

8.3 In terms of subsection 2(c), a SACU producer will be considered performing assembly operations if the value added by its operations in the SACU is less than 25 per cent as determined under subsection 4.

8.4 The value added in terms of subsection 3 shall be determined with reference to the direct and indirect costs of production only of the product under investigation and shall not include selling, general, administrative or packaging costs or profit.

8.5 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.

8.6 In the case of industries involving an exceptionally large number of producers, the Commission may determine support and opposition by reference to the largest number of producers that can be reasonably included in the

investigation or by using statistically valid sampling techniques based on the information available to the Commission at the time of its finding.

8.7 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.

9. Normal value

9.1 "Normal value" as defined in section 32(2)(b) of the *Main Act* shall be interpreted to mean -

(a) the price paid or payable for like goods produced and sold in the ordinary course of trade and in sufficient quantity for home consumption in the country of export or the country of origin by the foreign producer or its related party under investigation; or

(b) where such price is not known, the price at which such like goods are produced and sold on the same market and in the ordinary course of trade and in sufficient quantity for home consumption by another seller or sellers in that market; or

(c) in the absence of information on a price contemplated in paragraphs (a) and (b) -

(i) 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

(ii) the highest comparable price of the like product when exported from the country of origin to an appropriate third country, as long as that price is representative.

9.2 Domestic sales or export sales to a third country may be considered to be not in the ordinary course of trade if the Commission determines that such sales-

(a) took place at prices below total costs, including cost of production and administrative, selling, general and packaging costs, provided such sales took place -

(i) in substantial quantities equalling at least 20 per cent by volume of total domestic sales during the investigation period; and

- (ii) over an extended period of time, which period shall normally be a year, but in no case less than 6 months;
 - (b) were made to a related party; or
 - (c) do not reflect normal commercial quantities.
- 9.3 Domestic or third country sales of the like product shall normally be considered a sufficient quantity to determine a normal value if such sales constitute five per cent or more of the sales volume of the product to the SACU. Sales representing less than five per cent of export sales to the SACU may nevertheless be deemed sufficient where such sales are of sufficient magnitude to provide for a proper comparison.
- 9.4 Where the products are not shipped directly from the country of origin but are exported to the SACU from an intermediate country, the price at which the products are sold from the country of origin or export for shipment to the SACU may be compared with the comparable price in the country of export or of origin.
- 9.5 Exports may be deemed to originate in the country indicated –
- (a) on the certificate of origin; and/or
 - (b) on the bills of entry; and/or
 - (c) in the import statistics provided by the Commissioner for the South African Revenue Service.
- 9.6 In cases where the number of foreign producers or types of products is large, the investigation may be limited to a reasonable number of parties or types of products by using –
- (a) the largest percentage of the exports from the country in question which can reasonably be investigated; or
 - (b) samples that are statistically valid on the basis of the information available to the Commission at the time of the selection.
- 9.7 If the Commission decides to limit its investigations as contemplated in subsection 6, any selection may be made after consultation with the relevant parties.
- 9.8 In cases where the Commission has limited its investigation as contemplated in subsection 6, the Commission will nevertheless determine an individual margin of dumping for any foreign producer not initially selected who submits the necessary information in time for that information to be considered along with the information of foreign producers selected, except where the number

of foreign producers is so large that individual examinations would be unduly burdensome to the Commission.

9.9 If the Commission constructs the normal value, as contemplated in section 32(2)(b)(ii)(aa) of the *Main Act*, it may do so on any reasonable basis, including, but not limited to -

- (a) the cost of the foreign producer concerned;
- (b) the cost of another foreign producer or producers in the same country;
- (c) the information contained in the application; or
- (d) any other information at the Commission's disposal.

9.10 When the Commission constructs a normal value the cost build-up shall include -

- (a) production costs;
- (b) overhead costs;
- (c) selling, general and administrative costs;
- (d) any other costs deemed necessary by the Commission to compare the constructed normal value to the export price; and
- (e) a reasonable profit.

9.11 The constructed normal value in subsection 10 shall normally be constructed using the foreign producer's own costs and profit, provided that such costs -

- (a) reflect the actual costs of the product;
- (b) are Generally Accepted Accounting Practice (GAAP) consistent; and
- (c) are historically based.

9.12 The selling, general and administrative costs contemplated in subsection 10 shall be determined -

- (a) with reference to the product under investigation; or
- (b) in the absence of information in terms of paragraph (a) -
 - (i) with reference to the average such costs incurred by other sellers in that market; or
 - (ii) with reference to the narrowest range of products that can be identified; or
 - (iii) on any other reasonable basis.

9.13 The reasonable profit margin that is included in the constructed normal value as contemplated in subsection 10 shall normally be determined -

- (a) with reference to the actual profit realised on sales of the product under investigation; or
- (b) with reference to the actual profit realised on sales of the narrowest range of products that can be identified; or
- (c) with reference to the average such actual profit realised by other sellers on sales of the same category of products in that market if the profit margin cannot be properly isolated from the information kept by the foreign producer under investigation; or
- (d) on any other reasonable basis;

provided that the profit so included shall normally be based on the actual profit realised on sales before extraordinary items, interest, tax and any other circumstances that may affect such profit margin.

9.14 In cases where the normal value needs to be determined as contemplated in section 32(4) of the *Main Act*, the Commission may determine the normal value of the product under investigation for the foreign producer or country in question on the basis of --

- (a) the normal value established for or in a third country that has an industry at a similar level of development; or
- (b) the costs and profits of and for the company in question, as listed in subsection 10, and as contemplated in accordance with subsection 15.

9.15 In cases where the Commission determines the normal value as contemplated in subsection 14(a), the Commission will not choose a third country in which the relevant foreign producers perform only assembly operations. A foreign producer will be considered to be performing assembly operations if the value added by its operations in the third country is less than 25 per cent as determined under subsection 16.

9.16 The value added in terms of subsection 15 shall be determined with reference to the direct and indirect costs of production only of the product under investigation and shall not include selling, general, administrative or packaging expenses or profit.

9.17 In cases where the Commission determines the normal value as contemplated in subsection 14(b), such cost inputs shall be accorded the market related cost of the different inputs, whether determined in that country or in a third country.

9.18 Where the SACU industry in filing an application substantiates an allegation that section 32(4) of the *Main Act* applies to the application, it may submit normal value information contemplated in subsections 14 and 15 in support of its application.

10. Related foreign producers and resellers

10.1 Where the foreign producer sells the product under investigation on its domestic market through a related party –

- (a) the normal value shall be determined as the resale price to the first independent buyer, provided the adjustments as envisaged in section 32(3) of the *Main Act* should still be made; or
- (b) where such product is not subsequently resold or not resold in the condition sold to that related party, the normal value shall be determined –
 - (i) with reference to sales to independent buyers only; or
 - (ii) where there are no such sales to independent buyers, on any other reasonable basis.

10.2 Where a party has domestic sales both through related and unrelated parties, the Commission may decide to use only those sales to unrelated parties.

11. Export price

11.1 “Export price” is the price determined in terms of section 32(2)(a) of the *Main Act*.

11.2 Where there were no exports to the SACU during the period of investigation in a sunset review, the export price will be the comparable price of the like product when exported from the country of origin to a third country determined by the Commission.

11.3 In choosing the third country contemplated in subsection 2, the Commission may consider any relevant factor, including any or all of the following factors, with no one or several of these factors necessarily giving decisive guidance:

- (a) the similarity of the like good used to establish the normal value and the product exported from the country of origin to the third country in terms of the criteria used by the Commission in its like product analysis;

- (b) the similarity in the level of development of the domestic industry in the SACU producing the like product and in the third country, including but not limited to, the existence and number of domestic producers of the like product;
- (c) the similarity in the volume of exports of the product subject to investigation to the SACU, based on historical data, and exports from the country of origin to the third country; and
- (d) sales in the SACU and in the third country are at the same level of trade.

12. Constructed export price

12.1 "Constructed export price" is the price determined in terms of section 32(5) of the *Main Act*. The constructed export price may be determined on –

(a) The basis of the selling price to the first independent buyer in the SACU less –

(i) All actual or allocated costs incurred between the foreign producer's ex-factory price and the first independent resale price; and

(ii) A reasonable profit, as determined according to subsection 3; or

(b) Any other reasonable basis.

12.2 Subsection 1 applies where –

(a) the foreign producer and the importer are related; or

(b) the invoiced export price appears to be unreliable for any other reason.

12.3 The reasonable profit contemplated in subsection 1(a) may be determined by calculating –

(a) the total cost of the foreign producer with reference to the product under investigation;

(b) the total cost of the importer with reference to the product under investigation, including all costs from the ex-factory export point of the foreign producer; and

(c) the total profit with reference to the product under investigation realised by both the foreign producer and the importer;

and by allocating the profit in the same ratio as the costs incurred by the two parties. The reasonable profit allocated shall not be less than zero.

12.4 In the event that –

- (a) the imported product is not resold;
 - (b) is not resold in the same condition as imported; or
 - (c) where information on the resale price is not available;
- the export price may be constructed on any reasonable basis.

13. Comparison of normal value and export price

- 13.1 Adjustments shall be made in each case, on its merit, for differences which affect price comparability at the time of setting prices, including, but not limited to –
- (a) conditions and terms of trade;
 - (b) taxation;
 - (c) levels of trade;
 - (d) physical characteristics; and
 - (e) quantities.
- 13.2 Adjustments should be requested in interested parties' original response to the relevant questionnaires and must be –
- (a) substantiated;
 - (b) verifiable;
 - (c) directly related to the sale under consideration; and
 - (d) clearly demonstrated to have affected price comparability at the time of setting prices.
- 13.3 The comparison between the normal value and the export price shall normally be made at the ex-factory level and between sales at the same level of trade, e.g. at distributor, wholesale or retail level.
- 13.4 The comparison shall normally be made at the same terms of trade, including packaging, terms of delivery and payment terms.
- 13.5 The comparison between the normal value and the export price shall normally be made on a weighted average to weighted average basis, but may be made on a transaction-by-transaction basis should the circumstances require such comparison.
- 13.6 A normal value established on a weighted average basis may be compared to prices of individual export transactions if the Commission finds a pattern of export prices that differ significantly among different purchasers, regions or time periods.

13.7 In cases where the Commission has determined the margin of dumping as contemplated in subsection 6, it shall indicate reasons for its decision in all subsequent reports.

14. Margin of dumping

14.1 The original period of investigation for dumping, which is the period for which it is assessed whether dumping took place, shall normally be 12 months, and may be more, but in no case less than 6 months, and shall normally be a period ending not more than 6 months before the initiation of the investigation. The investigation period for dumping shall be clearly indicated in the initiation notice published in the *Government Gazette*.

14.2 In cases where only one product is under investigation, the margin of dumping shall be determined as the amount by which the normal value exceeds the export price.

14.3 In cases where more than one product is under investigation, the Commission shall normally determine the margin of dumping as follows:

(a) in the case of products that can be separately identified by the South African Revenue Service, a separate margin of dumping shall be calculated for each product; or

(b) in the case of products that cannot be separately identified by the South African Revenue Service, the Commission shall normally –

(i) calculate the margin of dumping for each product separately; and

(ii) determine the weighted average margin of dumping for all products on the basis of the individual export volume of each product.

14.4 The margin of dumping shall be regarded as *de minimis* if it is less than two per cent when expressed as a percentage of the export price.

14.5 The Commission shall normally calculate a separate anti-dumping duty for each exporter who submitted a response to the Commission's questionnaire that is not deficient as contemplated in section 33.1. In addition, the Commission shall normally calculate a residual anti-dumping duty for all exporters for whom a separate anti-dumping duty has not been calculated and who are from the same country as the exporter(s) for whom an anti-

dumping duty has been calculated. In calculating a residual anti-dumping duty the Commission shall base –

- (a) the normal value on the highest normal value verified, without any adjustments; and
- (b) the export price on statistics from the South African Revenue Service, unless such statistic are unreliable because other products that are not subject to investigation are also classifiable under the tariff subheading concerned or for any other reason. In such instances, the Commission may use facts available.

15. Material injury

15.1 The investigation period for injury, which is the period for which it is assessed whether the SACU industry experienced material injury, shall normally cover a period of three years plus the current financial year at the date that the application was submitted, but may be determined by the Commission as a different period provided that the period is sufficient to allow for a fair investigation. If injury information for the current financial year does not encapsulate a full calendar or fiscal year, information on injury covering the same calendar or fiscal period must also be submitted for each year of the three-year period for which injury information is provided. Such partial information is in addition to injury information for each year of the three-year period. The investigation period for injury shall be clearly indicated in the initiation notice published in the *Government Gazette*.

15.2 With regard to the Commission's assessment of material injury, the "SACU industry" means –

- (a) the domestic producers in the SACU as a whole of the like product;
- (c) the domestic producers in the SACU whose collective output of the like product constitutes more than 50 per cent of the total domestic production of that product, or
- (d) provided the Commission accepts a detailed explanation from the applicant why examining domestic producers whose collective output of the like product constitutes 50 per cent or less of the total domestic production of those products is appropriate, the domestic producers in

the SACU whose collective output of the like product constitutes a major proportion of the total domestic production of that product.

15.3 Where there is more than one domestic producer in the SACU of the like product who individually accounts for 35 per cent or more of domestic production of those products by volume, the Commission will require the submission of injury information by each such producer.

15.4 If the Commission does not receive the information contemplated in subsection 3, the Commission shall not initiate an investigation.

15.5 In determining material injury to the SACU industry the Commission shall consider whether there has been a significant depression and/or suppression of the SACU industry's prices.

15.6 In its determination of material injury the Commission shall further consider whether there have been significant changes in the domestic performance of the SACU industry in respect of the following potential injury factors:

- (a) sales volume;
- (b) profit and loss;
- (c) output;
- (d) market share;
- (e) productivity;
- (f) return on investments;
- (g) capacity utilisation;
- (h) cash flow;
- (i) inventories;
- (j) employment;
- (k) wages;
- (l) growth;
- (m) ability to raise capital or investments; and
- (n) any other relevant factors placed before the Commission.

15.7 Each of the factors mentioned in subsections 5 and 6 shall be considered for the product under investigation only or, where such analysis is not possible, for the narrowest group of products for which such analysis can be made. Only if no such information is available will the Commission consider the information for the company as a whole, and then with special circumspection.

16. Threat of material injury

- 16.1 A determination of threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which dumping would cause material injury must be clearly foreseen and imminent.
- 16.2 In considering a threat of material injury the Commission shall, in addition to the factors indicated under section 15, and where relevant information is available, consider such factors as:
- (a) a significant rate of increase of dumped imports into the SACU;
 - (b) sufficiently freely available, or an imminent substantial increase in, capacity of the foreign producer;
 - (c) the availability of other export markets to absorb additional export volumes;
 - (d) whether products are entering or will be entering the SACU at prices that will have a significant depressing or suppressing effect on SACU prices; and
 - (e) the foreign producer's inventories of the product under investigation.

17. Material retardation of the establishment of an industry

- 17.1 No investigation shall be initiated on the basis of the material retardation of the establishment of an industry unless the industry or proposed industry has supplied the Commission with a comprehensive business plan indicating the establishment of such industry in the absence of dumping.
- 17.2 The Commission may request a provisional payment or recommend an anti-dumping duty where the establishment of such industry is materially retarded by dumped imports.
- 17.3 If significant progress has not been made to establish an industry as proposed in subsection 2 within one year following the imposition of an anti-dumping duty, the Commission may recommend that the anti-dumping duty be withdrawn.

18. Causality

- 18.1 The Commission shall determine whether there is a causal link between dumping and the material injury determined under section 15.
- 18.2 In considering whether there is a causal link between the dumping and the material injury the Commission shall consider all relevant factors, including, but not limited to:
- (a) the change in the volume of dumped imports, whether absolute or relative to the production or consumption in the SACU market;
 - (b) the price undercutting experienced by the SACU industry vis-à-vis the dumped imports;
 - (c) the market share of the dumped imports;
 - (d) the magnitude of the margin of dumping; and
 - (e) the price of undumped imports available in the market.
- 18.3 The volume of dumped imports from a country shall normally be regarded as negligible if the volume of the dumped imports is found to account for less than three per cent of the total imports of the product under investigation into the SACU market, unless countries which individually account for less than three per cent of the total imports of the product under investigation into the SACU market collectively account for more than seven per cent of the total imports of the product under investigation into the SACU market.
- 18.4 The Commission may cumulatively assess the effect of the dumped imports only if it finds that cumulation is appropriate in light of –
- (a) competition between imports from the different countries; and
 - (b) competition between the imported products and the SACU like product;
- and if
- (c) the imports from the countries are not negligible as contemplated in subsection 2; and
 - (d) the margin of dumping is two per cent or more when expressed as a percentage of the export price.
- 18.5 The Commission shall consider all relevant factors other than the dumped imports that may have contributed to the SACU industry's injury and the injury caused by such other factors shall not be attributed to the dumped imports provided that an interested party has submitted, or the Commission

otherwise has, information on such factor or factors. Factors that may be relevant in this respect include, but are not limited to –

- (a) the volume and prices of imports not sold at dumped prices;
- (b) contraction in demand or changes in the patterns of consumption;
- (c) trade restrictive practices of and competition among SACU producers and between the foreign and SACU producers;
- (d) developments in technology;
- (e) other factors affecting the SACU prices;
- (f) the industry's export performance; and
- (g) the productivity of the SACU industry.

19. Lesser duty rule

- 19.1 If an exporter has provided the Commission with all information necessary to calculate a dumping margin, a provisional payment or anti-dumping duty imposed in respect of such exporter shall not exceed the margin of dumping established, and shall be imposed at a level less than the margin of dumping if such lesser payment or duty would be sufficient to remove the injury to the SACU industry caused by dumping.
- 19.2 The lesser payment or duty provided for in subsection 1 shall be considered sufficient to remove the injury to the SACU industry caused by dumping where such payment or duty eliminates any price disadvantage.
- 19.3 The margin of dumping and the price disadvantage shall be expressed as a percentage of the F.O.B. export price for purposes of comparison.

20. Public interest

- 20.1 In terms of section 16(1)(d)(i) of the *Main Act*, if directed by the Minister subsequent to the submission of the Commission's recommendation contemplated in sections 39, 48, 53, 60 and 64, the Commission may conduct an inquiry to determine whether, based on all information reviewed, there are reasonable grounds to conclude that the imposition, amendment or continuation of an anti-dumping duty, or the imposition, amendment or continuation of an anti-dumping duty in the amount determined in an investigation or review, would not be in the public interest.

20.2 The Commission's determination of the public interest as contemplated in subsection 1, shall be based on a consideration of any relevant factors, and may include consideration of whether –

- (a) commercially substitutable products in commercial quantities are readily available from other sources that are not the subject of the anti-dumping proceeding of which the public interest inquiry forms part; and
- (b) the imposition, amendment or continuation of an anti-dumping duty, or the imposition, amendment or continuation of an anti-dumping duty in the amount determined in an investigation or review –
 - (i) is likely to substantially lessen or prevent, or has substantially lessened or prevented, competition in the domestic market for goods or services;
 - (ii) is likely to substantially lessen or has substantially lessened the competitiveness of domestic producers by limiting access to the product under investigation or [by limiting access] to other goods or services;
 - (iii) is likely to cause significant damage or has caused significant damage to domestic producers that use the product under investigation in the production of other goods or the provision of services, which assessment may include the potential injury factors set forth in section 15.6;
 - (iv) is likely to significantly restrict, or has significantly restricted, consumer access, at competitive prices, to the product under investigation or like product, or to other goods produced or services that use the product under investigation as an input; or
 - (v) is likely to significantly impact, or has significantly impacted, the public health, the public safety or the environment.
- (c) The Commission may request the submission of information relevant to a determination of the public interest in a manner and form it deems appropriate
- (d) If, as a result of a public interest inquiry provided for in subsection 1, the Commission determines that the imposition, amendment or continuation of an anti-dumping duty, or the imposition, amendment or continuation of an anti-dumping duty in the amount determined in an investigation or

review, would not be in the public interest, the Commission shall specify in a recommendation to the Minister –

- (i) that an anti-dumping duty not be imposed, amended or continued; or
- (ii) the level of reduction of the anti-dumping duty determined in an investigation or review.

21. Verifications

21.1 The Commission may verify such information as it deems necessary to confirm the accuracy and the adequacy of information submitted by any interested party.

21.2 The Commission may conduct such verifications at the SACU producers and at cooperating importers, exporters and foreign producers as it deems necessary.

21.3 In the event that an importer, exporter or foreign producer refuses to receive a verification visit by the Commission, refuses the Commission access to relevant information or acts so as to significantly impede the investigation, the Commission may disregard the information submitted by that party.

21.4 Where a party -

- (a) fails to supply relevant substantiating evidence required by investigating officers during a verification;
- (b) fails to explain any calculations contained in its submissions; or
- (c) otherwise fails to cooperate during the investigation process;

the Commission may terminate the verification proceedings and the Commission may disregard any or all information submitted by the party in question. The Commission may nevertheless consider information that was properly submitted and verified.

21.5 The Commission shall inform the government of the country concerned of the dates of the intended verification visit and shall conduct the verification on those dates unless that government objects to the verification.

21.6 Where the government of the country concerned objects to the Commission's verification the Commission may make a preliminary or final determination based on the facts available, and may exclude any information submitted by any party in that country.

22. Verification reports

- 22.1 The purpose of a verification report related to an examination of information submitted by a foreign producer is to ensure that the Commission and the foreign producer verified agree on what was verified during the Commission's verification. The failure to reference in the verification report information verified will not preclude the Commission from using such information in its determinations.
- 22.2 Following a foreign producer verification the Commission shall make a verification report available to the company in question indicating the information verified. A verification report shall be made available before the Commission's preliminary determination.
- 22.3 The Commission will place a copy of the non-confidential verification report on the public file prior to its preliminary determination.
- 22.4 The foreign producer verified will receive 7 days to comment on the verification report. The Commission may grant a single extension upon good cause shown.

23. Time limit

All investigations and reviews shall be finalised within 18 months after initiation.

Sub-Part II – Pre-Initiation Procedure**24. Properly documented complaint**

- 24.1 Written complaints shall be made by or on behalf of the SACU industry using the appropriate Commission questionnaire.
- 24.2 On receipt of a complaint the Commission's trade remedies unit shall liaise with the SACU industry to ensure that all required information has been submitted in the required format.

25. Properly documented application

- 25.1 In determining whether a complaint submitted in terms of section 24 constitutes a properly documented application the Commission shall

- determine whether the application includes such information as is reasonably available to the applicant relating to the prescribed information.
- 25.2 The Commission will return all applications that are not properly completed in terms of subsection 1 to the applicant.

26. Normal value standard for initiation purposes

- 26.1 The applicant shall submit such information as is reasonably available on the price for the like product sold in the country of origin or of export.
- 26.2 For the purpose of subsection 1 an invoice indicating the price, quotes for domestic sales of the like product, price lists, international publications or any other reasonable proof of such domestic price shall be considered. The information submitted on such domestic price must reflect any discounts and other reductions in the price.
- 26.3 If a price as indicated in subsection 1 is not available at the same level of trade as for export purposes, the application shall indicate reasonable adjustments to allow the Commission to compare the submitted normal value and the submitted export price.
- 26.4 If the domestic selling price as contemplated in subsection 1 is not reasonably available to the applicant, the applicant shall state its efforts to obtain such price. If the applicant is unsuccessful after having undertaken reasonable efforts to obtain a domestic price as contemplated in subsection 1, the applicant may submit information in respect of normal value -
- (a) by constructing such value; or
 - (b) with reference to the export price from the exporting country or country of origin to any third country.
- 26.5 Where the applicant supplies a constructed price in terms of subsection 4(a), such constructed price shall separately indicate -
- (a) direct costs;
 - (b) indirect costs;
 - (c) selling, general and administrative costs; and
 - (d) profit;
- and shall be more detailed where possible. Without placing an undue burden on the applicant, direct and indirect costs should be substantiated with

relevant publications or other information. Selling, general and administrative costs and profit may be based on reasonable assumptions.

- 26.6 The applicant may supply the export price of the country under consideration as contained in the export statistics of that country or any other reasonable proof of export prices from that country to another country to substantiate a normal value in terms of subsection 4(b).

27. Material injury standard for initiation purposes

In determining material injury to a SACU industry the Commission shall consider whether the information submitted in this regard and relating to the factors listed in section 15 indicates a *prima facie* case of material injury.

28. Merit Assessment

- 28.1 In its merit assessment the Commission shall determine whether there is sufficient information to establish a *prima facie* case that dumping is causing material injury to the SACU industry.
- 28.2 In the event that the Commission makes a negative merit assessment it shall inform the applicant concerned accordingly and supply it with a full set of reasons for its decision.
- 28.3 The Commission may grant the SACU industry a meeting to discuss the reasons for rejecting an application if the applicant so requests.

29. Notification

- 29.1 The Commission shall notify the representative of the country of origin and of export, where applicable, that it has received a properly documented application in terms of section 25, after verification of the SACU industry's injury information, but prior to initiation.
- 29.2 Except as provided for in subsection 1, the Commission shall not publicise the application prior to the initiation of an investigation.
- 29.3 Wherever practicable, all known interested parties shall be supplied with a non-confidential version of the application once the initiation notice has appeared in the *Government Gazette*, as provided for in section 30.

30. Initiation

- 30.1 An investigation shall be formally initiated through publication of an initiation notice in the *Government Gazette*.
- 30.2 The initiation notice shall contain the basis of the alleged dumping, material injury and causality, and shall also indicate at least the following:
- (a) the identity of the applicant;
 - (b) a detailed description of the product under investigation, including the tariff subheading applicable to the product;
 - (c) the country or countries under investigation;
 - (d) the basis of the allegation of dumping;
 - (e) a summary of the factors on which the allegation of injury is based;
 - (f) the address to which representations by interested parties should be directed; and
 - (g) the time frame for responses by interested parties.
- 30.3 If the Commission, during its investigation, finds that the subject product is imported under a tariff subheading not initially indicated to be in the scope of the investigation, it may include the imports of such subject product in its injury analysis.
- 30.4 All interested parties shall be deemed to have received notice of the investigation once it has been duly initiated in terms of subsection 1 and no request for an extension of a deadline, as contemplated in section 32, shall be considered on the basis of ignorance of the investigation.
- 30.5 The Commission shall inform all known interested parties of the initiation of the investigation and supply them with all relevant documentation, unless the number of interested parties makes it impracticable.

Sub-Part III – Preliminary Investigation Phase**31. Responses by interested parties**

- 31.1 Importers, exporters and foreign producers are required to use the relevant Commission questionnaires in their responses to the Commission.
- 31.2 Parties shall be deemed to have received the questionnaires 7 days after the dispatch of the questionnaires by the Commission.

- 31.3 From receipt of the questionnaires, as contemplated in subsection 2, parties shall receive 30 days to submit their responses to the Commission. Such responses must reach the Commission's trade remedies unit by the deadline indicated.
- 31.4 The deadline for submission by parties not directly informed of the investigation by the Commission will be 40 days from the date of the publication of the initiation notice of the investigation in the *Government Gazette*.
- 31.5 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.

32. Extensions for submission

- 32.1 The Commission may grant parties up to two extensions on good cause shown.
- 32.2 Any extension granted in terms of subsection 1 will apply only to the party to which such extension was granted, and will not apply to other interested parties.

33. Deficiencies

- 33.1 Submissions may be deemed deficient –
- (a) If any relevant information has not been submitted;
 - (b) If a proper non-confidential version or, where applicable, a statement of reasons as contemplated in section 2.2, has not been submitted; or
 - (c) In the circumstances contemplated in section 31.5.
- 33.2 Parties will receive 7 days from the date of the Commission's deficiency letter to address any deficiencies pointed out by the Commission in terms of subsection 1.
- 33.3 The Commission will not consider submissions that are deficient after the deadline contemplated in subsection 2 for the purpose of its preliminary and final determinations.

34. Non-cooperation by exporters or foreign producers

- 34.1 In the event that one or more foreign producers in a particular country cooperates while other producers do not cooperate, the Commission, for the purpose of the non-cooperating producers, may base its preliminary and final determinations on the basis of facts available.
- 34.2 In the event that a foreign producer has submitted an incomplete or otherwise deficient submission by the deadline contemplated in sections 31, 32 and 33, as applicable, the Commission will disregard its information for the purpose of its preliminary and final determinations.

35. Provisional measures

- 35.1 The decision whether or not to apply a provisional measure shall be permissive even where all requirements for the application of a provisional measure has been fulfilled.
- 35.2 Provisional measures may not be imposed within less than 60 days after initiation of an investigation.
- 35.3 Provisional measures will normally be imposed for a period of six months.
- 35.4 The validity of provisional payments may be extended to nine months upon request by foreign producers representing a significant percentage of the trade involved.

36. Preliminary report

- 36.1 The Commission shall make available a non-confidential report within 7 days of the publication of its preliminary determination.
- 36.2 The preliminary report shall contain at least the following information:
- (a) identity of the applicant;
 - (b) a full description of the product under investigation;
 - (c) date of the Commission's decision to initiate the investigation;
 - (d) initiation date and notice number;
 - (e) date of the Commission's preliminary findings on dumping and injury;
 - (f) the margin of dumping;
 - (g) the methodology used by the Commission to determine the margin of dumping;
 - (h) the injury factors considered;

- (i) the causality factors considered;
- (j) the Commission's finding; and
- (k) while preserving the requirements of confidentiality, all relevant issues of fact and law considered by the Commission in reaching its preliminary determination.

Sub-Part IV – Final Investigation Phase

37. Comments on preliminary report

- 37.1 All interested parties, except parties who did not submit responses as contemplated in section 31 or who did not correct deficient submissions as contemplated in section 33, shall receive 14 days from the date the preliminary report is made available to comment in writing on the preliminary report.
- 37.2 The Commission may grant parties up to two extensions on good cause shown.
- 37.3 Any request under subsection 2 for an extension of the deadline contemplated in subsection 1 shall be requested in writing at least 7 days prior to such deadline and shall contain a proper motivation for the request.
- 37.4 The Commission will not accept new information following its preliminary determination.

38. Essential facts

- 38.1 All interested parties will be informed of the essential facts to be considered by the Commission.
- 38.2 All interested parties will receive 7 days to comment on the essential facts.
- 38.3 The Commission may grant parties a single extension on good cause shown.
- 38.4 The Commission will take all relevant comments on the essential facts into consideration in its final determination.

39. Definitive anti-dumping duties

- 39.1 The Commission's final determinations are forwarded in the form of a recommendation, whether or not and at what level to impose definitive anti-

dumping duties, for decision by the Minister until the provisions of section 64(2) of the *Main Act* come into operation.

39.2 Definitive anti-dumping duties will remain in place as provided for in section 54.1.

39.3 Definitive anti-dumping duties may be imposed with retroactive effect as provided for in terms of the Customs and Excise Act, 1964 (Act No 91 of 1964).

40. Price undertakings

40.1 An anti-dumping investigation may be suspended or terminated following the receipt of a satisfactory price undertaking from any foreign producer that has cooperated during the investigation to revise its prices or to cease exports to the SACU at dumped prices so that the Commission is satisfied that dumping or the injurious effect thereof is eliminated, provided the Commission has made a preliminary determination that there has been dumping and injury caused by such dumping.

40.2 The Commission may decide on the information to be submitted in respect of the offering and maintenance of undertakings and may terminate an undertaking if the conditions are not met.

40.3 Undertakings need not be accepted if the Commission considers their acceptance impractical, e.g. where the number of foreign producers is too great, or for other reasons, including reasons of general policy.

40.4 In cases where an undertaking is violated the Commission may take expeditious action against such foreign producer, including the immediate request to the Commissioner for the South African Revenue Service to impose provisional payments.

Part D – Reviews

Sub-Part I – General

41. Notification

41.1 The government of the country concerned shall be notified of the review as soon as a properly documented review application has been accepted.

41.2 The government of the country concerned and all other known interested parties shall be supplied with all the relevant non-confidential information as

soon the review in question has been initiated through publication in the *Government Gazette*.

42. Initiation

All reviews shall be initiated through notice in the *Government Gazette*. Such notice shall indicate the following minimum information:

- (a) the identity of the applicant;
- (b) the product under investigation;
- (c) the investigation periods for dumping and injury, respectively;
- (d) the scope of the review;
- (e) the current anti-dumping measures in place; and
- (f) a summary indicating the basic information on which the review is based.

43. Responses by interested parties

- 43.1 All interested parties are required to use the relevant Commission questionnaires in their responses.
- 43.2 Parties shall be deemed to have received the questionnaires 7 days after the dispatch of the questionnaires by the Commission.
- 43.3 From receipt of the questionnaires, as contemplated in subsection 2, parties shall receive 30 days to submit their responses to the Commission.
- 43.4 The Commission may grant parties up to two extensions on good cause shown.

44. Essential facts

- 44.1 All interested parties will be informed of the essential facts to be considered in the Commission's final determination.
- 44.2 All parties will receive 14 days from the dispatch of the essential facts letter to comment thereon.
- 44.3 The Commission may grant parties up to two extensions on good cause shown.
- 44.4 In its final determination the Commission will consider all relevant comments on the essential facts letter made by cooperating interested

parties, provided such comments are received by the deadline contemplated in subsections 2 and 3.

Sub-Part II– Interim reviews

45. Time frame

The Commission may initiate an interim review to determine the need for the continued imposition of an anti-dumping duty –

- (a) on its own initiative, or
- (b) provided that at least one year has elapsed since the publication in the *Government Gazette* of the notice giving effect to the final determination in the original investigation or the most recent interim, sunset or new shipper review, upon the request by an exporter, importer, foreign producer or the SACU industry.

46. Changed circumstances

46.1 The Commission shall only initiate an interim review provided for in section 45(a) in terms of the requirements provided for in section 3.3(b).

46.2 The Commission shall only initiate an interim review provided for in section 45(b) if the party requesting the interim review provides, *prima facie* evidence of –

46.2.1 a change in circumstances relating to dumping and/or material injury; and

46.2.2 the change in the margin of dumping and/or the lack of material injury.

46.3 Where an importer, exporter or foreign producer has not cooperated in the Commission's investigation that led to the imposition of the anti-dumping duty and such importer, exporter or foreign producer is subsequently willing to supply such information, this change in disposition will not qualify as a change in circumstances as contemplated in subsection 2.

46.4 No party shall be precluded from requesting an interim review simultaneously with a sunset review.

47. Review procedure

47.1 An interim review shall consist of a single investigation phase.

47.2 The Commission may verify such information as it deems necessary to confirm the accuracy and the adequacy of the information submitted by any interested party.

48. Final recommendation

The Commission's final determination is forwarded in the form of a recommendation for decision by the Minister until the provisions of section 64(2) of the *Main Act* come into operation, and may result in an increase, a decrease, the withdrawal or the confirmation of the existing anti-dumping duty.

Sub-Part III – New Shipper Reviews

49. Eligibility

49.1 A new shipper review may be requested by a foreign producer that –

49.1.1 did not export to the SACU during the original period of investigation for dumping, but exported to the SACU prior to the submission of a request under this section; and

49.1.2 is not related to a foreign producer to which the anti-dumping duty was applied.

49.2 The Commission shall not consider a request for a new shipper review before definitive anti-dumping duties have been imposed.

50. Information required

The foreign producer requesting a new shipper review shall provide the Commission with information on normal value, export price and any other information deemed necessary by the Commission and shall submit such information in the prescribed format.

51. Suspension of anti-dumping duties

51.1 The anti-dumping duties in respect of the party requesting a new shipper review shall be withdrawn simultaneously with the initiation of a new shipper review.

51.2 The Commission may request the Commissioner for the South African Revenue Service to impose provisional payments at the same level as the anti-dumping duties simultaneously with the withdrawal of the anti-dumping duties in terms of subsection 1. Such provisional payments shall remain in force for the duration of the review.

52. Review procedure

52.1 A new shipper review shall consist of a single investigation phase.

52.2 The Commission may verify such information as it deems necessary to confirm the accuracy and the adequacy of any information submitted by any interested party.

53. Final recommendation

The Commission's final determination is forwarded in the form of a recommendation for decision by the Minister until the provisions of section 64(2) of the *Main Act* come into operation and may result in –

- (a) the imposition of an anti-dumping duty; and/or
- (b) the termination of any provisional payment.

Sub-Part IV – Sunset Reviews

54. Duration of anti-dumping duties

54.1 A definitive anti-dumping duty shall remain in place for –

- (a) five years from the date of publication in the *Government Gazette* of the notice imposing such duty in the original investigation; or
- (b) five years from the date of publication in the *Government Gazette* of the notice giving effect to the final determination in the most recent review of such duty covering dumping and injury;

unless otherwise specified or unless a sunset review is commenced prior to the relevant expiry date above.

54.2 If a sunset review is initiated prior to the lapse of an anti-dumping duty, such anti-dumping duty shall remain in force until the sunset review has been finalised.

55. Initiation of sunset review

- 55.1 The Commission will publish on its website a list of anti-dumping duties with corresponding expiry dates.
- 55.2 Interested parties must request a sunset review 6 months prior to the expiry of the relevant anti-dumping duty.
- 55.3 An interested party that requests a sunset review as contemplated in subsection 2 must provide the Commission 5 months prior to the expiry of the relevant anti-dumping duty with an application containing *prima facie* evidence whether or not the removal of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping and injury.
- 55.4 If the Commission decides to initiate a sunset review, it shall publish an initiation notice in the *Government Gazette* prior to the expiry of such duties. Such notice shall contain the information as contemplated in section 42.

56. Likelihood of dumping

- 56.1 In determining the likelihood of a continuation or recurrence of dumping in terms of section 55.3, the Commission may consider various factors, including a comparison of the foreign producer's landed cost of the like product in SACU and the SACU industry's ex-factory selling price of the like product.
- 56.2 The foreign producer's landed cost contemplated in subsection 1 will be determined by calculating –
- 56.2.1 the ex-factory price of the like product sold in the country of origin; plus
- 56.2.2 all costs, charges and expenses up to and including the delivery of the goods onto the wharfside of the port of destination in the SACU to which such products were last shipped in commercial quantities, Customs cleared and ready for collection by the buyer.
- 56.3 Where the foreign producer's price determined in subsection 2 is lower than the SACU industry's ex-factory selling price of the like product, the Commission may determine that there is no likelihood of a continuation or recurrence of dumping.

57. Review procedure

- 57.1 A sunset review shall consist of a single investigation phase.

- 57.2 The Commission may verify such information as it deems necessary to confirm the accuracy and the adequacy of any information submitted by any interested party.
- 57.3 Where no exports took place to the SACU during the period under review, the export price will be the comparable price of the like product when exported from the country of origin to a third country, which third country will be determined by the Commission as contemplated in section 11.3.

58. Information required

- 58.1 In the event that the SACU industry requests that an anti-dumping duty be maintained, it shall provide the Commission in its application with the required information that expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.
- 58.2 Once a sunset review has been initiated based on an application submitted by the SACU industry, the foreign producers shall be required to submit information in the required format to enable the Commission to make a finding on dumping. Foreign producers shall not be precluded from supplying any other information they may deem relevant.
- 58.3 The Commission may require importers to supply any information the Commission deems necessary. Importers shall not be precluded from supplying any other information they may deem relevant.

59. Non-cooperation

- 59.1 Where the SACU industry does not request a sunset review or does not submit the required information within the deadline indicated in section 55.3, the Commission will recommend that the anti-dumping duty expire on the relevant date.
- 59.2 Where the SACU industry has supplied the required information and the foreign producer does not cooperate within the time frames contemplated in section 43, the Commission may rely on the facts available in its final determination.

60. Final recommendation

The Commission's final determination is forwarded in the form of a recommendation for decision by the Minister until the provisions of section 64(2) of the *Main Act* come into operation, and may result in the withdrawal, amendment or confirmation of the existing anti-dumping duty.

Sub-Part V – Anti-Circumvention Reviews

61. Circumvention

61.1 Other than circumvention contemplated in subsections 2(a) and (d), circumvention shall be deemed to take place if one or more of the following conditions are met:

- (a) a change in the pattern of trade between third countries and the SACU;
 - (i) which results from a practice, process or work;
 - (ii) for which there is no or insufficient cause or economic justification other than the imposition of the anti-dumping duty;
- (b) remedial effects of the anti-dumping measure are being undermined in terms of the volumes or prices of the product under investigation;
- (c) dumping can be found in relation to normal values previously established for the like or similar products.

61.2 For purposes of anti-circumvention the following types of circumvention shall be treated separately:

- (a) improper declaration of –
 - (i) the value of the product;
 - (ii) the origin of the product; or
 - (iii) the nature or classification of the product.
- (b) minor modifications of the product subject to an anti-dumping duty;
- (c) the export of parts, components and sub-assemblies with assembly in a third country or within the common customs area of the SACU;
- (d) absorption of the anti-dumping duty by either the exporter or the importer;
- (e) country hopping, as defined in section 61.8;

- (f) declaration under a different tariff heading, even where such different tariff heading does provide for the clearance of the product subject to an anti-dumping duty;
 - (g) any other form of circumvention as may be submitted for the Commission's consideration.
- 61.3 Any instance of circumvention as contemplated in subsection 2(a) shall be referred to the Commissioner for the South African Revenue Service for further investigation. This shall not preclude the Commission from taking anti-dumping action if the information at the Commission's disposal, including information obtained through submissions by interested parties, warrants such action.
- 61.4 Minor modifications of the product subject to an anti-dumping duty shall be deemed to have taken place if the subsequently exported product –
- (a) has materially the same production processes, uses the same raw materials and has basically the same physical appearance or characteristics; or
 - (b) is a substitute for the product on which anti-dumping duties have been imposed.
- 61.5 Assembly in a third country or within the SACU shall be deemed to take place if the value added by the assembly in such third country or in the SACU is less than 25 per cent as determined under subsection 6. Such assembly shall not be regarded as changing the country of origin.
- 61.6 The value added in terms of subsection 5 shall be determined with reference to the direct and indirect costs of production only and shall not include selling, general, administrative or packaging costs or profit.
- 61.7 Absorption of the anti-dumping duty shall be deemed to take place if:
- (a) the foreign producer decreases its export price in any manner to compensate the importer or a third party for the extra burden imposed by the anti-dumping duty, unless there is a corresponding decrease in the normal value of the product;
 - (b) the importer does not increase its price in line with the anti-dumping duties, unless such importer can provide evidence indicating that it absorbed such anti-dumping duty without assistance from any other

party and only from revenue generated by the specific product in question; or

- (c) in cases involving tenders, the tender price is not increased by the effect of the anti-dumping duty.

61.8 Country hopping shall be deemed to take place if, following the imposition of anti-dumping duties or provisional payments or the initiation of an anti-dumping investigation, the importers or exporters of the product subject to an anti-dumping duty switch to a supplier related to the supplier against which an anti-dumping investigation has been or is being conducted and such new supplier is based in another country or customs territory.

62. Information required

62.1 The SACU industry or other interested party shall provide such information that is reasonably available to it to indicate that circumvention is taking place.

62.2 Any request for an anti-circumvention review shall include information of the specific type of circumvention that is alleged to take place.

62.3 The Commission may require any interested party to submit such information as it deems necessary to properly conduct the review.

62.4 In the event that the party against which the allegation is made does not respond properly within the stated deadline, the Commission may make a determination on the facts available.

63. Review procedure

63.1 An anti-circumvention review may consist of a single investigation phase or of a preliminary and a final investigation phase.

63.2 Provided an anti-circumvention complaint is lodged with the Commission within one year after the publication of the Commission's final determination in the original investigation, the Commission may use for any circumvention alleged under sections 61.2(b), (c), (e), (f) or (g) the injury information submitted by the SACU industry in such investigation for purposes of the preliminary determination and the imposition of provisional payments.

- 63.3 Provided an anti-circumvention complaint is lodged with the Commission within one year after the publication of the Commission's final determination in the original investigation, the Commission may use for any circumvention alleged under sections 61.2(b), (c), (e), (f) or (g) the normal values previously established in such investigation to determine the margin of dumping for purposes of the preliminary determination and the imposition of provisional payments.
- 63.4 The relevant interest parties shall provide the Commission with updated information on injury and dumping by the deadline contemplated in section 43 for circumvention alleged under sections 61.2(b), (c), (e), (f) or (g).
- 63.5 In the event that the relevant interested parties have not submitted the information contemplated in subsection 4 by the deadline contemplated in section 43, the Commission may make a preliminary or final determination on the basis of the facts available, except that where the SACU industry has not provided the updated information on injury contemplated in subsection 4 by such deadline, the Commission shall terminate the proceeding without the impositions of measures.
- 63.6 In anti-circumvention reviews involving absorption, the Commission may construct the export price from the first point of resale by subtracting such costs as were indicated in the original investigation.
- 63.7 The Commission may conduct such verifications as it deems necessary to confirm the accuracy and the adequacy of any information submitted by any interested party.

64. Final recommendation

If the Commission makes a finding that circumvention has taken place, the Commission's final determination is forwarded in the form of a recommendation for decision by the Minister until the provisions of section 64(2) of the *Main Act* come into operation and may result in –

- (a) the increase of anti-dumping duties to compensate for absorption of anti-dumping duties;
- (b) the imposition of anti-dumping duties on parts, components or sub-assemblies; or

- (c) the imposition of the anti-dumping duties, at the required level, on the related supplier in the country from which the product under investigation has been exported subsequent to the imposition of the original provisional payments or anti-dumping duties or the initiation of the original investigation.

Sub-Part VI – Refunds

65. Applications for refunds

- 65.1 An importer may request reimbursement of anti-dumping duties collected where it is shown that the dumping margin, on the basis of which anti-dumping duties were paid, has been eliminated or has been reduced to a level which is below the level of the duty in force.
- 65.2 Other than as contemplated in section 66, any request, containing all prescribed information, for a refund shall be submitted during the anniversary month of the date of publication of the notice in the Government Gazette imposing the anti-dumping duty and shall relate only to the preceding 12-month period.
- 65.3 An application for refund shall be considered as duly supported by evidence where it contains precise information on the amount of the refund of anti-dumping duties claimed and all customs documentation relating to the calculation and payment of such anti-dumping duties. It shall also include, for the relative period under review, information on normal values and export prices to the SACU for the foreign producer to which the anti-dumping duty applies.
- 65.4 Regardless of whether the foreign producer and the importer are related parties, the foreign producer may supply any information contemplated in subsection 3 direct to the Commission.
- 65.5 The Commission may, at any time after receiving a refund application, decide to initiate an interim review, whereupon the information and determinations from such interim review shall be used to determine whether a refund is justified.

66. Refunds following interim reviews

Where the Commission, following an interim review, recommends that the existing anti-dumping duty be decreased or withdrawn, the relevant importer or importers may request that anti-dumping duties be refunded in line with the Commission's determinations.

Part E – Final Provisions**67. Delegation**

Other than final decision-making powers the Commission may delegate any of its functions in respect of anti-dumping investigations to its investigation staff.

68. Transitional application

These regulations shall apply to all investigations and reviews initiated after the promulgation of the regulations.
