

WORLD TRADE ORGANIZATION

G/ADP/N/1/ZAF/1

G/SCM/N/1/ZAF/1

8 December 1995

(95-3998)

Committee on Anti-Dumping Practices
Committee on Subsidies and Countervailing Measures

Original: English

NOTIFICATION OF LAWS AND REGULATIONS UNDER ARTICLES 18.5 AND 32.6 OF THE AGREEMENTS

SOUTH AFRICA

The following communication, dated 25 October 1995, has been received from the Permanent Mission of South Africa.

Further to the requirements under the Agreements on Anti-Dumping Practices and Subsidies and Countervailing Measures, and in accordance with the related decisions adopted by the Committees established under these Agreements, I have the honour to provide a copy of the full text of the Board on Tariffs and Trade Act, No. 107 of 1986, as amended, relevant extracts from the Customs and Excise Act, No. 91 of 1964¹, as amended, and a copy of the Guide to the Policy and Procedure with regard to Action Against Unfair International Trade Practices: Dumping and Subsidized Export.

¹Delegations wishing to inspect the full text of the legislation are requested to contact Miss S. Aspinall, Office 1023, Tel: 739 51 09.

STATUTES OF THE REPUBLIC OF SOUTH AFRICA - TRADE AND INDUSTRY

**BOARD ON TARIFFS AND TRADE ACT
NO. 107 OF 1986**

(ASSENTED TO 10 SEPTEMBER, 1986) (DATE OF COMMENCEMENT :
24 SEPTEMBER, 1986)

(Afrikaans text signed by the State President)

as amended by

Board on Trade and Industry Amendment Act, No. 60 of 1991
Board on Tariffs and Trade Amendment Act, No. 39 of 1995

ACT

To provide for the establishment of a Board on Tariffs and Trade and for matters related thereto.

1. **Definitions.** - (1) In this Act, unless the context otherwise indicates -

"Board" means the Board on Tariffs and Trade established by section 2;

"committee" means a committee contemplated in section 9;

"common customs area of Southern Africa Customs Union" means any state or territory with the government of which an agreement has been concluded under section 51 of the Customs and Excise Act, 1964 (Act No 91 of 1964);

"disruptive competition" means the export or the proposed export of goods to the Republic or the common customs area of the Southern African Customs Union, other than dumping or subsidized export, in quantities and under circumstances which cause or may cause material injury to established industries in the Republic or the common customs area of the Southern African Customs Union or which may retard the establishment of industries in the Republic or the common customs area of the Southern African Customs Union;

"dumping" means the introduction of goods into the commerce of the Republic or the common customs area of the Southern African Customs Union at an export price which is less than the normal value of the goods;

"export price" means the price actually or payable for goods sold for export net of all taxes, discounts and rebates actually granted and directly related to the sale under consideration;

"Minister" means the Minister of Trade and Industry and for Economic Co-ordination.

"normal value" means -

- (a) The comparable price actually paid or payable in the ordinary course of trade for like goods intended for consumption in the exporting country or countries of origin; or
- (b) in the absence of a price contemplated in paragraph (a) -
 - (i) the highest comparable price at which similar goods are being exported to any third country in the ordinary course of trade; or
 - (ii) the constructed cost of production of the goods in the country of origin plus a reasonable addition for selling costs and profit;

Provided that due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability;

"subsidized export" means the export or the proposed export of goods to the Republic or the common customs area of the Southern African Customs Union from any country where the authority of that country or any other country provides any form of financial aid or other

assistance in respect of those goods, including assistance in respect of the production, manufacture, transport or export thereof.

- (2) If, in the investigation of dumping as contemplated in section 4(1)(a)(i) -
- (a) the Board is of the opinion that the normal value of the goods concerned is, as a result of government intervention, not determined in the exporting country or country of origin according to free market principles, a comparable price of a third country may be applied to the goods of the exporting country or country of origin concerned;
- (b) (i) it is found that there is no export price as contemplated in the definition of 'dumping'; or
- (ii) it appears that in respect of the export price there is an association or a compensatory arrangement between the exporter concerned and the importer or the third party concerned; or
- (iii) it is found that for any other reason the export price actually paid or payable for the goods sold is unreliable,

'export price' in the said definition shall be construed to mean the price constructed on the basis of the price at which the imported goods are first resold to an independent buyer, or where not resold in the condition imported, on any reasonable basis.

2. **Establishment of Board on Tariffs and Trade.** - There is hereby established a board to be known as the Board on Tariffs and Trade.
3. **Objects of Board.** - The objects of the Board are to promote industrial growth within the framework of the economic policy of the Republic by conducting investigations into any matter which affects or may affect the trade and industry of the Republic or the common customs area of the Southern African Customs Union, and to advise the Minister in this regard.
4. **Functions of Board.** - (1) For the purposes of achieving its objects and subject to the provisions in any other law contained, the Board may -
- (a) (i) of its own accord investigate dumping, subsidized export or disruptive competition in or to the Republic and, if authorized thereto by an agreement, in or to the common customs area of the Southern African Customs Union;
- (ii) of its own accord investigate the development of industries in the Republic and, if authorized thereto by an agreement, in the common customs area of the Southern African Customs Union by the levying of customs and excise duties;
- (iii) by order of the Minister investigate any other matter which affects or may affect the trade and industry of the Republic and, if authorized thereto by an agreement, the common customs area of the Southern African Customs Union; and
- (b) report and make recommendations to the Minister in respect of any investigation referred to in paragraph (a).

- (2) Upon receipt of the report and recommendations referred to in subsection (1) (b), the Minister may -
 - (a) accept or reject such report and recommendations, or refer them back to the Board for reconsideration; and
 - (b) if he accepts the report and recommendations concerned, request the Minister of Finance to amend the relevant Schedule to the Customs and Excise Act, 1964 (Act No. 91 of 1964).
 - (3) The Board shall as soon as possible after 31 December of each year submit a report to the Minister regarding its functions during the preceding year.
 - (4) The work incidental to the performance of a duty or the exercise of a power of the Board shall be performed by officers or employees of the Department of Trade and Industry designated for that purpose by the Director-General : Trade and Industry.
5. **Constitution of Board.**- (1) The Board shall consist of such number of full-time and part-time members, but not fewer than four, as the State President may from time to time determine.
 - (2) The members of the Board shall be appointed by the State President by reason of their knowledge of and experience in commerce, industry and the economy.
6. **Chairman and deputy chairman.**- (1) The State President shall designate one of the members of the Board as chairman of the Board and another as deputy chairman.
 - (2) (a) When the Chairman is absent or not able to perform his functions as chairman, or when there is a vacancy in the office of the chairman, the deputy chairman shall act as chairman, and if the chairman as well as the deputy chairman are absent or not able to perform the functions of the chairman, the Board shall elect another member to act as chairman.
 - (b) Such member shall while acting as chairman have all the powers and perform all the duties of the chairman.
7. **Period of office, vacation of office and filling of vacancies.**- (1) A member of the Board shall be appointed for such period, not exceeding five years, as the State President may determine at the time of the appointment.
 - (2) A member of the Board shall vacate his office if he resigns or if the State President terminates his period of office if there is in the opinion of the State President a sound reason therefor.
 - (3) Any person who has ceased to be a member of the Board by effluxion of time may be reappointed.
 - (4) If a member of the Board ceases to hold office, the State President may, subject to section 5, appoint somebody to fill the vacancy.
8. **Meetings of Board.**- (1) The first meeting of the Board shall be held at the time and place determined by the Minister, and thereafter a meeting of the Board shall be held at the time

and place determined by the Board or, if authorized thereto by the Board the chairman of the Board.

- (2) A quorum for a meeting of the Board shall not be less than one-third of all its members, with a minimum of three.
- (3) A decision of the majority of the members of the Board present at a meeting shall constitute a decision of the Board, and in the event of an equality of votes the chairman shall have a casting vote in addition to his deliberative vote.
- (4) All decisions of the Board shall be recorded.

9. Committees.- (1) The Board may, with the consent of the Minister, establish from among their number committees.

- (2) Any such committee shall consist of such number of members as the Board may determine.
- (3) The Board shall designate one of the members of the committee as chairman thereof, and if any such chairman is absent from a meeting of the committee the members present shall elect one from among their number to act as chairman at that meeting.
- (4)
 - (a) The Board may, subject to such directions as it may issue from time to time-
 - (i) delegate any power granted to it by or under section 4 to such a committee; and
 - (ii) grant authority that a duty assigned to it by or in terms of section 4 may be performed by such a committee.
 - (b) The Board shall not be divested of a power so delegated and the performance of a duty so authorized, and may amend or set aside any decision of a committee.

10. Co-option of persons to serve on or advise committees.-(1) A committee may co-opt any person to serve on a committee or to attend a particular meeting thereof in connection with a particular matter dealt with by the committee.

- (2) Such a person may take part in the proceedings of the committee in connection with the matter or at the meeting in respect of which he has been co-opted, but shall not be entitled to vote.

11. Remuneration and allowances of members of Board and other persons.- Members of the Board and persons referred to in sections 10, 13 and 14 who are not in the employment of the State, shall be paid, from moneys appropriated by Parliament for that purpose, such remuneration and allowances as the Minister may with the concurrence of the Minister of Finance determine.

12. Enquiries by Board or committees.-(1) The Board or a committee may, subject to the directions of the Minister, conduct such enquiry as the Board or committee deems necessary to enable it to perform its function.s

- (2) The Board or a committee may for the purposes of an enquiry referred to in subsection (1) summon any person to give evidence at the enquiry or to produce any book, writing or document which in the opinion of the Board or a committee is relevant to the subject matter of the enquiry.
 - (3)
 - (a) A summons to attend as a witness before, or to produce any book, writing or document to, the Board or a committee shall be in the form determined by the chairman of the Board.
 - (b) Such summons shall be signed by the chairman of the Board or of a committee, as the case may be, and shall be served in the same manner as a summons to attend as a witness at a criminal trial in the Supreme Court.
 - (4) The Board or a committee may call and examine any person present at the enquiry, whether or not he has been summoned to attend in terms of subsection (2), and may inspect and retain for a reasonable period any book, writing or document the production of which was required in terms of subsection (2) or which he has with him; Provided that in connection with the examination of any such person or the production of any such book, writing or document, the law relating to privilege as applicable to a person subpoenaed to give evidence or to produce any book, writing or document before a court of law, shall apply.
 - (5)
 - (a) Whenever the Board or a committee deems it necessary, it may direct a person to give his evidence on oath or affirmation.
 - (b) The chairman of the Board or of a committee, as the case may be, may administer the oath to or accept an affirmation from the person concerned.
 - (6) A person who has been summoned to give evidence at such enquiry shall be entitled to receive from moneys appropriated by Parliament for that purpose, as witness fees an amount equal to the amount which he would have received as witness fees if he has been summoned to attend at a criminal trial in the Supreme Court held at the place specified in the summons sent to him.
 - (7) The Board or a committee may for the purposes of such enquiry direct any person to furnish it with information in the manner determined by it.
- 13. Delegation by Board or committees.**-(1) The Board or a committee may, subject to the directions of the Minister, delegate its powers regarding an enquiry under section 12 to an officer or employee of the Department of Trade and Industry designated for the purpose by the Director-General: Trade and Industry or, with the approval of the Minister, any other person.
- (2) The chairman of the Board or of a committee may -
 - (a) grant authority that a duty assigned to him by section 12(3)(b) may be performed by an officer, employee or other person referred to in subsection (1); and
 - (b) delegate any power granted to him by section 12 (5)(b) to an officer, employee or other person referred to in subsection (1).

- 14. Investigating officers.**- (1) Subject to the directions of the Minister the Board may, in order to obtain information which is required with regard to an enquiry under section 12, designate a member of the Board, an officer or employee of the Department of Trade and Industry designated for that purpose by the Director-General: Trade and Industry or, with the approval of the Minister, any other person, as an investigating officer, and such an investigating officer may at all reasonable times without previous notice enter premises on or in which there is or may be any commodity, book, statement or other document which is related to the specific information and may-
- (a) inspect or search such premises;
 - (b) demand, information regarding the said commodity, book, statement or other document from the owner or person in charge of the premises;
 - (c) investigate a commodity, book, statement or other document which is found in or on those premises and which has or probably has relevance to any matter which may concern the said investigation, or make copies of or extracts from such book, statement or other document; and
 - (d) demand from the owner or anyone in charge of those premises or of anyone in whose possession or under whose control that book, statement or other document is, an explanation of any entry therein.
- (2) A person designated under subsection (1) shall be provided with an authority signed by the chairman of the Board and in which it is stated that such person is assigned as an investigating officer in terms of this Act.
- (3) Before an investigating officer referred to in subsection (1) performs a function under this section he shall at the request of a person who is affected by an investigation produce the authority issued to him in terms of subsection (2).
- 15. Establishment and maintenance of accounting and costing systems.**- The Board may, with the approval of the Minister, require any person engaged in any particular industry or any branch thereof protected by a customs tariff or receiving any form of State aid, to establish and maintain in respect of his business or undertaking an accounting and costing system approved by the Board for that industry or that branch thereof : Provided that -
- (a) the Board shall determine the establishment of an accounting and costing system for an industry or any branch thereof only after consultation with that industry or that branch thereof;
 - (b) in approving of an accounting and costing system for an industry or any branch thereof, the Board shall give due consideration to the circumstances surrounding that industry or that branch thereof; and
 - (c) if the Board is satisfied that an industry or any branch thereof is hampered in the performance of its functions as a result of the establishment of the accounting and costing system under this section, it may with the concurrence of the Minister direct that such accounting and costing system be adapted in the manner it thinks fit.

16. Declaration of interest. - Whenever the Board or a committee considers any matter in which a member thereof has a pecuniary interest, that member shall declare the nature, extent and particulars of this interest to the Board or such committee, as the case may be, and thereupon the Board or the committee may, if it deems it necessary, request the member to excuse himself from participating in the proceedings of the Board or such committee for as long as that matter is being considered by the Board or the committee.

16A. Regulations. - The Minister may, after consultation with the Board, make regulations regarding -

- (a) procedures in connection with any function of the Board; and
- (b) any other matter in connection with the achievement of the objects of the Board.

17. Preservation of secrecy. - No person shall except for the purposes of the performance of his functions in terms of this Act or when required to do so by any court of law or under any law, disclose to any other person any information acquired by him in the performance of his functions in terms of this Act and relating to the business or affairs of any other person.

18. Tabling of reports and recommendations. - Every report and recommendation contemplated in section 4(1)(a) -

- (a) in connection with amendments to the Schedules to the Customs and Excise Act, 1964 (Act No 91 of 1964); and
- (b) in connection with any other matter, and which in the opinion of the Minister -
 - (i) could be made known without detriment to the public interest; and
 - (ii) is of general importance.

shall be laid upon the Table by the Minister in Parliament as soon as possible after receipt thereof.

19. Offenses and penalties. - Any person who -

- (a) (i) without sufficient cause (the onus of proof of which shall rest upon him) has failed to furnish the information required of him in terms of section 14(1)(d) or 12(7); or
- (ii) knowingly furnishes information which is false or misleading;
- (b) (i) having been summoned to give evidence at an enquiry under section 12, without sufficient cause (the onus of proof of which shall rest upon him) fails to attend at the time and place specified in the summons, or fails to remain in attendance until the person presiding at the enquiry has excused him from further attendance;
- (ii) having been called under section 12(4), without sufficient cause (the onus of proof of which shall rest upon him)-

- (aa) refuses to appear as a witness;
 - (bb) refuses to be sworn in or to make an affirmation as a witness after he has been directed under section 12(5)(a) to do so;
 - (cc) refuses to answer or fails to answer to the best of his knowledge and ability any question put to him; or
 - (dd) refuses to comply with a requirement to produce a book, writing or document specified in the summons or which he has with him; or
- (iii) tampers with or hinders, obstructs, threatens, deceives or in any way unduly influences any person with regard to evidence to be given or a book, writing or document to be produced by such person;
- (c)
 - (i) hinders or obstructs an investigating officer in the exercise of his powers under section 14; or
 - (ii) when an investigating officer requires of him information or an explanation under section 14 (1)(b) or (d), fails or refuses to furnish that information or to give that explanation or knowingly furnishes information or gives an explanation which is false or misleading;
- (d) Without sufficient cause (the onus of proof of which shall rest upon him) fails or refuses within a period specified by the Board, which period shall not be less than six months to establish or maintain an accounting and costing system in terms of section 15;
- (e) fails to comply with a provision of section 16; or
- (f) contravenes section 17.

shall be guilty of an offence and be liable on conviction to a fine not exceeding R2 000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment.

20. Repeal of laws, savings and transitional provisions.-

- (1) Subject to the provisions of this section the laws specified in the Schedule are hereby repealed.
- (2) Every person who immediately prior to the commencement of this Act held in terms of the provisions of the Board of Trade and Industries Act, 1944 (Act No. 19 of 1944), the office of chairman, deputy chairman or member of the Board of Trade and Industries shall be deemed to have been appointed by the State President in terms of the provisions of this Act for the unexpired period of his office as such.
- (3) If any matter which before the commencement of this Act was referred to the Board of Trade and Industries established in terms of the Board of Trade and Industries Act, 1944, has not been disposed of by that board or a committee thereof before such commencement, the Board on Tariffs and Trade established in terms of this Act may continue with the disposal of that matter in accordance with the provision of this Act, and anything done by the first-mentioned Board in connection with that matter shall be deemed to have been done by the Board established in terms of this Act.

- (4) Anything done under a provision of the Board on Tariffs and Trade Act, 1944 and which may be done under a provision of this Act, shall be deemed to have been done under the latter provision.

21. Short title.- This Act shall be called the Board on Tariffs and Trade Act, 1986.

STATUTES OF THE REPUBLIC OF SOUTH AFRICA - CUSTOMS AND EXCISE

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

[Issue No. 28 - Supplementary]

ACT

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

CHAPTER I

Definitions

1. Definitions

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

.....

"Commissioner" means the Commissioner for Customs and Excise mentioned in section 1B;

.....

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

.....

"duty" means any duty leviable under this Act;

"entry for home consumption" includes entry under any item in Schedule No. 3, 4 or 6;

.....

"exporter" includes any person who, at the time of exportation:

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

and, in relation to imported goods, includes the manufacturer, supplier or shipper of such goods or any person inside or outside the Republic representing or acting on behalf of such manufacturer, supplier or shipper;

.....

"goods" includes all wares, articles, merchandise, animals, currency, matter or things;

.....

"home consumption" means consumption or use in the Republic;

.....

"importer" includes any person who, at the time of importation:

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

.....

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

- (a) in the manufacture or assembly of any excisable goods or fuel levy goods;
- (b) in the conversion of any goods into excisable goods or fuel levy goods;
- (c) whereby the dutiable quantity or value of any imported goods specified in Section B of Part 2 of Schedule No. 1, excisable goods or fuel levy goods is increased in any manner;
- (d) in the recovery of excisable goods or fuel levy goods from excisable goods or any other goods; or
- (e) in the packing or measuring off of any imported goods specified in Section B of Part 2 of Schedule No. 1, excisable goods or fuel levy goods,

and, when used as a verb, has a corresponding meaning; and "manufacturer" has a corresponding meaning;

.....

"Minister" means the Minister of Finance;

.....

"prescribed" means prescribed by this Act;

.....

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

.....

CHAPTER VI

Anti-Dumping, Countervailing and Safeguard Duties

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

- (1) The goods specified in Schedule No. 2 shall, upon entry for home consumption, be liable, in addition to any other duty payable in terms of the provisions of this Act, to the appropriate anti-dumping, countervailing or safeguard duties provided for in respect of such goods in that Schedule at the time of such entry, if they are imported from a supplier, or originate in a territory, specified in that Schedule in respect of those goods.
- (2)
 - (a) The imposition of any anti-dumping duty in the case of dumping as defined in the Board on Tariffs and Trade Act, 1986 (Act No. 107 of 1986), a countervailing duty in the case of subsidized export as so defined or a safeguard duty in the case of disruptive competition as so defined and the rate at which or the circumstances in which such duty is imposed in respect of any imported goods shall be in accordance with any request by the Minister of Trade and Industry and for Economic Co-ordination under the provisions of the Board on Tariffs and Trade Act, 1986.
 - (b) Any such anti-dumping duty or countervailing duty may be imposed in respect of the goods concerned in accordance with such request with effect from the date on which any provisional payment in relation to anti-dumping or countervailing duty is imposed in respect of those goods under section 57A.
- (3)
 - (a) Whenever any anti-dumping, countervailing or safeguard duty is imposed on any goods under the provisions of this Chapter, the owner of any such goods stored in a customs and excise warehouse shall produce the invoice and other documents relating to such goods to the Controller not later than the time of entry of all or any part of such goods for removal from such warehouse.
 - (b) The provisions of paragraph (a) shall not apply in the case of such goods entered for export from a customs and excise warehouse.
- (4) An anti-dumping, countervailing or safeguard duty imposed under the provisions of this Chapter shall not apply to any goods entered under the provisions of any item specified in Schedule No. 3 or 4 unless such item is specified in Schedule No. 2 in respect of such goods.
- (5) Notwithstanding the provisions of section 56, 56A or 57, the Commissioner may, subject to such conditions as he may impose in each case, exempt from payment of any anti-dumping, countervailing or safeguard duty, any goods which are imported in such circumstances or in such quantities that the importation of such goods does not, in his opinion, constitute regular importation of such goods for trade purposes.

56. Imposition of anti-dumping duties

- (1) The Minister may from time to time by notice in the *Gazette* amend Schedule No. 2 to impose an anti-dumping duty in accordance with the provisions of section 55(2).
- (2) The Minister may, in accordance with any request by the Minister of Trade and Industry and for Economic Co-ordination, from time to time by notice in the *Gazette* withdraw or reduce, with or without retrospective effect and to such extent as may be specified in the notice, any anti-dumping duty imposed under sub-section (1).
- (3) The provisions of section 48(6) shall *mutatis mutandis* apply in respect of any amendment, withdrawal or reduction made under the provisions of sub-section (1) or (2) of this section.

56A. Imposition of countervailing duties

- (1) The Minister may from time to time by notice in the *Gazette* amend Schedule No. 2 to impose a countervailing duty in accordance with the provisions of section 55(2).
- (2) The Minister may, in accordance with any request by the Minister of Trade and Industry and for Economic Co-ordination, from time to time by notice in the *Gazette* withdraw or reduce, with or without retrospective effect and to such extent as may be specified in the notice, any countervailing duty imposed under sub-section (1).
- (3) The provisions of section 48(6) shall *mutatis mutandis* apply in respect of any amendment, withdrawal or reduction made under the provisions of sub-section (1) or (2) of this section.

57. Imposition of safeguard duties

- (1) The Minister may from time to time by notice in the *Gazette* amend Schedule No. 2 to impose a safeguard duty in accordance with the provisions of section 55(2).
- (2) The Minister may, in accordance with any request by the Minister of Trade and Industry and for Economic Co-ordination, from time to time by notice in the *Gazette* withdraw or reduce, with or without retrospective effect and to such extent as may be specified in the notice, any safeguard duty imposed under sub-section (1).
- (3) The provisions of section 48(6) shall *mutatis mutandis* apply in respect of any amendment, withdrawal or reduction made under the provisions of sub-section (1) or (2) of this section.

57A. Imposition of provisional payment

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

- (2) The Commissioner shall, in accordance with any request by the said Board, by further notice in the *Gazette* extend the period for which the provisional payment mentioned in sub-section (1) is imposed or withdraw or reduce it with or without retrospective effect and to such extent as may be specified in the request.
- (3) Such provisional payment shall be paid on goods subject thereto, at the time of entry for home consumption thereof, as security for any anti-dumping or countervailing duty which may be retrospectively imposed on such goods under section 56 or 56A and may be set off against the amount of the retrospective anti-dumping or countervailing duty payable.
- (4) If no anti-dumping or countervailing duty is imposed before expiry of the period for which a provisional payment in relation to the goods concerned has been imposed, the amount of such payment shall be refunded.
- (5) If the amount of any such provisional payment on the said goods:
 - (a) exceeds the amount of any anti-dumping or countervailing duty retrospectively imposed on such goods under section 56 or 56A, the amount of the difference shall be refunded; or
 - (b) is less than the amount of the anti-dumping or countervailing duty so imposed, the amount of the difference shall not be collected.

BOARD ON TARIFFS AND TRADE

PRIVATE BAG X753

PRETORIA 0001

REPUBLIC OF SOUTH AFRICA

SEPTEMBER 1995

GUIDE

TO THE POLICY AND PROCEDURE WITH REGARD TO ACTION AGAINST UNFAIR
INTERNATIONAL TRADE PRACTICES : DUMPING AND
SUBSIDISED EXPORT

PERSPECTIVE

1. The export of products from any country to the common area of the Southern African Customs Union (Customs Union)¹ may disrupt the markets in the Customs Union, which could have a harmful effect on the economies of the Customs Union partners. Disruption of these markets has traditionally been dealt with by the imposition of customs duties, embodied in Part 1 of Schedule No. 1 to the Customs and Excise Act. In terms of South Africa's obligations under the General Agreement on Tariffs and Trade (GATT), entered into by the majority of countries trading internationally, customs duties applicable to the majority of products in this Schedule are bound against increases above specified levels. It is therefore no longer possible to use Schedule No. 1 of the Act to combat unfair international trade practices.
2. Dumping and subsidised export are distinctly different forms of unfair international trade practices. Dumping is a trade practice applied by private enterprise. Subsidisation is a government practice to achieve specified policy objectives. However what these two forms of unfair international trade practices do have in common is that dumped and subsidised exports may cause or threaten to cause material injury to a domestic industry of the importing country or it may materially retard the establishment of a domestic industry in the importing country.

¹The Customs Union consists of Botswana, Lesotho, Namibia, Republic of South Africa and Swaziland.

3. GATT does not condemn dumping and subsidised exports which do not cause material injury. The Board on Tariffs and Trade (Board) may, under circumstances specified in GATT 1994, consider recommending the introduction of an anti-dumping duty or a countervailing duty to combat unfair international trade practices which cause or threaten to cause material injury to a domestic industry or materially retard the establishment of a domestic industry. These duties are characterised by their specificity and temporary nature and are therefore embodied in Schedule No. 2 to the Customs and Excise Act. The duties embodied in Schedule No. 2 to the Customs and Excise Act are payable in addition to the duties contained in Schedule No. 1.
4. In this Guide the discussion of material injury, the threat of material injury and the material retardation of the establishment of a domestic industry, as well as the causal relationship thereof with an unfair international trade practice applies equally to both dumping and to subsidised export.

SPECIFIED CIRCUMSTANCES

5. The Board considers the introduction of an anti-dumping or a countervailing duty or any other action it deems necessary whenever it finds the existence of dumping or subsidised export: Provided that -
 - (a) such export is the cause of material injury to an industry in the Customs Union; or
 - (b) the threat exists that material injury may be caused to an industry in the Customs Union by such export; or
 - (c) such export materially retards or prevents the establishment of a domestic industry in the Customs Union.

INJURY

6. Consideration of material injury includes an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential declines in sales, profits, market share, productivity, return on investments, or utilisation of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, and the ability to raise capital investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.
7. A determination of a threat of material injury is based on facts not merely on allegations, conjecture or remote possibility. The change in circumstance which would create a situation in which the dumping or subsidised export would cause material injury must be clearly foreseen and imminent.
8. Material retardation of the establishment of a domestic industry will only be considered by the Board if the industry to be established can compete at the same level of prices already established in the markets of the Customs Union members, even if such prices have been established by dumped or subsidised products. Should foreign suppliers lower their prices after the "new" local industry has put its products on the market the difference between the established price and the lower price could become liable for appropriate action if unfair

international trade practices were to be found and the criteria for action there against were met.

9. For the injury to be material the decline and the negative effects must be substantial to the point where the affected industry cannot combat the impact of the dumped or subsidised imports from its own resources.

CAUSALITY

10. Having established the existence of material injury or the threat of material injury or the retardation of the establishment of a new domestic industry the Board is obliged to determine whether and to what extent the cause thereof is the dumping or subsidised export as the case may be, and not anything else.
11. Consideration is given to -
 - (a) the volume of all relevant imports from all countries, existing tariffs and rebate provisions;
 - (b) the impact of these imports and of their prices on the domestic market; and
 - (c) factors such as political influences; the state of the economy; labour matters; boycotts; product quality and range; delivery periods; technology employed; the utilisation of production factors; and the policies of the industry concerning production, marketing and finance.

REMEDIAL ACTION

12. In terms of internationally accepted principles the Board may consider the introduction of an anti-dumping duty or a countervailing duty or any other action in cases where products exported to the Customs Union are dumped or are subject to subsidies.

UNFAIR INTERNATIONAL TRADE PRACTICE DEFINITIONS

13. **Dumping** means the introduction of goods into the commerce of the Republic or the common customs area of the Southern African Customs Union at an export price which is less than the normal value of the goods.
14. **Export price** means the price actually paid or payable for goods sold for export net of all taxes, discounts and rebates actually granted and directly related to the sale under consideration,
 - If (i) it is found that there is no export price as contemplated in the definition of 'dumping'; or
 - (ii) it appears that in respect of the export price there is an association or a compensatory arrangement between the exporter concerned and the importer or the third party concerned; or

- (iii) it is found that for any other reason the export price actually paid or payable for the goods sold is unreliable,

'export price' in the said definition shall be construed to mean the price constructed on the basis of the price at which the imported goods are first resold to an independent buyer, or where not resold in the condition imported, on any reasonable basis.

- 15. **Like product** means a product which is identical, i.e. alike in all respects to the product under consideration or 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.
- 16. **Normal value** means -
 - (a) the comparable price actually paid or payable in the ordinary course of trade for like goods intended for consumption in the exporting country or country of origin; or
 - (b) in the absence of a price contemplated in paragraph (a) -
 - (i) the highest comparable price at which like goods are being exported to any third country in the ordinary course of trade; or
 - (ii) the constructed cost of production of the goods in the country of origin plus a reasonable addition for selling costs and profit;

Provided that due allowance shall be made in each case for differences in conditions and terms of sale, for difference in taxation, and for other differences affecting price comparability.

If the Board is of the opinion that the normal value of the goods concerned is, as a result of government intervention, not determined in the exporting country or country of origin according to free market principles, a comparable price of a third country may be applied to the goods of the exporting country or country of origin concerned.

- 17. **Subsidised export** takes place when the authorities in the country of origin provide any form of financial or other assistance in respect of the product or an input into the manufacture, transportation or export of the product or when inputs are acquired from any country where the authorities of that country apply a form of the above-mentioned assistance.

PROCEDURES

- 18. An investigation by the Board to determine the existence, degree and effect of any alleged unfair trade practice, as contemplated above, may be initiated by way of a written petition based on a questionnaire prescribed by the Board, requesting such an investigation by or on behalf of the domestic industry concerned.
- 19. The term "domestic industry" is interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products. When producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers.

20. Such petition must include evidence of -
- (a) dumping or subsidies benefiting the exported product as the case may be;
 - (b) material injury or the threat thereof to the industry concerned or retardation of the establishment of a new domestic industry; and
 - (c) a causal link between the alleged particular unfair trade practice concerned and the alleged material injury, threat thereof or retardation.
21. Mere assertion, unsubstantiated by relevant evidence, will not be considered sufficient reason for the initiation of an investigation.
22. The Directorate: Dumping Investigations at the office of the Board may be approached for guidance in completing the required petition.

INFORMATION IN SUPPORT OF A PETITION

23. The petition must contain such information as is reasonably available to the petitioner on the following:
- (a) The identity of the petitioner and details of the volume and value of production of the like product by the petitioner.
 - (b) Where the petition is submitted on behalf of an industry, the identity of the industry on behalf of which the petition is made and a list of all known producers of the like product plus, to the extent possible, details of the volume and value of domestic production of the like product accounted for by each producer.
 - (c) A complete description of the imported product, the name(s) of the country or countries of export or origin of the product, the identity of each known exporter or foreign producer of the product and the identities of known importers of the product.
 - (d) In respect of dumped products, information on prices at which the product in question is sold when destined for consumption in the domestic market of the country or countries of origin or export or, where applicable, information on the prices at which the product is sold by the countries of origin for export to a third country or countries or the estimated cost of production in the country or countries of origin or export plus any other cost and profit deemed reasonable. In the case of exports from a country without a free market economy, a third country must be nominated to be used to determine the normal value, of the product under investigation, on the above mentioned basis.

OR

In respect of subsidised export, information concerning the nature, source and amount of subsidy granted and the nature and extent of other government assistance measures and their effect on the export price of the subsidised product.

24. In order to prove material injury or potential material injury information on the past three years, and on the current year, must be supplied in respect of -
- (a) Customs Union production of the product and similar products, expressed in quantity and value;
 - (b) capacity utilisation of Customs Union producers;
 - (c) imports, in quantity and value, of the product that is the subject of the petition and of like products from other countries;
 - (d) exports out of the Customs Union, in quantity and in value, of the product or similar products;
 - (e) the consumption of the product and similar products in the Customs Union;
 - (f) the market share of the Customs Union product and the market share of the imported products;
 - (g) prices charged by Customs Union producers and a cost analysis of representative products;
 - (h) resale prices of imported products;
 - (i) turnover and profit, and projections of future turnover and profit;
 - (j) employment of labour; and
 - (k) factors, other than imports, affecting Customs Union producers detrimentally.
25. In respect of a threat of material injury, the following information must be supplied regarding the extent of the threat -
- (a) the rate at which imports are increasing;
 - (b) the size of foreign exporters relative to local producers;
 - (c) the state of the relevant industry in the foreign country; and
 - (d) the extent of the material injury foreseen and the rate at which it will be caused.
26. In critical situations, if applicable, the reasons, in the opinion of the petitioner, for the necessity of interim action must be given.
27. The information supplied must, where possible, be substantiated by documentary evidence.

PUBLIC NOTIFICATION OF INVESTIGATION BY THE BOARD

28. On receipt of a petition for the imposition of an anti-dumping duty or a countervailing duty, as the case may be, the staff of the Board will examine the accuracy of the evidence provided

by the petitioner. Subsequently the Board will determine whether there is sufficient evidence to justify the initiation of an investigation.

29. If, on the evidence before it, the Board decides to initiate an investigation, a general notice will be published in the Government Gazette, in which will be set out -
- (i) the name of the petitioner;
 - (ii) a description of the product covered by the petition;
 - (iii) the countries of origin or export of the products in question;
 - (iv) a summary of the evidence submitted to the Board;
 - (v) the procedure to be followed; and
 - (vi) the time limit for response to the notice.
30. At the same time the governments of the countries concerned and all the parties known to be concerned with the relevant product will be informed in writing of the Board's decision to conduct an investigation of alleged dumping or subsidised exports as the case may be. The parties known to be concerned will simultaneously be supplied with relevant questionnaires. The questionnaire will be deemed to have been received 7 days after the date of the letter accompanying the questionnaire.
31. A period of 30 days after receipt of the questionnaire will be allowed for comment and response to the questionnaire. If comments and evidence are not submitted by the end of the 30 days the Board may make a preliminary or final finding on the basis of the evidence available to it.

EVIDENCE BY INTERESTED PARTIES

32. For the purposes of investigations into allegations of dumping or subsidised export "interested parties" shall include;
- (a) an exporter or foreign producer and the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;
 - (b) the government of the exporting country; and
 - (c) a producer of the like product in the Customs Union or a trade or business association with members whose collective output of the like product constitutes a major proportion of the total domestic production of the like product.
33. Should any of the interested parties wish to be represented in the investigation they must provide the Board with a letter of appointment of the representative detailing the identity of the representative and the scope of the representation.

34. All interested parties in an investigation into allegations of dumping or subsidised exports will be given a reasonable opportunity to present, in writing, all evidence they may consider relevant to the investigation announced by the Board.
35. Industrial users of the product under investigation and representative consumer organisations in cases where the product is commonly sold at the retail level may also provide information which is relevant to the investigation regarding dumping/subsidised export, injury or causality.
36. It is in their interest that producers/exporters and importers of the product concerned cooperate fully with the Board to ensure that the investigation is completed as quickly as possible.
37. The Board's investigating staff is available for informal meetings where interested parties may also submit written evidence in connection with the allegation of dumping or subsidised export.
38. In its investigation the Board will consider all relevant evidence submitted to it by all interested parties, industrial users and representative consumer organisations.
39. All evidence submitted to the Board during its investigation, other than confidential evidence, will be made available, on request, to interested parties.

PROVISIONAL MEASURES

40. Whenever the Board is satisfied, at any time during its investigation, that urgent action is justified to prevent material injury being sustained by the industry concerned during the time of its investigation, it may request the Commissioner for Customs and Excise to impose, by way of a notice in the Government Gazette, a provisional payment on the product(s) being the subject of the investigation.
41. Such a request will only be made after the Board has reached a preliminary finding, on the strength of the evidence available at such time, regarding the existence of dumping or subsidised export, and of material injury or the threat thereof or the retardation of the establishment of a domestic industry, and has found that the material injury or threat thereof or the retardation is the consequence of the dumping or the subsidised export.
42. Such provisional payment must be paid at the time of entry for home consumption of such products as security for any anti-dumping duty or countervailing duty which may be imposed retrospectively to the date of the provisional payment on such products. Such payments will be set off against the amount of the anti-dumping duty or countervailing duty payable retrospectively.
43. In all cases the Board will examine whether a provisional payment lower than the margin of dumping would be sufficient to remove injury or the threat thereof or the retardation of the establishment of an industry.
44. The provisional payment is valid for six months from the date of the imposition thereof. The Board may request the Commissioner for Customs and Excise to extend this period by a further three months if a request for such extension is received from the exporters or if any interested party causes delays in the finalisation of the investigation. If no anti-dumping duty or countervailing duty is imposed before the expiry of such period for which a provisional payment has been imposed, the provisional payment will be refunded.

45. If the amount of such provisional payment on the said product -
- (a) exceeds the amount of any anti-dumping duty or countervailing duty retrospectively imposed on such products, the amount of the difference will be refunded; or
 - (b) is less than the amount of any anti-dumping duty or countervailing duty so imposed, the amount of the difference will not be collected.
46. Whenever the Board requests the Commissioner for Customs and Excise to impose a provisional payment the Board will provide all interested parties with a report on the matter. Interested parties will be allowed 30 days to comment on the report.

INVESTIGATION

47. If the Board has reason to believe that the f.o.b. price is unreliable, an f.o.b. price will be calculated on the basis of the selling price at the first point of resale in the Customs Union.
48. In establishing the existence of dumping the Board takes into consideration whether the prices ruling on the domestic market of the country of export or origin are established by normal market forces. In such a case the dumping determination is based on current domestic value or exports to third countries or the cost of production (subparagraphs (a), (b)(i) or (b)(ii) under the definition of normal value). In cases of exports from a country where domestic prices are, in the opinion of the Board, not established by normal market forces, a comparable price of a third country where prices are established by free market forces will be applied to the goods concerned.
49. No anti-dumping duty shall exceed the margin of dumping, but may be less if, in the opinion of the Board, the lesser amount will be sufficient to remove the material injury.
50. No countervailing duty shall exceed the amount of the financial or other assistance per unit of the product, but may be less if, in the opinion of the Board, the lesser amount will be sufficient to remove the material injury.
51. During its investigation the Board considers all the evidence submitted and endeavours to obtain evidence from exporters and producers in the country of export/origin. Contact is also made with government representatives of the country of export and/or origin. As much evidence as possible, excluding confidential evidence or evidence that could be prejudicial to the competitive position of a firm, as indicated by the party submitting the evidence, is supplied to interested parties, on request. In cases where the Board considers it necessary, visits are made to exporters and/or producers in the country of export/origin after permission has been obtained from such exporters, producers and from the government of the country concerned. In cases where the petitioner or domestic producers are based in other Customs Union member countries or where such a request is made by the governments of such countries, the Board consults with the government of the relevant Customs Union countries.
52. On completion of the fact-finding phase of the investigation the Board considers the substantiated and verified information available to it. Information which has been indicated as being confidential without acceptable reasons therefor and not accompanied by non-confidential summaries thereof are not taken into consideration. When a decision is reached, a recommendation is formulated and a report prepared. The report with recommendation is

submitted to the Minister of Trade and Industry. In the case of primary agricultural products, a copy of the report and recommendation is also submitted to the Minister of Agriculture. If the Board recommends action and its recommendation is accepted by the Minister of Trade and Industry (and by the Minister of Agriculture in the case of primary agricultural products), the Minister of Trade and Industry requests the Minister of Finance to impose the relevant duty by Notice in the Government Gazette. If the Board recommends that the petition be rejected, the rejection of the petition is published in the Government Gazette. Should the Minister not accept the Board's recommendation, he/she refers the matter back to the Board for reconsideration.

53. The notice by the Minister of Finance contains, in particular -
- (a) an accurate description of the dumped or subsidised product;
 - (b) the Harmonised System tariff subheading applicable to the product;
 - (c) the names of the suppliers of the product, or, where this is impracticable, the country of origin or export of the product;
 - (d) in the case of dumping the anti-dumping duty to be paid;
 - (e) in the case of subsidised export, the countervailing duty to be paid;
 - (f) in a case where the relevant duty is imposed retrospectively, the date from which it is payable; and
 - (g) where applicable, the time schedule for the phasing out of the duty.

UNDERTAKINGS BY EXPORTERS

54. If, during the course of an investigation, exporters, against whom an allegation has been made offer an undertaking to put an end to the dumping or subsidised export, the Board will consider the matter and will submit its recommendation to the Minister. It will also recommend that the investigation either be terminated or continued. The Minister's subsequent decision is then published in the Government Gazette and the interested parties will be informed accordingly.
55. Should the exporter concerned not honour his undertaking the Board will be entitled to recommend the imposition of relevant duties immediately retrospective to the date of violation of the undertaking.

WITHDRAWAL OF ANTI-DUMPING DUTIES OR COUNTERVAILING DUTIES

56. In the case of anti-dumping or countervailing duties, the exporter(s) against whom the duty was imposed, representatives of the country/countries of export/origin or any other person or organisation concerned with the relevant product may request that the matter be reviewed provided that 12 months have elapsed since the imposition of the duty. The Board will in each case decide whether such review is justified after a preliminary investigation of the request has been carried out. The Board may also, on its own initiative, at any time decide to review an anti-dumping or countervailing duty.

REPORTS BY THE BOARD TO THE MINISTER OF TRADE AND INDUSTRY

57. Reports by the Board to the Minister are tabled in Parliament at the next session. These reports are available at the office of the Board after they have been tabled, but parties concerned with the relevant products may obtain copies of the reports after the promulgation of the recommended duties, if any, or after the report has been approved by the Minister in a case where a petition has been rejected.
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