

Amending South Africa's anti-subsidy legislation

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Abstract

In January 2009 South Africa's International Trade Administration Commission published draft amendments to the Countervailing (Anti-Subsidy) Regulations. After a brief overview of countervailing in South Africa this article considers the most important proposals and evaluates them, *inter alia*, against the World Trade Organisation's Agreement on Subsidies and Countervailing Measures to determine whether the amendments will improve consistency with South Africa's international obligations and increase transparency and fairness in countervailing investigations. The analysis shows that some of the proposed amendments, such as the inclusion of interested party hearings, amendments to the final investigation procedures and the determination of the export price in reviews will increase transparency in investigations. On the other hand the proposals to amend the definition of the domestic industry, to target only foreign producers and not necessarily exporters and to limit reviews to subsidy programmes included in the original investigation, will decrease the effectiveness of the instrument. By targeting only foreign producers and not exporters, the Regulations cannot be applied to any export subsidies paid directly to exporters who are not producers. Limiting the scope of review to subsidies that were countervailed in the original investigation, means that new or amended subsidies will not be countervailed. In addition, interested parties' rights to review are severely curtailed through proposed amendments to interim and judicial reviews, thus making the process less transparent. Viewed holistically, the amendments will detract from the current Countervailing Regulations.

Background

South Africa was one of first countries in the world to adopt legislation to address unfair international trade in the form of both dumping and subsidised exports.¹ It has consistently been one of the major users of the anti-dumping

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¹ See S8(1) of the Customs Tariff Act, 26 of 1914.

instrument,² although it has seldom applied the countervailing (or anti-subsidy) instrument,³ despite the fact that the oldest reference to countervailing action dates back to at least 1903.⁴ South Africa's first countervailing legislation was adopted in 1914.⁵ In the period up to 1992 there was no specialised unit within the Board on Tariffs and Trade (BTT) to conduct these investigations. The specialised unit was created following the promulgation of the Board Amendment Act.⁶ As far as could be ascertained only five countervailing duties were imposed prior to 1992.⁷

A specialised unit focusing exclusively on these two contingent trade remedies was established at the BTT on 1 August 1992.⁸ When the International Trade Administration Commission (Commission) replaced the Board in 2003, the specialised unit was renamed the Directorate: Trade Remedies. Its responsibilities were increased to include safeguard action.⁹ A

² GATT *Anti-dumping and countervailing duties* (July 1958) 14; Gustav F Brink *Anti-dumping and countervailing investigations in South Africa: a practitioner's guide to the procedures and practices of the Board on Tariffs and Trade* (2002) 3; Gustav F Brink *A theoretical framework for South African anti-dumping law* (LLD thesis, UP, 2004) 19. These sources show that South Africa was the single largest user of the instrument between 1948 and 1958, a large user between 1958 and 1978, and that it has been a top 10-user since 1995, but that it used the instrument infrequently between 1978 and 1992.

³ Brink n 2 above at 9 and 462; Gustav Brink 'Proposed amendments to the countervailing regulations: moving forwards or a missed opportunity?' *Tralac Working Paper 2/2009* 2.

⁴ Basson *Ontwrigtende mededinging in Suid-Afrika se invoerhandel met spesifieke verwysing na dumping* (M Com thesis, UP, 1980) indicates that 'anti-dumping' action against bounties (subsidies) granted by foreign governments on sugar exported to South Africa dates back to 1903. No original documentation could be found in this regard. GATT 1958 indicates that South Africa also had countervailing duties in place prior to 1948, but no information was available in the commission's archives.

⁵ See s 8(1) of the Customs Tariff Act, 26 of 1914.

⁶ Board on Tariffs and Trade Amendment Act 60 of 1992.

⁷ See Basson (1980) 94; Board Report 371: 'A. Premiedumping van metaal draagpale, -maste of -bouwerke vir elektriese lugtransmissieleidings, uit Italië; B. Kortings van die reg op gare draad uit Vlas' *Board Report 410* (20/10/1956); 'Premiedumping van sekere soort katoenstukgoedere uit die Verenigde State van Amerika' *Board Report 435* (28/09/1957); 'Bounty dumping of cotton canvas piece goods from the United States of America' (24/04/1958). Note that GATT (1958) 97 also indicates that a countervailing duty had been imposed on sugar imported from all countries in 1948. No official South African documentation was available regarding either the duty imposed and referred to by Basson or the countervailing duty imposed in respect of sugar.

⁸ Brink n 2 above at 5.

⁹ The International Trade Administration Act 71 of 2002, which created the International Trade Administration Commission, entered into force on 1 June 2003 – see Proclamation R9 of 2003 in *Government Gazette* 24801 of 21 February 2003, which indicated that ss 7, 8, 9, 10, 13, 23 and 24 came into operation on that date, while the remainder of the *ITA Act*, excluding those sections and the item mentioned in s 64(2) of the Act, would come into

total of twelve countervailing investigations were initiated between 1995 and the end of 2008,¹⁰ of which only four resulted in the imposition of countervailing duties.¹¹ Only one countervailing investigation has been initiated since 2002 and the application was withdrawn by the applicant following pressure from the Chinese government against the applicant's sister company in that country.¹² It follows that, unlike anti-dumping,¹³ countervailing measures are not an instrument that is widely used in South Africa.

In November 2003 the Commission¹⁴ promulgated the Anti-Dumping Regulations,¹⁵ the first trade remedy regulations in South African history. This was followed by the promulgation of the Safeguard Regulations on 27 August 2004,¹⁶ and by the Countervailing Regulations on 15 April 2005.¹⁷ In January 2009 the Commission published draft amendments to the Countervailing Regulations and invited public comment.¹⁸ This article provides a brief overview of countervailing action in South Africa before

operation on 1 June 2003. The establishment of the Directorate falls within the author's personal knowledge as he was the Director for Trade Remedies Policy in the directorate.

¹⁰ See http://www.wto.org/english/tratop_e/scm_e/scm_e.htm (accessed 9 February 2009); Notice 907 in *Government Gazette* 31272 of 25 July 2008.

¹¹ See: 'Investigation into the alleged dumping of polyvinyl chloride, originating in or imported from India, Republic of Korea and Thailand and/or the alleged subsidised export of polyvinyl chloride, originating in or imported from India: final determination' *Board Report 4116* (21/05/2001); 'Investigation into the alleged subsidised export of printed and dyed bed linen originating in or imported from Pakistan: preliminary determination' *Board Report 4137* (05/11/2001); 'Investigation into the alleged dumping and/or subsidised export of tubes, pipes and hollow profiles, welded and galvanised, of a circular cross section, of iron or non-alloy steel of an outside diameter ("nominal bore range") of between 15mm and 150mm and commonly referred to as "welded galvanised steel pipe", originating in or imported from India: final determination' *Board Report 4168* (30/05/2002); and 'Investigation into the alleged dumping of stranded wire, ropes and cables of iron or steel, not electrically insulated, originating in or imported from the People's Republic of China (PRC), Germany, India, Korea, Spain and the United Kingdom (UK) and the alleged subsidised export of stranded wire, ropes and cables of iron or steel, not electrically insulated originating in or imported from India and Korea: final determination' *Board Report 4173* (01/07/2002).

¹² Mathabo le Roux 'China blocks subsidy challenge from SA' *Business Day* 16 February 2009 (available at: www.businessday.co.za/articles/topstories.aspx?ID=BD4A940365 (accessed 19 March 2009)).

¹³ See WTO http://www.wto.org/english/tratop_e/ad_e/ad_e.htm for details on South Africa's use of the anti-dumping instrument since 1995 and Brink n 2 above at 3 for its use of the instrument prior to 1995.

¹⁴ Technically, the Minister of Trade and Industry promulgated the Regulations.

¹⁵ Notice 3197 in *Government Gazette* 25684 of 14 November 2003.

¹⁶ Notice 1808 in *Government Gazette* 26715 of 27 August 2004.

¹⁷ Notice 356 of 2005 in *Government Gazette* 27475 of 15 April 2005.

¹⁸ Notice 24 of 2009 in *Government Gazette* 31774 of 16 January 2009.

considering the major amendments proposed in the Commission's publication. These amendments are evaluated on the basis of their alignment to the World Trade Organisation Agreement on Subsidies and Countervailing Measures (Subsidies Agreement) to determine whether the proposed amendments will more properly align the Countervailing Regulations with South Africa's international obligations. It will also consider whether the proposals will increase transparency in countervailing investigations.

Countervailing action may be taken in instances where products exported from a country are subsidised and such subsidised exports cause injury to the domestic industry producing the like product in the importing country.¹⁹ A subsidy is defined as a 'financial contribution by a government at any level or any public body within the territory of an exporting country'²⁰ and where this leads to the transfer of a benefit to the recipient thereof.²¹

Upon receipt of a properly documented application, the Commission determines whether the application establishes a *prima facie* case of injurious subsidised exports.²² If affirmative, it will inform the government of the exporting country and invite it to consultations regarding the alleged subsidies.²³ After informing the foreign government of the application and inviting it to consultations, the Commission will initiate an investigation. Questionnaires are sent to all interested parties identified in the application, along with a copy of the non-confidential version of the application.²⁴ Interested parties have the opportunity to submit written responses in the prescribed format²⁵ and their information is subsequently verified by the Commission.²⁶ Following its preliminary investigation, the Commission publishes a report setting out its preliminary determination.²⁷ All interested

¹⁹ Sections 16(1)(a); 26(1)(d)(ii) and 32(2)(c) of the International Trade Administration Act, 71 of 2002, read with s 38 of the Countervailing Regulations; Art VI.1 of the General Agreement on Tariffs and Trade 1994; art 19.1 of the World Trade Organisation Agreement on Subsidies and Countervailing Measures. For a more detailed discussion of the intricacies of countervailing action see Gustav Brink 'South Africa's countervailing regulations' *Tralac Trade Brief* 4/2005 and Gustav Brink 'Countervailing reviews: countering subsidised exports of countering subsidy programmes?' 2007 *Tralac Trade Brief* 8.

²⁰ Section 8.1(a) of the Countervailing Regulations.

²¹ Section 8.1 of the Countervailing Regulations for the full definition of a subsidy.

²² Sections 21–24 of the Countervailing Regulations.

²³ Section 27.3 of the Countervailing Regulations.

²⁴ Section 28.5 of the Countervailing Regulations.

²⁵ Section 29.1 of the Countervailing Regulations.

²⁶ Section 18.2 of the Countervailing Regulations.

²⁷ Section 34.1 of the Countervailing Regulations.

parties have the opportunity to comment on the preliminary finding.²⁸ These comments are taken into consideration before the Commission reaches its final determination in the form of a recommendation to the Minister of Trade and Industry.²⁹ If it is found that subsidised exports are causing material injury to the domestic industry, countervailing duties may be imposed to the extent of the margin of subsidisation or a lesser amount that would be sufficient to remove the injury caused by such subsidised exports.³⁰

Most important proposed amendments

Introduction

The draft amendments to the Countervailing Regulations envisage a large number of changes to the Regulations that far exceed the scope of this article.³¹ This includes, in addition to the provisions discussed below, changes in definitions; changes in the time parties have to submit their final comments; confidentiality; the self-initiation of investigation by the Commission; representation on behalf of interested parties; the countervailability of subsidies; the calculation of the benefit; the way in which injury information must be presented; the determination of causality; the way in which the lesser duty rule is to be applied; the limitation of investigations to foreign producers to the exclusion of non-producing exporters; the purpose of verification reports; the investigation procedure in cases where exporters do not cooperate; the duration of provisional payments; and price undertakings.³²

Interested party hearings

The Countervailing Regulations provide for two types of hearing: oral hearings at the request of an interested party,³³ and adverse party meetings.³⁴ Whereas adverse party meetings are only held at the request of an interested

²⁸ Section 35.1 of the Countervailing Regulations.

²⁹ The provisions of the ITA Act referred to in s 64(2) of the Act have not yet come into operation. Until those sections come into operation, ITAC is required to investigate and evaluate applications for anti-dumping duties in accordance with s 32 read with the Board on Tariffs and Trade Act, 107 of 1986, which provides in s 4(1)(b) that the Commission must 'report and make recommendations to the Minister of Trade and Industry' in respect of any countervailing investigation.

³⁰ Section 17 of the Countervailing Regulations.

³¹ For a more detailed analysis of the various proposed amendments, see Brink 'Proposed amendments to the countervailing regulations: moving forwards or a missed opportunity?' 2009 *Tralac Working Paper 2*.

³² See Brink at no 31 above for a discussion of the various amendments proposed in respect of each of these issues.

³³ Section 5.1 of the Countervailing Regulations.

³⁴ Section 6.1 of the Countervailing Regulations.

party in order to debate certain issues with other parties before the Commission, and whereas any party could decline to participate in such hearings without its absence affecting its rights in the investigation,³⁵ the proposed regulations indicate that the Commission will now schedule two interested party hearings, one prior to its preliminary determination, and the other during the final investigation phase, at which interested parties will have an opportunity to address the Commission orally.³⁶ This will take place independently of a request from any interested party, although parties that wish to present information orally are still required to provide the Commission with an agenda and a detailed version of the information to be discussed in advance.³⁷

Since the Commission has a discretion whether to grant an oral hearing,³⁸ these compulsory³⁹ interested party hearings may contribute significantly to increased transparency in countervailing investigations and this is fully supported. These interested party hearings are in addition to the Subsidies Agreement requirement to host oral hearings.⁴⁰

Definition of domestic industry

The Countervailing Regulations at present define the domestic industry as 'the domestic producers in the SACU as a whole of the like product or those of them whose collective output of the product constitutes a major proportion of the total domestic production of those products',⁴¹ provided that they represent at least twenty-five per cent by volume of the total production in the Southern African Customs Union and at least fifty per cent by volume of production of those producers that express an opinion on the application.⁴² A World Trade Organisation dispute panel has held⁴³ that 'a major proportion' of the industry does not mean 'the major proportion' and that it is therefore

³⁵ Section 6.9 of the Countervailing Regulations.

³⁶ Section 8.1 of the draft amended Countervailing Regulations.

³⁷ Section 8.2 of the draft amended Countervailing Regulations.

³⁸ Section 5.1 of the Countervailing Regulations.

³⁹ Such hearings will only be held if at least one interested party indicates its interest in such a hearing. See s 8 of the proposed regulations.

⁴⁰ Article 12.2 of the Subsidies Agreement only requires that oral hearings be held on request of an interested party showing good cause why it cannot rely only on written representations.

⁴¹ Section 1 of the Countervailing Regulations.

⁴² Section 7.3 of the Countervailing Regulations.

⁴³ Although this is related to an anti-dumping matter, the ruling can also be applied to countervailing investigations as the concepts are identical.

not required that more than fifty per cent of the domestic industry by production volume must support the application.⁴⁴

The draft proposals envisage significantly amending the existing Regulations and to disregard the ruling of the dispute panel in this regard as they propose that at least fifty per cent of the domestic industry by production volume must actually support the application and, in addition, that all producers that represent more than thirty-five per cent of the total production volume must submit information.⁴⁵ Accordingly, in terms of the draft amendments, if there are two producers representing sixty-four per cent and thirty-six per cent, respectively, of total domestic production, both will have to submit information. Since this is not required by the Subsidies Agreement, and as it will complicate the lodging of applications, this draft amendment is not supported.⁴⁶

In addition, the draft amendments propose requiring that the domestic industry add at least twenty-five per cent value in the form of production and processing costs to raw materials, excluding packaging, selling and general expenses and profits, regardless of their origin.⁴⁷ This would effectively mean that very few South African industries would be in a position to lodge an application as the value added to raw materials in most instances does not exceed this value.⁴⁸ This will also indicate that a less efficient industry will be

⁴⁴ 'WTO Argentina – definitive anti-dumping duties on poultry from Brazil' *WT/DS241/R* (22/04/2003) § 7.341.

⁴⁵ Sections 17.3 and 17.4 of the draft amended Countervailing Regulations.

⁴⁶ Note that there is no prohibition on the commission requesting additional injury information from any party during the course of an investigation. However, the draft provisions indicate that no investigation will be initiated unless the parties mentioned in the text to this footnote have submitted information. Since major producers are normally serious competitors they may be unwilling to support each other in such applications, which may lead to such industry being unable to obtain protection against unfair trade in the form of subsidised exports.

⁴⁷ Section 13.3(c) of the draft amended Countervailing Regulations.

⁴⁸ Note that the value added is *not* determined on the basis of the value added to imported raw material, but on the processing cost expressed as a percentage of total production cost. Thus, if raw materials cost R100, half of which was sourced in South Africa, and the processing costs amount to R30, the commission would determine the value added as $R30/R130 = 23.1$ per cent. In this case the commission will find that insufficient value was added and will decline initiating an investigation. This procedure falls within the author's personal knowledge as this was applied in respect of some of his clients. It is submitted that if value added is to play a role it should be determined as the value added (and not included) to imported raw material, *ie* using the same facts as above, the value added would be R80 (domestic raw materials plus processing costs) divided by R50 (imported raw materials) equals 160 per cent.

in a position to lodge a countervailing application whereas a more efficient industry could not. Since these provisions are not based on the requirements of the Subsidies Agreement it is submitted that these provisions should be deleted.

De minimis margins and negligibility

The Countervailing Regulations provide for the non-imposition of countervailing duties where it is found that the margin of subsidisation is *de minimis*, or where the volume of imports is negligible. Thus, the Regulations provide that no countervailing duty may be imposed if the margin of subsidisation is less than one per cent in the case of developed countries,⁴⁹ or less than two per cent in the case of developing countries.⁵⁰ This is in line with the corresponding provisions in the Subsidies Agreement.⁵¹ In addition, the Regulations provide that no countervailing duties may be imposed where the volume of imports from a country is less than three per cent of the total volume of imports of the product under investigation, unless imports from countries which individually account for less than three per cent, collectively account for more than seven per cent of the total imports of the like product into the South African market.⁵² The latter provision is not in line with the requirements of the Subsidies Agreement, which provide for figures of four and nine per cent, respectively.⁵³

The draft amendments to the Countervailing Regulations propose some changes to these provisions by deleting the reference to the increased *de minimis* standard applicable to developing countries, thereby decreasing the compatibility of the Regulations with the Subsidies Agreement. In addition, the draft amendments fail to bring the negligibility standard in line with the requirements of the Subsidies Agreement. It is therefore proposed that the draft amendments be redrafted to provide for a *de minimis* margin of subsidisation standard of two per cent in the case of imports from developing countries, and for a negligibility standard that would require that the volume of subsidised (and not total) imports from a country under investigation be at least four per cent of the total volume of imports of the like product from all countries, or that subsidised imports from countries individually not exceeding four per cent of the total imports of the product under

⁴⁹ Sections 9.4 and 16.3(d) of the Countervailing Regulations.

⁵⁰ Section 9.5 of the Countervailing Regulations.

⁵¹ Article 11.9 regarding the *de minimis* level for developed countries; art 27.10(a) regarding the *de minimis* level for developing countries.

⁵² Section 16.2 of the Countervailing Regulations.

⁵³ See art 27.10(b) of the Subsidies Agreement.

consideration exceed nine per cent of the total volume of imports. This would bring the Countervailing Regulations in line with South Africa's international obligations under the Subsidies Agreement.

Targeting of certain subsidy programmes only

The Countervailing Regulations provide that the Commission 'shall be entitled to take into account and add up any or all subsidies found during the course of the investigation even if the [domestic] industry has not alleged the existence of such subsidy in the application'.⁵⁴ It appears that this provision was included to ensure that all subsidies found during the course of an investigation are included in the investigation. The draft amendments, however, have deleted this provision in its entirety, raising the question whether the Commission will determine the full margin of subsidisation or whether it will only investigate those subsidies that were included in an application. Accordingly, where the domestic industry is not aware of the existence of a subsidy, or where the nature of a subsidy has changed, it appears that the Commission will not take such subsidies into consideration even if it becomes aware of the existence of such subsidies.

Considering that the purpose of a countervailing investigation is to prevent material injury to the domestic industry as a result of subsidised imports, it is submitted that the Commission is under a statutory duty to determine the full margin of dumping with reference to all subsidies, regardless of whether they have been included in the application or not.⁵⁵

Public interest

The draft amendments propose introducing a public interest clause in the Countervailing Regulations, indicating that public interest will only be considered or investigated if the Minister of Trade and Industry has instructed the Commission to conduct such an investigation following the Commission's final recommendation that public interest should be investigated.⁵⁶ This provision is not supported in its current format.

At present the Commission struggles to complete countervailing investigations within the absolute maximum of eighteen months from initiation, and apart from the two applications that were withdrawn

⁵⁴ Section 10 of the Countervailing Regulations.

⁵⁵ Note that there is a separate provision that requires the domestic industry to submit all such information as was reasonably available to it. Accordingly, the domestic industry cannot lodge an application without submitting information on all subsidies that it was aware of.

⁵⁶ Section 22 of the draft amended Countervailing Regulations.

subsequent to initiation, the Commission has not managed to complete a single countervailing investigation in less than the twelve months as per the requirements of the Subsidies Agreement.⁵⁷ The following table provides an analysis of the time taken by the Commission in the ten investigations it has finalised since 1992, ie excluding the two applications that were withdrawn:

Table 1: Time taken to finalise countervailing investigations

Product	Country	Initiation	Concluded	Days
Paper insulated cable	India	21 Aug 98	05 Nov 99	441
Acetaminophenol	India	26 Feb 99	29 Jun 01	854
ACSR	India	30 Apr 99	25 May 01	756
Suspension PVC	India	24 Mar 00	22 Jun 01	455
Bed linen	Pakistan	24 Mar 00	28 Dec 01	644
PVC-based roll goods	India	23 June 00	28 Feb 02	615
Footwear	India	15 Sep 00	13 Dec 01	454
Wire, rope and cable	India	22 Sep 00	28 Aug 02	705
Wire, rope and cable	Korea	22 Sep 00	28 Aug 02	705
Galvanised tubes and pipes	India	16 Mar 01	14 Jun 02	455

Source: Author's analysis of Commission reports and *Government Gazette* notices.

This shows that the Commission took on an average 608,4 days to complete an investigation, ie more than the maximum of eighteen months. Only two of the investigations were finalised in less than eighteen months and none in less than twelve months. Only one of the two investigations that were finalised in under eighteen months resulted in the imposition of countervailing duties, being the *Galvanised tubes and pipes (India)* case. In total, only four of the cases resulted in countervailing duties being imposed, including three instances in which duties were imposed after the Commission had taken in excess of eighteen months to complete the investigations.⁵⁸ These four cases therefore represent the only investigations in which public

⁵⁷ Article 11.11 of the Subsidies Agreement provides that countervailing investigation should be completed in 12 months and that this may be exceeded only in 'special circumstances', in which case investigations must be finalised within no more than eighteen months.

⁵⁸ Note that all these cases precede the Countervailing Regulations.

interest might have come into play. However, since no countervailing duties may be imposed where an investigation takes longer than eighteen months to complete, it follows that the only case in which it could, in terms of the draft amendment, have played a role, would be the *Galvanised Tubes and Pipes (India)* case. However, if the recommendation had been made to the minister and if the minister had requested the Commission to conduct a public interest inquiry, the Commission would then have had to follow a fair administrative process in investigating public interest, including granting interested parties the opportunity to submit and rebut information, before making its final recommendation to the minister. Considering that the investigation had already taken 455 days to complete, it is clear that all of the above steps would have had to be taken within less than ninety days, failing which the eighteen-month deadline would have been exceeded. Accordingly, if a public interest provision is to be included in the Regulations,⁵⁹ it is submitted that the inquiry should be conducted immediately after the preliminary determination, and that parties be requested to submit their comments on public interest along with their other comments on the preliminary report in order to prevent delays in the finalisation of the investigation.

In addition, the draft amendments contain neither guidelines on how public interest will be determined, ie the factors to be taken into consideration in the determination, nor on the methodology to be followed. It is submitted that these issues should be addressed before a provision on public interest is included in the Countervailing Regulations. Considering that the domestic industry has to prove that there is unfair trade in the form of subsidised exports, that the domestic industry is experiencing material injury, and that such injury is as a result of the unfair trade before any countervailing measures may be imposed, the question should also be raised whether public interest should play a role in countervailing investigations. Note that there is no similar requirement in the WTO Subsidies Agreement and that this requirement in the WTO is limited in application to safeguard measures, which are aimed at addressing *fair* trade.

Further, it has to be clarified what public interest entails, as at present all countervailing investigations are conducted on behalf of the Southern African Customs Union, which includes Botswana, Lesotho, Namibia and

⁵⁹ See Brink 'Proposed amendments to the Anti-Dumping Regulations: are the amendments in order?' *Tralac Working Paper (21/2006)* 16–21 and Brink 'Proposed amendments to the Countervailing Regulations: moving forwards or a missed opportunity?' *Tralac Working Paper (02/2009)* 25–27 regarding arguments as to whether public interest provisions should be included in the regulations.

Swaziland. These countries' public interest is not necessarily the same as South Africa's public interest. Accordingly, specific provisions will have to be included to indicate how these countries' interests will be taken into consideration.

Final investigation procedure

In terms of the Countervailing Regulations parties that cooperated during the preliminary investigation phase but that did not submit proper responses, may submit additional information until the deadline for responses to the Commission's preliminary report.⁶⁰ In such instances the Commission will verify their information during the final investigation phase.⁶¹ The draft amendments propose several amendments to the existing Regulations. The first is that parties may receive additional time to submit information during the preliminary investigation phase,⁶² but that no new information may be submitted after the preliminary determination.⁶³ This should have the effect of decreasing the time taken to finalise an investigation after the publication of the Commission's preliminary report, which decreases the uncertainty caused by the investigation. It is therefore supported.

The proposed amendments also provide that only cooperating interested parties may comment on the Commission's report.⁶⁴ This is contrary to the requirements of the Subsidies Agreement which provides that all interested parties shall have the right throughout the investigation to defend their interests.⁶⁵ It may also violate interested parties' constitutional rights to fair administrative action.⁶⁶

The last significant proposed amendment is that it will now be required that a final report be issued setting out all issues of law and fact that were taken into consideration in reaching the Commission's final determination. While this is supported as it addresses a major deficiency in the Countervailing Regulations, it is submitted that the proposed provisions should also state the minimum information to be contained in such a report.

⁶⁰ Section 35.5 of the Countervailing Regulations.

⁶¹ Section 18.2 of the Countervailing Regulations.

⁶² Section 34.1 of the draft amended Countervailing Regulations.

⁶³ Section 39.4 of the draft amended Countervailing Regulations.

⁶⁴ Section 39.1 of the draft amended Countervailing Regulations.

⁶⁵ Article 12.8 of the Subsidies Agreement.

⁶⁶ Section 33(1) of the Constitution Act, 108 of 1996.

Determination of export price in reviews

The Countervailing Regulations do not at present provide for the determination of the export price in reviews where no such export price exists. This may occur in cases where subsidised imports have ceased after the imposition of the countervailing duty. The Commission, however, has to determine the export price in order to determine the margin of subsidisation, which must be expressed as a percentage of the export price.⁶⁷ The proposed amendments now provide that in such instances ‘the export price ... will be the comparable price of the like product when exported from the country of origin to a third country ...’⁶⁸ The proposed amendments also prescribe the criteria that should be taken into consideration in determining the ‘third country’.⁶⁹ These provisions will add significantly to the transparency in countervailing duty reviews.

Interim reviews

The Countervailing Regulations provide that

[t]he Commission will not normally consider an application for an interim review sooner than twelve months after the publication of its final finding in the original investigation or the previous review.⁷⁰

The draft amendments now propose that the Regulations be amended to provide that no interim review shall be initiated within two years after the publication of the previous determination in a matter,⁷¹ except in cases where the Commission initiates a review *sua sponte*.⁷² In addition, no interim review may be requested less than one year prior to the last date that an application must be made for a sunset review,⁷³ thus seventeen months prior to the lapse of the countervailing duty.⁷⁴ Considering that countervailing duties may not remain in place for a period not exceeding sixty months,⁷⁵ the combined effect of these proposals is that a period of only nineteen months remains during which an interim review may be requested. This will

⁶⁷ Section 16.3(d) of the Countervailing Regulations.

⁶⁸ Section 64.2 of the draft amended Countervailing Regulations.

⁶⁹ Section 64.3 of the draft amended Countervailing Regulations.

⁷⁰ Section 44 of the Countervailing Regulations.

⁷¹ Section 48.1(a) of the draft amended Countervailing Regulations.

⁷² Section 48.1(b) of the draft amended Countervailing Regulations.

⁷³ Section 48.2 of the Countervailing Regulations.

⁷⁴ A sunset review application must be submitted at least 5 months prior to the lapse of the countervailing duty – see ss 54.1 to 54.3 of Countervailing Regulations, as well as s 63.2(b) of the draft amended Countervailing Regulations.

⁷⁵ Sections 38.1 and 53.1 of the Countervailing Regulations.

significantly inhibit interested parties' ability to lodge review applications and it is submitted that the provisions should be reconsidered.

A further proposed amendment is that the current provision regarding 'significantly changed circumstances' required for the initiation of an interim review is divided into two separate provisions, the first requiring a party to indicate changed circumstances,⁷⁶ and the second requiring it to show the change in the margin of subsidisation or the lack of material injury.⁷⁷ This provides greater clarity and is supported.

The last proposed amendment in respect of interim reviews is that the current provisions⁷⁸ permitting a review of the scope of application of a countervailing duty have been deleted. This follows the Commission's, it is submitted incorrect, finding that it cannot in an interim review take into consideration subsidy programmes that did not form part of the original investigation.⁷⁹ It is submitted that this finding is fatally flawed, as this would mean the continued presence of unfair international trade in the form of subsidised exports in South Africa.⁸⁰ It is also submitted that this proposed amendment would be *ultra vires* the International Trade Administration Act,⁸¹ which provides that the 'object of the Act is to foster economic growth and development in order to raise incomes and promote investment and employment ... by establishing an efficient and effective system for the administration of international trade'.⁸² It is submitted that allowing unfair trade in the form of subsidised exports to continue unabated will not foster economic growth as envisaged in the Act.

⁷⁶ Sections 49.1(a) of the draft amended Countervailing Regulations.

⁷⁷ *Id* at s 49.1(b).

⁷⁸ Ss 45.3 and 47.2 of the Countervailing Regulations.

⁷⁹ 'Interim review of the countervailing duty on stranded wire, ropes and cables of iron or steel, not electrically insulated originating in or imported from India: final determination' *Commission Report 252* (06/09/2007) at 9, where the commission 'reiterated its position that the provisions of [Countervailing Regulation] 10 do not extend to the investigation of new subsidies in an interim review. The Commission indicated that the purpose of a changed circumstances review or any other review is to review whether or not the existing duty in place is still necessary based on certain new developments.' See in general also Brink 'Countervailing reviews: countering subsidised exports of countering subsidy programmes?' *Tralac Trade Brief* 8/2007.

⁸⁰ *Id* 10–13 in this regard.

⁸¹ International Trade Administration Commission Act 71 of 2002.

⁸² Section 2 of the International Trade Administration Commission Act.

Judicial reviews

In respect of judicial reviews the Countervailing Regulations provide as follows:

Without limiting a court of law's jurisdiction to review final decisions of the Commission, participating interested parties may challenge *preliminary decisions or the Commission's procedures prior to the finalisation of an investigation* in cases where it can be demonstrated that

- (a) the Commission has acted contrary to the provisions of the Main Act or these regulations;
- (b) the Commission's action or omission has resulted in serious prejudice to the complaining party; and
- (c) such prejudice cannot be made undone by the Commission's future final decision.⁸³

The Explanatory Document published along with the draft amendments to the Regulations, indicates that the provision on judicial reviews contained in the Countervailing Regulations has been removed as the Promotion of Administrative Justice Act⁸⁴ already addresses all issues relating to judicial reviews. This is not the case. It is submitted that a proper reading of the current provision shows that it specifically provides for the review of *preliminary* determinations and other 'procedures prior to the finalisation of an investigation' which are not provided for in the Promotion of Administrative Justice Act. If this provision were to be deleted, interested parties would no longer be in a position to obtain interim relief prior to the finalisation of an investigation. At present this forms an important form of relief as parties have already requested judicial review of Commission decisions in at least two sunset reviews prior to finalisation of the investigations.⁸⁵ The duties remained in place pending the outcome of the judicial review,⁸⁶ thus protecting the industry from subsidised exports.

⁸³ Section 64 of the Countervailing Regulations. (Emphasis added.)

⁸⁴ Promotion of Administrative Justice Act 3 of 2000.

⁸⁵ *Algorax v ITAC* (unreported case 18829/2006TPD); *SCAW v ITAC* (unreported case 48829/08TPD). Although both these cases related to anti-dumping sunset reviews, s 64 of the Anti-Dumping Regulations are identical to s 64 in the Countervailing Regulations.

⁸⁶ In *Algorax v ITAC* the court found in favour of the industry, which resulted in the maintenance of the anti-dumping duties. *SCAW v ITAC* was ongoing at the time of writing, but the court had already granted an interdict preventing the Commission from recommending that the anti-dumping duties be removed before the judicial review had been finalised.

Conclusion

Although only one countervailing investigation has been undertaken since the Countervailing Regulations were promulgated in 2004, the International Trade Administration Commission has undertaken an extensive review of the Regulations. While this was an ideal opportunity to bring the Regulations in line with the requirements of the World Trade Organisation's Agreement on Subsidies and Countervailing Measures and to increase transparency, several of the Commission's proposals appear to reduce transparency, negatively impact on interested parties' rights, and will increase disparity with the WTO Agreement. It is therefore submitted that the Commission should take the public comments on its draft amendments into consideration and host further consultations on the basis of new draft proposals.