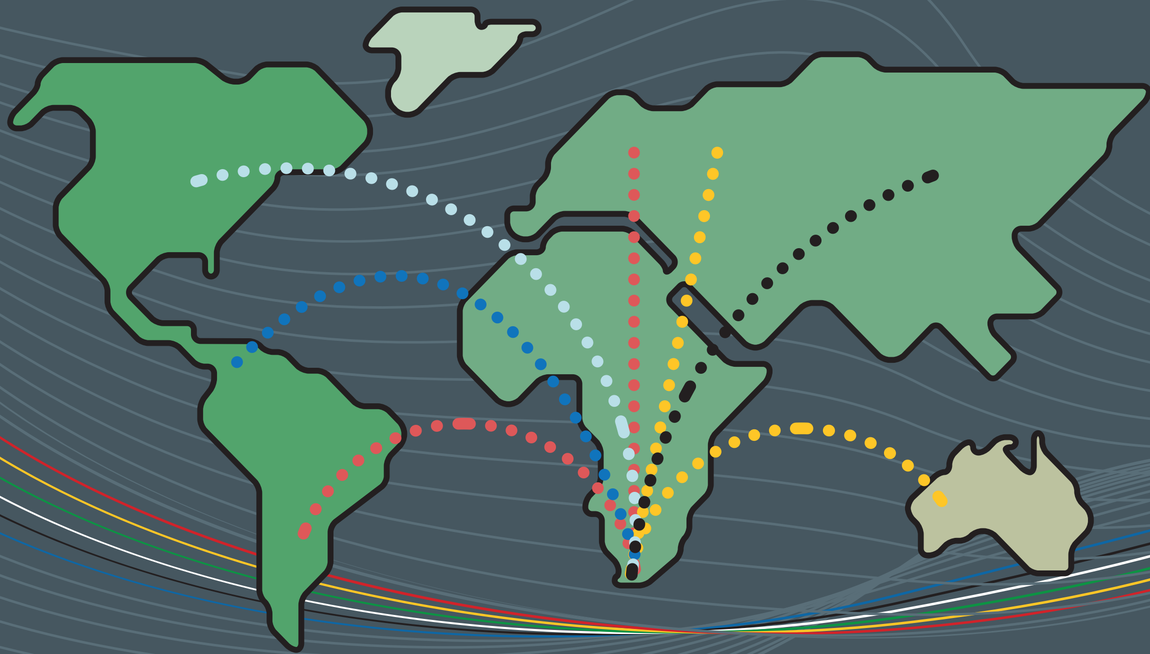

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TRADE RELATIONS & TRADE REMEDIES

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Introduction

South Africa's trade policy provides the key principles for its global integration strategy with respect to engagements at regional, bilateral and multilateral levels. It is designed to define the contribution that trade policy can make to the country's broad economic development and how it will support the National Industrial Policy Framework (NIPF). The NIPF states that "our fundamental approach is that tariff policy should be decided primarily on a sector by sector basis, dictated by the needs and imperatives of sector strategies".

World Trade Organisation

The establishment of the World Trade Organisation (WTO) on 1 January 1995 was a significant development in the multilateral trading system. As the body responsible for regulating world trade, its role has become increasingly difficult. This is because of the proliferation of preferential trading agreements and the introduction of more complex issues such as non-tariff barriers and the so-called "new generation" or "Singapore issues".

The latest round of trade negotiations being conducted through the WTO at the multilateral level, the Doha Development Agenda (DDA), has been lengthy and erratic in its progress with regard to reforms. A contributing factor to this delay may be the fact that many developing countries feel that they have not benefited from becoming integral members of the trading system and making commitments to trade reform. There is a general feeling that the balance in the world trading system remains in favour of the developed nations.

Commitments regarding the liberalisation of agricultural trade is a particularly thorny issue as emerging economies are of the view that the developed world, mostly represented here by the United States (US) and the European Union (EU), have kept their domestic markets highly protected in an area deemed to be of comparative advantage for developing countries. The DDA was meant to have realised some serious commitments on this front from the so-called North, but this has not materialised. Instead, these countries are pushing for the South to commit on issues of interest to them, such as reductions in tariffs on industrial goods, intellectual property rights, investment and services.

After five years of difficult negotiations and little headway, the former Director-General of the WTO, Pascal Lamy, formally suspended the talks in July 2006. It was not until January 2007 that a group of trade ministers from key countries agreed to resume negotiations, primarily in an effort to achieve some consensus before the US Trade Promotion Authority (a body able to fast-track the implementation of negotiations) was due to expire in mid-2007. No consensus was reached and this round of negotiations has yet to be concluded. A compromise package of subsidy and tariff cuts was proposed in July 2007, but did not prompt a close to the negotiations.

During the 2013 World Economic Forum (WEF) at Davos, trade ministers agreed that the core of any outcome of the WTO Ministerial Conference in Bali, Indonesia (Bali Ministerial), should include trade facilitation, some agricultural components and items of special interest to developing and least-developed countries. Unlike previous WEF gatherings, the trade ministers at the 2013 WEF did not make any commitment on negotiations of the DDA in Bali. A much more pragmatic approach was adopted instead. Ministers agreed that success in Bali should not be seen as the end of the DDA, but should be considered as a stepping stone on the way to address the remaining issues under the DDA.

The WTO went to the Bali Ministerial in December 2013 with the new Director-General, Ambassador Roberto Carvalho de Azevêdo of Brazil. While there are no signs of when the DDA will be concluded, the appointment of a Brazilian diplomat somewhat demonstrates the growing influence of developing countries in the WTO and has been widely welcomed as a positive move.

Important Emerging Markets

South Africa is strategically aligning itself to partner with important emerging economies. It is doing this both at a multilateral level through, for example, the G-209 and, more recently, through its membership of the Brazil, Russia, India, China and South Africa (BRICS) network; and at a trilateral level through the arrangement among the India, Brazil and South Africa (IBSA) group of countries.

The idea of the Brazil, Russia, India and China (BRIC) group of countries was first conceived in 2001 by Goldman Sachs as part of an economic modelling exercise to forecast global economic trends over the next half a century. BRIC foreign ministers met in New York on 21 September 2010 on the sidelines of the United Nations General Assembly (UNGA) and agreed that South Africa may be invited to join them. Accordingly, South Africa was invited and in 2011 the acronym changed to BRICS.

The BRICS economies are considered to be among the fastest developing.

China is South Africa's leading trading partner, both as an export destination and as a source of imports. South Africa has had strong relations with India and Brazil since the IBSA tripartite alliance was formed in 2003. IBSA countries have always played an active role in the WTO. In late 2005, India and Brazil offered to halve their tariffs on industrial goods and services, which would align them to South Africa's levels of liberalisation in this area, in order to facilitate a deadlock reached in the DDA. While the impasse continues to this day, such developments have served to contribute towards cementing the tripartite alliance under the IBSA and present an increasingly united front with greater negotiating leverage within the WTO arena. With all the IBSA countries being members of BRICS, however, it is not clear how IBSA will function in the future.

South Africa could potentially learn a great deal from the experience of these countries. India and China, for example, have both undergone substantial trade liberalisation and regulatory reform. In the past decade and prior to its accession to the WTO, China had initiated a significant trade and investment liberalisation programme, primarily unilaterally driven, although pressure from the US to do so was evident. Since its accession, such reforms have accelerated.

This said, these countries have adopted a combination of tariff protection and selective trade liberalisation sequenced in a way that did not disrupt local productive capacity. It is clear that there are benefits from opening up an economy; adopting the approach that maximises these benefits is the issue. Reduction of tariffs alone is unlikely to increase exports dramatically.

According to work done by the World Bank and Organisation for Economic Cooperation and Development, developing countries, mostly from East Asia and accounting for a total population of around three billion people, have more than doubled their trade to gross domestic product (GDP) ratios and real per capita incomes since the 1980s. Average import tariffs were reduced by more than a third over this period.

Meanwhile, the remaining developing countries, which account for around 1.5 billion people, have liberalised little and have had few improvements in their export to GDP and income per capita ratios. It is imperative to note, however, that liberalisation must be part of broader institutional reforms that are supportive of the market. The key objective is to contribute to greater economic efficiency.

Protection contributes to inefficiency by delaying the restructuring of inefficient industries and restricting consumer and producer choice. In Southeast Asia, industries that succeeded were those that were opened up to inward investment and subjected to lower tariffs. Infant industry protection was, by and large, unsuccessful.

It is apparent that an industrial strategy should focus on supporting the market and strengthening institutional structures. It is felt that South Africa is too focused on negotiating bilateral agreements that are superficial in nature and do not really address the needs of the economy as a whole. The focus should be on deepening unilateral commitments in the direction of benefiting the economy as a whole.

Evolution of South Africa's Trade Policy

Since becoming a democracy, South Africa has opened up its economy on various levels and liberalised its trade regime substantially. It has also normalised its trade environment by removing the dual exchange rate and opening up its capital account. The country became a founding member of the WTO in 1995; negotiated bilateral agreements with the EU, Mercosur and the European Free Trade Association (EFTA); and committed to some unilateral liberalisation.

As South Africa entered the mid-1990s, it embarked on a change of trade policy stance from import substituting industrialisation towards export orientation. Trade liberalisation was undertaken in earnest as numerous trade reforms were implemented and certain sectors were incentivised (through specific instruments providing, for example, targeted export subsidies). The depreciation of the exchange rate at the time contributed positively to South Africa's adoption of a more open trade stance.

South Africa's tariff reform process over the past 16 years has essentially encompassed four facets:

- Firstly, nominal tariffs, particularly in manufacturing (which was historically the most protected sector) were reduced. At the time, as a founding member of the WTO and signatory to the General Agreement on Tariffs and Trade (GATT), South Africa committed itself to a tariff reform package and phase-out of distorting subsidies.
- Secondly, the number of tariff bands and categories was reduced.
- Thirdly, surcharges and quantitative controls, particularly related to agriculture, were removed.
- Fourthly, there was a phased unilateral reduction of tariffs.

In the 1990s South Africa phased out its general export subsidies under the General Export Incentive Scheme in accordance with its WTO commitments and introduced WTO compatible supply-side incentives. Explicit subsidies still exist for two sectors, namely clothing and textiles and motor vehicles and components.

The Motor Industry Development Programme, which was deemed to be incompatible with the WTO, has been replaced with the Automotive Production Development Programme (APDP). The objectives of the APDP are to create an environment that will enable registered light motor vehicle manufacturers to significantly grow production volumes and enable component manufacturers to significantly grow value addition so that additional employment opportunities can be created across the automotive value chain.

The clothing and textiles sector is subsidised through the Textile Clothing Industry Development Programme (TCIDP) which replaced the Duty Credit Certificate Scheme (DCCS). The DCCS was introduced on 31 March 2006, with its implementation being for a period of two years from 1 April 2005 to 31 March 2007. One condition of the TCIDP was that the tradability of duty credit certificates be limited to manufacturers for the export period of 1 April 2006 to 31 March 2007. Late in 2007, the DCCS was extended to March 2009.

South Africa has also embarked on a process of significant tariff reform. During the 1990s import controls and surcharges in manufacturing were gradually phased out and quantitative restrictions related to agriculture were converted into tariffs. These tariffs in turn were reduced substantially except for a few key commodities such as sugar. Import surcharges were also abolished.

The tariff structure has also been simplified over the past 15 years, with both the number of tariff lines being almost halved from 12 500 in 1990, and the number of different bands also being reduced by 50% from 200 in 1990. Tariff peaks do, however, still exist and effective rates of protection remain high in certain key products.

On a multilateral level, South Africa has been active. The country has participated in 15 out of the 18 plurilaterals that it was invited to. In these sessions, the Department of Trade and Industry (DTI) realised that its negotiating stance had been of a defensive nature as it struggled to identify market access opportunities due to an absence of an institutional relationship with the private sector. The DTI has expressed its commitment to improve on this issue. Under DDA, the DTI is currently studying the texts on agriculture that have been released. Once this process is completed they will be able to assess whether their offer needs to be revised before being formally tabled.

The multilateral trade agenda has now begun focusing less on traditional areas of trade reform, such as tariffs, and more on the "new generation issues" and technical barriers to trade. South Africa's focus has been on issues of rules of origin, subsidies, Government procurement and safeguard mechanisms. In this regard, its negotiating team has been actively working with the Association for Southeast Asian Nations (ASEAN), the Africa group and other like-minded countries. There has, however, been very little progress due to a stand-off between ASEAN and the EU. ASEAN wants to focus on safeguard measures while the EU is pushing for more movement on Government procurement.

These issues have led to the increasing complexity and lethargy associated with trade negotiations done through the WTO. As a result, South Africa, like other countries, has shifted its attention to pursuing bilateral relations with new trade partners and regional trade groupings.

South Africa concluded its first major preferential trade agreement, the Trade and Development Cooperation Agreement (TDCA), as a democracy with the EU. The TDCA came into force on 1 January 2000 but to date two agreements – governing "Fisheries" and "Wine & Spirits" – have yet to be ratified by South Africa. The "Wine & Spirits" agreement provides for financial compensation to South Africa for its agreement to phase out the use of certain European names of origin, for example port and sherry. South Africa has delayed its ratification of the agreement as it needs to assess more clearly the implications of accepting the "geographic indications" clauses which would affect exports of wine and cheese, as well as canned goods.

Besides the TDCA, South Africa has actively pursued other bilateral and regional trade negotiations in the past 15 years. At the time of the TDCA coming into force, South Africa was party to the Southern African Development Community (SADC) Trade Protocol and Southern African Customs Union (SACU).

Following the strengthening of the SACU in 2003, South Africa's trade negotiating mandate was reduced as this process needs to be undertaken in consultation with other SACU member states. This marked an important shift in trade policy for South Africa as it meant that all Free Trade Agreements (FTAs) concluded by the country needed to be done through SACU as a regional grouping. This has important implications not only for South Africa's negotiating capacity but also for the political sensitivity created by the perception of South Africa as a nation influencing regional economic and political outcomes.

While negotiating within a bloc has benefits, it can also create complications. For example, China is reluctant to negotiate with SACU because Swaziland recognises Taiwan as an independent state. South Africa's trade policy and negotiating stance has become substantially more complicated over time and now needs to take into account a host of new issues. Negotiations at a bilateral level are complicated further in light of the various levels of development among the SACU member states.

The negotiation of a SACU-US free-trade agreement is an example of how such processes struggle to become concluded due to asymmetrical levels of development and the increased complexity of the issues being negotiated. After protracted negotiations the two sides failed to reach a consensus in 2006. In 2005, SACU called for a phased approach and concluded an initial basic free trade agreement. The new-generation issues were negotiated later on in the process, that is once SACU had achieved greater harmonisation on these issues internally. The negotiations deadlocked as a result and have not been revisited since. Some analysts feel that South Africa missed an opportunity to fast-track such harmonisation and commit to a more comprehensive agreement. They argue that the benefits from trade agreements signed with, for example, India and China will stem from commitments made on the new-generation issues and not really from trade in goods. Calls are for greater harmonisation within SACU of, for example, regulatory frameworks, and the establishment of key SACU institutions to fully implement the SACU Agreement.

South Africa had hoped to conclude FTAs with the EFTA, the US, and Mercosur in 2005 as well as to begin talks with India. So far only the agreements with EFTA and Mercosur have been concluded, with the former being a fully-fledged FTA and the latter a preferential trading agreement.

It has become apparent, however, that negotiation of market access can be problematic and needs to be carefully considered. China is again a case in point. In recent years, South Africa, like other countries, has faced severe competition from China within the textiles and clothing sector. Chinese imports clearly benefit from cheap labour and are much more competitive than local producers in terms of price. The resulting flood of cheaper imports has led to many a call from industry for South Africa to restrict such imports by increasing tariffs and implementing a quota system. The key problem with this is that South African consumers would suffer as they would no longer have access to more affordable clothing.

On the other hand, China's rapid growth and subsequent demand for resource-based goods has benefited South African exports. By raising duties on Chinese imports, South Africa runs the risk of retaliation by China – reducing our market access to their markets. It is pertinent to note that textiles and clothing is already one of the most protected import sectors with tariffs of 30% to 40% (despite a decrease of 10% to 20% since the 1990s). Chinese imports are still cheaper than domestically produced goods despite these tariffs. The South African textiles and clothing sector would need to compete on more than price to be able to succeed. Focus on improved quality and better designs are areas in which South African manufacturers could compete more effectively.

South Africa is also a member of the SADC, which has set ambitious targets for its member states. The SADC has signed a number of accords, though important questions remain about the SADC's members' ability to implement these.

South Africa has not only been intimately involved with the deepening of the SADC itself, but a further facet of South Africa's relationship with the SADC is its inclusion in the SADC's Economic Partnership Agreement (EPA) negotiations with the EU. In light of South Africa's relatively large negotiating capacity in the region and, following the phasing out of Cotonou and the introduction of the EPAs, South Africa's role within the region vis-à-vis the EU has become enhanced.

In parallel, it is clear that trade negotiations have already become more complex as South Africa has to negotiate taking into account the interests and stakes of a growing number of countries. South Africa has been firm in its position that no binding commitments should be made by countries within the region in relation to certain issues. It feels strongly that the region needs to be more convergent internally before seeking to open itself up, for example, in relation to competition policy. As such, it sought a five-year window period within which the region could assess its ability to liberalise fully in these areas, but this proposal was rejected by the EU.

South Africa has reiterated its commitment to the liberalisation of the services sector, but it is clear in its view that this should not take place prematurely. Within the SADC, a framework regarding the modalities for liberalisation of the sector is being negotiated. It has been agreed that this would need to take the form of a protocol, which means it requires ministerial approval at member-state level. However, South Africa is still to sign off on the text itself and it will be some time before such a protocol comes into effect.

Alongside the bilateral and the plurilateral trade agreements, South Africa is also a beneficiary of a unilateral preferential trade measure introduced by the US in the form of the Africa Growth and Opportunity Act (AGOA). AGOA offers South Africa and other qualifying African countries duty-free and quota-free market access to the US. It has assisted in boosting the level of trade between South Africa and the US and has helped South Africa to attract foreign investment from companies that want to access the US market. As AGOA is set to expire in 2015, South Africa has begun lobbying efforts for the extension of AGOA and to secure more benefits from an extended AGOA.

Industrial Policy

In January 2007, Cabinet adopted the NIPF that sets out Government's broad approach to industrialisation with certain core objectives. Guided by the NIPF, the implementation of industrial policy was set out in an Industrial Policy Action Plan (IPAP). In August 2007, Cabinet approved the first IPAP that included "easy-to-do" actions. There has, however, been growing recognition that industrial policy needs to be scaled-up from "easy-to-do" actions to "need-to-do" interventions, to generate a new path of industrialisation. A process of intensive consultation and analysis, led by the Minister of Trade and Industry, culminated in a revised IPAP for the 2010 to 2011 and the 2012 to 2013 (IPAP 2) financial years. It was recognised that a one-year IPAP is too short a period and hence future IPAPs would set out key interventions over a three-year rolling period, updated annually and with a 10-year outlook on desired economic outcomes.

The IPAP 2 represented a significant step forward in South Africa's industrial policy efforts. Since the launch of IPAP 2 in February 2010, one of the key highlights in respect of certain sector strategies has been that the International Trade Administration Commission (ITAC) has processed numerous applications for increases, rebates and reductions of duties in line with IPAP priorities. In addition, an early warning system was developed by the South African Bureau of Standards (SABS) to identify technical barriers to trade for exporters.

IPAP 2 2011-2012 to 2013-2014 constitutes a consolidation of plans and programmes outlined in the previous iteration of IPAP 2. Economic data and sector profiles have been updated and action plans that were completed have been removed so that other action programmes, designed to strengthen and take forward the development of IPAP, may be prioritised.

In his statement to the National Assembly on the IPAP 2, Minister Rob Davies stated that IPAP 2 "represents a consolidation and strengthening of plans and programmes outlined in the previous version of the document. Key Action Plans have been upgraded to augment government's intervention to support industrial development and employment creation. Concrete interventions in two new traversal interventions, namely skills for the economy and innovation and technology, have been added to the four traversal interventions in IPAP 2 2011/12 – 2013/14… significant progress has been registered since the publication of IPAP 2 in 2010. Plans laid out in the 2011/12 iteration of IPAP 2 will deepen and strengthen this work. It is anticipated that these interventions will lead to 43 000 direct jobs and 86 000 indirect jobs over the course of the next financial year."

Contribution of IPAP to the New Growth Path

Industrial policy and the IPAP form part of a larger set of inter-related policies and strategies that make up Government's New Growth Path (NGP). Government has committed to making employment creation the main criterion for economic policy. The NGP, launched in November 2010 by the Ministry of Economic Development, articulates this sentiment.

The NGP identifies a number of job drivers led by agriculture, mining, manufacturing, tourism and other high-level services that can create substantial employment. It proposes both sectoral interventions and a package of macroeconomic and microeconomic policies designed to ensure that the economy becomes more competitive and more employment friendly. The IPAP constitutes a central tool in the NGP job-creation strategy.

Application for Tariff Increases

Tariff applications are regulated by the International Trade Administration Act, No. 71 of 2002 (the ITA Act), which should be read together with the Tariff Investigations Regulations promulgated under the ITA Act and the Customs and Excise Act, No. 91 of 1964 (the Customs and Excise Act).

The NIPF identifies tariffs “as instruments of industrial policy that have implications for employment, investment, technology and productivity growth”. The scope for the selective use of tariffs has also been identified under certain circumstances. Applications are made to ITAC.

Trade Remedies

The WTO agreement on trade in goods allows WTO members to protect themselves against unfair trade practices. Anti-dumping or countervailing duties may be imposed in respect of dumped or subsidised imports.

Apart from anti-dumping and countervailing measures, imports into a particular territory may also be subject to safeguard measures. Unlike anti-dumping and countervailing measures, safeguard measures are a fair trade remedy available to WTO members and essentially constitute emergency action against imports of particular products. Each of these trade remedies has been used in South Africa.

Anti-dumping measures

The WTO rules on dumping are contained in article VI of GATT and the WTO Anti-Dumping Agreement. South African legislation on dumping is contained in the ITA Act and the regulations thereto; the Board on Tariffs and Trade Act, No. 107 of 1986; and the Customs and Excise Act.

Dumping occurs when a manufacturer in one country exports a product at a lower ex-factory price (export price) than what is used when selling it to its domestic customers (normal value). The comparison of the normal value to the export price is done at the same level of trade and typically at ex-factory level.

Trade authorities in the importing country are entitled to impose anti-dumping duties if they determine that the domestic manufacturing industry is injured by dumped imports. Such investigations are either initiated of their own accord or upon application by the domestic manufacturing industry in the importing country.

The level of duty is based on the margin of dumping which usually reflects the difference between the normal value and export price. Trade authorities are also entitled to apply the lesser duty rule, that is, a duty level which is lower than the margin of dumping if this is sufficient to stop the injury. Only exporters that cooperate with the importing country’s trade authorities benefit from the lesser duty rule.

An anti-dumping application is made on a prescribed form and if, after verification of the information provided in the form, ITAC is satisfied that there is a *prima facie* case, ITAC initiates an investigation by publishing a notice in the Government Gazette. At the same time, ITAC advises the embassies of affected countries and issues interested parties among exporters and importers with questionnaires to complete and return to ITAC. After considering the responses from the interested parties, ITAC may impose provisional duties while it continues with the investigation in order to stop the injury in the interim period. Provisional duties may be imposed no less than 60 days after the initiation of an investigation and may only remain in place for six months. This period may be extended to nine months if requested by an interested exporter.

Once ITAC completes its investigation and determines that dumped imports caused the applicants’ injury, it makes a recommendation to the Minister of Trade and Industry to impose duties. The Minister of Trade and Industry will, if he accepts ITAC’s recommendation, request the Minister of Finance to amend the Schedule to the Customs and Excise Act to impose definitive anti-dumping duties which will replace the provisional duties.

Countervailing measures

The procedure followed in respect of countervailing investigations is similar to the procedure followed in anti-dumping investigations except that they relate to subsidised imports. If products are imported at prices that are subsidised by the Government of the exporting country and such subsidised imports cause material injury to the SACU industry, countervailing duties may be imposed.

The international rules on subsidies and countervailing duties are contained in the WTO Agreement on Subsidies and Countervailing Measures. The ITA Act and its Countervailing Regulations apply to such investigations.

The evidentiary burden on an applicant in respect of injury and causation in countervailing investigations is generally the same as that of anti-dumping investigations. It must, however, first be determined whether a subsidy exists or not.

A “subsidy” is defined as any benefit conferred by any Government of a country that enables a producer of an industry to enhance its export competitiveness. Once it has been determined that there is a subsidy, the extent of the subsidy must be determined. Only if a subsidy is 1% or more of the invoiced export price can a countervailing measure be imposed, as a subsidy which is less than 1% is deemed to be *de minimis*. The *de minimis* threshold for developing countries is 2%.

Safeguard measures

The ITA Act defines “safeguard measure” as a remedy or procedure for use in response to disruptive competition. Essential concepts recognised in international law on safeguard measures are set out in greater detail in article XIX GATT, 1994 and the WTO Agreement on Safeguards promulgated pursuant to article XIX (the Safeguard Agreement) and the Safeguard Regulations promulgated under the ITA Act (Safeguard Regulations).

In terms of paragraph (a) of the preamble to the Safeguard Regulations, a safeguard measure may only be imposed in response to a rapid and significant increase in imports of a product as a result of an unforeseen development, where such increased imports cause or threaten to cause serious injury to the SACU industry producing the like or directly competitive product. This is consistent with the provisions of Article 2 of the Safeguard Agreement.

Regulation 17 of the Safeguard Regulations provides that as soon as the Commission has made a preliminary determination that there are critical circumstances where a delay would cause damage that would be difficult to repair, and there is clear evidence that increased imports have caused or are threatening serious injury, it may request the Commissioner of the South African Revenue Service (SARS) to impose, by way of a notice in the Government Gazette, a provisional duty on the products that are the subject of the investigation. In such event, the Commissioner for SARS is bound to impose such provisional duty. The provisional duty is limited to 200 days from the date it is imposed and is regarded as part of the total duration for which safeguard measures are in force.

Article 5.1 of the Safeguard Agreement and Safeguard Regulation 21.1 both provide, among other things, that a WTO member country may apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

The procedure followed by the Commission in conducting safeguard investigations is similar to that followed in anti-dumping or countervailing investigations. The only difference is that in addition to oral hearings, which the Commission may grant to a party on request, the Commission holds a single public hearing specifically to discuss public interest issues relating to the proposed safeguard measure.

In a recent safeguard investigation, the Commission imposed provisional payments without first providing interested parties an opportunity to make representations to the Commission – an opportunity usually afforded in anti-dumping and countervailing investigations. This decision was challenged in the High Court and was held to be unlawful.

Conclusion

As the South African economy faces slow recovery from the aftermath of the global economic crisis, Government is expected to use more trade policy measures to encourage growth. Government has begun taking a tough stance in trade negotiations to preserve policy space for critical interventions in the economy when required. South Africa is also diversifying its trade relations by increasing trade with emerging economies while maintaining relations with its traditional trading partners, which will benefit the country in the long term.

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