

## SOUTH AFRICA

### TRADE SUMMARY

The U.S. trade deficit with South Africa was \$1.5 billion in 2002, an increase of \$29 million from 2001. U.S. goods exports in 2002 were \$2.5 billion, down 14.7 percent from the previous year. Corresponding U.S. imports from South Africa were \$4.0 billion, down 9.2 percent. South Africa is currently the 37<sup>th</sup> largest export market for U.S. goods. U.S. exports of private commercial services (i.e., excluding military and government) to South Africa were \$1.3 billion in 2001 (latest data available), and U.S. imports were \$891 million. The stock of U.S. foreign direct investment (FDI) in South Africa in 2001 was \$3.0 billion, down from \$3.2 billion in 2000. U.S. FDI in South Africa is concentrated largely in manufacturing, services and wholesale sectors.

South Africa has increasingly opened its market since 1994 by reducing tariff rates and non-tariff barriers. The South African government aims to open the market further in order to increase trade and to develop more competitive domestic industries. It is exploring a number of free trade agreements, including negotiations with the United States, and is active in the WTO Doha Development Agenda negotiations in Geneva.

### IMPORT POLICIES

#### Import Permits

Under the Import and Export Control Act of 1963, the Minister of Trade and Industry may control the import of certain goods into South Africa. The list of restricted goods has decreased in recent years. The products that still require import permits are: fish and fish products, residues, petroleum products, ozone-depleting chemicals, firearms and ammunition, gambling equipment and radioactive chemical elements. The rules generally prohibit the import of used products, including clothes.

#### Tariffs

To comply with its WTO commitments, since 1994 South Africa has reformed and simplified its tariff structure. It has reduced tariff rates from an import-weighted average tariff rate of more than 20 percent to 7 percent. Notwithstanding these reforms, importers have complained that South Africa's tariff schedule remains complex and can create uncertainty. Tariff rates mostly

fall within eight levels ranging from 0 percent to 30 percent, but some are higher. There are high tariffs on imports of textiles and apparel, including some specific duties. In the Uruguay Round, South Africa agreed to a twelve-year phase down in duties on textiles and apparel, but since then has unilaterally moved to a seven-year phase down process. As of September 1, 2002, the following rates, which are also the end rates, apply:

Apparel	40 percent
Yarns	15 percent
Fabrics	22 percent
Finished goods (Household goods)	30 percent
Fibers	7.5 percent

#### Dumping

South African companies began submitting a number of antidumping petitions during the past five years. The Board of Tariffs and Trade (BTT) indicated that this increase in petitions had been expected as a result of tariffs being phased down. Previously, formula duties and even high rates of *ad valorem* or specific duties were sometimes used to counter dumping. Due to South Africa's WTO binding commitments and tariff policy, however, this practice is no longer followed. The number of antidumping petitions filed decreased in 2002. While no new antidumping investigations against imports from the United States were instituted in 2002, antidumping duties remain on U.S. poultry.

#### Free Trade Agreement with the European Union

South Africa and the European Union (EU) began to implement the trade provisions of their agreement on Trade, Development and Cooperation in 2000. Under the Agreement, South Africa and the EU will establish a free trade area over a transitional period of up to twelve years for South Africa, and up to ten years for the EU. The FTA provides for the reduction and eventual elimination of duties on trade between the EU and South Africa. U.S. firms exporting to South Africa are concerned that their products will be less competitive because of the preferences given to the EU. For example, there is a five percent differential between the duties on EU and U.S. trucks.

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### STANDARDS, TESTING, LABELING AND CERTIFICATION

#### Biotechnology

There has been an active debate in South Africa on products produced using modern biotechnology – often referred to as genetically modified organisms (GMOs). The Genetically Modified Organisms Act that came into force on December 1, 1999, aims to ensure that all activities involving the use of GMOs (including production, import, release and distribution) will be carried out in such a way as to limit possible harmful consequences to the environment. Since 1999, some stores have promoted claims of selling a limited range of GMO-free products, while a few consumer groups have urged the Ministry of Health to introduce compulsory GMO labeling. The South African government issued draft regulations on the labeling of biotechnology products in mid-2002. The comment period has expired but the South Africa government has not yet issued the final regulation.

In June 2001, the South African government published the National Biotechnology Strategy for South Africa, a document that shows the South African government's intent to stimulate the growth of biotechnology industries. The document states that biotechnology can make an important contribution to national priorities, particularly in the area of human health, food security and environmental sustainability. Environmental and health groups continued to exert pressure on the South African government in 2002 to examine the safety of GMO foods.

#### Agricultural Standards

The Directorate of Plant Health and Quality within the National Department of Agriculture is responsible for setting standards for certain agricultural and agricultural-related products. This includes aspects such as composition, quality, packaging, marketing, and labeling as well as physical, physiological, chemical, and microbiological analyses. These standards are published pursuant to the Agricultural Product Standards Amendment Act of 1998 and the Liquor Products Act of 1989 in the form of regulations for products to be sold on the local market and in the form of standards and requirements for products that are intended for export. U.S. distilled spirits producers have

complained that South African regulations that require a minimum alcohol content by volume (a.b.v.) for whisky, rum and other products limit the marketing of U.S.-origin spirits that meet the international standard of 40 percent a.b.v.

The South African government requires prospective importers to apply for an import permit for certain controlled products. The import of irradiated meat from any source is still banned on public health grounds. U.S. horticultural producers have complained about various South African phytosanitary barriers on the importation of apples, cherries, and pears from the United States. They estimate that, if these barriers were removed, U.S. exports of each of these fruits could increase by \$5 million to \$25 million in annual sales to South Africa.

### GOVERNMENT PROCUREMENT

Government purchases are by competitive tender for project, supply and other contracts. The South African government does use its position as both buyer and lawmaker, however, to promote the economic empowerment of historically disadvantaged individuals (HDIs) through its Black Economic Empowerment (BEE) program. Regulations set a legal framework and formula for allowing preference points to HDIs when tendering for a government procurement contract. Points are awarded based on such criteria as a percentage of HDI ownership and the percentage of HDI managers.

While many U.S. companies operating in South Africa have significant programs that support HDIs, they have concerns about the lack of clarity and consistency in the rules. A major concern is whether HDI equity ownership will become mandatory and a cost of doing business with the South African government. Companies hope that regulations implementing the Preferential Procurement Policy Framework Act announced in 2001 will increase transparency in government procurement by establishing clear rules for preferential awarding of government contracts to firms with black ownership or shareholders.

The South African government introduced an Industrial Participation (IP) program in 1996. All government and parastatal purchases or lease contracts (goods, equipment or services)

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with an imported content equal to or exceeding \$10 million (or the rand equivalent thereof) are subject to an IP obligation. This obligation requires the seller/supplier to engage in commercial or industrial activity equaling or exceeding 30 percent of the imported content of total goods purchased under government tender. U.S. companies are concerned about the lack of clarity and inconsistent application of the rules. South Africa is not a signatory to the WTO Agreement on Government Procurement.

### INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION

#### Legal Regime

Property rights, including intellectual property rights, are protected under a variety of laws and regulations. The South African government passed two IPR-related laws in parliament at the end of 1997 – the Counterfeit Goods Act and the Intellectual Property Laws Amendment Acts – to enhance IPR protection. The Department of Trade and Industry (DTI) administers these acts. Although South Africa's intellectual property laws and practices are generally in conformity with those of the industrialized nations, there are deficiencies in enforcement and in guaranteeing the protections afforded under these laws. The enforcement of individual copyright claims is complicated by the lack of evidentiary presumptions in the law, requiring use of an expensive registration system or submission of extensive proof of copyright subsistence and ownership.

South Africa introduced measures to enhance enforcement of the Counterfeit Goods Act in 2001. The South African government appointed more inspectors, designated more warehouses for counterfeit goods, destroyed counterfeit goods, and improved the training of customs, border police and South African police services officials. Despite these efforts, the U.S. copyright industry estimates that trade losses due to the piracy of copyrighted works are still large, especially in the film industry. Although law enforcement authorities often cooperate with the private sector in investigating allegations of counterfeit trade, there are concerns about laxity in enforcement of IPR laws against imports of pirated goods. Complainants can take both civil and criminal action against offenders.

South Africa is a member of the Paris Union and

acceded to the Stockholm Text of the Paris Convention for the Protection of Intellectual Property. South Africa is also a member of the World Intellectual Property Organization (WIPO).

#### Pharmaceutical IPR Issues

The pharmaceutical industry has argued in the past that changes made in 1997 to South Africa's Medicines Act undermine patents and could be a violation of South Africa's TRIPS obligations. On April 19, 2001, however, following a three-year protracted legal battle with the South African government, 39 drug companies dropped their court challenge to South Africa's Medicines and Related Substances Control Amendment Act. The case revolved around the right of the South African government to permit parallel imports or the local manufacturing of patented drugs. In the agreement with the pharmaceutical companies, the South African government agreed that its implementation of the Medicines Control Act would be consistent with the South African constitution and WTO Rules. The South African Health Ministry also agreed to consult with the industry and public on regulations implementing the Act. South Africa actively participates in negotiations in the WTO to find a solution to problems cited in the Doha Declaration on TRIPS and Public Health.

#### Software/Audio Visual IPR Issues

Software piracy still occurs frequently in South Africa. Between February and March 2001, the Business Software Alliance (BSA) gave South African organizations a one-time opportunity to legalize their software by registering. The campaign received 608 registrations to legalize pirated or illegally installed software, representing over 60,000 desktop personal computers. An independent research firm, International Planning and Research Corporation, conducted a survey for the BSA during 2001. They found that the local piracy rate dropped from 45 percent to 38 percent. Piracy in the video and sound industry also continues to be a concern. The Motion Pictures Association estimates video and optical disk piracy to be 16 percent.

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### SERVICES BARRIERS

#### Telecommunications

Previously in the WTO, South Africa made a series of value-added telecommunications commitments and, for basic telecommunications services, adopted the WTO reference paper on pro-competitive regulatory principles. The South African government also committed to license a second supplier no later than January 1, 2004, to compete against the current monopoly supplier, Telkom, in long-distance, data, telex, fax and private leased circuits services. Despite the end of Telkom's exclusivity period in May 2002, Telkom has been able to continue its monopoly because of the absence of a second network operator. Nineteen percent of the new operator will be reserved for BEE groups and 30 percent will be allocated to the telecommunications divisions of Eskom (the state energy utility) and Transnet (the transport parastatal), which already have some infrastructure in place. Equity interest from either foreign or domestic investors in the second national operator (SNO) will make up the remaining 51 percent and provide capital and technical expertise needed to compete with the incumbent operator. As of year-end 2002, two consortiums have submitted bids for the majority equity share in the SNO, although no winner has been named.

Internet Service Providers (ISPs) and value-added network services (VANS) have cited problems with Telkom during the past number of years. Telkom refused to provide new facilities to VANS operators as it claimed that VANS and ISPs are resellers of basic services and thus were infringing on Telkom's monopoly. This problem is made even more acute by South Africa's failure to liberalize resale services between 2000 and 2003, as set forth in its WTO schedule on basic telecommunications. South Africa's telecommunications regulatory authority, ICASA, has sole authority to determine whether these services are illegal. Service providers have complained about ICASA ineffectiveness in asserting its authority over Telkom and have pursued remedies in the Pretoria High Court. Telkom also often challenges decisions taken by ICASA, leading to delays in implementing rulings. The Amended Telecommunications Act of 2001 allows only Telkom and the SNO to provide voice over Internet protocol (VOIP) services, and it appears to expand the definition of a public switched telecommunications service

(PSTS) to include the provision, repair and maintenance of any other telecommunications apparatus. Interested parties continue to raise questions concerning the consistency of these and other provisions of the Amended Telecommunications Act with South Africa's WTO obligations. The United States continues to monitor South Africa pursuant to section 1377 of the Trade Act of 1988 for compliance with its WTO commitments.

South Africa passed an "e-commerce" bill on July 31, 2002, designed to encourage use of the Internet in business transactions. The new law is controversial because of the uncertainty of its impact on the ".za" domain name, Internet retailing, encryption providers, unsolicited e-mail, and government access to private databases. For example, the bill would give the South African government sole control of the ".za" domain name in contrast to international norms, and would require retailers to provide a mandatory seven-day return policy for all products, including music and software.

#### Other Services

The United States is seeking to reach an open skies air transport agreement with South Africa. During negotiations in May 2001, however, South Africa indicated that it would not agree to open skies, desiring instead a more incremental liberalization of the existing air transport agreement. Open skies agreements provide for open route rights, capacity, frequencies, designations and pricing, as well as opportunities for cooperative marketing arrangements, including code-sharing and airline alliances. South African Airways (SAA), the national airline wholly-owned by the transport parastatal Transnet, had previously noted concerns about U.S. airlines exercising fifth-freedom rights in Africa and thereby impinging on one of SAA's strategic markets.

South Africa's Postal Services Act and related regulations appear to impose burdensome licensing and registration requirements and to discriminate against foreign express couriers in favor of South Africa Post. Interested parties have raised questions about the consistency of the Act and with the country's WTO obligations.

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### ANTICOMPETITIVE PRACTICES

#### Ownership Patterns

There is an historical legacy of concentrated ownership in some sectors of the South African economy. During the apartheid years, a large portion of the South African population was entirely excluded from ownership of business enterprises. Moreover, government policies from 1961 to 1994 prohibited some successful companies such as South African Breweries, Anglo American (including DeBeers) and Sasol from investing abroad. They therefore expanded their activities locally. As a result, conglomerates with considerable market power developed in the South African marketplace. This situation is beginning to change, however, as many of the major players have now started to expand internationally and have listed on foreign stock exchanges. Together with the more effective competition authority and strong sectoral initiatives to enlarge the share of black participation in the economy, South Africa's business environment is becoming more competitive and more open to new entrants (including U.S. companies) in the market.

Sectors such as energy, transport and telecommunications have also historically been controlled or dominated by parastatals. These sectors are also gradually restructuring and opening up for competition from the private sector. The privatization program of the South African government, although moving slowly, is also starting to bring a change in ownership patterns.

### ELECTRONIC COMMERCE

Effective July 31, 2002, all companies that do business in South Africa via electronic commerce must comply with the new Electronic Communications and Transactions Law. The new law was designed to facilitate electronic commerce, but may increase regulatory burdens and introduce uncertainty into the future of electronic commerce in the country. The Law requires government accreditation for certain electronic signatures, takes government control of the ".za" domain name, and requires a long list of disclosures for web sites that sell via the Internet.

### OTHER BARRIERS

#### Transparency, Corruption and Crime

South African law provides for prosecution of government officials who solicit or accept bribes. Penalties for offering or accepting a bribe may include criminal prosecution, monetary fines, dismissal for government employees, or deportation for foreign citizens. South Africa boasts no fewer than ten agencies engaged in anti-corruption activities. Some, like the Public Service Commission (PSC), Office of the Public Protector (OPP), and Office of the Auditor-General (OAG), are constitutionally mandated and address corruption as only part of their responsibilities. Others, like the South African Police Anti-Corruption Unit, and the Directorate for Special Operations, more popularly known as the Scorpions, are dedicated to combating crime and corruption. High rates of violent crime, however, are a strain on capacity and make it difficult for South African criminal and judicial entities to dedicate adequate resources to anti-corruption efforts.

During the last few years, crime has been a far more serious problem than either corruption or political violence, and an impediment to, and a cost, of doing business in South Africa. The South African police forces have not been effective or well accepted in many communities because of their historical role in enforcing minority rule, lack of training, and internal crime and corruption within the forces. The levels of crime, especially violent crime, are a deterrent to attracting U.S. companies to do business in South Africa.

New laws, such as the Promotion of Access to Information Act signed into law in February 2000, have helped to increase transparency in government in the last few years. The Public Finance Management Act (PFMA), which became effective on April 1, 2000, helped to raise the level of oversight and control over public monies, and improved the transparency of government spending, especially with regard to off-budget agencies and parastatals. Notwithstanding these efforts, businesses do complain about the lack of certainty and consistency interpreting and implementing some government policies.

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### Medicines Control Act

One U.S. company has experienced difficulty in marketing its vitamin supplements in South Africa because of the way the Medicines and Related Substances Control Act of 1965 is administered. Some government regulators have interpreted the Act to define the company's products as medicine subject to licensing although the products are sold in major markets around the world as nutritional supplements. The company estimates it lost sales in 2001 of \$1 million. The implementation of the law favors domestic producers who market competing products. Moreover, the U.S. company has lost significant market share to other international companies because of the action by the regulatory authorities. Other companies have expressed concern about the inadequacy of draft regulations being proposed with regard to parallel importation and of their potential incompatibility with the trademark and copyright acts.

### Immigration Laws

For a number of years, U.S. and other foreign companies have complained that South African immigration legislation and the application of the law made it extremely difficult to get work permits for their foreign employees. Previously, South Africa relied on the apartheid-era Aliens Control Act, which did not take into account international developments and the opening up of the South African market. A new immigration law came into force on May 31, 2002. The legislation establishes yearly quotas for granting work permits to foreigners. Businesses have criticized the new law for creating uncertainty, because the quota system sets limits on the number of skilled people in particular categories who may enter the country, while corporate permits allow investors to apply in bulk for all their needs. It is not clear whether these corporate permits fall in or out of the quota system. The Trade and Industry Minister has suggested that the South African government may need to revise the law in order to acquire critically needed skills in South Africa. Home Affairs officials, on the other hand, oppose moving away from quotas because the option is to revert to the system of the Aliens Control Act, whereby the employer had to establish the need for a skill. The Minister of Home Affairs has said that the new law is an enormous improvement on the uncertainty of the previous legislation and places South Africa on a par with

other countries, especially with respect to investors and intra-company transfer permits. To address the rising criticism against the quota system, many expect that the Minister will propose an amendment bill to parliament.

### Southern African Customs Union

South Africa has been a member of the Southern African Customs Union (SACU) since its inception in 1910. The SACU Agreement was renegotiated in 1969 following the independence of Botswana, Swaziland, and Lesotho. Namibia joined SACU in 1990. SACU aims to promote free trade and cooperation on customs matters among its five member states. There are presently no internal tariff barriers between SACU members, but because of different tax regimes, there are some tax adjustments that occur at the borders. All SACU members, except Botswana, share a common currency as members of the Common Monetary Area (CMA). Imports from outside SACU are subject to a common external tariff. The SACU governments signed a new agreement in October 2002 setting out the responsibilities of the Council of Ministers, the Customs Union Commission, and the Secretariat. SACU has also signaled its intent to begin negotiations on a free trade agreement with the United States in 2003.

Because of SACU, products from Botswana, Lesotho, Swaziland, and Namibia enter South Africa duty-free. In a few cases, products from these countries compete directly with U.S. goods and have the advantage of a lower duty. For example, soda ash from Botswana comes into South Africa at a zero percent duty; whereas, soda ash from the U.S. faces an 8 percent duty. South Africa does not produce soda ash, but the duty on imported soda ash was introduced for the benefit of Botswana.