

SOUTH AFRICA

TRADE SUMMARY

The U.S. goods trade deficit with South Africa was \$1.4 billion in 2009, down \$2.0 billion from 2008. U.S. goods exports in 2009 were \$4.5 billion, down 31.3 percent from the previous year. Corresponding U.S. imports from South Africa were \$5.9 billion, down 40.9 percent. South Africa is currently the 39th largest export market for U.S. goods.

U.S. exports of private commercial services (*i.e.*, excluding military and government) to South Africa were \$2.0 billion in 2008 (latest data available), and U.S. imports were \$1.5 billion. Sales of services in South Africa by majority U.S.-owned affiliates were \$4.5 billion in 2007 (latest data available), while sales of services in the United States by majority South African-owned firms were \$1.2 billion.

The stock of U.S. foreign direct investment (FDI) in South Africa was \$4.9 billion in 2008 (latest data available), down from \$5.2 billion in 2007. U.S. FDI in South Africa was led by the manufacturing and wholesale trade sectors.

IMPORT POLICIES

Tariffs

South Africa is a member of the World Trade Organization (WTO), the Southern African Development Community, and the Southern African Customs Union (SACU). As a member of SACU, which links the trade regimes of Botswana, Lesotho, Namibia, South Africa, and Swaziland, South Africa applies the SACU common external tariff (CET). In practice, South Africa effectively sets the level of MFN tariffs applied by all SACU countries. South Africa's average applied duty in 2009 was 8.1 percent. Almost 97 percent of tariffs are charged on an *ad valorem* basis, with rates ranging from 0 percent to 96 percent, the highest of which are charged on dairy products, preparations of vegetables, beverages, and spirits.

The International Trade Administration Commission (ITAC) is tasked with administering South African trade laws. ITAC continues to receive requests from a number of industries for tariff protection, and U.S. companies have cited protective tariffs as a barrier to trade in South Africa. For example, U.S. apparel exporters expressed concern about increases in South African tariffs on over 120 clothing items in late 2009. Tariffs for these products were increased from 20 percent and 40 percent up to their WTO bound rate of 45 percent, *i.e.*, the rate that generally cannot be exceeded under WTO rules, and serve as a further impediment to enter South Africa's apparel market.

The South African government introduced a National Industrial Policy Framework and Industrial Policy Action Plan (the Framework) in 2007, with the goal of promoting value added industries in eight sectors, including: capital and transport equipment; automotive goods and components; chemicals, plastic fabrication, and pharmaceuticals; forestry, pulp, paper, and furniture; business process outsourcing; tourism; biofuels; and clothing and textiles. The Framework sets out specific mechanisms to assist these sectors, including a comprehensive review of import duties that has been underway for the last few years, and a potential reduction of selected import duties on inputs and components.

In August 2009, the South African Department of Trade and Industry (DTI) issued a policy statement suggesting that tariffs on agricultural goods could be raised and export taxes introduced in response to the impact on the agricultural sector of the global economic crisis. To date, no such action has been taken.

Nontariff Measures

The Minister of Trade and Industry is authorized to prohibit imports into South Africa, by notice in the Government Gazette, of goods of a specified class or kind, except under the authority of, and in accordance with, the conditions stated in a permit issued by the ITAC. The ITAC requires import permits on used goods if such goods are manufactured domestically, thus creating a *de facto* ban on most used goods, including used clothing. Other categories of controlled imports include waste, scrap, ashes, residues, and goods subject to quality specifications.

Other often-cited nontariff barriers to trade include customs valuation above invoice prices, import permits, antidumping measures, and excessive regulation.

Antidumping Measures

Transparency and due process remain issues with respect to the actions of ITAC and its administration of South Africa's antidumping laws and regulations.

As of the end of 2009, South Africa maintained antidumping duties on three products from the United States: chicken meat portions; L-lysine-HCl; and acetaminophenol.

In September 2007, South Africa's Supreme Court of Appeal ruled that ITAC had improperly calculated the five year expiration date of antidumping duties imposed on A4 paper imported from Indonesia and that, as a result, authority to impose duties had expired prior to the initiation of the sunset review for that product. ITAC subsequently announced its intention to terminate antidumping duties on several imported products because the sunset review of those duties had not been initiated before the expiration of the five year period as calculated under the court's interpretation of South African law. At the same time, ITAC indicated its intention to seek court permission to retain and "regularize" antidumping duties on 16 products, including chicken meat portions, acetaminophenol, and L-lysine-HCl from the United States, because, although the sunset reviews were initiated after the five year lapse date, ITAC found that dumping and injury were likely to continue or recur. In July 2009, ITAC announced that it would soon be filing the court application to address the consequences of the Supreme Court decision on these 16 products. As of the end of 2009, this application had not yet been filed with the Court.

GOVERNMENT PROCUREMENT

Government purchases are made through competitive tenders for goods, services, and construction. South Africa uses government procurement to promote the empowerment of the historically disadvantaged majority population in South Africa through its Black Economic Empowerment (BEE) strategy. See the section on Investment Barriers for more details on BEE.

South Africa's Preferential Procurement Policy Framework Act of 2000 (the Framework Act) and its implementing regulations created the legal framework and a formula for evaluating tenders for government contracts. To augment this, the DTI has been working on regulations to clarify the Framework Act and to incorporate the objectives of the Broad-Based Black Economic Empowerment Act of 2003. These regulations would give preference to bidders who comply with BEE objectives and would include BEE thresholds in tender evaluations. In procurement valued up to one million rand (about \$130,000), 80 percent of the tender evaluation would be based on the bid price and 20 percent on the supplier's commitment to BEE objectives. For tenders valued over one million rand, companies would earn 90 percent of their points from their bid price and 10 percent from their commitment to BEE objectives. The National Treasury is working with the DTI to align preferential procurement regulations

with the BEE Code of Good Practice on Procurement in order to help standardize how firms are evaluated on their compliance with industry BEE scorecards.

South Africa's National Industrial Participation Program, introduced in 1996, subjects all government and parastatal purchases or lease contracts for goods, equipment, or services with an imported content equal to or exceeding \$10 million (or the rand equivalent thereof) to an industrial participation obligation. This obligation requires the seller/supplier to engage in local commercial or industrial activity valued at 30 percent or more of the value of the imported content of the total goods purchased or leased under a government tender.

South Africa is not a signatory to the WTO Agreement on Government Procurement.

INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION

Enforcement of intellectual property rights (IPR) in South Africa presents challenges. In recent years, the South African government has introduced measures to enhance enforcement of the 1997 Counterfeit Goods Act. The government has appointed more inspectors, designated more warehouses for securing counterfeit goods, destroyed counterfeit goods, and improved the training of customs, border police, and police officials. Although law enforcement authorities often cooperate with the private sector in investigating allegations of trade in pirated or counterfeit goods, some members of the business community have expressed concerns about lax enforcement of IPR laws against imports of infringing goods, as well as slow and cumbersome court proceedings. There have been some concerns that the South African Customs Administration interpreted a 2004 court ruling as limiting its ability to seize potentially infringing goods that are marked for transshipment through South Africa. This interpretation is still being debated within the South African government.

Under South African law, complainants can take both civil and criminal action against IPR offenders. The number of arrests for trading in pirated or counterfeit goods has increased in the last few years. In addition, South Africa has taken steps to improve enforcement, such as the creation of DTI's enforcement unit, and the establishment of Commercial Crime Courts in several cities. The South African government has also formed an interagency counterfeit division including the DTI, the South African Revenue Service (SARS), and the South African Police Service to improve coordination on IPR enforcement. SARS has launched a public awareness campaign about the seriousness and impact of IPR crimes, with special attention to counterfeiting issues related to merchandising for the 2010 World Cup soccer tournament in South Africa. DTI is also working with universities to incorporate IPR awareness into college curricula.

Despite efforts to improve IPR enforcement, monetary losses from counterfeiting and piracy remain high. U.S. industry is increasingly concerned about illegal commercial photocopying, especially at universities, libraries, and other on-campus venues. U.S. industry has also expressed concern about software, optical disc, and Internet piracy, the growing number of counterfeit production facilities, advertisements of "burn-to-order" services, and the unwillingness of South African Internet Service Providers (ISPs) to shut down infringing sites or access thereto. Counterfeit medicines are also a growing problem.

There is no direct legal protection for local distributors against parallel imports. However, in 2008, several members of the Motion Picture Association of America, acting individually, successfully obtained a civil injunction against a major DVD rental chain that was parallel importing their product. The Cape High Court awarded costs against the importer, who is appealing the decision.

SERVICES BARRIERS

Telecommunications

State-controlled Telkom, South Africa's main telecommunications provider, continues to dominate the market for value added and basic telecommunications services. Many businesses complain about high telecommunications prices, which are partly a result of Telkom's control of most of South Africa's wireline infrastructure. Telkom enjoyed a protected legal monopoly status prior to passage of the Electronic Communications Act (ECA) of 2005, which allowed the creation of a second national operator for telecommunications services. This second operator, however, with a small network, has yet to offer serious price competition in the market.

Liberalization policies implemented by the Department of Communications (DOC) in recent years have addressed some of the problems facing smaller operators. As a result, more mobile operators may now install their own fixed lines to link cell towers into their networks, Value Added Network Service (VANS) providers may use infrastructure not owned by Telkom, and VANS providers may offer voice services. In addition, private telecommunications network operators may sell spare capacity.

The telecommunications regulator, the Independent Communications Authority of South Africa (ICASA), has been tasked with issuing new licenses to mobile operators and ISPs, but missed its original deadline to issue these licenses, reportedly due to confusion of roles with the Department of Communications (DOC).

Despite legislative efforts to increase competition and ICASA independence, the DOC pursued a policy of "managed liberalization" under the Mbeki administration. In October 2008, the Pretoria High Court rejected the DOC's efforts to impose an invitation-only application process for VANS providers to convert their licenses to new Independent Electronic Communications Network Service (I-ECNS), providing operators the right to develop and operate their own telecommunications network. ICASA announced the recipients of the I-ECNS licenses on January 20, 2009. At the time, ICASA also promised licensees that it would complete the spectrum allocation process for these licenses and finalize BEE equity ownership requirements by the end of the first quarter of 2009, but had not done so by the end of 2009.

In January 2009, the South African government approved the sale of existing government-controlled shares in the new second national fixed-line operator Neotel to its parent corporation, India-based Tata Communications. This decision allowed Tata to gain a controlling share (56 percent) of Neotel, which was the sole South African sponsor of the United States-led SEACOM undersea fiber-optic cable. SEACOM became operational in late July 2009 and now provides the first true broadband connectivity for countries on Africa's eastern seaboard. Neotel is also promoting the development of other undersea cable projects, including EASSY (East Africa) and WACS (West Africa), which are expected to begin operations in mid-2010. Privately owned satellite firm Intelsat and a South African investment consortium also plan to build and launch a new \$250 million satellite that is expected to enter service in early 2011.

Broadcasting

ICASA maintains local content regulations for satellite, terrestrial, and cable subscription services. Foreign ownership in a broadcaster is capped at a maximum of 20 percent. In July 2009, the South African government embarked on plans to amend the country's Broadcasting Act (1999). This follows a number of changes in the broadcasting and telecommunications sector since the Broadcasting Act came into effect, such as the migration from analog to digital television broadcasting. The DOC has announced

a goal for the completion of digital migration by November 2011. Full migration should free up scarce spectrum (approximately 80-100 megahertz) that could be used to promote new technology and e-government services, since digital signals take up less bandwidth than analog signals.

INVESTMENT BARRIERS

In February 2007, the DTI published Codes of Good Practice in the Government Gazette that included a new generic scorecard to measure a company's level of BEE in areas such as equity ownership, management, employment, procurement from black-owned companies, and development of black-owned enterprises. The Codes permit multinational corporations to earn BEE equity ownership "points" for empowerment actions in non-equity areas, provided the DTI approves and provided the multinational has a global corporate policy of owning 100 percent of the equity in its subsidiaries. Many U.S. companies had pressed for the right to use such "equity-equivalent" mechanisms. Although completion of the Codes of Good Practice has cleared up much of the uncertainty that surrounded BEE, they are complex documents and much about their interpretation and implementation remains unclear. By the end of 2009, only one multinational company had received DTI approval of an "equity-equivalent" program, which has led to complaints that the approval process is slow and nontransparent.

Several "transformation charters" have also been negotiated by stakeholders in sectors such as financial services, mining, and petroleum. These charters are intended to promote accelerated empowerment within particular sectors. It is expected that many of these charters will be converted into binding sector codes. There is uncertainty, however, as to whether equity-equivalent plans approved by DTI under the Codes of Good Practice would automatically satisfy equity requirements imposed by the transformation charters. In at least one case (the information and communications technology sector), a DTI-approved equity-equivalent plan was determined not to satisfy the requirements of a charter. In the financial services sector, a charter was reopened after labor unions complained that the charter's equity requirements were too generous to banks. Government, banks, and unions have so far been unable to agree on a revised charter, although talks continue. Because the time period for publishing the sector-specific charter in the Government Gazette has lapsed, some argue the sector is now governed by the Codes of Good Practice.

ELECTRONIC COMMERCE

The Electronic Communications and Transactions Law governs all companies that conduct electronic commerce in South Africa. The law was designed to facilitate electronic commerce, but has been criticized as imposing significant regulatory burdens. The law requires government accreditation for certain electronic signatures, takes government control of South Africa's ".za" domain name, and requires a long list of disclosures for websites that sell via the Internet.

In early 2006, the South African Law Reform Commission submitted draft legislation and discussion documents on privacy and data protection for public comment and held a series of workshops on the draft legislation. Industry is still evaluating the extent to which this legislation, which is still awaiting action by the National Assembly, will affect the ability of South African and foreign companies to receive and send transborder flows of personally identifiable data.

OTHER BARRIERS

Ownership Patterns

While South Africa's business environment has improved dramatically in the post-apartheid era, the energy, transportation, and telecommunications sectors are still dominated by state-owned or state-controlled monopolies.

Transparency and Corruption

Laws such as the Promotion of Access to Information Act and the Public Finance Management Act, both enacted in 2000, have helped to increase transparency in government. The 2004 Prevention and Combating of Corrupt Activities Act defines graft, bars the payment of bribes by South African citizens and firms to foreign public officials, and obliges public officials to report corrupt activities. One shortcoming of the Act has been its failure to protect whistleblowers against recrimination or defamation claims.

South Africa has no fewer than 10 agencies engaged in anticorruption activities. Some, like the Public Service Commission, the Office of the Public Protector, and the Office of the Auditor-General, are constitutionally mandated to address corruption as part of their responsibilities. However, high rates of violent crime create a strain on enforcement capacity and make it difficult for South African criminal and judicial entities to dedicate adequate resources to anticorruption efforts. Following the April 2009 elections, the Zuma administration pledged to make anticorruption efforts a high priority and initiated a presidential hotline to receive reports of corrupt practices.

Business Mobility

Many economic sectors in South Africa experience severe difficulty in recruiting because of skills shortages and emigration. For a number of years, U.S. and other foreign companies have complained of difficulties in the procedures for obtaining temporary work permits for their skilled foreign employees.