

# **SOUTHERN AFRICAN CUSTOMS UNION (SACU)**

## **TRADE SUMMARY**

The U.S. goods trade deficit with SACU countries was \$4.3 billion in 2007, an increase of \$533 million from \$3.8 billion in 2006. U.S. goods exports in 2007 were \$5.7 billion, up 23.9 percent from the previous year. Corresponding U.S. imports from SACU countries were \$10.1 billion, up 19.4 percent.

The stock of U.S. foreign direct investment (FDI) in SACU countries was \$3.9 billion in 2006 (latest data available), up from \$3.6 billion in 2005.

## **OVERVIEW**

The Southern African Customs Union (SACU) links the trade regimes of Botswana, Lesotho, Namibia, South Africa, and Swaziland. There are currently no internal tariff barriers among SACU members. All SACU members except Botswana are members of a common monetary area, with currencies pegged to the South African rand. Imports from outside SACU are subject to a common external tariff. The 2002 SACU Agreement, which became fully operational in 2004, provided for a more democratic structure that reduces reliance on South Africa for administrative decisions. The Agreement set up a Council of Ministers (COM) as the supreme decision making body for SACU. The COM is supported by the Commission of Senior Officials (a group of technical experts) and a SACU Secretariat located in Windhoek, Namibia. A SACU Tariff Board formulates and implements tariff policy; it reports directly to the COM.

The United States began free trade agreement (FTA) negotiations with the five SACU countries in June 2003, but active negotiations were suspended in April 2006. As a way forward in the U.S.-SACU FTA negotiations, the United States and SACU are negotiating a new type of agreement, a Trade, Investment, and Development Cooperative Agreement (TIDCA). The proposed United States-SACU TIDCA would be a framework for trade and investment promoting activities that could provide the “building blocks” for the future resumption of FTA negotiations, while allowing the United States and SACU to take meaningful interim steps towards improving their trade and investment relationship.

The TIDCA would establish a forum for consultative discussions on a wide range of trade and investment issues, including, but not limited to, FTA issues. The proposed TIDCA would establish a Consultative Council that would oversee the implementation of the TIDCA, set up working groups, and monitor progress towards the negotiation of various trade and investment related agreements. The TIDCA would provide a mechanism to address SACU trade practices of concern to U.S. exporters.

## **1. SOUTH AFRICA**

### **IMPORT POLICIES**

The International Trade Administration Commission (ITAC) is tasked with administering South African trade laws. Its specific responsibilities include:

- **Tariff Administration:** ITAC administers tariff related programs, including the Motor Industry Development Program (MIDP) and the Duty Credit Certificate System (DCCS). In addition,

interested parties may petition ITAC to review tariffs with the purpose of reducing or increasing them.

- **Trade Remedies:** ITAC administers SACU's use of antidumping and countervailing duty measures. ITAC also administers SACU's safeguard laws, which have recently been adopted by South Africa. The textiles and apparel industry was the first to utilize the China specific ITAC safeguard procedures, introduced in 2004 as permitted by China's WTO protocol of accession, when it filed petitions for protection against rising Chinese imports. In response, the government imposed a quota system limiting certain Chinese textile and apparel imports, which became effective January 1, 2007. In May 2007, ITAC initiated SACU's first global safeguard investigation by imposing provisional duties on lysine products of 160 percent, which were lowered to 27 percent in a December 2007, final determination.
- **Import and Export Control:** ITAC issues import and export permits for certain items designated by the Minister of Trade and Industry under the authority of the International Trade Administration Act of 2002 (which replaced the Import and Export Control Act of 1963).

## **Tariffs**

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 a few cases, products that are duty free from SACU partners compete directly with U.S. goods that are subject to duties. One example is soda ash imported from Botswana at a zero duty, while soda ash from the United States faces a 5.5 percent duty. If tariffs on U.S. soda ash were removed, U.S. industry estimates that U.S. exports of high quality soda ash to South Africa could increase from less than \$8 million to \$25 million, closer to its historical level. The soda ash duty benefits Botswana, the only producer of soda ash within SACU. A longstanding complaint from this Botswana producer to South Africa's Competition Commission, that U.S. soda ash exports compete unfairly in the South African market, could result in a prohibition of U.S. imports of soda ash. Initially, the Competition Commission accepted the complaint as a "*per se*" offense, but a 2006 decision by the South African Supreme Court of Appeal remanded the case to the Competition Commission to confirm that U.S. exports have actually damaged the South African market. The Commission's appellate division ruled on a procedural matter in June 2007 and will now proceed on the merits of the case.

The Department of Trade and Industry (DTI) released its National Industrial Policy Framework and Industrial Policy Action Plan in August 2007. The Framework's objective is to promote value added industries in four key sectors and four priority sectors under the South African government's Accelerated and Shared Growth Initiative for South Africa (ASGI-SA) 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 Action Plan sets out specific mechanisms to assist these sectors that include a comprehensive review of import duties in 2008 and a potential reduction of selected import duties on downstream products and components.

## **Nontariff Measures**

The Minister of Trade and Industry is authorized to prohibit imports, by notice in the Government Gazette, of goods of a specified class or kind into South Africa, except under the authority of, and in accordance with, the conditions stated in a permit issued by ITAC. The main categories of controlled imports are as follows:

- Used goods. ITAC requires import permits on used goods or substitutes if such goods are manufactured domestically, thus creating a *de facto* ban on most used goods, including used clothing;
- Waste, scrap, ashes, and residues;
- Other harmful substances; and
- Goods subject to quality specifications: This restriction permits the monitoring of manufacturing specifications that enhance vehicle safety (such as in the case of tires) or protect human life.

Other often cited nontariff barriers to trade include port congestion, customs valuation above invoice prices, theft of goods, import permits, antidumping measures, intellectual property violations, and inefficient bureaucracy and excessive regulation.

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

During 2006, ITAC initiated an antidumping investigation into the alleged dumping of white self-copy paper imported from the United States, but terminated the investigation in 2007. ITAC also completed a sunset review of antidumping duties on frozen chicken meat portions imported from the United States that resulted in the continuation of the antidumping duties. In 2007, ITAC initiated a sunset review of antidumping duties on l-lysine feed supplement that resulted in the termination of antidumping duties in December 2007. In addition to frozen chicken meat portions, South Africa imposes anti dumping duties on U.S.-origin suspension polyvinyl chloride (PVC) and acetaminophenol.

On September 25, 2007, South Africa's Supreme Court of Appeal ruled that ITAC had improperly calculated the 5 year expiration date of antidumping duties imposed upon A4 paper imported from Indonesia, and as a result, authority to impose duties had expired prior to the initiation of the sunset review. The Supreme Court of Appeal's ruling may affect many other ITAC trade remedy measures, including those in force involving exports from the United States. This will be an issue in 2008 as ITAC begins to implement the court ruling with respect to other trade remedy actions.

In May 2007, ITAC imposed a 160 percent provisional safeguard duty on l-lysine products imported from all countries on the same day that it announced the initiation of its investigation. This was the first time that ITAC opted to utilize a global safeguard remedy. The Pretoria High Court overturned ITAC's provisional safeguard duties on the grounds that ITAC failed to provide proper notice and an opportunity for all interested parties to comment. Following the court's ruling, ITAC continued its investigation and on December 14, 2007 the South African authorities imposed final definitive duties of 27 percent.

### **Free Trade Agreement with the European Union**

In 2000, South Africa and the European Union (EU) began to implement provisions of their Trade, Development, and Cooperation Agreement (TDCA). Under the TDCA, South Africa and the EU agreed to establish a free trade area over a transitional period of up to 12 years for South Africa, and 10 years for the EU. The Agreement provides for the reduction and eventual elimination of duties on approximately 85 percent of the products imported by South Africa from the EU, and 95 percent of the products exported by South Africa to the EU. The Agreement exempts certain agricultural products from liberalization. Some U.S. businesses exporting to South Africa are concerned that their products are less

competitive because of preferences for EU products that the TDCA provides. An example includes the tariff differential between EU and U.S. bottled and bulk distilled spirits; another example is automobiles.

In November 2005, South Africa and the EU completed a work program on automobile trade as part of the TDCA. The EU agreed to phase out all tariffs on South African automotive imports by 2010. South Africa agreed to reduce tariffs on European car imports from 25 percent to 18 percent by 2012. The EU and South Africa reached an agreement in November 2006 to further liberalize trade in the automotive sector on given product tariff codes. South Africa's vehicle and component exports to the EU grew by 40 percent in 2006. Currently, 49 percent of South Africa's vehicle and component exports go to the EU.

## **STANDARDS, TESTING, LABELING, AND CERTIFICATION**

The South African Bureau of Standards (SABS) often adopts European Union standards rather than those developed by international or U.S.-domiciled standards developing organizations. The U.S. Government is working with SABS to consider alternative standardization policies, which would allow for the use of competing non-EU standards that meet the same objectives and allow for the adoption of international and U.S. standards that would not interfere with access for U.S. products.

### **Biotechnology**

The South African government generally accepts the use of biotechnology products. Transgenic varieties of cotton, corn, and soybeans are approved for commercial planting and account for approximately 92 percent of South Africa's cotton, 44 percent of its corn and 59 percent of its soybeans. Agricultural biotechnology has wide appeal for South African farmers as they recognize the technological benefits of fewer inputs and potentially higher yields.

U.S. agricultural interests in South Africa are wide ranging and diverse. Wheat is the main U.S. export, followed by other bulk, intermediate, and consumer-ready products. Those products affected by biotechnology issues are corn, soybeans, and planting seeds (corn, cotton, and soybeans). South Africa does not grant import permits for products coming from countries that have approved biotechnology varieties of a product that has not been approved in South Africa. Accordingly, the South African government has not approved U.S. yellow corn for importation because there are a number of genetically modified varieties of yellow corn that have been approved in the United States and not in South Africa. If yellow corn were in short supply in South Africa, importers would have to apply to the government for a special waiver to import it, and would have to guarantee that the corn would be milled near the port to ensure that seeds from such imports could not be planted.

U.S. grain producers have raised concerns about the treatment of "stacked events" when it comes to import approval for biotechnology products. Although the U.S. Government considers products containing a combination of two previously approved genetic modifications (such as for insect resistance and herbicide tolerance) as "conventional," only encouraging producers to notify the U.S. Government of such "stacked events," South Africa – like the EU – considers "stacked events" to constitute a completely new event, thus requiring a *de novo* review for registration purposes. This requirement creates significant delays in registering products, causing U.S. exporters to lose export opportunities.

Agricultural biotechnology regulations in South Africa are managed by an Executive Council (EC) with representation from eight government departments: the Department of Agriculture; the Department of Science and Technology; the Department of Environment and Tourism; the Department of Trade and Industry; the Department of Health; the Department of Water Affairs and Forestry (DWAF); and, the Department of Arts and Culture (DAC). In April 2007, the DWAF and DAC were added to the EC as a

result of amendments to the 1997 Genetically Modified Organism (GMO) Act. In addition to an expanded EC, the April amendments improved legislative administration and ensured 1997 GMO Act compliance with the Cartagena Biosafety Protocol.

The EC has decision making authority over agricultural biotechnology approvals. To assist the EC, an Advisory Committee (AC) consisting of independent experts reviews all GMO applications with the authority to request additional data and information. The AC's review is taken into consideration in the EC decision making process. Final determinations are based on consensus among the members of the EC. Although the EC's final determination is made public, the decision making process leading to a determination lacks transparency.

The Advisory Committee and the Executive Council meet infrequently which slows the decision making process. In addition, the consensus nature of the EC decision making process allows for committee members to request additional data and information outside their particular areas of expertise or regulatory jurisdiction.

### **Agricultural Standards**

The South African government requires an import permit for certain controlled products. Public health officials still ban the importation of irradiated meat from any source.

U.S. horticultural producers have complained about a range of South African sanitary or phytosanitary (SPS) import requirements that affect imports of apples, cherries, and pears from the United States. They estimate that, if these barriers were removed, U.S. exports of these fruits to South Africa could potentially reach \$25 million in annual sales. U.S. producers have also expressed concern about unnecessary SPS requirements for some grains, pork, poultry, and horticultural products.

In September 2006, the U.S. Department of Agriculture's (USDA) Animal and Plant Health Inspection Service sponsored the trip of two South African National Department of Agriculture (NDA) inspection officials to the Pacific Northwest to visit orchards and packing houses in order to liberalize the NDA's SPS requirements for importing U.S. apples. There has been no change in the status of U.S. apples since that trip.

To fulfill South Africa's commitment under the WTO Marrakesh Agreement on market access, the NDA published the rules and procedures regarding the application for import permits for agricultural products on October 24, 2003. The NDA issues permits to importers registered with the South African Revenue Service (SARS) and the Department of Trade and Industry (DTI) for agricultural products listed in the Table of Import Arrangements. Ten percent of such permits are reserved for "new importers" (those who have not imported within the past 3 years), and 10 percent are reserved for small, medium, and microenterprises.

In response to the Bovine Spongiform Encephalopathy (BSE) case in Washington State announced by the USDA on December 23, 2003, South Africa banned all ruminant animals and products originating in the United States. By January 15, 2004, South Africa, in accordance with World Organization for Animal Health (OIE) standards, exempted nonrisk products such as hides, skins, wool, and mohair from the ban. On May 8, 2006 the Chief Veterinary Officer of the USDA sent his South African counterpart a full report detailing USDA's surveillance program. In May 2007, South Africa's Chief Veterinary Officer informed USDA officials that an audit of the U.S. food safety system would need to be completed before it reopens South Africa to beef meat products from the United States. The ban on risk products remains in effect. The United States continues to urge South Africa to fully reopen its beef market consistent with OIE guidelines.

## **GOVERNMENT PROCUREMENT**

Government purchases are made through competitive tender for goods, services, and construction contracts. 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 section below 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 set forth a formula for evaluating tenders for government contracts. To augment this, the Department of Trade and Industry (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 give preference to bidders who comply with BEE objectives. The regulations also include BEE thresholds for tender qualification. Companies bidding on procurement valued up to one million rand earn 80 percent of their points from their bid price and 20 percent from their commitment to BEE objectives. For tenders valued over one million rand, companies 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 (NIPP) 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 total goods purchased or leased under government tender.

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

## **INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION**

South Africa is a signatory to the Berne Convention for the Protection of Literary and Artistic Works, the Paris Convention for the Protection of Industrial Property, the Patent Cooperation Treaty, and the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, as well as the International Union for the Protection of New Varieties of Plants (UPOV) Convention and the World Intellectual Property Organization (WIPO) Convention. South Africa is also a signatory to the Trademark Law Treaty, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

### **Legal Regime**

Enforcement of intellectual property rights is a concern. The United States has provided training assistance on IPR enforcement to South African government and private sector representatives.

Since 2001, the South African government has introduced measures to enhance enforcement of the 1997 Counterfeit Goods Act. The government 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, there are concerns about lax enforcement of IPR laws against imports of infringing goods, as well as slow and cumbersome court proceedings.

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 doubled from 2005 to 2006 and continued to increase in 2007. South Africa has taken some positive steps with the creation of the Department of Trade and Industry's enforcement unit, which has expanded its number of investigators to 47, and the establishment of Commercial Crime Courts in several cities. The appointment of two senior prosecutors in 2006 and an additional nine prosecutors in 2007 focusing on intellectual property offenses and operating within the Commercial Crime Courts also increases the capacity to prosecute intellectual property cases. The South African government has also formed an interagency counterfeit division including the Department of Trade and Industry (DTI), South African Revenue Service (SARS), and the South African Police Service (SAPS) to improve coordination on IPR enforcement. SARS has launched a public awareness campaign about the seriousness and impact of IPR crimes, and DTI is 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 and Internet piracy, the growing number of burner labs, advertisements of "burn-to-order" services and the unwillingness of South African Internet service providers (ISPs) to shut down infringing sites or access thereto. In addition, counterfeit medicines are also a growing problem. U.S. industry reports that South Africa is also becoming a transshipment point for pirated and counterfeit goods into the rest of Africa, noting that it is unclear whether South African Customs has the power to interdict such shipments and should exercise that power.

## **SERVICES BARRIERS**

### **Telecommunications**

Telkom, South Africa's main telecommunication provider, continues to maintain a dominant position in the provision of value added and basic telecommunications services. Many businesses have complained about high telecommunications prices, many of which are a result of Telkom's control of the underlying network. In 2004, in response to a complaint brought in 2002 by Value Added Network Service (VANS) providers, the South African Competition Commission found that Telkom had abused its dominant position by engaging in anticompetitive conduct with respect to the VANS providers and referred the matter to the Competition Tribunal for final determination.

One U.S. company has also pursued legal remedies against Telkom to honor the results of a binding arbitration decision against Telkom regarding a multi-million dollar breach of contract claim. Instead of honoring the arbitrator's findings, Telkom took steps to block the arbitral award and appealed the award to a local high court. In November 2006, the South African Supreme Court of Appeal found in favor of the U.S. company, and an arbitration panel is still deliberating to calculate the recoverable damages.

In its WTO commitments, South Africa committed to license a second national operator (SNO) to compete in long-distance, data, telex, fax and privately leased circuit services no later than January 1, 2004. The Minister of Communications conditionally completed the selection of the SNO's shareholders following a public bidding process in September 2004, and South Africa's Independent Communications Authority (ICASA) licensed the SNO in December 2005. Disagreements among SNO shareholders over operational control and allocation of equity stakes, however, delayed the SNO's start of operations until August 30, 2006. As a result, Telkom continued to enjoy monopoly privileges well beyond its period of exclusivity, which ended in May 2002. The SNO began operations under the name "Neotel", which is

26 percent owned by Videsh Sanchar Nigam (a subsidiary of the Indian industrial giant Tata). Neotel has entered the business-to-business market and plans to enter the residential market.

Some of the problems facing VANS and ISP are being addressed by certain liberalization policies that were implemented by the Department of Communications (DOC) starting in February 2005. As a result of such liberalization, mobile operators are allowed to use any fixed lines in the provision of their service, VANS can be offered through infrastructure other than that which is owned by Telkom, and VANS providers are allowed to provide voice services. In addition, private telecommunications network operators are allowed to sell spare capacity.

A Convergence Bill and ICASA Amendment Bill were passed in June 2006 in an effort to resolve some of the remaining barriers in this sector, including the failure to empower the regulator. While the ICASA Amendment Bill did provide some independence to ICASA, the fact that the DOC must approve ICASA's funding allows it to maintain influence over ICASA. Critics believe that ICASA should be strengthened to better carry out its regulatory mandate. ICASA has begun to address recent capacity problems and has fully staffed all vacant executive management positions.

### **Broadcasting**

ICASA maintains local content regulations for satellite, terrestrial, and cable subscription services. Foreign ownership in a broadcaster is presently capped at a maximum of 20 percent.

## **INVESTMENT BARRIERS**

### **Uncertain Implementation of the BEE Act**

In January 2004, President Mbeki signed into law the Broad-Based Black Economic Empowerment Act of 2003, giving the force of law to the government's Black Economic Empowerment (BEE) strategy. The intention of BEE is to move the historically disadvantaged majority population in South Africa into the mainstream of the economy. While BEE is not mandatory in most sectors and companies are generally free to pick their level of empowerment, a low overall BEE "score" would affect a company's competitiveness on government tenders and possibly limit its access to other business opportunities. U.S. businesses support the goals of BEE, and many companies have a history of instituting human resource management, procurement, and enterprise development policies in South Africa that are consistent with BEE objectives.

In February 2007, the Department of Trade and Industry (DTI) published Codes of Good Practice in the Government Gazette that included a new generic scorecard that companies will use to measure their level of black empowerment 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 score equity ownership "points" through the use of mechanisms not involving the transfer of equity if these mechanisms are approved by DTI and the multinationals have a global corporate policy of owning 100 percent of the equity in their subsidiaries. Many U.S. companies had pressed for the right to use such "equity equivalent" mechanisms. The completion of the Codes of Good Practice has cleared up much of the uncertainty that surrounded BEE that had been of concern to foreign investors. However, the Codes are complex documents and there is much about their interpretation and implementation that remains unclear.

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 transformation within particular sectors, taking into consideration sector-specific circumstances and challenges. It is



expected that many charters will be converted into sector codes that will be binding on signatories and government, once gazetted. Confusion has arisen over whether Equity Equivalent plans approved by DTI under the Codes of Good Practice can automatically satisfy equity requirements imposed by transformation charters. For example, state-owned Telkom has refused to recognize at least one DTI-approved Equity Equivalent plan that did not satisfy the requirements of the Information and Communications Technology charter.

U.S. Government agencies and the U.S. Embassy in Pretoria have been closely monitoring the ongoing development and implementation of South Africa's BEE policies and have maintained a continuous dialogue with the South African government and U.S. industry on BEE.

## **ANTICOMPETITIVE PRACTICES**

### **Ownership Patterns**

There is a historical legacy of concentrated ownership in some sectors of the South African economy. Between 1961 and 1994, the apartheid government prevented a large portion of the South African population from participating actively in the economy by disallowing them the opportunity to gain higher education and managerial experience or to take advantage of entrepreneurial and investment opportunities. Apartheid policies also prohibited successful companies such as South African Breweries, Anglo American, DeBeers, and SASOL from investing abroad. Therefore, these enterprises expanded their businesses domestically in horizontal and vertical conglomerates. As a result, major South African companies entangled themselves into complex ownership structures and a series of crossholdings that concentrated considerable power in the South African marketplace. This situation has changed considerably since 1994, as many of the major players have disentangled their businesses, focused on core businesses, sold off noncore assets, expanded internationally, and even listed on foreign stock exchanges. Together with more effective competition laws and BEE initiatives to enlarge the share of black participation in the economy, South Africa's business environment has become more transparent, more competitive, and more open to new entrants (including U.S. companies) than it was 10 years ago. The exceptions have been the energy, transportation, and telecommunications sectors, which are still dominated by state-owned or state-controlled monopolies.

## **ELECTRONIC COMMERCE**

The Electronic Communications and Transactions Law, effective July 31, 2002, governs all companies that conduct electronic commerce in South Africa. The law was designed to facilitate electronic commerce, but may instead increase the regulatory burden and introduce an unacceptable level of uncertainty for some businesses. 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 web sites that sell via the Internet.

The South African Law Reform Commission submitted draft legislation and discussion documents on privacy and data protection for public comment by February 28, 2006. The Commission held a series of workshops on the legislation in February 2006. Numerous public submissions were received, and the Commission recently finalized its report with recommendations on the draft legislation, which must now be approved by the Minister, Cabinet, and Parliament. The draft legislation will reach the Parliament for approval in June 2008 at the earliest. This legislation may negatively impact the ability of South African and foreign companies to receive and send trans-border flows of personally identifiable data.

## **OTHER BARRIERS**

### **Transparency, Corruption and Crime**

Laws, such as the Promotion of Access to Information Act, signed into law in February 2000, have helped to increase transparency in government during the last few years. The Public Finance Management Act, which became effective on April 1, 2000, helped to raise the level of oversight and control over public funds and to improve transparency in government spending, especially with regard to off-budget agencies and state-owned enterprises. These efforts notwithstanding, businesses complain about the lack of certainty and consistency in interpreting and implementing some government policies.

South African law provides for the prosecution of government officials who solicit or accept bribes. Penalties for offering or accepting a bribe may include criminal prosecution, monetary fines, dismissal from government employment, or deportation (for foreign citizens). South Africa has no fewer than 10 agencies engaged in anti-corruption 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 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.

On April 28, 2004, President Mbeki signed The South African Prevention and Combating of Corrupt Activities Act (PCCAA) into law. The PCCAA, *inter alia*, 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.

### **Immigration Laws**

For a number of years, U.S. and other foreign companies have complained about difficulties in obtaining work permits for their foreign employees. A 2002 immigration law established yearly quotas for granting work permits to foreigners. Local businesses criticized the law for creating uncertainty because the quota system sets limits on the number of skilled people that may enter the country in particular categories. However, corporate investors are allowed to make blanket permit applications for the people they need, although it is unclear whether these corporate permits fall within the quota system. The Minister of Home Affairs has said that the law is an enormous improvement over previous legislation and places South Africa on a par with other countries, especially with respect to investors and intra-company transfer permits.

On July 1, 2005, the Immigration Amendment Act Number 19 came into effect. The Minister of Home Affairs released the quota category schedule for skilled workers in February 2006, but subsequently decided that the quota schedule should be adjusted to match the critical skills most needed in South Africa. A revised quota schedule for skilled workers was released in April 2007, with categories primarily for scientists, science technicians, engineers, and education and health professionals.

## **2. BOTSWANA**

### **IMPORT POLICIES**

#### **Tariffs**

Botswana is a member of various regional and international economic and trade bodies including the WTO, Southern African Customs Union (SACU), and Southern African Development Community (SADC). Botswana's tariff policies are generally determined by and integrated with SACU, in accordance with the 2002 SACU Agreement. Accordingly, Botswana uses the Harmonized System of Classification (HS) and applies the SACU common external tariff (CET). Botswana has been a participant in SADC's ongoing Economic Partnership Agreement (EPA) negotiations with the EU. Botswana, along with all of the SADC countries, except for South Africa, signed an "interim agreement of goods" with the EU. This interim agreement covers tariffs on goods, sanitary and phytosanitary issues, technical barriers to trade, and trade facilitation. It also includes a clause to conclude negotiations on investment and services by year-end 2008.

#### **Nontariff Measures**

Import permits are required for goods entering Botswana directly from countries outside of SACU, with the exception of Malawi, and are obtainable from the Department of Trade and Consumer Affairs in the Ministry of Trade and Industry. The import permits are not transferable and are usually granted upon request.

Importation of certain agricultural products and plants requires approval from the Ministry of Agriculture prior to obtaining an import permit from the Department of Trade and Consumer Affairs. Imports of fresh pork are banned, but processed pork products may be imported. Imports of beef and beef products are banned. Although poultry imports are permitted when there is a domestic market deficit, the Botswana poultry sector met all domestic demand throughout 2006 and the first two quarters of 2007. Imports of some vegetables and dairy products are seasonally banned when domestic supply is determined to be adequate, regardless of price. The government "discourages" the importation of used clothing, although there are no written regulations to this effect. The importer of used clothes is required to apply for an import permit, which may be issued for a duration of 6 months, obtainable from the Department of Trade and Consumer Affairs. Fumigation is required.

### **GOVERNMENT PROCUREMENT**

Based on the Public Procurement and Asset Disposal Act of 2002, the Public Procurement and Asset Disposal Board (PPADB), an independent parastatal, is responsible for the award of all government contracts. The tender process is open. In order to enhance efficiency and transparency, PPADB has adopted Standardized Bidding Packages for services and supplies. Lobbying of the PPADB or its members is prohibited. The Independent Complaints Review Committee of the PPADB reviews the Board's decisions, which are subject to challenge by stakeholders, *e.g.*, contractors and procuring entities. The PPADB has published its decisions concerning awarded tenders, prequalification lists and newly registered contractors. The PPADB Act empowers the government, under its economic and social objectives, to introduce from time to time reservation and preference schemes for the benefit of citizens and local companies. Preferences are also applied on production inputs sourced locally from qualifying firms. The government reserves certain tenders for 100 percent Botswana-owned companies, including all contracts valued at P300,000 (\$50,000) or less. On large tenders, the relevant ministries review the finalists selected by the PPADB and exert some degree of influence in the final award. The PPADB has

stated that it considers these schemes to be in conformance with Botswana's obligations under its international and regional trade agreements. Botswana is not a signatory to the WTO Agreement on Government Procurement.

## **INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION**

Botswana is a signatory to both the Berne Convention for the Protection of Literary and Artistic Works and the Paris Convention for the Protection of Industrial Property. Botswana is also a party to the WIPO Convention, the Patent Cooperation Treaty, the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty. Botswana's legislation, including the 2006 Copyright Act, is intended to conform to international IPR standards, but there are notable deficiencies with respect to geographic indications and integrated circuits, and enforcement of intellectual property rights remains a challenge. The government of Botswana has conducted comprehensive workshops on Intellectual Property in coordination with the U.S. Patent and Trademark Office.

## **SERVICES BARRIERS**

The government is continuing to reorganize and restructure some ministries and departments to improve the efficiency and effectiveness of services delivery. It is moving towards privatizing a number of parastatal businesses through the creation of autonomous authorities or boards, although observers of this process view it as moving too slowly. One such authority is the Public Enterprise Evaluation and Privatization Agency (PEEPA) that was established in 2000 to oversee the implementation of the Privatization Policy. The government intends to use privatization as a tool to increase foreign direct and portfolio investment in the country. PEEPA will ultimately determine the extent of foreign participation in the privatization process. The Ministry of Finance and Development Planning, to which PEEPA reports, has stated that local investors may be given preference in privatization initiatives in some instances. The government of Botswana has not succeeded in any of its recent privatization efforts. For example, the long awaited Air Botswana privatization has collapsed. SA Airlink won the tender for Air Botswana, but the government rescinded this award after a 10 month delay, challenging technical aspects of the bid that had been certified by the Public Procurement and Assets Disposal Board (PPADB). The Botswana government has now shifted attention to the privatization of the Botswana Telecommunications Corporation (BTC). A procurement tender has been filed through the Ministry of Communications, Science, and Technology to the PPADB.

The telecommunications market was liberalized in 1996 following the adoption of the Telecommunications Policy of 1995 and enactment of the Telecommunications Act (Act No. 15 of 1996) that abolished BTC's monopoly in some segments of the market and established an independent regulator, the Botswana Telecommunications Authority (BTA). The BTA was created to safeguard competition and ensure unrestricted interconnection with the public network. Market segments liberalized so far are mobile telephony, data communications, payphones, telecommunications equipment sales, and Internet services. Competition in the cellular phone industry is dominated by two international firms, Mascom (Portuguese) and Orange (French), which compete for the bulk of the local market. Voice-Over-Internet Protocol (VOIP) is not allowed (except over private networks). Universal licenses have been granted for all licensed telecommunications corporations, opening the cell phone market to parastatal BTC.

## **INVESTMENT BARRIERS**

All foreign investors wishing to invest in Botswana are required to register a company in Botswana in accordance with the Companies Act and to: comply with other applicable legislation; transfer technology

to Botswana, in certain circumstances; transfer skills to citizens of Botswana by promoting their involvement and participation in positions in the supervisory, middle, and senior management levels of companies; and ultimately replace expatriate employees with Botswana citizens within an agreed period, though there are often exceptions to this rule in practice.

The Botswana Export Development and Investment Authority (BEDIA), founded in 1998, is an autonomous organization established to promote investment in Botswana with a special emphasis on export oriented manufacturing industries. The Authority is designed to serve as the primary government contact point for both domestic and foreign investors. BEDIA maintains a center for potential investors to expedite clearances, residence and work permits, and factory and land allocation. Unfortunately, the acquisition of land, work permits, and business licenses remains encumbered by significant bureaucratic and political constraints. Despite several years of focus on this issue by BEDIA and other government agencies, Botswana has not achieved improvement in this area.

## **ELECTRONIC COMMERCE**

Internet usage is on the rise, but nationwide usage remains extremely low. According to the government, less than 10 percent of the population uses the Internet. There is a growing number of Internet service providers and Internet cafes, but due to the high cost of fixed-line phone charges associated with dial-up service, the cost of accessing the Internet remains prohibitive for the majority of the population. DSL services are increasing their presence in the market, but limited bandwidth and slow connection speeds continue to inhibit the growth of electronic commerce.

## **OTHER BARRIERS**

The legal system is sufficient to conduct commercial dealings, and foreign and domestic parties have equal access to, and standing under, the judicial system. Botswana courts will, in general, accept and enforce decisions of a foreign court found to have jurisdiction in a given case. However, a backlog of court challenges has adversely affected international companies that have won government procurement contracts. In some instances even companies that have won these challenges have had to rebid the tender due to the length of time, in one case over four years, for the court to render a decision. There is a growing concern that the backlog could deter American companies interested in competing for contracts in Botswana.

## **3. LESOTHO**

### **IMPORT POLICIES**

#### **Tariffs**

Lesotho's tariff policies are generally determined by and integrated with SACU, in accordance with the 2002 SACU Agreement. Accordingly, Lesotho applies the SACU Common External Tariff and other SACU import policies. Additional charges include clearing fees ranging from M750 to M1,000 (approximately \$110 to \$140). Lesotho is a Member of the WTO, the Southern Africa Development Community (SADC), and the Africa, Caribbean and Pacific-European Union (ACP-EU) Cotonou Trade Agreement. With seven of its fellow SADC member states, Lesotho has been a participant in the ongoing negotiations on a SADC-EU Economic Partnership Agreement (EPA). Lesotho, along with the other SADC countries except for South Africa, signed an "interim agreement of goods" with the EU. This interim agreement covers tariff lines on goods, sanitary and phytosanitary issues, technical barriers to trade, and trade facilitation. It also includes a clause to conclude negotiations on investment and services by year-end 2008.

## **Nontariff Barriers**

Lesotho applies a permit system for all imports from non-SACU members. The system is applicable to all consignments imported by individuals. Manufacturers can receive a “blanket permit” with a validity of 12 months and an additional grace period of 3 months. Lesotho has yet to submit its Import Licensing Questionnaire to the WTO.

In recent years, the government of Lesotho (GOL) has undertaken agricultural sector structural reforms including the removal of price subsidies and import controls on maize and wheat produce in favor of market-determined prices. The 1967 Agricultural Marketing Act, however, continues to control the importation of bread, legumes, sugar, eggs, meat, dairy products, fruits, and vegetables. The government provides subsidies to maize, milk, beans, and other grains and agricultural inputs during poor harvest seasons. Currently, the government provides a 30 percent subsidy on agricultural inputs and a 20 percent subsidy on grains as a response to the 2006/2007 drought and subsequent crop failure.

With the exception of eggs, sugar, and legumes, import restrictions allow a limited exemption for consumer purchases outside the country. The Department of Marketing under the Ministry of Trade and Industry, Cooperatives and Marketing monitors local production of consumer goods and issues import licenses for goods that are in short supply. However, national production has never met local demand. As a result, import licenses are issued as a matter of course.

Nonautomatic licenses apply to imported used clothing. In practice, licenses for used clothing are not issued, constituting a *de facto* ban. The Ministry issues permits for the import of used vehicles from outside the SACU area.

## **STANDARDS, TESTING, LABELING, AND CERTIFICATION**

Lesotho does not have a national standards body and no national standards have been developed. The Standards and Quality Assurance section of the Ministry of Trade and Industry, Cooperatives and Marketing functions as the focal point for standards and quality assurance. Industries in Lesotho have traditionally relied on the South African Bureau of Standards for voluntary standards facilities and quality assurance schemes. Local exporters have relied on traditional export markets and have developed their standards according to technical and quality requirements of importing countries and firms or based on international standards.

Lesotho participates in a regional program on Standardization, Quality, Accreditation, and Metrology for the SADC. The program aims to harmonize standards for adoption by all member states. Efforts are also underway to develop a regional accreditation authority.

## **GOVERNMENT PROCUREMENT**

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

In 2007, the Government adopted new public procurement regulations. Standard government procurement in Lesotho is conducted through open competition. However, some preferences are given to locally owned companies in the government bidding process. Procurement regulations require the government to advertise online in order to conform to SACU standards. Lesotho’s Ministry of Trade and Industry encourages foreign companies to bid on public tenders as joint ventures with local firms.

## **INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION**

Lesotho's Industrial Property Order (1989), Copyright Order (1989) and the Industrial Property Regulations (1989) are the basis for legal protection of intellectual property rights. Patents have rarely been issued in Lesotho, but trademark protection is widely sought and granted. Lesotho is a party to the WIPO Convention, the Berne Convention for the Protection of Literary and Artistic Works, and the Paris Convention for the Protection of Industrial Property. Lesotho is also a party to the Patent Cooperation Treaty and the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks.

## **SERVICES BARRIERS**

The Trading Enterprises Order of 1996 restricts foreigners from participating in small scale trading activities that are reserved for nationals only. These include butcheries, barbershops, certain cafes, and hair salons.

## **INVESTMENT BARRIERS**

Lesotho welcomes foreign investment. Foreign investors have participated in the country's privatization program without discrimination. According to the International Finance Corporation, however, it takes 73 days to start a new business in Lesotho – a consequence of significant bureaucratic impediments and inefficiencies. In response, the government of Lesotho has embarked on a private sector development initiative in order to improve the nation's investment climate. The private sector development initiative will be implemented through funding from the Millennium Challenge Corporation and the World Bank.

## **ELECTRONIC COMMERCE**

The government of Lesotho adopted Lesotho's National Information and Communication Technology Policy in 2005. This introduced a regulatory framework for electronic commerce into Lesotho's legal system. The Ministry of Communications, Science, and Technology is responsible for its implementation.

Electronic commerce has not widely penetrated the country due to the high cost and low speed of Internet access. Telecom Lesotho, the sole fixed line Internet service provider, also holds a monopoly for international Internet access. Telecom Lesotho does not allow the use of wireless connections by local Internet providers.

## **OTHER BARRIERS**

### **Corruption**

The government has received international accolades for its prosecution of multinational companies for corruption related to the awarding of contracts for construction of the Lesotho Highlands Development Project. In cases that have been upheld by the Lesotho Court of Appeals, the former Chief Executive of the Lesotho Highlands Development Authority (LHDA) and three multinational corporations have been convicted for fraud and bribery.

The government has established a Directorate on Corruption and Economic Offenses that continues to prosecute cases regarding embezzlement and bribery in government departments and the private sector.

## **4. NAMIBIA**

### **IMPORT POLICIES**

Namibia is a member of various regional and international economic and trade bodies including the WTO, the Southern African Customs Union (SACU), whose Secretariat is headquartered in Namibia, and the Southern African Development Community (SADC). Namibia's tariff policies are generally determined by and integrated with SACU, in accordance with the 2002 SACU Agreement. Accordingly, Namibia applies the SACU common external tariff (CET).

The Directorate of International Trade of the Ministry of Trade and Industry (MTI) is responsible for coordinating the country's trade policies and overseeing Namibia's participation in international trade bodies. The Directorate is responsible for managing import/export procedures. Namibia, as a WTO Member, is a party to the WTO Agreement on Import Licensing. Most nonagricultural imports require a permit issued by MTI. In addition, a limited number of products are subject to specific import licensing requirements: medicines; chemicals; frozen or chilled fish and meat; live animals and genetic materials; controlled petroleum products; firearms and explosives; diamonds, gold and other minerals; and seemingly all second-hand goods such as clothing and motor vehicles. In practice, however, MTI does not issue licenses for imports of used clothing, resulting in a *de facto* ban on this product. Namibia bans the importation of used vehicles older than 5 years from non-SACU countries as well as left hand drive vehicles.

With respect to agricultural trade, the Namibian Agronomic Board issues permits for the import, export, and transit of controlled agronomic crops, *i.e.*, wheat and wheat products and corn and corn products. Imports of agronomic crops and derivatives, as well as all plants and plant products, also require the issuance of a phytosanitary certificate by the Ministry of Agriculture, Water and Rural Development. Retailers of fruits, vegetables, and other crop products must purchase 25 percent of their stock from local farmers. The Namibian Meat Board regulates the import and export of live animals (cattle, sheep, goats, and pigs) and derivative meat products. Importers of live animals and meat products must demonstrate compliance with the country's animal health standards by obtaining a veterinary import permit from the Directorate of Veterinary Services.

### **STANDARDS, TESTING, LABELING, AND CERTIFICATION**

The South African Bureau of Standards (SABS) currently undertakes standardization functions in Namibia as a result of the agreement signed between SABS and the Namibian Government in July 1991. The Namibian Government, however, recently established the Namibian Standards Institute, which will take over from SABS once the new institution builds its technical capacity.

Namibia is a party to the Convention on Biological Diversity and a signatory to the subsequent Cartagena Protocol on Biosafety. In an effort to meet its international commitments, the government has drafted new legislation – the Biosafety Act 2006. The Act will regulate the importation, sale and use of products of agricultural biotechnology and will establish new regulatory and administrative structures. It will impose new registration obligations on facilities that use or produce agricultural biotechnology products and will require persons and companies to receive authorization prior to importing such products. It will require biotechnology products to be clearly labeled and identified for purposes of traceability. The Biosafety Act was passed by the Namibian Parliament in December 2006, but has not yet been fully implemented because drafting regulations has not been completed. Pending implementation of the Biosafety Act, the government has imposed a moratorium on the importation of agricultural biotechnology products.



## **GOVERNMENT PROCUREMENT**

Most government transactions, including the awarding of contracts and the purchase of supplies, are made through the Tender Board of Namibia. The Board is comprised of representatives from various government ministries and appointed by the Minister of Finance. Government procurement tender notices are published in the local media. The Tender Board gives preference to goods manufactured and/or assembled in Namibia as well as by historically disadvantaged Namibians. Namibia is not a signatory to the WTO Agreement on Government Procurement.

## **EXPORT SUBSIDIES**

Since independence in 1990, the government has pursued policies to diversify its economy and to create employment. To achieve these goals, the government has put in place tax and nontax incentives to attract manufacturers and export oriented businesses. The Offshore Development Company administers the country's Export Processing Zone (EPZ) regime. Companies granted EPZ status can set up operations anywhere in Namibia. There are no restrictions on the industrial sector as long as the exports are destined for markets outside the SACU region. Benefits of the EPZ regime include no corporate tax, no import duties on the importation of capital equipment or raw materials, and no value added tax, stamp or transfer duties. Nonresidents operating in an EPZ may hold foreign currency accounts.

## **INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION**

Namibia is a party to the WIPO Convention, the Berne Convention for the Protection of Literary and Artistic Works, and the Paris Convention for the Protection of Industrial Property. Namibia is also a party to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks and the Patent Cooperation Treaty. Namibia is a signatory to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

The responsibility for IPR protection is divided between two government ministries. The Directorate of Internal Trade of MTI oversees industrial property and is responsible for the registration of companies, private corporations, patents, trademarks, and designs. The Ministry of Information and Broadcasting manages copyrights.

The government is in the process of updating copyright legislation in part to implement the provisions of the WIPO Treaties on Performance and Phonograms and Copyrights. A draft bill that was scheduled to be considered by the Namibian Parliament in 2006 has yet to be introduced. Absent new legislation, Namibia lacks adequate legal and enforcement mechanisms to address the problems associated with piracy.

## **SERVICES BARRIERS**

The telecommunications sector is dominated by government-owned Telecom Namibia. Foreign investment exists in both of the country's mobile operators. However, the government of Namibia still has a share in both of these companies. Although the government pledged to foreign investors that no further licenses would be issued in the mobile phone market for the next 5 years, Telecom Namibia was granted a license and allowed to introduce a mobile service. The government of Namibia is in the process of drafting a new bill on telecommunications which aims to pave the way for new technology services and increased competition in the communications sector. An Internet provider has pursued legal action against Telecom Namibia alleging monopolist policies in the Internet sector.

Under the Namibia National Re-insurance Act of 1998, insurance companies are required to cede 20 percent of any policy issued or renewed to the state-owned Namibia National Reinsurance Corporation (NamibRe). In 2006, the government and private insurers reached an agreement in which the mandatory cession clause would not be enforced for 5 years.

## **INVESTMENT BARRIERS**

Namibia's Foreign Investment Act of 1990 provides for equal treatment of domestic and foreign investors and provides nondiscriminatory access to all sectors. The government guarantees foreign investors access to foreign currency, repatriation of capital, and dispute settlement through international arbitration. There are few restrictions on the establishment of private businesses or the size of an investment. The Namibian Investment Center is responsible for implementing the country's investment promotion policies.

There is no legal local participation requirement for foreign investments, but the government actively encourages partnerships with historically disadvantaged Namibians. In certain industries, such as the fishing sector, investors complain of a concerted campaign to "Namibianize" existing investments.

The lengthy and administratively burdensome process of obtaining work permits is among investors' greatest complaints in Namibia. Although the government cites the 36 percent unemployment rate as their motivation for their strict policy, generally Namibia does not yet have the available skills capacity to fill the jobs which foreigners seek. Namibia also lacks a category of visa providing for "business" visits. In some instances, immigration officials have either refused entry or arrested individuals who have traveled to Namibia for short-term business meetings or consultations under the pretext that those individuals lacked work permits.

Land reform is at the forefront of public debate. The Namibian Constitution provides for the government initiated purchase of private property in the public interest subject to the payment of "just" compensation under a "willing buyer-willing seller" system, and the government has begun to implement this program as prescribed by the Constitution. Namibian law also allows for expropriation with just compensation of land in the public interest. To date, land acquisition and expropriations have been undertaken legally and with compensation. Domestic groups have criticized Namibia's government recently for the slow pace of acquiring commercial farmland and resettling Namibia's landless population. The government considers foreign-owned and nonproductive farmland primary targets for expropriation. The government introduced a land tax at the beginning of April 2005 in an effort to raise money for land acquisition. Absentee landowners are subject to higher tax rates per hectare than resident farmers.

## **ELECTRONIC COMMERCE**

Electronic commerce is still relatively unknown to Namibian consumers. Only a small percentage of Namibians enjoy access to the Internet. The government is in the early stages of formulating policies to regulate electronic commerce. MTI's Directorate of Internal Trade included a section on electronic commerce in the new 2004 Companies Act. Implementation of the new Act is expected in 2008 after regulations have been drafted.

## **OTHER BARRIERS**

According to recent surveys, there is a growing public perception that official corruption is on the rise.

Anticorruption was the centerpiece of President Pohamba's election campaign, and it is a top priority of his administration along with the elimination of mismanagement and fraud. Anticorruption legislation is in place to combat public corruption.

Anticorruption bodies include the Office of Ombudsman and the Office of the Auditor-General. In 2003, an Anti-Corruption Bill was passed and the government later established an independent Anti-Corruption Commission. The challenge remains for the Commission to effectively investigate cases of corruption that culminate in successful prosecution. Only a few initial cases of relatively low level corruption have been brought to trial. In addition, the government has yet to take action on reports and recommendations from several presidential commissions that were established in past years to investigate allegations of kickbacks and irregularities in Namibian parastatals.

A large court backlog continues to cause lengthy delays of all types of trials.

There are examples of Namibian ministry or government officials interpreting laws inconsistently, often to the detriment of foreign investors.

## **5. SWAZILAND**

### **IMPORT POLICIES**

#### **Tariffs**

Swaziland is a member of the World Trade Organization (WTO), the Southern African Customs Union (SACU), the Southern Africa Development Community (SADC), and the Common Market for Eastern and Southern Africa (COMESA). As a member of SACU, Swaziland's tariff policies are generally determined by and integrated with SACU, in accordance with the 2002 SACU Agreement. Accordingly, Swaziland applies the SACU common external tariff. However, Swaziland introduced a 14 percent sales tax for goods coming through its borders regardless of the SACU member country of origin.

Swaziland's continued retention of its COMESA status is uncertain as the COMESA Heads of State and Government continue to give Swaziland a 1 year derogation. The present derogation ends in December 2008. COMESA plans to establish a Customs Union by December 2008, making Swaziland's multiple memberships in SACU and COMESA a challenge. The government of the Kingdom of Swaziland (GKOS) has engaged the USAID Southern African Competitiveness Hub to study if Swaziland may be able to maintain both its SACU and COMESA memberships simultaneously.

#### **Nontariff Measures**

There are no restrictions on imports into Swaziland and few prohibited imports (except illicit drugs, pornography and arms). Permits are required for certain imports, including all agricultural products, mineral fuels, used clothes, mineral oils, motor vehicle parts, used cars, medicinal drugs, and electrical appliances. Licensing permits issued by the Ministry of Finance are generally easy to obtain and are valid for one shipment. Goods consigned to Swaziland from outside SACU must be cleared through customs at the first port of importation into SACU. A bill of entry must be completed and submitted to customs along with copies of the supplier's invoices and a Swaziland import permit.

Another cited nontariff barrier to trade is the Southern African Development Community's (SADC) Single Administrative Document 500 (SAD 500) form. The form is used for multiple border crossings and is supposed to standardize the number of forms needed for transporting goods between SADC countries. Entrepreneurs trading between SADC countries find the form rather cumbersome. The business community has inundated the Federation of Swaziland Employers and Chamber of Commerce with complaints. Large businesses are coping with the requirement by designating employees to complete the form. However small entrepreneurs, with a much smaller employee base and fewer

resources, become reliant on makeshift offices opened at the borders to complete the forms. These offices often charge exorbitant fees.

Other nontariff barriers to trade commonly cited are levy charges and sales tax on some products like agricultural products, mineral fuels, electronic equipment, *etc.*

## **STANDARDS, TESTING, LABELING, AND CERTIFICATION**

In December 2005, the Ministry of Enterprise and Employment created the Swaziland Standards Authority (SSA) to eliminate Swaziland's reliance on the South African Bureau of Standards (SABS). The Ministry named the first Director to the SSA in April 2007 and plans to have a fully operational office by April 2008.

## **GOVERNMENT PROCUREMENT**

Although the government may accord local business a 15 percent price preference in tendering for government contracts, it appears that this preferential treatment is not always granted. Firms from South Africa and other southern African countries are selected for a large portion of government contracts. However, for small- and medium-sized tenders, bidding companies must be registered in Swaziland. The government inspects the premises of all suppliers prior to awarding the tender. The government's withholding of a 10 percent tax from resident government suppliers is still being practiced despite the complaints from the private sector.

The government issues tender notices 7 days to 30 days before tenders are due, depending on the size of the contract. Potential suppliers must pay a fee to obtain tender documentation and participate in government procurements. Tenders must be submitted to the Central Tender Board and suppliers are invited for the opening of the tenders. In some instances, a Ministry can apply for a waiver of the tender procedure if there are too few companies that supply a particular commodity.

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

## **INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION**

Swaziland is a party to the WIPO Convention, the Berne Convention for the Protection of Literary and Artistic Works and the Paris Convention for the Protection of Industrial Property. Swaziland is also a party to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks and the Patent Cooperation Treaty. Swaziland is a signatory to the Patent Law Treaty and the Trademark Law Treaty.

Protection for patents, trademarks, and copyrights in Swaziland is inadequate.

Updated patent legislation has been in draft form for the past 3 years. When the new legislation is enacted, the African Regional Industrial Property Organization is expected to help Swaziland with technical assistance in granting patents.

Copyright protection is also limited as the copyright statutes are not adequately implemented. The Ministry of Justice and Constitutional Affairs has drafted an updated Copyright Act, based on the World Intellectual Property Rights Organization (WIPO) model.

## **SERVICES BARRIERS**

Foreign participation in the services sector is generally not restricted. In 2005, one major reform undertaken by the GKOS was to remove the monopoly held by the Swaziland Royal Insurance Corporation in the country. The Office of the Registrar of Insurance and Pension Fund opened its offices in May 2007.

MTN Swaziland is the only mobile telecommunications provider. MTN Swaziland was given a 10 year monopoly that ends in 2008. The government will consider whether or not to remove the monopoly in 2008.

The Swaziland Telecommunications Corporation is the sole provider of the fixed line telecommunications services.

## **INVESTMENT BARRIERS**

Swaziland does not have an investment code. The emphasis on foreign investment is more a matter of policy statements by the government and individual ministers than a matter of laws and institutions to support such policies. Calls for the streamlining of procedures to start a business have gone unheeded. Suggestions from the USAID-funded 2005 Investor Road Map report have not been implemented.

Major legislation to support a solid investment climate is lacking in Swaziland. There is a need for a Securities Code to support investors who buy shares in the securities market. A Securities Bill has been proposed but not yet passed. Related legislation known as the Financial Services Regulatory Authority Bill has not reached Parliament. The legislation would bring under one regulatory net all nonbank financial institutions such as insurance firms, retirement funds, building societies, capital markets, and intermediaries.

Companies are governed by the outdated Companies Act of 1912, which is retooled from an 1889 South African law. There is a draft bill to replace the Companies Act. It would regulate incorporation, registration, management, administration, and dissolution of companies. A Parliamentary Select Committee presented a report on the draft bill to the Senate. Presently, the Minister of Enterprise and Employment Portfolio Committee is studying the bill. The Ministry has not presented the bill for debate in the House of Assembly. While foreign businesses currently operating in Swaziland complain about the lack of regulations, some also emphasize that it would be a mistake to decide against investing in Swaziland for this reason alone.

There are no formal policies or practices that discriminate against foreign owned investors and companies in Swaziland. Foreign investors are free to invest in most sectors of the Swazi economy; however, investors should be aware of state-run or state-sanctioned monopolies. Pineapple canning, cellular and fixed line telecommunications, and water are all state sanctioned or state owned monopolies. The Trade and Business Facilitation Bill, originally drafted in 2001, requires specified sectors to maintain a certain degree of Swazi ownership and encourages small scale entrepreneurship in rural areas. According to the Ministry of Enterprise and Employment, the bill has not gone through Parliament.

The Cabinet has approved a privatization policy and the GKOS is taking steps to implement the policy. The privatization process will create a Public Enterprise Agency charged with ensuring that public enterprises are managed efficiently and are not a drain on the nation's resources. Key parastatals being targeted for privatization, with the possibility of joint ventures for foreign investors, are the Swazi Post and Telecommunications Corporation (SPTC) and the Swaziland Electricity Board. The Swaziland

Electricity Act 2007 outlawed the Swaziland Electricity Board's previous monopoly. There is room for improvement as GKOS efforts are moving slowly.

Land acquisition is a barrier to investment in Swaziland. Large plots of land, not designated as Swazi Nation Land, are difficult to find and companies, especially those in agribusiness, are finding it difficult to expand their operations.