

2011 National Trade Estimate Report  
on  
FOREIGN TRADE BARRIERS



Ambassador Ronald Kirk  
Office of the United States Trade Representative



# ACKNOWLEDGEMENTS

The Office of the United States Trade Representative (USTR) is responsible for the preparation of this report. U.S. Trade Representative Ron Kirk gratefully acknowledges in particular the contributions of Deputy U.S. Trade Representatives Demetrios Marantis, Michael Punke, and Miriam Sapiro; USTR General Counsel Timothy Reif; Chief of Staff Lisa Garcia; and Assistant USTR for Public/Media Affairs Carol Guthrie, Senior Policy Advisor Janis Lazda, Special Assistant Stephen Ostrowski, and all USTR staff who contributed to the drafting and review of this report. Thanks are extended to partner Executive Branch agencies, including the Environmental Protection Agency and the Departments of Agriculture, Commerce, Health and Human Services, Justice, Labor, Transportation, Treasury, and State. Ambassador Kirk would also like to thank Jessica Bartos, John Hensley, Theodore Kahn, Tal Manor, and Mia Warner for their contributions.

In preparing the report, substantial information was solicited from U.S. Embassies around the world and from interested stakeholders. The draft of this report was circulated through the interagency Trade Policy Staff Committee.

March 2011



# LIST OF FREQUENTLY USED ACRONYMS AND ABBREVIATIONS

AD .....	Antidumping
AGOA .....	African Growth and Opportunity Act
APEC.....	Asia Pacific Economic Cooperation
ASEAN .....	Association of Southeast Asian Nations
ATC.....	Agreement on Textiles and Clothing
ATPA .....	Andean Trade Preferences Act
ATPDEA .....	Andean Trade Promotion & Drug Eradication Act
BIA.....	Built-In Agenda
BIT .....	Bilateral Investment Treaty
BOP.....	Balance of Payments
CACM.....	Central American Common Market
CAFTA.....	Central American Free Trade Area
CARICOM .....	Caribbean Common Market
CBERA .....	Caribbean Basin Economic Recovery Act
CBI.....	Caribbean Basin Initiative
CFTA.....	Canada Free Trade Agreement
CITEL .....	Telecommunications division of the OAS
COMESA .....	Common Market for Eastern & Southern Africa
CTE .....	Committee on Trade and the Environment
CTG.....	Council for Trade in Goods
CVD.....	Countervailing Duty
DDA.....	Doha Development Agenda
DSB.....	Dispute Settlement Body
EAI.....	Enterprise for ASEAN Initiative
DSU.....	Dispute Settlement Understanding
EU .....	European Union
EFTA.....	European Free Trade Association
FTAA .....	Free Trade Area of the Americas
FOIA .....	Freedom of Information Act
GATT .....	General Agreement on Tariffs and Trade
GATS .....	General Agreements on Trade in Services
GDP.....	Gross Domestic Product
GEC.....	Global Electronic Commerce
GSP .....	Generalized System of Preferences
GPA.....	Government Procurement Agreement
IFI.....	International Financial Institution
IPR.....	Intellectual Property Rights
ITA .....	Information Technology Agreement
LDBDC .....	Least Developed Beneficiary Developing Country
MAI.....	Multilateral Agreement on Investment
MEFTA .....	Middle East Free Trade Area
MERCOSUL/MERCOSUR .....	Southern Common Market
MFA.....	Multifiber Arrangement
MFN.....	Most Favored Nation
MOSS.....	Market-Oriented, Sector-Selective

MOU .....	Memorandum of Understanding
MRA.....	Mutual Recognition Agreement
NAFTA .....	North American Free Trade Agreement
NEC .....	National Economic Council
NIS .....	Newly Independent States
NSC.....	National Security Council
NTR.....	Normal Trade Relations
OAS.....	Organization of American States
OECD.....	Organization for Economic Cooperation and Development
OPIC.....	Overseas Private Investment Corporation
PNTR.....	Permanent Normal Trade Relations
ROU .....	Record of Understanding
SACU .....	Southern African Customs Union
SADC .....	Southern African Development Community
SME.....	Small and Medium Size Enterprise
SPS .....	Sanitary and Phytosanitary Measures
SRM .....	Specified Risk Material
TAA.....	Trade Adjustment Assistance
TABD.....	Trans-Atlantic Business Dialogue
TACD.....	Trans-Atlantic Consumer Dialogue
TAEVD .....	Trans-Atlantic Environment Dialogue
TALD .....	Trans-Atlantic Labor Dialogue
TBT .....	Technical Barriers to Trade
TEP.....	Transatlantic Economic Partnership
TIFA.....	Trade & Investment Framework Agreement
TPRG.....	Trade Policy Review Group
TPSC .....	Trade Policy Staff Committee
TRIMS.....	Trade Related Investment Measures
TRIPS.....	Trade Related Intellectual Property Rights
UAE.....	United Arab Emirates
UNCTAD .....	United Nations Conference on Trade & Development
UNDP.....	United Nations Development Program
URAA .....	Uruguay Round Agreements Act
USDA.....	U.S. Department of Agriculture
USITC .....	U.S. International Trade Commission
USTR.....	United States Trade Representative
VRA .....	Voluntary Restraint Agreement
WAEMU .....	West African Economic & Monetary Union
WB .....	World Bank
WTO .....	World Trade Organization



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# FOREWORD

The 2011 National Trade Estimate Report on Foreign Trade Barriers (NTE) is the twenty-sixth in an annual series that surveys significant foreign barriers to U.S. exports. This document is a companion piece to the President's Trade Policy Agenda published in March. The issuance of the NTE Report continues the elaboration of an enforcement strategy, utilizing this report, among other tools, in that strategy.

In accordance with section 181 of the Trade Act of 1974, as added by section 303 of the Trade and Tariff Act of 1984 and amended by section 1304 of the Omnibus Trade and Competitiveness Act of 1988, section 311 of the Uruguay Round Trade Agreements Act, and section 1202 of the Internet Tax Freedom Act, the Office of the U.S. Trade Representative is required to submit to the President, the Senate Finance Committee, and appropriate committees in the House of Representatives, an annual report on significant foreign trade barriers.

The statute requires an inventory of the most important foreign barriers affecting U.S. exports of goods and services, foreign direct investment by U.S. persons, and protection of intellectual property rights. Such an inventory facilitates negotiations aimed at reducing or eliminating these barriers. The report also provides a valuable tool in enforcing U.S. trade laws, with the goal of expanding global trade and strengthening the rules-based trading system, which benefits all economies, and U.S. producers and consumers in particular.

The report provides, where feasible, quantitative estimates of the impact of these foreign practices on the value of U.S. exports. Information is also included on some of the actions taken to eliminate foreign trade barriers. Opening markets for American goods and services, either through negotiating trade agreements or through results-oriented enforcement actions, is this Administration's top trade priority. This report is an important tool for identifying such trade barriers.

## SCOPE AND COVERAGE

This report is based upon information compiled within USTR, the Departments of Commerce and Agriculture, and other U.S. Government agencies, and supplemented with information provided in response to a notice published in the *Federal Register*, and by members of the private sector trade advisory committees and U.S. Embassies abroad.

Trade barriers elude fixed definitions, but may be broadly defined as government laws, regulations, policies, or practices that either protect domestic products from foreign competition or artificially stimulate exports of particular domestic products.

This report classifies foreign trade barriers into nine different categories. These categories cover government-imposed measures and policies that restrict, prevent, or impede the international exchange of goods and services. They include:

- Import policies (*e.g.*, tariffs and other import charges, quantitative restrictions, import licensing, and customs barriers);
- Government procurement (*e.g.*, "buy national" policies and closed bidding);

- Export subsidies (*e.g.*, export financing on preferential terms and agricultural export subsidies that displace U.S. exports in third country markets);
- Lack of intellectual property protection (*e.g.*, inadequate patent, copyright, and trademark regimes and enforcement of intellectual property rights);
- Services barriers (*e.g.*, limits on the range of financial services offered by foreign financial institutions, regulation of international data flows, restrictions on the use of foreign data processing, and barriers to the provision of services by foreign professionals);
- Investment barriers (*e.g.*, limitations on foreign equity participation and on access to foreign government-funded research and development programs, local content requirements, technology transfer requirements and export performance requirements, and restrictions on repatriation of earnings, capital, fees and royalties);
- Government-tolerated anticompetitive conduct of state-owned or private firms that restricts the sale or purchase of U.S. goods or services in the foreign country's markets;
- Trade restrictions affecting electronic commerce (*e.g.*, tariff and nontariff measures, burdensome and discriminatory regulations and standards, and discriminatory taxation); and
- Other barriers (barriers that encompass more than one category, *e.g.*, bribery and corruption,<sup>1</sup> or that affect a single sector).

Significant foreign government barriers to U.S. exports that prior to the 2010 NTE reports were addressed under the rubric of “standards, testing, labeling and certification” measures are now treated separately in two specialized reports. One report is dedicated to identifying barriers in the form of standards-related measures (such as product standards and testing requirements). A second report addresses barriers that take the form of sanitary and phytosanitary measures (such as procedures to prevent the spread of crop pests or rules regulating food additives). Together, the three reports provide the inventory of trade barriers called for under U.S. law.

The two specialized reports were first issued in March 2010. USTR will issue new, up-to-date versions of these two reports in conjunction with the release of this report to continue to highlight the increasingly critical nature of standards-related measures and sanitary and phytosanitary issues to U.S. trade policy. The reports will identify and call attention to problems resolved during 2010, in part as models for resolving ongoing issues and to signal new or existing areas in which more progress needs to be made.

USTR continues to more vigorously scrutinize foreign labor practices and to redress substandard practices that impinge on labor obligations in U.S. free trade agreements (FTAs) and deny foreign workers their internationally recognized labor rights. USTR has also introduced new mechanisms to enhance its monitoring of the steps U.S. FTA partners have taken to implement and comply with their obligations under the environment chapters of those agreements. To further these initiatives, USTR has implemented interagency processes for systematic information gathering and review of labor rights practices and environmental enforcement measures in FTA countries, and USTR staff regularly visit FTA countries to monitor practices and directly engage governments and other actors. The Administration has reported on these activities in the *2011 Trade Policy Agenda* and *2010 Annual Report of the President on the Trade Agreements Program*.

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The NTE covers significant barriers, whether they are consistent or inconsistent with international trading rules. Many barriers to U.S. exports are consistent with existing international trade agreements. Tariffs, for example, are an accepted method of protection under the General Agreement on Tariffs and Trade 1994 (GATT 1994). Even a very high tariff does not violate international rules unless a country has made a commitment not to exceed a specified rate, *i.e.*, a tariff binding. On the other hand, where measures are not consistent with U.S. rights international trade agreements, they are actionable under U.S. trade law, including through the World Trade Organization (WTO).

This report discusses the largest export markets for the United States, including: 58 countries, the European Union, Taiwan, Hong Kong, and one regional body. Some countries were excluded from this report due primarily to the relatively small size of their markets or the absence of major trade complaints from representatives of U.S. goods and services sectors. However, the omission of particular countries and barriers does not imply that they are not of concern to the United States.

NTE sections report the most recent data on U.S. bilateral trade in goods and services and compare the data to the preceding period. This information is reported to provide context for the reader. In nearly all cases, U.S. bilateral trade increased in 2010 compared to the preceding period, reflecting the improving world economy (with world Gross Domestic Product and world trade up 5 percent and 12 percent, respectively). The merchandise trade data contained in the NTE are based on total U.S. exports, free alongside (f.a.s.)<sup>ii</sup> value, and general U.S. imports, customs value, as reported by the Bureau of the Census, Department of Commerce. (NOTE: These data are ranked in the Appendix according to size of export market). The services data are drawn from the October 2010 Survey of Current Business, compiled by the Bureau of Economic Analysis in the Department of Commerce (BEA). The direct investment data are drawn from the September 2010 Survey of Current Business, also from BEA.

## **TRADE IMPACT ESTIMATES AND FOREIGN BARRIERS**

Wherever possible, this report presents estimates of the impact on U.S. exports of specific foreign trade barriers or other trade distorting practices. Where consultations related to specific foreign practices were proceeding at the time this report was published, estimates were excluded, in order to avoid prejudice to those consultations.

The estimates included in this report constitute an attempt to assess quantitatively the potential effect of removing certain foreign trade barriers on particular U.S. exports. However, the estimates cannot be used to determine the total effect on U.S. exports either to the country in which a barrier has been identified or to the world in general. In other words, the estimates contained in this report cannot be aggregated in order to derive a total estimate of gain in U.S. exports to a given country or the world.

Trade barriers or other trade distorting practices affect U.S. exports to another country because these measures effectively impose costs on such exports that are not imposed on goods produced in the importing country. In theory, estimating the impact of a foreign trade measure on U.S. exports of goods requires knowledge of the (extra) cost the measure imposes on them, as well as knowledge of market conditions in the United States, in the country imposing the measure, and in third countries. In practice, such information often is not available.

Where sufficient data exist, an approximate impact of tariffs on U.S. exports can be derived by obtaining estimates of supply and demand price elasticities in the importing country and in the United States. Typically, the U.S. share of imports is assumed to be constant. When no calculated price elasticities are available, reasonable postulated values are used. The resulting estimate of lost U.S. exports is approximate, depends on the assumed elasticities, and does not necessarily reflect changes in trade patterns

### **FOREIGN TRADE BARRIERS**

with third countries. Similar procedures are followed to estimate the impact of subsidies that displace U.S. exports in third country markets.

The task of estimating the impact of nontariff measures on U.S. exports is far more difficult, since there is no readily available estimate of the additional cost these restrictions impose. Quantitative restrictions or import licenses limit (or discourage) imports and thus raise domestic prices, much as a tariff does. However, without detailed information on price differences between countries and on relevant supply and demand conditions, it is difficult to derive the estimated effects of these measures on U.S. exports. Similarly, it is difficult to quantify the impact on U.S. exports (or commerce) of other foreign practices, such as government procurement policies, nontransparent standards, or inadequate intellectual property rights protection.

In some cases, particular U.S. exports are restricted by both foreign tariff and nontariff barriers. For the reasons stated above, it may be difficult to estimate the impact of such nontariff barriers on U.S. exports. When the value of actual U.S. exports is reduced to an unknown extent by one or more than one nontariff measure, it then becomes derivatively difficult to estimate the effect of even the overlapping tariff barriers on U.S. exports.

The same limitations that affect the ability to estimate the impact of foreign barriers on U.S. goods exports apply to U.S. services exports. Furthermore, the trade data on services exports are extremely limited in detail. For these reasons, estimates of the impact of foreign barriers on trade in services also are difficult to compute.

With respect to investment barriers, there are no accepted techniques for estimating the impact of such barriers on U.S. investment flows. For this reason, no such estimates are given in this report. The NTE includes generic government regulations and practices which are not product-specific. These are among the most difficult types of foreign practices for which to estimate trade effects.

In the context of trade actions brought under U.S. law, estimates of the impact of foreign practices on U.S. commerce are substantially more feasible. Trade actions under U.S. law are generally product-specific and therefore more tractable for estimating trade effects. In addition, the process used when a specific trade action is brought will frequently make available non-U.S. Government data (U.S. company or foreign sources) otherwise not available in the preparation of a broad survey such as this report.

In some cases, industry valuations estimating the financial effects of barriers are contained in the report. The methods computing these valuations are sometimes uncertain. Hence, their inclusion in the NTE report should not be construed as a U.S. Government endorsement of the estimates they reflect.

March 2011

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## **Endnotes**

<sup>i</sup> Corruption is an impediment to trade, a serious barrier to development, and a direct threat to our collective security. Corruption takes many forms and affects trade and development in different ways. In many countries, it affects customs practices, licensing decisions, and the awarding of government procurement contracts. If left unchecked, bribery and corruption can negate market access gained through trade negotiations, undermine the foundations of the international trading system, and frustrate broader reforms and economic stabilization programs. Corruption also hinders development and contributes to the cycle of poverty.

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Information on specific problems associated with bribery and corruption is difficult to obtain, particularly since perpetrators go to great lengths to conceal their activities. Nevertheless, a consistent complaint from U.S. firms is that they have experienced situations that suggest corruption has played a role in the award of billions of dollars of foreign contracts and delayed or prevented the efficient movement of goods. Since the United States enacted the Foreign Corrupt Practices Act (FCPA) in 1977, U.S. companies have been prohibited from bribing foreign public officials, and numerous other domestic laws discipline corruption of public officials at the state and federal levels. The United States is committed to the active enforcement of the FCPA.

The United States has taken a leading role in addressing bribery and corruption in international business transactions and has made real progress over the past quarter century building international coalitions to fight bribery and corruption. Bribery and corruption are now being addressed in a number of fora. Some of these initiatives are now yielding positive results.

The United States led efforts to launch the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Antibribery Convention). In November 1997, the United States and 33 other nations adopted the Antibribery Convention, which currently is in force for 38 countries, including the United States. The Antibribery Convention obligates its parties to criminalize the bribery of foreign public officials in the conduct of international business. It is aimed at proscribing the activities of those who offer, promise, or pay a bribe. (*For additional information, see <http://www.export.gov/tcc> and <http://www.oecd.org>*).

The United States also played a critical role in the successful conclusion of negotiations that produced the United Nations Convention Against Corruption, the first global anti-corruption instrument. The Convention was opened for signature in December 2003, and entered into force December 14, 2005. The Convention contains many provisions on preventive measures countries can take to stop corruption, and requires countries to adopt additional measures as may be necessary to criminalize fundamental anticorruption offenses, including bribery of domestic as well as foreign public officials. As of September 2010, 140 countries had signed the Convention, and there were 148 parties, including the United States.

In March 1996, countries in the Western Hemisphere concluded negotiation of the Inter-American Convention Against Corruption (Inter-American Convention). The Inter-American Convention, a direct result of the Summit of the Americas Plan of Action, requires that parties criminalize bribery and corruption. The Inter-American Convention entered into force in March 1997. The United States signed the Inter-American Convention on June 2, 1996 and deposited its instrument of ratification with the Organization of American States (OAS) on September 29, 2000. Thirty-one of the thirty-three parties to the Inter-American Convention, including the United States, participate in a Follow-up Mechanism conducted under the auspices of the OAS to monitor implementation of the Convention. The Inter-American Convention addresses a broad range of corrupt acts including domestic corruption and transnational bribery. Signatories agree to enact legislation making it a crime for individuals to offer bribes to public officials and for public officials to solicit and accept bribes, and to implement various preventive measures.

The United States continues to push its anti-corruption agenda forward. The United States seeks binding commitments in FTAs that promote transparency and that specifically address corruption of public officials. The United States also is seeking to secure a meaningful agreement on trade facilitation in the World Trade Organization (WTO) and has been pressing for concrete commitments on customs operations and on transparency of government procurement regimes in FTA negotiations. In the Trans-Pacific Partnership negotiations, the United States is seeking expanded transparency and anticorruption disciplines. The United States is also playing a leadership role on these issues in APEC and other fora.

<sup>ii</sup> Free alongside (f.a.s.): Under this term, the seller quotes a price, including delivery of the goods alongside and within the reach of the loading tackle (hoist) of the vessel bound overseas.



# ANGOLA

## TRADE SUMMARY

The U.S. goods trade deficit with Angola was \$10.7 billion in 2010, up \$2.7 billion from 2009. U.S. goods exports in 2010 were \$1.3 billion, down 9.2 percent from the previous year. Corresponding U.S. imports from Angola were \$11.9 billion, up 27.9 percent. Angola is currently the 69th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Angola was \$2.6 billion in 2009 (latest data available), up from \$2.3 billion in 2008.

## IMPORT POLICIES

### Tariffs and Nontariff Measures

Angola is a Member of the World Trade Organization (WTO) and the Southern African Development Community (SADC). In March 2003, Angola agreed to adhere to the SADC Protocol on Trade, which seeks to facilitate trade by harmonizing and reducing tariffs and by establishing regional policies on trade, customs, and methodology. However, Angola keeps delaying implementation of this protocol in the hope that the country can revive domestic production of non-petroleum goods, which remains low as a result of years of civil war and economic underdevelopment. The government is concerned that implementation of the SADC Protocol on Trade would lead to a large increase in imports, particularly from South Africa.

A new tariff schedule came into force in September 2008 which removed duties on imported raw materials, equipment, and intermediate goods for industries and reduced tariffs on 58 categories of basic goods. According to the WTO, Angola's average MFN tariff rate is 7.4 percent, with tariffs as high as 30 percent on products such as coffee, alcoholic beverages, building products (*i.e.*, cement, bricks, ceramic tiles). A new surcharge of one percent was established on imports of luxury products. Personal customs fees and transportation taxes were revoked by the new statute and are no longer charged. Besides tariffs levied on imports, additional fees associated with importing include: clearing costs (2 percent); VAT (2 percent to 30 percent depending on the good); revenue stamps (0.5 percent); port charges (\$500 per day per 20 foot container or \$850 per day per 40 foot container); and port storage fees (free for the first 15 days, then \$20 per 20 foot container or \$40 per 40 foot container per day).

Tariff obligations for the oil industry are largely determined by individually negotiated contracts between international oil companies and the Angolan government. In December 2004, a new Petroleum Customs Law was introduced that aimed to standardize tariff and customs obligations for the petroleum industry while protecting existing oil company rights and exemptions negotiated under prior contracts. According to customs officials, the law eliminated exemptions from duties on items imported by oil companies that are not directly used as equipment in oil production, as had been the case previously. Oil companies are still disputing the customs officials' interpretation of the law. Because most U.S. exports to Angola consist of specialized oil industry equipment, which is largely exempt from tariffs, the annual impact of tariff barriers on U.S. exports is relatively low.

### Customs Barriers

Administration of Angola's customs service has improved in the last few years but remains a barrier to market access. The Angolan government implemented a new customs code in January 2007 which follows

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the guidelines of the World Customs Organization (WCO), WTO, and SADC. However, during most of 2009, port clearance time averaged several months and importers commonly faced additional delays, often the result of capacity constraints at the Port of Luanda. For instance, shipping containers, although cleared, may be physically inaccessible because they are behind other containers. The situation improved with the recent creation of two dry ports for container storage, and with the diversion of some marine traffic to the Port of Lobito. As of mid-2010, port clearance time averaged one month.

The importation of certain goods into Angola requires an import license issued by the Ministry of Trade. The import license is renewable annually and covers all shipments of the authorized good or category of goods imported by the licensed importer. The importation of certain goods also requires specific authorization from various government ministries. This often leads to bureaucratic bottlenecks, which often leads to delays and extra costs. Goods that require ministerial authorization include the following: pharmaceutical substances and saccharine and derived products (Ministry of Health); radios, transmitters, receivers, and other devices (Ministry of Telecommunications); weapons, ammunition, fireworks, and explosives (Ministry of Interior); plants, roots, bulbs, microbial cultures, buds, fruits, seeds, and crates and other packages containing these products (Ministry of Agriculture); fiscal or postal stamps (Ministry of Post and Telecommunications); poisonous and toxic substances and drugs (Ministries of Agriculture, Industry, and Health); and samples or other goods imported to be given away (Customs).

Angola has formal trade barriers to the importation of genetically-modified organisms (GMOs) unless they are milled or sterilized. This conforms to SADC regional policies that bar the use of GMOs as cultivating seeds. If companies operating in the oil and mining industries present a letter from the Minister of Petroleum or the Minister of Geology and Mines, they may import, without duty, equipment to be used exclusively for oil and mineral exploration.

Required customs paperwork includes the “*Documento Unico*” (single document) for the calculation of customs duties, proof of ownership of the good, bill of lading, commercial invoice, packing list, and specific shipment documents verifying the right to import or export the product. Any shipment of goods equal to or exceeding \$1,000 requires a clearing agent. The number of clearing agents has increased from 55 in 2006 to 157 in 2010, but competition among clearing agents has not reduced fees, which typically range from 1 percent to 2 percent of the value of the declaration.

Pre-shipment inspection is also a barrier for goods including cars, live animals and living plants, cereals, seeds, food produce, pharmaceuticals, chemicals, alcoholic beverages, and dairy products. BIVAC (Bureau Inspection Valuation Assessment Control), a private company associated with Bureau Veritas, is the government’s recommended agent for pre-shipment inspections. Exporters who use an agent other than BIVAC for pre-shipment inspection are subject to additional inspection upon arrival.

## **GOVERNMENT PROCUREMENT**

The government advertises tender notices in local and international publications 15 days to 90 days before the tenders are due. Tender documents are normally obtained from a specific government ministry, department, or agency for a non-refundable fee. Completed tenders, accompanied by a specified security deposit, usually must be submitted directly to the procuring ministry. The tendering process often lacks transparency. Information about government projects and tenders is often not readily available from the appropriate authorities, and the interested parties must spend considerable time to obtain the necessary information. Awards for government tenders are sometimes published in the government newspaper “*Jornal de Angola*.” Under the Promotion of Angolan Private Entrepreneurs Law, the government gives Angolan companies preferential treatment in the procurement of goods, services and public works contracts.

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In September 2010 a new Public Procurement law was adopted. The new law made significant changes to the procedures for the acquisition of goods and services, as well as the award of concessions, by the government. These changes include: additional local content requirements; the use of competitive public tender as the standard procedure for government procurement; a new definition of the legal regime for public works contracts; and the creation of a Public Tender Management Unit that will have overarching responsibility for the preparation and launching of public tenders.

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

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

Angola is a party to the World Intellectual Property Organization (WIPO) Convention, the Paris Convention for the Protection of Industrial Property, and the WIPO Patent Cooperation Treaty. Intellectual property is protected by Law 3/92 for industrial property and Law 4/90 for the attribution and protection of copyrights. Intellectual property rights are administered by the Ministry of Industry (trademarks, patents, and designs) and by the Ministry of Culture (authorship, literary, and artistic rights).

Although Angolan law provides basic protection for intellectual property rights and the National Assembly is working to strengthen existing legislation, IPR protection remains weak in practice due to a lack of enforcement capacity. However, government officials have made efforts to confiscate and destroy pirated goods. On September 18, 2008 Angola's Economic Police burned 2.5 tons of counterfeited medicines, and pirated CDs and DVDs in a public event aimed at curbing the sales of pirated merchandise in Angola. According to Angola's National Department for the Protection of Intellectual Property Rights, the owners of the pirated goods were sentenced to up to six months in jail or fined approximately 110,000 Kwanza (approximately \$1,500). However, there are no reports of the authorities' conducting similar destructions of pirated material in 2009 or 2010. The government has also worked with international computer companies on anti-piracy measures. No suits involving U.S. intellectual property are known to have been filed in Angola.

## **INVESTMENT BARRIERS**

Angola is formally open to foreign investment, but its regulatory and legal infrastructure is not adequate to facilitate significant foreign direct investment outside the petroleum sector or to provide sufficient protection to foreign investors. Smaller firms in non-extractive industries tend to have a particularly difficult time conducting business in Angola. In 2003, Angola created the National Private Investment Agency (ANIP) and replaced its 1994 Foreign Investment Law with a new Law on Private Investment (Law 11/03). The 2003 law lays out the general parameters, benefits, and obligations for foreign investment in Angola. It encourages foreign investment by providing equal treatment for domestic and foreign investors, offering fiscal and customs incentives, and simplifying the investment application process. However, the law is vague on profit repatriation and includes only weak legal safeguards to protect foreign investors. In addition, many provisions of the law are subordinate to other sector-specific legislation (including in the petroleum, diamond, and financial sectors), allowing government ministries to override some of the protections and incentives contained in the investment law.

Angolan law has no provisions for international arbitration and requires that any investment dispute be resolved in Angolan courts. In 2008, the Attorney General ruled that Angola's specialized courts to hear tax disputes were unconstitutional. Consequently, foreign investors effectively have no legal recourse to dispute claims for additional taxes imposed by the Ministry of Finance upon audit. The World Bank's "Doing Business in 2011" survey estimates that commercial contract enforcement – measured by the

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amount of time elapsed between the filing of a complaint and the receipt of restitution – generally takes 1,011 days in Angola. A law on voluntary arbitration that would provide the legal framework for speedier, non-judicial resolution of disputes has been drafted, but not yet approved.

Although the new investment law is part of an overall effort by the Angolan government to create a more investor-friendly environment, many laws governing the economy have vague provisions that permit wide interpretation and inconsistent application by the government. Foreign investors can establish fully-owned subsidiaries in many sectors, but frequently are strongly encouraged (even though not formally required) to take on a local partner. In the petroleum sector, the government is gradually implementing local content requirements first set forth in 2003. The relevant legislation mandates that many foreign oil services companies form joint venture partnerships with local companies on any new ventures. For the provision of goods and services not requiring heavy capital investment, or non-specialized expertise, foreign companies may only participate as a contractor to Angolan companies. For activities requiring higher levels of capital investment and higher levels of expertise, foreign companies may only participate in association with Angolan companies.

Obtaining the proper permits and business licenses to operate in Angola is time-consuming and adds considerably to the cost of investment.

## **OTHER BARRIERS**

### **Corruption**

In November 2009, President Dos Santos called for a zero tolerance policy against corruption. In March 2010, the National Assembly approved a law on Public Probity which requires most government officials to declare their assets to the Attorney General. Nevertheless, corruption remains prevalent due to rent-seeking behavior by powerful officials, the lack of adequately trained government staff, dependence on a centralized bureaucracy and antiquated regulations dating back to the colonial era. The process to register a company is complicated and may involve up to 14 steps with many different government ministries. The payment of gratuities and other facilitation fees can result in quicker service and approval. Investors are often tempted to seek quicker service and approval by paying gratuities and other facilitation fees.

Investors have at times experienced harassment, political interference, and pressure to sell their investments. In some cases, these practices have involved individuals with powerful positions within the government who exert pressure directly or through the established bureaucracy. As a result, some investors have experienced significant delays in payments for government contracts and in obtaining the proper permits or approval of projects. Investors report pressure to form joint ventures with powerful local interests.

Angola's public and private companies have not traditionally used transparent accounting systems consistent with international norms, and few companies in Angola adhere to international audit standards. The government approved an audit law in 2002 that sought to require audits for all "large" companies, but this rule is not generally enforced.

### **Infrastructure**

Angola's badly damaged and neglected infrastructure substantially increases the cost of doing business for investors. Poor roads, destroyed bridges, and mined secondary routes raise transportation costs. The country is in the process of rebuilding its communications, energy, transportation, and road infrastructure. Domestic and international communications are improving, but communication networks are

## **FOREIGN TRADE BARRIERS**

oversubscribed in the provinces and sometimes in the capital city of Luanda, and coverage can be unreliable. Frequent interruptions plague water and power supplies, while power surges can damage electronic equipment. Increased overhead for investors includes outlays for security services, back-up electrical generators, and cisterns. However, rebuilding infrastructure is a major policy objective of the Angolan government. The government budgeted \$16 billion in 2010 for restoration of public infrastructure to address these deficiencies, and is actively seeking significant private investment in the power and housing sectors.



# ARAB LEAGUE

The impact of the Arab League boycott of Israeli companies and Israeli-made goods on U.S. trade and investment in the Middle East and North Africa varies from country to country. While it can still pose a significant potential barrier (because of associated compliance costs) for U.S. companies and their subsidiaries operating in certain parts of the region, the boycott has for many years had an extremely limited practical effect overall on U.S. trade and investment ties with many key Arab League countries. The 22 Arab League members include the Palestinian Authority and the following states: Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Kuwait, Jordan, Lebanon, Libya, Mauritania, Morocco, Oman, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Yemen, and the United Arab Emirates. About half of the Arab League members are also Members of the World Trade Organization (WTO) and are thus obligated to apply WTO commitments to all current WTO Members, including Israel. To date, no Arab League member upon joining the WTO has invoked the right of non-application of WTO rights and obligations with respect to Israel.

The United States has long opposed the Arab League boycott through both words and action. U.S. Government officials have urged Arab League member states to end enforcement of the boycott. Many agencies play a role in this effort. The Department of State and U.S. embassies in relevant host countries take the lead in raising U.S. boycott-related concerns with political leaders in Arab League member states. The U.S. Departments of Commerce and the Treasury and the United States Trade Representative monitor boycott policies and practices of Arab League member states and, aided by U.S. embassies, lend advocacy support to firms facing boycott-related pressures from host country officials.

Under U.S. antiboycott legislation enacted in 1978, U.S. firms are prohibited from responding to any request for information that is designed to determine compliance with the boycott and are required to report receipt of any such request to the U.S. Department of Commerce's Office of Anti-boycott Compliance (OAC). Part of the U.S. Government's task involves noting for host country officials the persistence of illegal boycott requests and those requests' impact on both U.S. firms and on the countries' ability to expand trade and investment ties with the United States. In this regard, Department of Commerce OAC officials periodically visit Arab League member states to consult with appropriate host country counterparts.

The primary aspect of the boycott prohibits the importation of Israeli-origin goods and services into boycotting countries. This prohibition may conflict with the obligation of Arab League member states that are also members of the World Trade Organization (WTO) to treat products of Israel on a Most Favored Nation (MFN) basis. The secondary and tertiary aspects of the boycott discriminate against U.S. firms and those from other countries that wish to do business with both Israel and boycotting countries. The secondary aspect of the boycott prohibits individuals, as well as private and public sector firms and organizations, in Arab League countries from engaging in business with U.S. firms and those from other countries that contribute to Israel's military or economic development. Such firms are placed on a blacklist maintained by the Damascus-based Central Boycott Office (CBO), a specialized bureau of the Arab League. The tertiary aspect of the boycott prohibits business dealings with U.S. and other firms that do business with blacklisted companies.

Enforcement of the boycott is the responsibility of individual Arab League member states and efforts vary widely from country to country. Some Arab League member governments have consistently maintained that only the League as a whole can revoke the boycott. Other member governments support the view that adherence to the boycott is a matter of national discretion; a number of states have taken steps to dismantle various aspects of it. Attendance by Arab League member governments of periodic meetings of the CBO

## FOREIGN TRADE BARRIERS

is inconsistent; the U.S. Government has on numerous occasions indicated to Arab League members that attendance at these meetings is not conducive to improving trade and investment ties, either with the United States or within the region. A number of governments have responded that they only send representatives to CBO meetings in an observer capacity, or to push for additional discretion in national enforcement of the CBO-drafted prohibited company lists.

**EGYPT:** Egypt has not enforced any aspect of the boycott since 1980, pursuant to its peace treaty with Israel. However, U.S. firms occasionally find some government agencies using outdated forms containing boycott language. In past years, Egypt has included boycott language drafted by the Arab League in documentation related to tenders funded by the Arab League. When Egypt's new government is formed, the Administration will be monitoring its actions with regard to the boycott.

**JORDAN:** Jordan formally ended its enforcement of any aspect of the boycott with the signing of the Jordanian-Israeli peace treaty in 1994. Jordan signed a trade agreement with Israel in 1995 – and later an expanded trade agreement in 2004 (essentially Israel's first free trade agreement with an Arab country). Jordanian-Israeli bilateral trade grew from \$10 million in 1996 to approximately \$374 million in 2008, though trade fell to an estimated \$130 million in 2010 (likely a result of the international financial crisis). While some elements of society continue to oppose improving political and commercial ties with Israel, government policy does not condone such positions.

**LIBYA:** Libya does not maintain diplomatic relations with Israel and has a boycott law on its books. Since U.S. trade sanctions against Libya were rescinded in April 2004, U.S. companies have reported problems with Libya's implementation of its boycott law. Libyan officials in 2010 reaffirmed their support for the boycott and continue to examine U.S. companies' business relationships with Israel; Libya's enforcement efforts have deterred several U.S. firms from pursuing business opportunities in the country. In 2009, prohibited boycott-related requests received by U.S. firms from Libyan entities continued to increase, according to Department of Commerce data.

**IRAQ:** The legal status of Iraq's boycott laws is ambiguous. Conflicting requirements imposed under the Hussein regime, during the Coalition Provisional Authority (CPA)'s administration of Iraq, and under the new government of Iraq, have been complicating efforts to harmonize an official Iraqi position on enforcement of the boycott. There is an existing law from 1956 which provides for an office charged with the enforcement of the boycott, but Iraqi officials have taken steps to move away from boycott enforcement. Iraqi officials, when apprised of boycott-related complaints, have been willing to replace boycott-based restrictions with alternative formulations which do not raise the same concerns. U.S. companies continue to encounter prohibited requests in documentation (*e.g.*, contracts, business registration applications, patent and trademark registrations) prepared by certain Iraqi ministries, parastatal organizations, and private sector entities. However, the number of these requests has been steadily decreasing. All Iraqi ministries but one - the Ministry of Health - have ceased requesting private sector compliance with the boycott; U.S. Embassy officials met with Ministry of Health representatives twice in 2010 to urge removal of boycott-related language from ministry procurement tenders. U.S. Government authorities continue to engage regularly with the Iraqi government to resolve remaining discrepancies between Iraqi government policies and individual entity practices.

**YEMEN:** There are no specific laws on the books in Yemen regarding the boycott, though Yemen continues to enforce the primary aspect of the boycott and does not trade with Israel. Yemen has stated that, absent an Arab League consensus to end the boycott, it will continue to enforce it. However, Yemen also continues to adhere to its 1995 governmental decision to renounce observance of the secondary and tertiary aspects of the boycott and does not maintain an official boycott enforcement office. Yemen does

not maintain in its territory an Arab League office dedicated to the boycott, but it remains a participant in the meetings of the CBO in Damascus.

**LEBANON:** Since June 1955, Lebanese law has prohibited all individuals, companies and organizations from directly or indirectly contracting with Israeli companies and individuals or buying, selling or acquiring in any way products produced in Israel. This prohibition is reportedly widely adhered to in Lebanon. Lebanese legislation also requires that all CBO recommendations for the placing of companies on the national boycott list be submitted to the Cabinet, which has an uneven record of implementing specific CBO recommendations.

**ALGERIA:** Algeria does not maintain diplomatic, cultural or direct trade relations with Israel, though indirect trade reportedly does take place. The country has legislation in place that supports the Arab League boycott, but domestic law contains no specific provisions relating to the boycott and government enforcement of the primary aspect of the boycott reportedly is sporadic. Algeria appears not to enforce any element of the secondary or tertiary aspects of the boycott.

**MOROCCO:** Moroccan law contains no specific references to the Arab League boycott. The government informally recognizes the primary aspect of the boycott due to Morocco's membership in the Arab League, but does not enforce the boycott in any of its aspects. Trade with Israel reportedly does take place, but cannot be quantified from official statistics. U.S. firms have not reported boycott-related obstacles to doing business in Morocco. Moroccan officials do not appear to attend CBO meetings in Damascus.

**TUNISIA:** Upon the establishment of limited diplomatic relations with Israel, Tunisia terminated its observance of the Arab League boycott.

**SUDAN:** The government of Sudan supports the Arab League boycott and has enacted legislation requiring adherence to it. Though Sudanese law has not been amended to reflect non-enforcement of the secondary and tertiary aspects of the boycott, there are no regulations in place to enforce these aspects.

**DJIBOUTI:** Djibouti generally supports Palestinian causes in international organizations and there is little direct trade between Djibouti and Israel. Nevertheless, the government currently does not enforce any aspects of the Arab League boycott. No U.S. companies have reported boycott-related complaints to the American Embassy in Djibouti.

**SYRIA:** As host to the Arab League Central Boycott Office, Syria continues to be the strictest adherent of the primary and secondary aspects of the boycott, though it has shown some restraint in enforcement of the tertiary boycott. Syria maintains its own boycott-related blacklist of firms, separate from the CBO list, which it regards as outdated. Syria's boycott practices have not had a substantive impact on U.S. businesses because of U.S. economic sanctions imposed on the country in 2004.

**MAURITANIA:** Though Mauritania 'froze' its diplomatic relations with Israel in March 2009 (in response to Israeli military engagement in Gaza), Mauritania enforces no aspect of the boycott.

**GULF COOPERATION COUNCIL (GCC):** In September 1994, the GCC member countries (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates) announced an end to their enforcement of the secondary and tertiary aspects of the boycott, eliminating a significant trade barrier to U.S. firms. In December 1996, the GCC countries recognized the total dismantling of the boycott as a necessary step to advance peace and promote regional cooperation in the Middle East and North Africa. Although all GCC states are complying with these stated plans, some commercial documentation containing boycott language continues on occasion to surface and impact individual business transactions.

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The situation in individual GCC countries is as follows:

*Bahrain* does not have any restrictions on trade with U.S. companies that have relations with Israeli companies. Outdated tender documents in Bahrain have occasionally referred to the secondary and tertiary aspects of the boycott, but such instances have been remedied quickly when brought to authorities' attention. The government has stated publicly that it recognizes the need to dismantle the primary aspect of the boycott and is taking steps to do so. The U.S. Government has received assurances from the government of Bahrain that it is fully committed to complying with WTO requirements on trade relations with other WTO Members, and Bahrain has no restrictions on U.S. companies trading with Israel or doing business in Israel, regardless of their ownership or other relations with Israeli companies. Although there are no entities present in Bahrain for the purpose of promoting trade with Israel, Israeli-labeled products reportedly can occasionally be found in Bahraini markets.

*Kuwait* has not applied a secondary or tertiary boycott of firms doing business with Israel since 1991, and continues to adhere to the 1994 GCC decision. The government of Kuwait states that foreign firms have not encountered serious boycott-related problems for many years. Kuwait claims to have eliminated all direct references to the boycott in its commercial documents as of 2000 and affirms that it removed all firms and entities that were on the boycott list due to secondary or tertiary aspects of the boycott prior to 1991. Kuwait has a three person boycott office, which is part of the General Administration for Customs. While Kuwaiti officials reportedly regularly attend Arab League boycott meetings, it is unclear if they are active participants. There is no direct trade between Kuwait and Israel.

*Oman* does not apply any aspect of the boycott, and has no laws providing for boycott enforcement. Although outdated boycott language occasionally appears in tender documents, Omani officials are working to ensure that such language is not included in new tender documents and have immediately removed outdated language when brought to their attention. Omani customs processes Israeli-origin shipments entering with Israeli customs documentation, although Omani firms typically avoid marketing any identifiably Israeli consumer products. Telecommunications and mail flow normally between the two countries. Omani diplomatic missions are prohibited from taking part in Arab League boycott meetings.

*Qatar* does not have any boycott laws on the books and does not enforce the boycott. However, it normally sends an embassy employee to observe the CBO meetings in Damascus. Although some Qatari government tender documents still include outdated boycott language, the U.S. embassy is unaware of boycott language used in any recent documents. An Israeli trade office opened in Qatar in May 1996. Although Qatar ordered that office closed in January 2009 in protest against the Israeli military action in Gaza, a small number of local staff remains in place. Despite this closure, Qatar continues to allow trade with Israel and allows Israelis to visit the country. Official data from the Qatari government indicates modest trade between the countries; actual trade, including Israeli exports of agricultural and other goods shipped via third countries, would likely double the official figures. Qatar permits the entry of Israeli business travelers who obtain a visa in advance. The chief executive of Qatar's successful 2022 World Cup bid indicated that Israeli citizens would be able to attend the event.

*Saudi Arabia*, in accordance with the 1994 GCC decision, modified its 1962 law, resulting in the termination of the secondary and tertiary boycotts. Senior Saudi government officials from relevant ministries have requested that U.S. officials keep them informed of any allegations that Saudi entities are seeking to enforce these aspects of the boycott. The Ministry of Commerce and Industry (MOCI) has established an office to address any reports of boycott-related violations; reported violations appear to reflect out-of-date language in recycled commercial and tender documents. MOCI and Commerce Department OAC officials met in January 2010 to discuss methods for ensuring Saudi commercial

#### FOREIGN TRADE BARRIERS

documents and tenders are in compliance with U.S. antiboycott regulations. Saudi companies have usually been willing to void or revise boycott-related language when they are notified of its use.

*The United Arab Emirates (UAE)* complies with the 1994 GCC decision and does not implement the secondary and tertiary aspects of the boycott. The UAE has not renounced the primary aspect of the boycott, but the degree to which it is enforced is unclear. According to data from the U.S. Department of Commerce, U.S. firms continue to face a relatively high number of boycott requests in the UAE (this could be attributed to the high volume of U.S.-UAE goods and services trade) which the government explains is mostly due to the use of outdated documentation, especially among private sector entities. The United States has had success in working with the UAE to resolve specific boycott cases – Commerce Department OAC and Ministry of Economy officials met in February 2010 in the latest of a series of meetings to encourage removal of boycott-related terms and conditions from commercial documents. The government continues to take steps to eliminate prohibited boycott requests; it has issued a series of circulars to public and private companies explaining that enforcement of the secondary and tertiary aspects of the boycott is a violation of Emirati policy. The Emirati authorities report that compliance with these requests has been high and is ongoing. The Ministry of Economy also reports it conducts periodic checks of entities' compliance efforts.

### **Non-Arab League Countries**

In recent years, press reports occasionally have surfaced regarding the implementation of officially-sanctioned boycotts of trade with Israel by governments of non-Arab League member states, particularly some member states of the 57 member Organization of the Islamic Conference (OIC), headquartered in Saudi Arabia (Arab League and OIC membership overlaps to a considerable degree). Information gathered by U.S. embassies in various non-Arab League OIC member states does not paint a clear picture of whether the OIC institutes its own boycott of Israel (as opposed perhaps to simply lending support to Arab League positions). The degree to which non-Arab League OIC member states enforce any aspect of a boycott against Israel also appears to vary widely. Bangladesh, for example, does impose a primary boycott on trade with Israel, and one company as a result has been unable to import key industrial inputs made in Israel. By contrast, OIC members Tajikistan, Turkmenistan and Kazakhstan impose no boycotts on trade with Israel and in some cases actively encourage such trade.



# ARGENTINA

## TRADE SUMMARY

The U.S. goods trade surplus with Argentina was \$3.6 billion in 2010, an increase of \$1.9 billion from 2009. U.S. goods exports in 2010 were \$7.4 billion, up 33.1 percent from the previous year. Corresponding U.S. imports from Argentina were \$3.8 billion, down 2.2 percent. Argentina is currently the 29th largest export market for U.S. goods.

U.S. exports of private commercial services (*i.e.*, excluding military and government) to Argentina were \$3.7 billion in 2009 (latest data available), and U.S. imports were \$1.4 billion. Sales of services in Argentina by majority U.S.-owned affiliates were \$6.3 billion in 2008 (latest data available), while sales of services in the United States by majority Argentina-owned firms were \$150 million.

The stock of U.S. foreign direct investment (FDI) in Argentina was \$14.1 billion in 2009 (latest data available), up from \$12.5 billion in 2008. U.S. FDI in Argentina is mostly in mining, the nonbank holding companies, and manufacturing sectors.

## IMPORT POLICIES

### Tariffs

Argentina is a member of the MERCOSUR common market, formed in 1991 and comprised of Argentina, Brazil, Paraguay, and Uruguay. MERCOSUR's Common External Tariff (CET) averages 11.6 percent and ranges from 0 percent to 35 percent *ad valorem*, with a limited number of country-specific exceptions. A number of country-specific exceptions and tariffs may be imposed by each MERCOSUR member on products imported from outside the region that transit at least one or more MERCOSUR members before reaching their final destination.

Argentina is permitted by MERCOSUR to maintain 100 exceptions to the CET on goods until December 31, 2011, setting tariffs (at Argentina's discretion) either above or below CET. MERCOSUR member countries are also currently allowed to set import tariffs independently for computer and telecommunications equipment, sugar, and some capital goods. (Argentina also has bilateral arrangements with Brazil and Uruguay on automobiles and automotive parts.) As of November 2010, Argentina's average applied import tariff rate was 11.6 percent.

During its 39th meeting in August 2010, MERCOSUR's Common Market Council (CMC) advanced toward the establishment of a Customs Union with the much-anticipated approval of a Common Customs Code and the implementation of a plan to eliminate double application of the CET within MERCOSUR. The plan takes effect in three installments with the first phase due to be implemented no later than January 1, 2012 in all member countries. The CMC also took steps to adopt a harmonized guide for Customs Value Control of imports no later than August 1, 2011. While the majority of tariffs are levied on an *ad valorem* basis, Argentina charges compound rates consisting of *ad valorem* duties plus specific levies known as "minimum specific import duties" (DIEM) on products in several sectors, including textiles and apparel, footwear, and toys. Although these DIEMs expired on December 31, 2010, there are concerns that the Argentine government is considering an extension. These compound import duties do not apply to goods from MERCOSUR countries and cannot exceed an *ad valorem* equivalent of 35 percent.

## FOREIGN TRADE BARRIERS

## **Nontariff Barriers**

Argentina has imposed a growing number of customs and licensing procedures and requirements since October 2008 that, combined with a series of measures implemented in mid-2007, can make importing U.S. products and products from third-country affiliates of U.S. companies more difficult. The measures include additional inspections, port-of-entry restrictions, expanded use of reference prices, automatic and non-automatic licenses, and requirements for importers to have invoices notarized by the nearest Argentine diplomatic mission when imported goods are below reference prices. A number of U.S. companies with operations in Argentina have expressed concerns that the measures implemented in October 2008 and subsequently have delayed imports and made imports of intermediate and final goods from U.S. companies and their third-country affiliates more costly and, in some cases, nearly impossible. In response to U.S. Government inquiries, Argentine government officials have asserted that all of these measures are nondiscriminatory and WTO-consistent.

Argentina prohibits the import of many used capital goods. Local legislation requires compliance with strict conditions on the entry of those used capital goods that are allowed, which are also subject to import taxes up to 28 percent and a 0.5 percent statistical tax. Argentina has carved out exceptions for some industries (e.g., graphics, printing, machine tools, textiles, and mining), enabling importation of used capital goods at a 0 percent import tax. The Argentina-Brazil Bilateral Automobile Pact also bans the import of used self-propelled agricultural machinery, unless it is rebuilt. Argentina prohibits the importation and sale of used or retreaded tires (but in some cases allows remolded tires), used or refurbished medical equipment, including imaging equipment, and used automotive parts. Argentina generally restricts or prohibits the importation of any remanufactured good, such as remanufactured automotive parts, earthmoving equipment, medical equipment, and information and communications technology products.

Starting in April 2010, importers have reported delays in the approval of certificates of free sale for imported food products by the Instituto Nacional de Alimentos (INAL) – a division in Argentina’s equivalent of the U.S. Food and Drug Administration. The certificate is necessary to import food products into Argentina. While there is no formal regulation restricting imports, approval of the certificate is reportedly conditioned on an absence of a domestic substitute of the product. Additionally, in 2010, Argentine policymakers reportedly began requiring companies to invest domestically or commit to export an equal amount in order to import.

### *Antidumping*

According to World Trade Organization (WTO) figures, Argentina has initiated over 30 antidumping investigations since October 2008. Provisional duties have been applied in several cases. Affected goods include textiles, clothing (including footwear), and metal products, mostly from major trading partners Brazil and China. According to the WTO, only one other country initiated more antidumping investigations between January and April 2010 than Argentina.

Argentina initiated an antidumping investigation on coated paper and paperboard from the United States on December 15, 2010.

### *Import Licensing*

Since October 2008, the government of Argentina has significantly expanded the list of products subject to both automatic and non-automatic import licensing. In 2009 and 2010, Argentina continued and expanded the use of non-automatic licenses to protect what Argentina characterizes as “sensitive sectors with policy

instruments approved by the WTO.” U.S industry representatives have complained that the time for ruling on non-automatic licenses often extends beyond 60 days to 100 days or more, partly due to a backlog of license applications. Obtaining a license is burdensome and requires multiple duplicative reviews by several different government offices. Once issued, the certificates are valid for 60 days.

According to the most recently available official information, over 600 tariff lines are currently subject to non-automatic licenses. Of the products subject to the non-automatic licenses, almost 50 percent are textile products, yarn, and fabrics. However, a broad range of other sectors has been targeted, including metallurgical products, chemical products, general and special purpose machinery, and consumer goods.

Since 2005, the government of Argentina has also required non-automatic import licenses for toys and shoes. Shoe import licenses are valid for only 120 days and according to exporters, obtaining them involves burdensome procedures. The government of Argentina says this requirement is needed for informational purposes. Some U.S. companies, however, claim it is designed to delay footwear imports.

Another measure, Disposition 16/2008 of November 2008, imposed automatic license requirements on 1,200 different types of consumer goods, which collectively represented approximately seven percent of total imports in 2007. Products affected include food and drink, pet food, computer and audio equipment, cars, bicycles, cameras, mattresses, telephones, toys, and watches. The licenses are issued 48 to 72 hours after application and are described as statistical requirements. Companies have reported not being granted import licenses unless they commit to export from or invest in Argentina. They also claim that they are prevented access to parts of the Argentine market.

In February 2010, Argentina and Brazil agreed to study non-automatic licenses currently in force in both countries and to find ways to make the licensing regimes less burdensome. No further announcements have followed, and in August 2010 the Argentine press reported delays in the approval of non-automatic licenses for agricultural machinery, which mostly affects exports from Brazil. Brazil accounts for 50 to 60 percent of total Argentine imports of agricultural machinery (\$620 million in 2010, according to private estimates), while the United States accounts for 17.3 percent.

Due to a surge in demand between March and June 2010, driven by strong economic growth, the government of Argentina agreed with local industry representatives from the automotive and agriculture machinery industries to suspend non-automatic licenses on truck tires and agricultural machinery.

In February 2011, Argentina expanded the list of products requiring non-automatic licenses to include approximately 200 more products. The Minister of Industry stated in a press release that this increase is designed to help domestic manufacturers and boost local production.

#### *Customs Valuation*

Argentina currently applies reference values to over 24,000 imported products. The stated purpose of reference pricing is to prevent under-invoicing, and authorities establish benchmark unit prices for customs valuation purposes for certain goods that originate in and/or are imported from specified countries. These benchmarks establish a minimum price for market entry and dutiable value. Importers of affected goods must pay duties calculated on the reference value, unless they can prove that the transaction was conducted at arm's-length. Private estimates indicate that approximately 24,000 products are currently subjected to reference prices for Argentine customs purposes.

Customs External Note 57 of 2007, which the government of Argentina indicated was designed to discourage under-invoicing and fraudulent under-payment of customs duties, requires importers of any

#### FOREIGN TRADE BARRIERS

goods from designated countries that are invoiced below the reference prices to have the invoice validated by both the exporting country's customs agency and the appropriate Argentine Embassy or Consulate in that country. The government of Argentina has made the list of reference prices and applicable countries (the Annex to Customs External Note 58) available at:

<http://www.infoleg.gov.ar/infolegInternet/anexos/130000-134999/131630/notaext58-2007-sup.doc>.

Customs External Notes 87/2008 of October 2008 and 15/2009 of February 2009 establish administrative mechanisms that restrict the entry of products deemed sensitive, such as textiles, apparel, footwear, toys, electronic products, and leather goods. The stated purpose of the measures is to prevent under-invoicing. While restrictions are not country specific, they are to be applied more stringently to goods from countries considered "high risk" for under-invoicing, and to products considered at risk for under-invoicing as well as trademark fraud. The full text of Note 87/2008 can be found at:

<http://www.infoleg.gov.ar/infolegInternet/anexos/145000-149999/145766/norma.htm>.

Resolution 2783/2010 of February 2010 set reference values for the import of some tariff lines of glassware for table/kitchen from several countries, including the United States. The full text of Resolution 2783/2010 can be found at:

<http://www.infoleg.gov.ar/infolegInternet/anexos/160000-164999/164881/norma.htm>. In 2009, U.S. imports into Argentina falling under the affected tariff lines totaled \$260,000.

#### *Ports of Entry*

Argentina restricts entry points for several classes of goods. Customs Resolution 52 of 2007 and subsequent resolutions restrict the ports of entry for numerous items, including sensitive goods classified in 20 Harmonized Tariff Schedule (HTS) chapters (*e.g.*, textiles, shoes, electrical machinery, metal and certain other manufactured goods, and watches), via specialized customs procedures for these goods. Resolution 52 was itself a modification of the 2005 General Resolution 1924, which implemented specialized customs treatment for textiles, footwear, and toys.

With Resolution 52, partial limitations on ports of entry were also applied to plastic household goods, leather cases and apparel, porcelain and ceramic tableware and ornaments, household glass goods, imitation jewelry, household appliances, pots and pans, computers, car parts, motorcycles and parts, bicycles and parts, lamps, and toys. The government of Argentina has listed products limited to certain ports of entry and the ports of entry applicable to those products at:

<http://www.infoleg.gov.ar/infolegInternet/anexos/130000-134999/131847/norma.htm>.

Depending on their country of origin, many of these products are also subject to Customs External Note 58 of 2007, which revised some reference prices and set new ones on over 7,000 tariff lines. This Note expanded selective, rigorous "red channel" inspection procedures (via Resolution 1907 of 2005 and amplified by Customs External Note 55 in 2007) to a broader range of goods and requires importers to provide guarantees for the difference of duties and taxes if the declared price of an import is lower than its reference price.

Since the first measure regarding the limitation of ports of entry was formally announced, several provincial and national legislative authorities have requested the elimination or modification of the specialized customs scheme. Through Resolutions 3/2010 and 37/2010 of February and June 2010, respectively, the government of Argentina increased the number of authorized ports of entry for certain products.

Since 2005, the government of Argentina has requested private sector companies to negotiate and abide by sector-specific voluntary price caps aimed at limiting price increases, especially on Argentina's basic consumption basket components. Sectors in which voluntary price accords have been negotiated include a variety of foodstuffs, personal hygiene and cleaning products, and pharmaceuticals. The government, which had largely frozen public utility electricity and natural gas rates since 2002, has recently allowed selective increases targeting industrial and other large users, and is starting to allow increases for consumers.

### *Customs Procedures*

Certificates of origin have become a key element in Argentine import procedures because of antidumping measures, criterion values, and other restrictions with a geographic consideration. In August 2009, Argentina's Federal Administration for Public Revenue (AFIP) revised certificate of origin requirements for a long list of products with non-preferential origin treatment through External Note 4. These additions referred mainly to certain organic chemicals, tires, bicycle parts, flat-rolled iron and steel, certain iron and steel tubes, air conditioning equipment, wood fiberboard, most fabrics (wool, cotton, other vegetable, etc.), carpets, most textiles (knitted, crocheted, etc.), apparel, footwear, metal screws and bolts, furniture, toys and games, brooms, and brushes. To receive the MFN tariff rate, the certificate of origin must be certified by an Argentine consulate. The certificate is valid for 180 days, which has proven problematic for some companies that import goods subject to non-automatic licenses, and companies report that the major delays in obtaining an import license often put them over the 180-day validity period for the certificate of origin.

The import-export regulations applied to couriers were most recently modified in 2005 via AFIP Resolution 1811, which reduced the maximum value of express delivery service shipments for which simplified customs clearance procedures are applied from \$3,000 to \$1,000. Additionally, couriers are now considered importers and exporters of goods, rather than transporters, and also must declare the tax identification codes of the sender and addressee, both of which render the process more time consuming and costly. These regulations increase the cost not only for the courier, but also for users of courier services. The U.S. Government has raised these policies with the Ministry of Federal Planning, Public Investment and Services, the Directorate of Customs, and the National Administration of Civil Aviation.

## **EXPORT POLICIES**

Following the 2002 currency devaluation, the government of Argentina imposed export taxes on all but a few exports, including significant export taxes on key hydrocarbon and agricultural commodities, to generate revenue, increase domestic supplies, and constrain domestic price increases. In many cases, the export tax for raw materials is set higher than the sale price of the processed product to encourage development of domestic value-added production. Crude hydrocarbon export taxes are indexed to world commodity benchmarks. Total export tax revenue in 2009 was equal to 15.7 percent of the value of all Argentine exports (down from 16.3 percent in 2008), including goods not subject to export taxes. In 2009, when a severe drought affected agricultural production, export taxes predominantly came from oil and energy exports, accounting for 12 percent of total tax collection.

Despite proposals within and without the Argentine Congress to reduce or eliminate export taxes, the taxes continue to be actively supported and managed by the government of Argentina, and remain a major source of fiscal revenue. The following major agricultural commodities are currently subject to export taxes: soybeans at 35 percent; soybean oil and soybean meal at 32 percent; sunflower seeds at 32 percent; sunflower meal and sunflower oil at 30 percent; wheat at 23 percent; and corn at 20 percent. The export tax on pure biodiesel was 20 percent in 2010, with a 2.5 percent rebate. The difference in tax rates between raw and processed products appears to create large incentives to process those commodities

## **FOREIGN TRADE BARRIERS**



locally – particularly for soybeans, which are turned into oil and in turn provide the feedstock for Argentina’s rapidly growing biodiesel industry.

The Common Customs Code (CCC), approved during the 39th MERCOSUR Common Market Council (CMC) meeting in August 2010, which still needs to be ratified and enacted by member states, also restricts new export taxes. Although the CCC does not overturn existing export tax policies (Decision 27/2010, Article 157, Item b.4), it restricts future taxes and anticipates a transition to a common export tax policy.

### **Export Registrations**

In addition to applying high export taxes, the government of Argentina requires export registration for major commodities before an export sale can be shipped. The National Organization of Control of Agricultural Commercialization (ONCCA) administers the Registry of Export Operations for meat, grain (including vegetable oils), and dairy products under the provisions of Resolution 3433/2008 of August 27, 2008. All exports must be registered and the government has the authority to reject or delay exports depending on domestic price and supply conditions. This process has been used to control the quantity of goods exported, thereby guaranteeing domestic supply. Export registrations of wheat, corn, beef, and dairy products continue to be subject to periodic restrictions to guarantee domestic supplies. As of November 2010, registrations were open for all major commodities. Resolution 7552/2009 of October 2009 establishes mandatory domestic supply levels for corn and wheat (8 million tons and 6.5 million tons, respectively), which must be maintained in the domestic market in order for export registrations to be granted for those commodities. Resolution 7552/2009 eliminated restrictions for wheat and corn exports, principally for exporters and producers participating in an agreement to precondition exports on satisfaction of domestic market needs.

Argentina imposes time restrictions on grain and oilseed exports depending on when the export tax is paid. Under applicable regulations, export permits are valid for 45 days after registration is approved, if the export tax is paid at time of export. Up to 365 days for corn and wheat, and 180 days for soybean and sunflowers products, are allowed if the exporter pays 90 percent of the export tax at the time the export license is approved.

### **GOVERNMENT PROCUREMENT**

Law 25551 of 2001 establishes a national preference for local industry for most government purchases where the domestic supplier bid, depending on the size of the company, is no more than five percent to seven percent higher than the foreign bid. The preference applies to tender offers by all government agencies, public utilities, and concessionaires. There is similar legislation at the provincial level. These preferences serve as barriers to participation by foreign firms.

Argentina is not a signatory to the WTO Agreement on Government Procurement, but it is an observer to the WTO Committee on Government Procurement.

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

Argentina was listed on the Priority Watch List in the 2010 Special 301 report. Key concerns cited in the report relate to the need to strengthen IPR enforcement to combat the widespread availability of pirated and counterfeit products. Although cooperation continues between Argentina’s enforcement authorities and U.S. industry, stronger IPR enforcement actions to combat the widespread availability of pirated and counterfeit products are needed. Problems persist in the civil and criminal enforcement areas, including

#### **FOREIGN TRADE BARRIERS**

civil damages that have not proven to be a deterrent to piracy and counterfeiting. In criminal cases, delays in the adjudication of IPR infringement cases are common, and there is a reluctance to impose stronger penalties, such as incarceration, for repeated and/or serious violations. Argentina also continues to face a backlog of patent applications and does not provide adequate protection against unfair commercial use of undisclosed test and other data generated to obtain marketing approval for pharmaceutical products. In addition, Argentina lacks an effective system to prevent the issuance of marketing approvals for unauthorized copies of patented pharmaceutical products.

## **SERVICES BARRIERS**

### **Audiovisual Services**

U.S. industry remains concerned with the added costs associated with exporting movies to Argentina due to measures governing the showing, printing, and dubbing of films, and the practice of charging *ad valorem* customs duties on U.S. exports based on the estimated value of the potential royalty generated from the film in Argentina rather than on the value of the physical materials being imported.

On October 10, 2009, the Argentine Congress passed a law for regulation of audiovisual communication services, Law 26.522. Although the government of Argentina has already promulgated regulations to implement Law 26.522, some provisions are suspended pending judicial decisions. Some U.S. companies have raised concerns regarding several aspects of the law, which could potentially discriminate between national and foreign investors. Law 26.522 establishes, non-retroactively, a cap of 30 percent foreign capital ownership in media outlets, a minimum national content of 60 percent to 70 percent, an obligation to include all signals owned totally or partially by the national government, a minimum screen quota for Argentine movies, and a fee on foreign programmers in the amount of 0.5 percent of annual revenue for acquiring Argentine films. Foreign media operations are given different tax treatment from local companies and the law also imposes a limit on the number of broadcasting licenses (based on geography and market segment) in the hands of a single licensee.

### **Financial Services**

Argentina limits lending by foreign bank branches based on local paid-in capital, as opposed to the parent bank's capital.

## **INVESTMENT BARRIERS**

The Argentine parliament approved a bill to nationalize Argentina's private pension system and transfer pensioner assets to the government social security agency in November 2008. Compensation to investors in the privatized pension system, including to U.S. investors, is still pending and under negotiation.

### **Exchange and Capital Controls**

Hard currency earnings on exports, both from goods and services, must be converted to pesos in the local foreign exchange market, with some exceptions. There are limits set on the total amount of export income that may remain in foreign currency. For example, the maximum foreign exchange clearance allowed for hydrocarbon exports is 30 percent of total revenues. There is no maximum for exports of certain minerals, re-exports of some temporary imports, and exports to Argentine foreign trade zones.

Time limits to fulfill the obligation to convert to pesos range from approximately 60 days to 360 days for goods (depending on the goods involved) and 15 days for services. For certain capital goods and situations

## **FOREIGN TRADE BARRIERS**

where Argentine exports receive longer-term financing not exceeding six years, Argentine exporters receive more liberal time limits. A portion of foreign currency earned through exports may be used for foreign transactions.

Argentina has expanded its capital control regime since 2003, with the stated goal of avoiding the potentially disruptive impact on the nominal exchange rate from large short-term capital flows. In May 2005, the government issued Presidential Decree 616 revising registration requirements for inflows and outflows of capital and extending the minimum investment time period from 180 days to 365 days. The Decree also expanded the registration requirement to include “all types of debt operations of residents that could imply a future foreign currency payment to nonresidents” and requires that all foreign debt of private Argentine residents, with the exception of trade finance and initial public debt offerings that bring foreign exchange into the market, must include provisions that the debt need not be repaid in fewer than 365 days. Since 2004, both foreign and domestic institutional investors are restricted to total currency transactions of \$2 million per month, although transactions by institutions acting as intermediaries for others do not count against this limit. In June 2010, the Argentine Central Bank introduced a regulation that permitted Argentine residents to conduct more than \$2 million per month in foreign exchange transactions for specific enumerated purposes, *e.g.*, to purchase bonds issued by the federal government, to deposit in the local banking system, and to finance investment projects. The Central Bank also requires Argentine residents who purchase more than \$250,000 within a year to show that the purchase is compatible with personal income tax filings.

The Ministry of Economy implemented Decree 616 through resolutions in 2005 and 2006 that imposed more restrictive controls on the following classes of inbound investments: inflows of foreign funds from private sector debt (excluding foreign trade and initial public offerings of stock and bond issues); inflows for most fiduciary funds; inflows of nonresident funds that are destined for the holding of Argentine pesos or the purchase of private sector financial instruments (excluding foreign direct investment and the primary issuance of stocks and bonds); and investments in public sector securities purchased in the secondary market. These inflows are subject to three restrictions: (a) they may not be transferred out of the country for 365 days after their entry; (b) proceeds from foreign exchange transactions involving these investments must be paid into an account in the local financial system; and (c) a 30 percent unremunerated reserve requirement must be met, meaning that 30 percent of the amount of such transactions must be deposited in a local financial entity for 365 days in an account that must be denominated in dollars and pay no interest. As of September 2006, a deposit is not required for capital inflows intended to finance energy infrastructure works. Furthermore, as of January 2008, a deposit is not required for inflows for the purchase of real estate property by foreigners as long as the foreign exchange liquidation occurs on the day of settlement (and transfer of the title). As of February 2009, a deposit is not required for inflows to be used for tax payments and social security contributions within the 10 days following settlement of the foreign currency exchange. Violations are subject to criminal prosecution. In October 2007, the Central Bank introduced new control measures, banning all foreign entities from participating in Central Bank initial public offerings. However, foreign firms may still trade Central Bank debt instruments on the secondary market.

### **Non-Payment of Investment Treaty Awards**

Fifteen U.S. investors have submitted claims to investor-state arbitration under the United States-Argentina bilateral investment treaty (BIT). Some of these claims allege that measures imposed by Argentina during the financial crisis that began in 2001 breached certain BIT obligations. Investor-state arbitral tribunals have ruled against Argentina in a number of these cases, awarding hundreds of millions of dollars to U.S. investors.

To date, Argentina has resisted paying any awards made to U.S. investors. Argentina has argued that, under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”), it is not required to pay damages until a prevailing claimant has completed the potentially lengthy additional process of taking all necessary steps to enforce a final ICSID award through the Argentine courts. In 2008, the U.S. Government filed a submission in an ongoing arbitration rebutting Argentina’s argument and reaffirming its view that Argentina is obligated to pay final ICSID awards immediately. Arbitral tribunals have consistently rejected Argentina’s argument.

As a result of Argentina’s failure to pay two final ICSID awards, the two U.S. companies to which these awards are owed have filed petitions with the Office of the United States Trade Representative seeking the suspension of all benefits to Argentina under the Generalized System of Preferences (GSP). These petitions have been accepted for review and included in the U.S. Government’s annual GSP review for 2010. Decisions on both petitions are pending.

### **ELECTRONIC COMMERCE**

Argentina does not allow the use of electronically produced air waybills that would accelerate customs processing and the growth of electronic commerce transactions.



# AUSTRALIA

## TRADE SUMMARY

The U.S. goods trade surplus with Australia was \$13.2 billion in 2010, up \$1.6 billion from 2009. U.S. goods exports in 2010 were \$21.8 billion, up 11.2 percent from 2009. Corresponding U.S. imports from Australia were \$8.6 billion, up 7.1 percent. Australia is currently the 15th largest export market for U.S. goods.

U.S. exports of private commercial services (i.e., excluding military and government) to Australia were \$12.2 billion in 2009 (latest data available), and U.S. imports were \$5.7 billion. Sales of services in Australia by majority U.S.-owned affiliates were \$39.8 billion in 2008 (latest data available), while sales of services in the United States by majority Australia-owned firms were \$12.0 billion.

The stock of U.S. foreign direct investment (FDI) in Australia was \$106.4 billion in 2009 (latest data available), up from \$94.5 billion in 2008. U.S. FDI in Australia is led by the finance and insurance, mining, manufacturing, and information sectors.

## FREE TRADE AGREEMENT (FTA)

The United States-Australia FTA entered into force on January 1, 2005. Since then, the U.S. and Australian governments have met annually to address issues that have arisen under the FTA. Under the FTA, trade in goods and services and foreign direct investment have continued to expand and more than 99 percent of U.S. exports of manufactured goods are now duty-free.

In March 2010, the United States began negotiations to join a regional Asia-Pacific trade agreement called the Trans-Pacific Partnership (TPP), with the objective of shaping a high-standard, broad-based regional agreement. This agreement will create a potential platform for economic integration across the Asia-Pacific region, a means to advance U.S. economic interests with the fastest growing economies in the world, and a tool to expand U.S. exports, which are critical to U.S. economic recovery and the creation and retention of high-paying, high quality jobs in the United States. The TPP negotiating partners currently include Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, and Vietnam.

## GOVERNMENT PROCUREMENT

Australia is the only major industrialized country that is not a signatory to the WTO Agreement on Government Procurement. However, under the United States-Australia FTA, the Australian government opened its government procurement market to U.S. suppliers, eliminating discriminatory preferences for domestic suppliers and agreeing to use fair and transparent procurement procedures.

## INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION

Australia generally provides for strong IPR protection and enforcement. It has legislation criminalizing copyright piracy and trademark counterfeiting. Penalties (including imprisonment) can be combined with confiscation of proceeds of the crime, the infringing goods, and the equipment used to make those goods. The Australian Notice of Objection Scheme provides Customs with the power to seize imported goods which infringe notified trademarks and copyright. IPR rights holders can also prevent the importation and exportation of infringing products through court injunctions.

## FOREIGN TRADE BARRIERS

Under the FTA, Australia must notify the holder of a pharmaceutical patent of a request for marketing approval by a third party for a product claimed by that patent. However, U.S. and Australian pharmaceutical industry representatives have raised concerns that unnecessary delays in this notification process restrict their options for action against third parties that would infringe their patents if granted marketing approval by the Australian Therapeutic Goods Administration.

Australia was an active participant in the Anti-Counterfeiting Trade Agreement (ACTA) negotiations, which were concluded in November 2010. The ACTA establishes an international framework that will assist the parties to the agreement in their efforts to effectively combat IPR infringement, in particular the proliferation of counterfeiting and piracy, which undermines legitimate trade.

## **SERVICES BARRIERS**

### **Telecommunications**

In February 2007, the Australian government transferred its remaining 17 percent stake in Telstra into an independent Future Fund, reducing concerns about its conflicting roles as regulator and owner of the dominant operator. The United States remains concerned about foreign equity limits in Telstra, which are still capped at 35 percent, and the fact that individual foreign investors are only allowed to own up to 5 percent of the company.

In June 2010, Telstra signed a non-binding Financial Heads of Agreement with NBN Company (NBN Co) to participate in the rollout of the National Broadband Network (NBN). The agreement provides for the decommissioning of Telstra's copper network and cable broadband service and use of Telstra's infrastructure. The transaction would see Telstra progressively migrate its voice and broadband traffic from its copper and cable networks to NBN Co's network. The NBN is intended, by design, to be a neutral provider of broadband services, a structure which could do much to address persistent complaints about the lack of non-discriminatory access to network services, including from U.S. companies. Other telecommunications companies, such as Optus, will also join the NBN. The Australian government passed a bill to split off Telstra's wholesale business and clear the way for the NBN, after making guarantees to the Australian Green Party that any future privatization would first have to be approved by the Parliament. In late November 2010, the Parliament also passed the first of a series of bills that will enable the Australian government to build the NBN. The United States will closely monitor the NBN to ensure that competitors are able to obtain reasonable access to services and customers.

### **Audiovisual Trade Barriers**

Though preexisting Australian-content requirements remain in effect under the FTA, the agreement limits or prohibits their extension to other media or means of transmission. Australia's Broadcasting Services Amendment Act requires subscription television channels with significant drama programming to spend 10 percent of their programming budgets on new Australian drama programs.

The Australian Content Standard of 2005 requires commercial television broadcasters to produce and screen Australian content, including 55 percent of transmission between 6:00 a.m. and midnight. In addition, there are specific minimum annual sub-quotas for Australian (adult) drama, documentary and children's programs. In July 2010, the Australian government provided license fee rebates of 25 percent in FY 2010 and 41.5 percent in FY 2011 to commercial television broadcasters in order to help them maintain Australian content production.

## **Radio**

The Australian commercial radio industry code of practice sets quotas for the broadcast of Australian music on commercial radio. The code requires that up to 25 percent of all music broadcast between 6:00 a.m. and midnight be music performed by Australians. In July 2010, the Australian Communications and Media Authority announced registration of a new code that provides temporary exemption for digital-only commercial radio stations (stations not also simulcast in analog) from the Australian music quotas. The exemption will be reviewed in 2013. Since January 2008, all licensees of regional commercial radio broadcasting licences have been required to broadcast minimum levels of local content.

## **INVESTMENT BARRIERS**

Under Australia's Foreign Investment Law, the Foreign Investment Review Board (FIRB) screens in advance potential foreign investments in Australia above a threshold value of A\$231million (\$231million). The FIRB may deny approval of particular investments above that threshold on national interest grounds, although it rarely has done so. The FTA, however, exempts all new "greenfield" investments from FIRB screening. The FTA also raised the threshold for screening of most U.S. investments in Australia from A\$800 million (\$800 million) to A\$1.004 billion (\$1.004 billion) (indexed annually).

Foreign ownership of Australian media assets is regulated by the *Foreign Acquisitions and Takeovers Act 1975* and Australia's *Foreign Investment Policy*. All foreign persons, including U.S. investors, must notify the Australian government and get prior approval to make investments of 5 percent or more in the media sector, regardless of the value of the investment. The media sector includes daily newspapers, television and radio (including internet sites that broadcast or represent these forms of media).

## **OTHER BARRIERS**

### **Pharmaceuticals**

The FTA addressed transparency and certain regulatory concerns by establishing a Medicines Working Group (MWG) to promote discussion and mutual understanding of issues relating to the Pharmaceuticals Annex of the FTA. These consultations have helped enhance transparency and have improved the dialogue between the U.S. industry and the Australian government in this sector.

### **Blood Plasma Products and Fractionation**

In line with commitments under the FTA, Australia reviewed its plasma fractionation arrangements in 2006. The review determined that fractionation of Australian plasma should continue to be done locally and recommended against public tendering, concluding that the voluntary collection of blood in Australia and self sufficiency in blood products should remain key objectives of Australian policy. Going against the review's recommendation, the then Federal Health Minister proposed the application of the FTA competitive tendering rules. In March 2007, however, state and territory health ministers rejected the federal government's recommendation for tendering.

Without a consensus for change, the Australian government decided to maintain existing arrangements without competitive tendering. In 2010, the National Blood Authority (NBA) negotiated a new eight-year term contract with CSL Limited for the ongoing fractionation of Australian plasma and manufacture of key blood products. While foreign – including U.S. – companies supply a range of blood products to Australia through the NBA, the United States remains concerned that an open and competitive tendering system for blood fractionation is still lacking in Australia.

## **FOREIGN TRADE BARRIERS**





# **BAHRAIN**

## **TRADE SUMMARY**

The U.S. goods trade surplus with Bahrain was \$829 million in 2010, up \$625 million from 2009. U.S. exports in 2010 were \$1.2 billion, up 87.2 percent from the previous year. Corresponding U.S. imports from Bahrain were \$420 million, down 9.3 percent. Bahrain is currently the 71st largest export market for U.S. goods.

## **IMPORT POLICIES**

Upon entry into force of the United States-Bahrain Free Trade Agreement (FTA) in August 2006, 100 percent of bilateral trade in consumer and industrial products became duty free immediately. Bahrain will phase out tariffs on the remaining handful of agricultural product lines by 2015. Textiles and apparel trade is duty free, promoting new opportunities for U.S. and Bahraini fiber, yarn, fabric and apparel manufacturing. Generally, to benefit from preferential tariffs under the FTA, textiles and apparel must be made from either U.S. or Bahraini yarn and fabric. The FTA provides a temporary transitional allowance for textiles and apparel that do not meet these requirements, in order to assist U.S. and Bahraini producers in developing and expanding business contacts.

As a member of the Gulf Cooperation Council (GCC), Bahrain applies the GCC common external tariff of five percent for most non-U.S. products, with a limited number of GCC-approved country-specific exceptions. Bahrain's exceptions include alcohol (125 percent) and tobacco (120 percent). Some 438 food and medical items are exempted from customs duties entirely. According to the WTO, Bahrain's simple average applied tariff for non-U.S. products is 8.5 percent for agricultural goods and 4.7 percent for non-agricultural goods.

## **GOVERNMENT PROCUREMENT**

The Tender Board plays an important role in ensuring a transparent bidding process, which the Government of Bahrain regards as vital to attracting foreign investment. In 2002, Bahrain implemented a new government procurement law to ensure transparency and reduce bureaucracy in government tenders and purchases. The law specifies procurements on which international suppliers are allowed to bid. The Tender Board is chaired by a Minister of State who oversees all tenders and purchases with a value of BD 10,000 (\$26,525) or more.

The FTA requires procuring entities in Bahrain to conduct all procurements covered by the FTA in a fair, transparent, and nondiscriminatory manner.

In December 2008, Bahrain became an observer to the WTO Committee on Government Procurement.

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

In the FTA, Bahrain committed to provide strong IPR protection and enforcement. Bahrain has launched public awareness campaigns that equate IP piracy with theft to combat television satellite cable piracy. In October 2009, the Telecommunication Regulatory Authority (TRA) blocked all the IP addresses used in cable piracy and the Ministry of Industry and Commerce banned the sale of decoding devices.

## **FOREIGN TRADE BARRIERS**

In order to implement its FTA obligations, Bahrain passed several key pieces of IPR legislation. These laws improve protection and enforcement in the areas of copyrights, trademarks, and patents. Implementing regulations supporting these laws have also been enacted. Bahrain joined the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty in December 2005.

As part of the GCC Customs Union, the six Member States are preparing a draft common trademark law, as well as a draft common unfair competition law to protect companies from unfair commercial use of undisclosed information submitted for marketing approval of pharmaceutical products. The United States is engaged in a dialogue with GCC technical experts to help ensure that the trademark law and unfair competition law will facilitate Member States' implementation of international and bilateral obligations.

# BOLIVIA

## TRADE SUMMARY

The U.S. goods trade deficit with Bolivia was \$171 million in 2010, up \$98 million from 2009. U.S. goods exports in 2010 were \$507 million, up 17.6 percent from the previous year. Corresponding U.S. imports from Bolivia were \$678 million, up 34.4 percent. Bolivia is currently the 92nd largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Bolivia was \$138 million in 2009 (latest data available), down from \$324 million in 2008.

## IMPORT POLICIES

Bolivia's new constitution, adopted in February 2009, establishes broad new guidelines to give priority to local production. However, to date, implementing legislation has not been enacted.

### Tariffs

In an effort to protect Bolivia's local industry, the government changed its tariff structure in November 2007. Under this scheme, imported capital goods designated for industrial development enter duty-free; non-essential capital goods are subject to a five percent tariff; and most other goods are subject to tariffs of 10 percent to 20 percent. In May 2009, Bolivia established a 35 percent tariff on most apparel and textiles, home furnishing products, and wooden furniture (Supreme Decree 125). According to the WTO, Bolivia's simple applied average tariff is 10.3 percent. The simple average is 12.4 percent for agricultural products and 10 percent for non-agricultural products.

Bolivia is a member of the Andean Community regional trade group. The other members of the Andean Community are Colombia, Ecuador, and Peru.

### Nontariff Measures

The Bolivian government generally does not apply specific restrictions to trade in goods, such as permits or import licenses. However, beginning in January 2008, all importers must register with the Bolivian National Customs Office.

Since December 2008, Bolivia has prohibited the importation of cars more than five years old, diesel vehicles with engines smaller than 4,000 cubic centimeters, and all vehicles that use liquefied petroleum gas.

In February 2008, Bolivia established by decree a zero percent import tariff for: live bovine animals; fresh bovine meat; fresh, frozen and refrigerated chicken meat; wheat and wheat flour; corn; rice; and vegetable oil. The decree also prohibits the export of these products, except for vegetable oils and oilseeds. The decree has been modified several times to establish export quotas and certificates in order to ensure adequate domestic supply and control domestic prices for specific commodities.

## FOREIGN TRADE BARRIERS

Since January 2004, Bolivia has banned the importation of certain types of used clothing, including: old or damaged apparel; used bedding and intimate apparel; old shoes; and certain damaged textile articles, including rags, cords, string, and rope. In June 2006, the government of Bolivia renewed these prohibitions and banned all used clothing imports after April 20, 2007.

## **GOVERNMENT PROCUREMENT**

Government expenditures account for a significant portion (44 percent) of Bolivia's Gross Domestic Product. The central government, sub-central governments (states and municipalities), and other public entities remain important buyers of machinery, equipment, materials, and other goods and services. In 2004, Bolivia enacted, through Supreme Decree 27328, the "*Compro Boliviano*" (Buy Bolivian) program. This program supports domestic production by giving preference and exclusivity to Bolivian products in government purchases.

In 2007, and again in 2009, the Bolivian government modified its rules for procurement and contracting of services. Under these rules, the government must give priority to small and micro producers and peasant associations in procurements under \$100,000. In addition, the government requires fewer guarantees and places fewer prerequisites on vendors that qualify as small and micro producers or peasant associations.

Bolivian companies also are given priority in government procurement valued between \$142,000 and \$5.7 million. Importers of foreign goods can participate in these procurements only where locally manufactured products and service providers are unavailable or where the Bolivian government does not select a domestic supplier. In such cases, and where procurement exceeds \$5.7 million, the government can call for an international tender. Foreign companies that want to submit a tender for government consultancy contracts must do so in association with a Bolivian company.

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

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

Bolivia was listed on the Watch List in the 2010 Special 301 report. Key concerns cited in the report relate to rampant piracy and counterfeiting, including counterfeiting of medicines, that persist in Bolivia. The report noted a need for significant improvements to the Bolivian IPR regime, including with respect to the Bolivian copyright law. Despite one notable pharmaceutical-related success, the report noted that substantial additional resources and a greater commitment by enforcement and judicial authorities were necessary to improve enforcement actions against piracy and counterfeiting.

## **INVESTMENT BARRIERS**

Government policy changes stemming in part from the adoption of a new constitution in February 2009 have raised concerns among some foreign investors. While the constitution has yet to be fully implemented, one of its most troubling provisions calls for a limit on foreign companies' access to international arbitration in cases of conflicts with the government. It also states that all bilateral investment treaties must be renegotiated to adjust to this and other new constitutional provisions. The United States–Bolivia Bilateral Investment Treaty (BIT), which entered into force in June 2001, could be affected by this requirement, as the treaty guarantees recourse to international arbitration. In a related action, in October 2007, Bolivia became the first country to withdraw from the World Bank's International Centre for Settlement of Investment Disputes (ICSID).

## **FOREIGN TRADE BARRIERS**

The current Bolivian administration has reversed the privatization trend set in motion by previous governments and has placed increasing emphasis on public enterprise. In an effort to control key sectors of the economy, the current administration has obtained through contract renegotiations, as required by Bolivian law, 51 percent ownership control in the following companies:

- *Empresa Andina* (Repsol – Spain) – oil and gas sector;
- *Compania Logistica de Hidrocarburos Bolivia* (German and Peruvian) – oil and gas sector;
- *Transredes* (British, American, Dutch) – oil and gas sector;
- *Chaco* (British Petroleum - British) – oil and gas sector; and
- *ENTEL* (Italian) – telecommunications sector.

In September 2009, as part of renationalization negotiations, the Bolivian government acquired 47 percent to 50 percent of the shares in electric companies that were privatized 12 years ago: producers *Corani* (French); *Guarachachi* (British); and *Valle Hermoso* (Bolivian); and distributor *Empresa Luz y Fuerza Electrica Cochabamba* (ELFEC) (Bolivian). On May 1, 2010, the government of Bolivia took control of 100 percent of the shares and assumed management control of these four companies. The government has also announced that additional sectors, including water and railways, could be nationalized.

The government is also using means other than nationalization to reestablish the public sector's role in the economy. In the past few years, the Bolivian government has created 18 public companies to operate in "strategic" sectors such as food production, industrialization of natural resources, and internal and external market sales. Private sector entities complain that these public companies generate subsidized, unfair competition and are leading to a state driven economic system.

The new Bolivian constitution also includes requirements for state involvement in natural resource companies. It states that all natural resources will be administered by the government of Bolivia. The government will grant ownership rights and control the exploitation, exploration, and industrialization of natural resources through public companies, communities, and private companies that will enter joint ventures with the public sector.

With respect to hydrocarbon resources, Article 359 of the new constitution stipulates that all hydrocarbon deposits, whatever their state or form, belong to the government of Bolivia. No concessions or contracts may transfer ownership of hydrocarbon deposits to private or other interests. The Bolivian government exercises its right to explore and exploit hydrocarbon reserves and trade related products through the state-owned firm *Yacimientos Petrolíferos Fiscales Bolivianos* (YPFB). YPFB benefitted from the new nationalization laws beginning in 2006 that required operators to turn all production over to it and to sign new contracts that give YPFB control over the distribution of gasoline, diesel fuel, and liquefied petroleum gas to gas stations. Article 359 allows YPFB to enter into joint venture contracts for limited periods of time with national or foreign individuals or companies wishing to exploit or trade hydrocarbons or their derivatives.

Outside the hydrocarbons sector, the government is considering a change to the mining code that would require all companies to enter into joint ventures with the state mining company, *Corporacion Minera de Bolivia* (COMIBOL).

Bolivian labor law limits foreign firms' ability to globally staff their companies by restricting foreign employees to 15 percent of the work force.



# BRAZIL

## TRADE SUMMARY

The U.S. goods trade surplus with Brazil was \$11.4 billion in 2010, an increase of \$5.4 billion from 2009. U.S. goods exports in 2010 were \$35.4 billion, up 35.5 percent from the previous year. Corresponding U.S. imports from Brazil were \$23.9 billion, up 19.2 percent. Brazil is currently the 8th largest export market for U.S. goods.

U.S. exports of private commercial services (*i.e.*, excluding military and government) to Brazil were \$12.7 billion in 2009 (latest data available), and U.S. imports were \$4.8 billion. Sales of services in Brazil by majority U.S.-owned affiliates were \$24.1 billion in 2008 (latest data available), while sales of services in the United States by majority Brazil-owned firms were \$1.1 billion.

The stock of U.S. foreign direct investment (FDI) in Brazil was \$56.7 billion in 2009 (latest data available), up from \$44.5 billion in 2008. U.S. FDI in Brazil is led by the manufacturing and finance/insurance sectors.

## IMPORT POLICIES

### Tariffs

Brazil's import tariffs range from 0 percent to 35 percent, with an average applied tariff rate of 11.6 percent in 2010. Brazil's average bound tariff in the WTO is significantly higher, at 31.4 percent. Given the large disparities between bound and applied rates, U.S. exporters face significant uncertainty in Brazil's market because the government has the ability to raise applied rates to bound levels in an effort to manage prices and supply. Average applied tariffs in Brazil have risen by three percentage points since 2007, and are imposed on the vast majority of imports. These high *ad valorem* tariffs affect U.S. exports across diverse sectors including automobiles, auto parts, electronics, chemicals, plastics, textiles, and apparel.

Throughout 2009 and 2010, Brazil increased import tariffs on hundreds of industrial products, including electrical machinery, machine tools, automotive parts, telecommunications equipment, crane lorries, textiles and leather, and toys.

Brazil is a member of the MERCOSUR common market, formed in 1991 and comprised of Argentina, Brazil, Paraguay, and Uruguay. MERCOSUR's Common External Tariff (CET) averages 11.5 percent and ranges from 0 percent to 35 percent *ad valorem*, with a limited number of country-specific exceptions. Tariffs may be imposed by each MERCOSUR member on products imported from outside the region that transit at least one MERCOSUR member before reaching their final destination. In December 2009, Brazil, along with the other MERCOSUR members, approved tariff increases for hundreds of products in the CET, including dairy, textiles, and bags, backpacks, and suitcases. In many cases, the applied tariffs were increased up to the WTO bound levels.

Brazil is permitted by MERCOSUR to maintain 100 exceptions to the CET until December 31, 2015, and maintains higher tariffs than its MERCOSUR partners on certain goods, including cell phones, telecommunications equipment, computers and computer printers, wind turbines, certain chemicals and pharmaceuticals, sardines, and mushrooms.

## FOREIGN TRADE BARRIERS



## **Nontariff Barriers**

Brazil applies federal and state taxes and charges to imports that can effectively double the actual cost of imported products in Brazil. The complexities of the domestic tax system, including multiple cascading taxes and tax disputes among the various states, pose numerous challenges to U.S. companies operating in Brazil.

A number of imports are prohibited, including foreign blood products and all used consumer goods, such as automobiles, clothing, and tires, as well as used medical equipment and information and communications technology products. Brazil also restricts the entry of certain types of remanufactured goods (*e.g.*, earthmoving equipment, automotive parts, and medical equipment) through onerous import licensing procedures. In general, Brazil only allows the importation of such goods if an importer can provide evidence that they are not or cannot be produced domestically. A 25 percent merchant marine tax on long distance freight at Brazilian ports puts U.S. agricultural products at a competitive disadvantage to MERCOSUR products. Brazil applies a 60 percent flat import tax on most manufactured retail goods imported by individuals via mail and express shipment, which go through a simplified customs clearance procedure called RTS (simplified tax regime). Goods with a value of over \$3,000 cannot be imported using this regime.

## **Import Licensing/Customs Valuation/Trade Remedies**

All importers must register with the Secretariat of Foreign Trade (SECEX) to access Brazil's "SISCOMEX" computerized trade documentation system. SISCOMEX registration requirements are onerous, including a minimum capital requirement. However, the SISCOMEX system, updated in early 2007, has cut the wait time for import-export license processing almost in half. Fees are assessed for each import statement submitted through SISCOMEX. Brazil has both automatic and non-automatic import license requirements. Brazil's non-automatic import licensing system covers imports of products that require authorization from specific ministries or agencies, such as beverages (Ministry of Agriculture), pharmaceuticals (Ministry of Health), and arms and munitions (National Defense Ministry). Although a list of products subject to non-automatic import licensing procedures is available on the SISCOMEX system, specific information related to non-automatic import license requirements and explanations for rejections of non-automatic import license applications are lacking. The lack of transparency surrounding these procedures can create additional burdens for U.S. exporters.

U.S. companies continue to complain of onerous and burdensome documentation requirements, which are required before certain types of goods can enter Brazil even on a temporary basis. For example, the Ministry of Health's regulatory agency, ANVISA, must approve product registrations for imported pharmaceuticals, medical devices, health and fitness equipment, cosmetics, and processed food products. Currently, the registration process at ANVISA takes from three months to six months for new versions of existing products, but can take over six months to register products new to the market. Registration of certain pharmaceutical products can take over one year, since ANVISA requires that a full battery of clinical testing be performed in Brazil, regardless of whether or not the drug already has approval from the U.S. Food and Drug Administration.

U.S. companies have also complained that customs officials often apply a higher dutiable value based on a retail price rather than recognizing the company's stated transaction value.

In recent years, Brazil has become a more active user of trade remedies. In 2010, Brazil initiated AD investigations on U.S. exports of n-butanol, toluene diisocyanate, nitrile rubber and light weight coated paper. As of January 2011, Brazil has not issued its findings regarding whether or not to impose AD duties

on any of these products. In 2010 Brazil issued an affirmative final determination in the AD investigation of polypropylene resin from the United States, imposing AD duties of \$82.77 per ton (approximately 6%). Brazil also issued affirmative findings in 2010 in reviews involving the antidumping measures on ethylene glycol and polyvinyl chloride in suspension, maintaining AD measures on these products. Brazil presently has AD measures in force on U.S. exports of the following products: pre-sensitized aluminum plate; butyl acrylate; ethylene glycol; polyethylene terephthalate resin; phenol; polycarbonate resin, polypropylene resin; polyvinyl chloride in suspension and supercalendered paper.

## **EXPORT SUBSIDIES**

In October 2007, Brazil restored tax breaks to exporters with the enactment of Law 11529, the stated intention of which was to help industries hurt by the strengthening of the national currency, the real. This law allows certain Brazilian industrial sectors (textiles, furniture, ornamental stones, woodworking, leatherworking, shoes, leather goods, heavy and agricultural machinery manufacturers, apparel, and automotive – including parts) and some agricultural products (including cattle semen and embryos, horticultural and fruit products, eggs, seeds, wheat and wheat flour, day-old chicks, fluid and pasteurized milk, cheeses, whey, blends for bakery products, fertilizers, and pesticides) to apply tax credits under the social integration (PIS) and social security (COFINS) programs to the purchase of capital goods, both domestic and imported, to be used for manufacturing finished products. The law also expands the government's program for exporting companies purchasing capital goods. To be exempt from paying the 9.25 percent PIS-COFINS tax on these purchases, companies normally must prove they derive at least 70 percent of their revenues from exportation. This benchmark was lowered to 60 percent for companies in the sectors covered by the legislation.

The government of Brazil offers a variety of tax, tariff, and financing incentives to encourage production for export and the use of Brazilian-made inputs in domestic production. For example, Brazil's National Bank for Economic and Social Development (BNDES) provides long-term financing to Brazilian industries through several different programs. The interest rates charged on this financing are customarily lower than the prevailing market interest rates for domestic financing. One BNDES program, FINAME, provides financing for Brazilian firms to purchase Brazilian-made machinery and equipment and capital goods with a high level of domestic content. These programs can be used for financing capacity expansions and equipment purchases in industries such as steel and agriculture.

Brazil's Special Regime for the Information Technology Exportation Platform (REPES) suspends PIS and COFINS taxes on goods and information technology services imported by companies that commit to export software and information technology services to the extent that those exports account for over 80 percent of their annual gross income. The Special Regime for the Acquisition of Capital Goods by Exporting Enterprises (RECAP) suspends these same taxes on new machines, instruments, and equipment imported by companies that commit for a period of at least three years to export goods and services such that they account for at least 80 percent of their overall gross income for the previous calendar year. As of November 2010, 241 companies benefit from RECAP.

## **GOVERNMENT PROCUREMENT**

U.S. companies have found it difficult to participate in Brazil's public sector procurement unless they are associated with a local firm. Without a substantial in-country presence, U.S. companies regularly face significant obstacles to winning government contracts and are often more successful in subcontracting with larger Brazilian firms. Regulations allow a Brazilian state enterprise to subcontract services to a foreign firm only if domestic expertise is unavailable. Additionally, U.S. and other foreign firms may only bid to provide technical services where there are no qualified Brazilian firms.

### **FOREIGN TRADE BARRIERS**

Brazilian government procurement policies apply to purchases by government entities and state-owned companies. Brazil has an open competition process for major government procurements. Until 2010, Brazilian law forbade distinctions between domestic and foreign-owned companies during the tendering process, although it allowed a preference for Brazilian goods and services when two equally qualified vendors were considered and price was the overriding factor in selecting suppliers. However, in July 2010, then President Lula signed a provisional measure (MP 495) giving preference to Brazilian-owned firms that fulfill certain economic stimulus requirements such as generating employment or contributing to technological development, even when their bids are up to 25 percent more expensive than competing foreign-owned firms. In early December 2010, both houses of the Brazilian Congress passed MP 495. With the enactment of the new law, companies interested in pursuing government procurement contracts in Brazil may need to consider fulfilling the requirements to be a Brazilian company as defined by the new law.

The procurement of certain parastatal companies is subject to simplified procedures designed to make those companies more competitive with their private sector counterparts. With the end of the oil monopoly in 1997, the Brazilian government issued Law Decree number 2745/98, which regulates the procurement of services, construction works, and the acquisition of goods and equipment. Pursuant to Law Decree number 2745/98, Petrobras may issue tenders through invitation letters, electronic auctions, or national or international bids. From time to time, however, suppliers have found that Brazil's federal Attorney General will question procurement conducted pursuant to these simplified procedures resulting in delays in tenders from Petrobras. In May 2009, the Brazilian government extended the same simplified procurement procedures to the parastatal power company Eletrobras and its subsidiaries through Law 11.943/09.

Brazil's regulations regarding the procurement of information technology goods and services require federal agencies and parastatal entities to give preferences to locally produced computer products based on a complicated and nontransparent price/technology matrix. However, Brazil permits foreign companies that have established legal entities in Brazil to compete for procurement-related multilateral development bank loans.

Through direct bidding or participation in consortia, most government procurement is open to at least some form of international competition. However, many of the larger bids (*e.g.*, military purchases) can lead to unilateral single source procurement awards. The value of current pending military procurements exceeds \$1 billion.

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

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

Brazil was listed on the Watch List in the 2010 Special 301 report. While Brazil has continued to make important progress in enhancing the effectiveness of intellectual property enforcement, particularly with respect to pirated audiovisual goods, some areas of IPR protection and enforcement continue to represent barriers to U.S. exports and investment. Key issues cited in the report include concerns regarding IPR enforcement, including the need to increase raids and seizures of pirated and counterfeit products and to increase actions against book and Internet piracy. Concerns also remain with respect to border enforcement and the lack of expeditious and deterrent sentences. The United States has also raised concerns regarding long delays in receiving patent protection for new innovations in the patent application process, and inadequate protection against unfair commercial use of undisclosed test and other data generated to obtain marketing approval for human-use pharmaceutical products. In January 2011, the

Federal Attorney General reissued an opinion that the Brazilian Ministry of Health's National Health Vigilance Agency (ANVISA) does not have the authority to review patentability requirements when analyzing pharmaceutical patent applications. The United States will continue to monitor how the Attorney General decision is implemented by ANVISA and any changes affecting patent processing in Brazil.

## **SERVICES BARRIERS**

### **Audiovisual Services and Broadcasting**

Brazil imposes a fixed tax on each foreign film released in theaters, foreign home entertainment products, and foreign programming for broadcast television.

Remittances to foreign producers of audiovisual works are subject to a 25 percent income withholding tax. Brazilian distributors of foreign films are subject to a levy equal to 11 percent of their withholding taxes. This tax, called the CONDECINE (Contribution to the Development of a National Film Industry), is waived for the Brazilian distributor if the producer of the foreign audiovisual work agrees to invest an amount equal to 70 percent of the income withholding tax on their remittances in co-productions with Brazilian film companies. The CONDECINE tax is also levied on any foreign video and audio advertising.

Brazil also requires that 100 percent of all films and television shows be printed locally. Importation of color prints for the theatrical and television markets is prohibited. Domestic film quotas also exist for theatrical screening and home video distribution.

Foreign ownership of cable companies is limited to 49 percent, and the foreign owner must have a headquarters in Brazil and have had a presence in the country for the prior 10 years. Foreign cable and satellite television programmers are subject to an 11 percent remittance tax. The tax, however, can be avoided if the programmer invests 3 percent of its remittances in co-production of Brazilian audiovisual services. National cable and satellite operators are subject to a fixed title levy on foreign content and foreign advertising released on their channels. Law 10610 of 2002 limits foreign ownership in media outlets to 30 percent, including the print and "open broadcast" (non-cable) television sectors. "Open broadcast" television companies are also subject to a regulation requiring that 80 percent of their programming content be domestic in origin and the Brazilian Congress is considering local content and Brazilian-company distribution requirements for pay television programming as well.

### **Express Delivery Services**

U.S. express delivery service (EDS) companies face significant challenges in the Brazilian market due to numerous limitations established by the Brazilian government, such as high import taxes, an automated express delivery clearance system that is only partially functional, and low maximum value limits for express export and import shipments.

The Brazilian government charges a flat 60 percent duty for all goods imported through the Simplified Customs Clearance process used for express delivery shipments. U.S. industry contends that this flat rate is higher than duties normally levied on goods arriving via regular mail, putting express delivery companies at a competitive disadvantage. Moreover, Brazilian Customs has established maximum value limits of \$10,000 for exports and \$3,000 for imports sent using express services. These limits severely

restrict the Brazilian express delivery market's growth potential and impede U.S. exporters doing business with Brazil.

### **Financial Services**

U.S. companies wanting to enter Brazil's insurance and reinsurance market must establish a subsidiary, enter into a joint venture, or acquire or partner with a local company. Market entry for banks may occur on a case-by-case basis.

### **Telecommunications**

Brazil's mobile termination rates (the rate a telecommunications operator must pay a competitor to deliver a call to one of the customers on that competitor's network) are among the highest in the region. ANATEL, Brazil's independent regulator, is seeking to address the issue by conducting a proceeding to review and establish reasonable rates. A regulation affecting mobile termination rates was released for public comment in late 2010, and is still under internal evaluation. In the meantime, U.S. carriers providing mobile services in Brazil will continue to face higher than average costs.

### **INVESTMENT BARRIERS**

There is neither a bilateral investment treaty nor a bilateral double taxation treaty in force between the United States and Brazil.

### **Civil Aviation**

Currently, foreign ownership in Brazilian airlines is capped at 20 percent. In May of 2009, Brazil's Civil Aviation Regulatory Agency (ANAC) proposed increasing that ceiling to 49 percent, but the proposal would require Brazilian Congressional approval and is still awaiting review.

### **Foreign Ownership of Farmland**

In August 2010, Brazil's federal Attorney General issued a revised interpretation of Brazil's 1971 land ownership legislation (Law 5709), strengthening existing language that limits foreign ownership to 25 percent of the farmland in any rural municipality. The revised interpretation also restricts the size of foreigners' land purchases, with the maximum size that may be purchased varying by state. It is unclear whether the new rule can be enforced without further action by the Brazilian Congress. The new rule was introduced at a time that an increasing number of U.S. and other foreign investors are considering investment in Brazilian farmland.

# **BRUNEI DARUSSALAM**

## **TRADE SUMMARY**

The U.S. goods trade surplus with Brunei was \$112 million in 2010, an increase of \$54 million in 2009. U.S. goods exports in 2010 were \$124 million, up 24.0 percent from the previous year. Corresponding U.S. imports from Brunei were \$12 million, down 71.4 percent. Brunei is currently the 136th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Brunei was \$19 million in 2009 (latest data available), down from \$26 million in 2008.

In 2010, the United States entered into negotiations on a regional Asia-Pacific trade agreement called the Trans-Pacific Partnership (TPP), with the objective of shaping a high-standard, broad-based regional agreement. This agreement will create a potential platform for economic integration across the Asia-Pacific region, a means to advance U.S. economic interests with the fastest-growing economies in the world, and a tool to expand U.S. exports, which are critical to the creation and retention of high-paying, high-quality jobs in the United States. In addition to Brunei, the TPP negotiating partners currently include Australia, Chile, Malaysia, New Zealand, Peru, Singapore, and Vietnam.

## **IMPORT POLICIES**

### **Tariffs**

Brunei has bound nearly 93 percent of its tariff lines. The average bound rate is 25.8 percent, while applied rates averaged 3.6 percent in 2008 (latest available data) and ranged from 0 percent to 30 percent. With the exception of a few products – including coffee, tea, tobacco, and alcohol – tariffs on agricultural products are zero. Roughly 130 products, including alcoholic beverages, tobacco, coffee, tea, petroleum oils, and lubricants are subject to specific rates of duty and higher rates of overall protection.

Brunei offers preferential tariff rates to many Asia-Pacific countries under its various trade agreements. As a member of the Association of South East Asian Nations (ASEAN), Brunei is reducing intraregional tariffs as agreed under the ASEAN Free Trade Agreement. Brunei also accords preferential access to its market to Australia, New Zealand, China, India, Korea, and Japan (as part of free trade agreements concluded by ASEAN); to Chile, Singapore, and New Zealand (as part of the Trans-Pacific Strategic Economic Partnership); and to Japan (under a bilateral Economic Partnership Agreement).

## **GOVERNMENT PROCUREMENT**

All procurement is conducted by Ministries, Departments, and the State Tender Board of the Ministry of Finance. Most invitations for tenders or quotations (procurements below B\$250,000 (approximately \$168,000)) are published in a bi-weekly government newspaper, but often are selectively tendered only to locally registered companies. The relevant ministry may approve purchases up to a B\$250,000 threshold, but tender awards above B\$250,000 must be approved by the Sultan in his capacity as Minister of Finance, based on the recommendation of the State Tender Board. The award process often lacks transparency, with tenders sometimes not being awarded or being re-tendered for reasons not made public.

Military procurement is a closed process. The Ministry of Defense selectively invites companies to bid on large procurements. Similarly, Royal Brunei Technical Services, a semi-government-owned military enterprise, does not publish open tenders.

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

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

Brunei was listed on the Watch List in the 2010 Special 301 report. While Brunei has made notable progress on enforcement in 2009, including coordinated efforts to remove pirated music from stores and some improvements in prosecuting IPR infringers, there are areas of IPR protection and enforcement that continue to represent barriers to U.S. exports and investment. Key issues cited in the report include high copyright piracy rates, including the open sale of pirated goods, such as optical discs and unlicensed software in retail stores, and inadequate deterrent penalties for those convicted. The United States also continues to urge Brunei to pass long pending legislation to amend its copyright law.

### **OTHER BARRIERS**

Transparency is lacking in many areas of Brunei's economy. Brunei has not yet notified its state trading enterprises to the WTO Working Party on State Trading Enterprises. Brunei operates state-owned monopolies in key sectors of the economy such as oil and gas, telecommunications, transport, and energy generation and distribution. In addition, Brunei's foreign investment policies are unclear, particularly with respect to limits on foreign equity participation and the identification of sectors in which foreign investment is restricted.

# CAMBODIA

## TRADE SUMMARY

The U.S. goods trade deficit with Cambodia was \$2.1 billion in 2010, up \$350 million from 2009. U.S. goods exports in 2010 were \$153 million, up 20.7 percent from the previous year. Corresponding U.S. imports from Cambodia were \$2.3 billion, up 19.6 percent. Cambodia is currently the 129th largest export market for U.S. goods.

## IMPORT POLICIES

*Tariffs:* Cambodia is one of the few least-developed WTO Members that took on binding tariff commitments on all products in its tariff schedule. Its overall simple average bound tariff rate is 19.1 percent. Cambodia's simple average applied rate is 14.2 percent, but the country charges rates as high as 35 percent on both agricultural and non-agricultural products. U.S. exporters report high tariffs on core restaurant items, agriculture, and food products that, if removed, could lead to more than \$10 million in increased U.S. exports to Cambodia.

*Customs:* Cambodia joined the WTO in 2004 and was given a transition period until January 1, 2009 to implement the WTO Customs Valuation Agreement. The government is not yet fully compliant with the Agreement. Both local and foreign businesses have raised concerns that the Customs and Excise Department engages in practices that are nontransparent and often appear arbitrary. Importers frequently cite problems with undue processing delays, unnecessarily burdensome paperwork and formalities driven by excessively discretionary practices. The United States and Cambodia continue to discuss these and other customs issues under the bilateral Trade and Investment Framework Agreement (TIFA).

*Taxation:* Cambodia levies a 10 percent value-added tax (VAT) on goods and services consumed in Cambodia. To date, the VAT has been selectively imposed only on large companies, though the Cambodian government is in the process of expanding the base to which the tax is applied. VAT is not collected on exports and services consumed outside of Cambodia (technically, a zero percent VAT applies). Subject to certain criteria, the zero percent rate also applies to supporting industries or subcontractors supplying goods and services to exporters such as garment manufacturers and the textile and footwear industries.

## GOVERNMENT PROCUREMENT

Cambodia's government procurement regime is governed by a 1995 sub-decree. The sub-decree requires public tenders for all international purchases over 200 million riel (approximately \$50,000) for civil work and 100 million riel (approximately \$25,000) for goods. Despite these regulations, the conduct of government procurement often is not transparent. The Cambodian government frequently provides short time frames to respond to public announcements of tenders, which often are not widely publicized.

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

## INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION

While Cambodia has made progress in implementing the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), there are areas of IPR protection and enforcement that continue to represent barriers to U.S. exports and investment. Specifically, Cambodia's IPR enforcement has been

### FOREIGN TRADE BARRIERS



ineffective at addressing continued widespread copyright piracy and trademark counterfeiting. Pirated CDs, videos, software, and other copyrighted materials as well as a vast array of counterfeit goods, including counterfeit pharmaceuticals, are widely available in Cambodia's markets. Additionally, while the 1996 United States-Cambodia Bilateral Trade Agreement contained a broad range of IPR commitments that were to be phased in, Cambodia has not yet enacted legislation regarding, for example, protection of encrypted satellite signals or for semiconductor layout designs. Work also remains ongoing on draft legislation to implement commitments with respect to the protection of trade secrets. The lack of strong laws on unfair competition and franchising also hamper civil enforcement efforts to protect IPR.

## **SERVICES BARRIERS**

### **Legal Services**

Efforts by Cambodian law firms to propose a 49-percent equity limitation on foreign firms and restrictions on their forms of commercial arrangement, although unsuccessful, have introduced a measure of legal uncertainty for firms in this sector.

## **INVESTMENT BARRIERS**

Cambodia's Constitution restricts foreign ownership of land. Foreign investors may use land through concessions and renewable leases. In 2010, a new law allowing foreign ownership of properties above the ground floor was enacted. The law stipulates that no more than 70 percent of a building can be foreign owned, and foreigners cannot own property within 30 kilometers of the national border.

## **ELECTRONIC COMMERCE**

Electronic commerce is a nascent concept in Cambodia. Online commercial transactions are extremely limited, and Internet access is still in its infancy. The Cambodian government has not imposed any specific restrictions on products or services traded via electronic commerce and no existing legislation governs this sector. Electronic commerce legislation is being drafted to facilitate domestic and international electronic commerce by eliminating legal barriers and promoting public confidence in the authenticity, integrity and reliability of data messages and electronic communications.

## **OTHER BARRIERS**

*Corruption:* Both foreign and local businesses have identified corruption in Cambodia as a major obstacle to business and a deterrent to attracting foreign direct investment. In 2010, Cambodia adopted anti-corruption legislation and established a national Anti-Corruption Unit to undertake investigations, law enforcement measures, and public outreach. However, the law does not go into effect until December 2011. Several recent polls and perception surveys indicate that the public institutions and agencies considered to be the most corrupt are the courts, police and Customs.

*Judicial and Legal Framework:* Cambodia's legal framework is incomplete and unevenly enforced. While numerous trade and investment laws have been passed over the past five years, including a law on commercial arbitration in 2006, many business-related draft laws are still pending. The judicial system is often arbitrary and subject to corruption. Many Cambodian and foreign business representatives perceive the court system to be unreliable and susceptible to external political and commercial influence. To address these concerns, the Cambodian government established a commercial arbitration body in 2009 called the National Arbitration Center (NAC), which aims to be Cambodia's first alternative dispute resolution mechanism able to commercial disputes more efficiently than through the court system. Disagreements

## **FOREIGN TRADE BARRIERS**

between the Ministry of Commerce and the arbitrators, however, have delayed its operations. Disputes also can be resolved through international arbitration, including through the World Bank's International Center for Settlement of Investment Disputes. In practice, most commercial disputes in Cambodia are still resolved by negotiations facilitated by the Ministry of Commerce, the Cambodian Chamber of Commerce, and other concerned institutions.

*Smuggling:* Widespread smuggling of products, such as vehicles, fuel, soft drinks, livestock, crops, and cigarettes, has undermined fair competition and legitimate investment. The Cambodian government has issued numerous orders to suppress smuggling and has created various anti-smuggling units within governmental agencies, particularly the Department of Customs and Excise. Enforcement efforts, however, remain weak and inconsistent.



# CANADA

## TRADE SUMMARY

The U.S. goods trade deficit with Canada was \$28.3 billion in 2010, up \$6.7 billion from 2009. U.S. goods exports in 2010 were \$248.2 billion, up 21.3 percent from the previous year. Corresponding U.S. imports from Canada were \$276.5 billion, up 22.2 percent. Canada is currently the largest export market for U.S. goods.

U.S. exports of private commercial services (i.e., excluding military and government) to Canada were \$42.0 billion in 2009 (latest data available), and U.S. imports were \$22.0 billion. Sales of services in Canada by majority U.S.-owned affiliates were \$112.1 billion in 2008 (latest data available), while sales of services in the United States by majority Canada-owned firms were \$67.0 billion.

The stock of U.S. foreign direct investment (FDI) in Canada was \$259.8 billion in 2009 (latest data available), up from \$239.2 billion in 2008. U.S. FDI in Canada is led by the manufacturing, nonbank holding company, and finance/insurance sectors.

## North American Free Trade Agreement

The North American Free Trade Agreement (NAFTA), signed by the United States, Canada, and Mexico, entered into force on January 1, 1994. At the same time, the United States suspended the United States-Canada Free Trade Agreement, which had entered into force in 1989. Under the NAFTA, the United States and Canada agreed to progressively eliminate tariff and nontariff barriers to trade in goods; provide improved access for services, and strengthen the protection of foreign investment and intellectual property rights. After signing the NAFTA, the parties concluded supplemental agreements on labor and the environment which obligate them to enforce their national environmental and labor laws.

## IMPORT POLICIES

### Tariffs

On January 1, 1998, per the terms of the NAFTA, Canada eliminated tariffs on all industrial and most agricultural products imported from the United States. In 2010, Canada announced the unilateral elimination of MFN tariffs on imported manufacturing inputs. Most tariffs were eliminated immediately and the remainder will be eliminated by 2015.

### Agricultural Supply Management

Canada uses supply management systems to regulate its dairy, chicken, turkey, and egg industries. Canada's supply management regime involves production quotas, producer marketing boards to regulate price and supply, and border protection achieved through tariff-rate quotas (TRQs). Canada's supply management regime severely limits the ability of U.S. producers to increase exports to Canada above the TRQ levels and inflates the prices Canadians pay for dairy and poultry products. The United States has pressed for expanded in-quota quantities for these products as part of the negotiations regarding disciplines on TRQs in the WTO Doha Round agricultural negotiations. One of the barriers created by Canada's dairy policies is a 245 percent *ad valorem* tariff on U.S. exports of breaded cheese sticks.

Early in 2008, Canada announced its intention to proceed with the implementation of the Special Safeguard (SSG) under the WTO Agreement on Agriculture for its supply-managed goods. The SSG is a provision that would allow additional duties to be imposed on over-quota trade when import volumes rise above a certain level, or if prices fall below a certain level. Canada continues to work on the details of this mechanism and monitor over-quota trade, but has not established a timeframe for announcing the SSG price and volume triggers.

### **Restrictions on U.S. Grain Exports**

Canada has varietal registration requirements on wheat. On August 1, 2008, Canada eliminated a portion of the varietal controls by no longer requiring that each registered variety of grain be visually distinguishable based on a system of Kernel Visual Distinguishability (KVD) requirements. This KVD requirement previously limited U.S. export access to Canada's grain market because U.S. varieties are not visually distinct and cannot be registered for use in Canada. While this policy change is a step in the right direction, it will take years before U.S. wheat varieties are able to complete the necessary field trials to determine whether they will be registered for use in Canada. In the meantime, U.S. wheat, regardless of quality, will continue to be sold in Canada as "feed" wheat at sharp price discounts compared to Canadian varieties.

### **Personal Duty Exemption**

The United States continues to urge Canada to facilitate cross border trade for returning residents by relaxing its taxation of goods that Canadian visitors purchase in the United States. Canada's allowance is linked to the length of a visitor's absence from Canada and allows a zero exemption for Canadians absent less than a day. The exemption is C\$50 for visitors absent for at least 24 hours, and C\$400 and C\$750 for visits exceeding 48 hours and 7 days, respectively. The United States provides much more generous treatment for its returning travelers, with a minimum allowance of US\$200 and, once each 30 days, a US\$800 allowance for travelers returning after 48 hours.

### **Wine and Spirits**

Market access barriers in several provinces hamper exports of U.S. wine and spirits to Canada. These include "cost of service" mark-ups, listings, reference prices, labeling, discounting, distribution and warehousing policies.

### **The Canadian Wheat Board and State Trading Enterprises (STEs)**

The United States has longstanding concerns about the monopolistic marketing practices of the Canadian Wheat Board. The United States seeks a level playing field for U.S. farmers, including through the elimination in the WTO Doha Round agricultural negotiations of the monopoly power of exporting STEs.

### **SOFTWOOD LUMBER**

The Softwood Lumber Agreement (SLA) entered into force in 2006 and will expire in 2013 unless renewed. Its implementation settled extensive litigation and resulted in the revocation of U.S. antidumping and countervailing duty orders on softwood lumber from Canada. The SLA is designed to create a downward adjustment in softwood lumber exports from Canada into the United States through the imposition of export measures by Canada when demand in the United States is low. The SLA also provides for binding arbitration to resolve disputes between the United States and Canada regarding interpretation and implementation of the Agreement. Under the SLA, arbitration is conducted under the

#### **FOREIGN TRADE BARRIERS**

rules of the LCIA (formerly the London Court of International Arbitration). The bilateral Softwood Lumber Committee, established pursuant to the SLA, meets to discuss a range of implementation issues and Canadian provincial assistance programs for softwood lumber industries.

In 2007, the United States expressed concerns regarding Canada's implementation of SLA export measures, in particular the operation of the Agreement's surge mechanism and quota volumes, and several federal and provincial assistance programs. In February 2009, an arbitral tribunal found that the equivalent of an additional \$36.66 million should be collected on imports of softwood lumber products from the provinces of Ontario, Quebec, Manitoba, and Saskatchewan. When Canada did not cure the breach voluntarily, the United States imposed a 10 percent *ad valorem* tariff on softwood lumber products exported to the United States from Ontario, Quebec, Manitoba, and Saskatchewan. In September 2009, the tribunal rejected Canada's arguments that it had cured its breach by offering to pay the United States \$36.66 million. In September 2010, the United States agreed that Canada could undertake domestic export measures to cure the breach in a manner consistent with the tribunal's decision.

In 2008, the United States filed a separate request for arbitration challenging a number of assistance programs implemented by Quebec and Ontario, which the United States believed were inconsistent with Canada's obligations under the anti-circumvention provision of the SLA. In January 2011, the LCIA found certain of the challenged programs breached the Agreement and determined that, in order to remedy the breach, Canada should impose additional charges on exports of softwood lumber to the United States originating in Quebec and Ontario. Canada began collecting the additional charges on March 1, 2011. These additional export charges will remain in place for the duration of the SLA and are anticipated to result in the collection of \$59.4 million.

In January 2011, the United States requested a third arbitration under the SLA regarding the under-pricing of timber harvested from public lands in the Interior region of British Columbia. The central issue of the dispute involves the mis-assignment of public timber to the salvage "grade 4", which British Columbia has then sold to Canadian softwood lumber producers at the very low fixed rate of 25 cents per cubic meter.

## **DOMESTIC SUPPORT MEASURES**

### **Aerospace Sector Support**

Canada established the Strategic Aerospace and Defence Initiative (SADI) in 2007, replacing Technology Partnership Canada (TPC). The SADI "provides repayable support for strategic industrial research and pre-competitive development projects in the aerospace, defence, space and security industries." There is no minimum or maximum limit on how much a company can apply to receive through SADI, although typically SADI is expected to contribute about 30 percent of a project's eligible costs. SADI repayment is generally based on a royalty applied to the company's gross business revenues. To receive funding through SADI, the level of assistance from all government sources shall not normally exceed 75 percent of a project's eligible costs. The first SADI funds were disbursed in early 2008; SADI is expected to invest nearly C\$900 million between 2007 and 2012, with funding to reach a maximum of C\$255 million per year.

In 2008, the Canadian federal government and the Quebec provincial government announced aid to the Bombardier aircraft company not to exceed C\$350 million (federal) and C\$117 million (provincial) to support research and development (R&D) related to the launch of a new class of Bombardier C Series jets. Under this program, Bombardier received a contribution of C\$39.6 million from the federal government in fiscal year 2009 (April 1-March 31) and C\$36.9 million in fiscal year 2010. Bombardier is scheduled to receive a contribution of C\$67 million in fiscal year 2011.

## **FOREIGN TRADE BARRIERS**

About one-half of the federal money is for general R&D. The other half is tied specifically to the development of the C-Series aircraft. The government of the United Kingdom is also contributing to the C-Series development, as major components of the aircraft, specifically the wings, are to be produced in Northern Ireland.

The United States has expressed its concerns to Canada that any launch aid associated with the C-Series must be consistent with Canada's international trade obligations. The United States has also expressed concern over the possible use of official export credits to support commercial aircraft sales in the U.S. market.

### **Ontario Feed-In Tariff Program**

The Province of Ontario instituted a feed-in tariff renewable energy program as part of the *Green Energy and Green Economy Act of 2009*. Under the program, the Ontario Power Authority will provide a guaranteed tariff for energy produced through renewable means (including wind, solar/photovoltaic) on the condition that suppliers use a provincially-mandated percentage of local content (equipment, services, etc.) in their generating activity. U.S. suppliers of equipment and services have complained about the program, because its domestic content requirement provides a disincentive to purchase from U.S. suppliers. In September 2010, Japan filed a request for consultations with the WTO Dispute Settlement Body regarding the domestic content requirements of the Ontario *Green Energy and Green Economy Act 2009*. The United States and the European Union were granted third-party status in these proceedings.

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

Canada was listed on the Priority Watch List in the 2010 Special 301 report. Concerns listed in the report relate to Canada's failure to implement key copyright reforms, its weak border enforcement system, and its failure to implement the World Intellectual Property Organization Internet Treaties, which Canada signed in 1997. The United States continues to urge Canada to enact legislation to strengthen its copyright laws and implement these treaties.

The United States also urges Canada to enact legislation to give customs officers the authority, without the need for a court order, to seize products suspected of being pirated or counterfeit. Canada's IPR enforcement regime would also benefit from the provision of increased resources and training to customs officers and domestic law enforcement personnel. Canada and the United States are working together on enhanced training.

In addition, the U.S. pharmaceutical industry has expressed concerns related to Canada's 2010 pharmaceutical pricing guidelines, specifically with respect to the regulatory burden placed on pharmaceutical manufacturers.

Canada has been an active participant in the Anti-Counterfeiting Trade Agreement (ACTA) negotiations, which were concluded in November 2010. The ACTA establishes an international framework that will assist Parties in their efforts to effectively combat the infringement of intellectual property rights, in particular the proliferation of counterfeiting and piracy, which undermines legitimate trade and the sustainable development of the world economy.

## **SERVICES BARRIERS**

### **Telecommunications**

Canada maintains a 46.7 percent limit on foreign ownership of suppliers of facilities-based telecommunications service, except for submarine cable operations. This is among the most restrictive regimes among developed countries. In addition to the equity limitations, Canada requires that at least 80 percent of the members of the board of directors of facilities-based telecommunications service suppliers be Canadian citizens. As a consequence of these restrictions on foreign ownership, U.S. firms' presence in the Canadian market as wholly U.S.-owned operators is limited to that of a reseller, dependent on Canadian facilities-based operators for critical services and component parts. These restrictions deny foreign providers certain regulatory advantages only available to facilities-based carriers (*e.g.*, access to unbundled network elements and certain bottleneck facilities). This limits those U.S. companies' options for providing high quality end-to-end telecommunications services, since they cannot own or operate their own telecommunications transmission facilities. In 2009, an Egyptian-controlled cell phone service provider was permitted to acquire wireless spectrum rights in Canada, but the company has since faced difficulties leasing space for cellular equipment on incumbent-owned towers, and that license has now been challenged in court, adding to the uncertainty to the Canadian regulatory regime. Canada is currently considering a range of possible legislative steps to further liberalize the sector, but the narrow range of options (*e.g.* excluding cable platforms, one of the most viable means to compete in the telecommunications sector) and uncertain political support undercut potential progress.

### **Canadian Content in Broadcasting**

The Canadian Radio-television and Telecommunications Commission (CRTC) requires that for Canadian over-the-air broadcasters, Canadian programs must make up 60 percent of television broadcast time overall and 50 percent from 6 p.m. to midnight. It also requires that 35 percent of popular musical selections broadcast on the radio should qualify as "Canadian" under a Canadian government-determined point system. For cable television and direct to home broadcast services, more than 50 percent of the channels received by subscribers must be Canadian programming services.

The CRTC also requires that the English and French television networks operated by the Canadian Broadcasting Corporation not show popular foreign feature movies between 7 p.m. and 11 p.m. The only non-Canadian films that may be broadcast during that time must have been released in theaters at least two years previously. Non-Canadian channels must be pre-approved ("listed") by the CRTC. For other services, such as specialty television and satellite radio services, the required percentage of Canadian content varies according to the nature of the service. Canadian licensees may appeal the listing of a non-Canadian service which is thought to compete with a Canadian pay or specialty service. The CRTC will consider removing existing non-Canadian services from the list, or shifting them into a less competitive location on the channel dial, if they change format to compete with a Canadian pay or specialty service.

The CRTC is holding hearings to determine whether it can and should regulate media content distributed over the Internet. Despite the impracticality of imposing a quota regime on on-demand digital services with limitless titles, Canada's traditional broadcasters have called for Canadian content requirements to be imposed on services such as Netflix, iTunes, and Google video, which have begun to establish a presence in Canada.

Distributors of theatrical films in Canada must submit their films to six different provincial or regional boards for classification: there is no national classification system. Most of these boards also classify products intended for home video distribution.

## **FOREIGN TRADE BARRIERS**



## **INVESTMENT BARRIERS**

### **General Establishment Restrictions**

Under the Investment Canada Act (ICA), the Broadcasting Act, the Telecommunications Act, and standing Canadian regulatory policy, Canada screens new or expanded foreign investment in the energy and mining, banking, fishing, publishing, telecommunications, transportation, film, music, broadcasting, cable television, and real estate sectors.

The ICA has regulated foreign investment in Canada since 1985. Foreign investors must notify the government of Canada prior to the direct or indirect acquisition of an existing Canadian business of substantial size (as defined below). The Canadian government also reviews the acquisition by non-Canadians of existing Canadian businesses, as well as the establishment of new Canadian businesses in designated types of business activity relating to Canada's culture, heritage, or national identity where the federal government has authorized such review as in the public interest. In 2009, the Harper government increased the threshold for review to C\$1 billion (enterprise value), allowing almost all U.S. investment to enter the country without notification. At the same time, the government added national security considerations as an additional component of investment review. Industry Canada is the reviewing authority for most investments, except for those related to cultural industries, which come under the jurisdiction of the Department of Heritage. The ICA sets time limits for the reviews. Once an application for review is received, the Minister has 45 days to determine whether or not to allow the investment. A 30 day extension is permitted if the investor is notified prior to the end of the initial 45 day period. Reviews of investments in cultural industries usually require the full 75 days to complete.

Under the ICA, the Minister of Industry can make investment approval contingent on meeting certain conditions such as minimum levels of employment and R&D. Since the global economic slowdown in 2009, some foreign investors in Canada have had difficulties meeting these conditions. On November 3, 2010, the Canadian government blocked a C\$38.6 billion hostile takeover by an Australian company, BHP Billiton, of Potash Corp. of Saskatchewan, as not being of "net benefit" to Canada under the ICA. This was only the second time an investment has been blocked since 1985.

# CHILE

## TRADE SUMMARY

The U.S. goods trade surplus with Chile was \$3.4 billion in 2009, a decrease of \$247 million from 2008. U.S. goods exports in 2009 were \$9.4 billion, down 21.0 percent from the previous year. Corresponding U.S. imports from Chile were \$6.0 billion, down 27.4 percent. Chile is currently the 24th largest export market for U.S. goods.

U.S. exports of private commercial services (*i.e.*, excluding military and government) to Chile were \$1.9 billion in 2008 (latest data available), and U.S. imports were \$1.0 billion. Sales of services in Chile by majority U.S.-owned affiliates were \$7.2 billion in 2007 (latest data available), while sales of services in the United States by majority Chile-owned firms were \$441 million.

The stock of U.S. foreign direct investment (FDI) in Chile was \$12.6 billion in 2008 (latest data available), up from \$11.6 billion in 2007. U.S. FDI in Chile is concentrated largely in the finance/insurance, manufacturing, banking, and mining sectors.

## IMPORT POLICIES

### Tariffs

The United States-Chile Free Trade Agreement (FTA) entered into force on January 1, 2004. Under the FTA, the Parties immediately eliminated tariffs on 87 percent of bilateral trade and will establish duty-free trade for all products by 2016.

Chile has one of the most open trade regimes in the world. The uniform applied tariff rate for nearly all goods is 6 percent. There are several exceptions to the uniform tariff. For example, higher effective tariffs rates will remain for wheat, wheat flour, and sugar during the 12 year transition period under the FTA due to the application of an import price band system. Importers also must pay a 19 percent value added tax (VAT) calculated on the customs value plus import tariff. In the case of duty-free imports, the VAT is calculated on the customs value alone.

### Import Controls

There are virtually no restrictions on the types or amounts of goods that can be imported into Chile, nor any requirements to use the official foreign exchange market. However, Chilean customs authorities must approve and issue a report for all imports valued at more than \$3,000. After customs authorities issue the report, the goods to be imported must generally be shipped within 30 days. Commercial banks may authorize imports of less than \$3,000. Importers and exporters must also report their import and export transactions to the Central Bank. Commercial banks may sell foreign currency to any importer to cover the price of the imported goods and related expenses as well as to pay interest and other financing expenses that are authorized in the import report.

Chile prohibits the importation of used vehicles, used motorcycles, and used retreaded tires (with the exception of wheel-mounted tires). Some used items originating from a country without an FTA with Chile are subject to an additional importation charge of 3 percent over the CIF (cost, insurance, and freight). This additional charge can be eliminated or reduced, depending on the product, if the used item is imported from a third country that has an FTA with Chile. However, if the used item is imported from a

## FOREIGN TRADE BARRIERS

country that does not have an FTA with Chile, even if the importing company is from a country with whom Chile has an FTA, they will be subject to the additional charge of 3 percent over the CIF.

### **Nontariff Barriers**

Chile maintains a complex price band system for wheat, wheat flour, and sugar that, under the FTA, will be phased out by 2016 for imports from the United States. Mixtures containing more than 65 percent sugar (*e.g.*, high fructose corn syrup) content are subject to the sugar price band system. The price band system was created in 1985 and is intended to guarantee a minimum and maximum import price for the covered commodities. When certain CIF prices (as calculated by Chilean authorities) fall below the set minimum price, a special tax is added to the tariff rate to raise the price to the minimum price. The government sets a minimum import price that is normally higher than both international and Chilean domestic prices. Beginning in 2008, the minimum price has been adjusted downward by 2 percent per year on U.S. imports; in 2014 Chile's President will evaluate whether to continue the price band system or eliminate it prior to 2016 as required under the FTA.

Non-Chilean companies operating in the country are required to contract the services of a customs agent when importing or exporting goods valued at over \$1,000 FOB (Free on Board). The customs agent is the link between the exporter/importer and the National Customs Service and is responsible for facilitating foreign trade operations and acting as the official representative of the exporter/importer in the country.

Customs agents' fees are not standardized. This is an extra cost borne by non-Chilean companies operating in-country. However, companies established in any of the Chilean duty-free zones are exempt from the obligation to use a customs agent when importing or exporting goods.

### **EXPORT POLICIES**

Chile currently provides a simplified duty drawback program for nontraditional exports. The program reimburses a firm up to 3 percent of the value of the product it exports, if 50 percent of that product consists of imported raw materials. If the capital equipment used to produce exported goods is imported, it must carry a minimum CIF value of \$3,813 in order to be eligible for duty drawback. The net value of the invoice is used if the capital good in question is also manufactured domestically. For imported vehicles to be used in an export business, such vehicles must have a minimum CIF value of \$4,830. Another export promotion measure lets all exporters defer import duties for up to seven years on imported capital equipment or receive an equivalent government subsidy for domestically produced capital goods.

In accordance with its commitments under the FTA, Chile is eliminating, over a transition period, the use of duty drawback and duty deferral for imports that are incorporated into any goods exported to the United States. Full drawback rights are allowed through 2012. Beginning in 2013, the amount of drawback allowed is reduced until it reaches zero in 2016.

Under Chile's separate VAT reimbursement policy, exporters have the right to recoup the VAT they have paid when purchasing goods and using services intended for export activities. Any company that invests in a project in which production will be for export is eligible for VAT reimbursement.

### **GOVERNMENT PROCUREMENT**

Chile's 2003 Basic Law on Administrative Contracts for the Supply and Rendering of Services (No. 19.886) sets out the legal framework for government procurement of goods and services; however, the law does not apply to state-owned companies, which follow their own regulations.

#### **FOREIGN TRADE BARRIERS**

The FTA requires procuring entities to use fair and transparent procurement procedures, including advance notice of purchases and timely and effective bid review procedures for procurement covered by the agreement. It also includes nondiscrimination provisions that require Chilean entities covered by the FTA to allow U.S. suppliers to participate in their procurement on the same basis as Chilean suppliers in procurements covered by the Agreement. The FTA covers the procurement of most Chilean central government entities, 15 regional governments, 11 ports and airports, and 346 municipalities.

Chile is not a signatory to the WTO Agreement on Government Procurement, but it is an observer to the Committee on Government Procurement.

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

Chile was listed on the Priority Watch List in the 2010 Special 301 Report. Although the report noted positive steps taken by the Chilean government in 2009 and early 2010, including the creation of the National Institute for Industrial Property to oversee industrial property registration and protection, the United States continues to have concerns regarding the implementation of Chile's IPR commitments under the FTA. In May 2010, the Chilean government implemented a new intellectual property law, which includes language amending its copyright law. However, the legislation falls short of fully addressing Chile's commitments. For example, the legislation does not include protections against the circumvention of technological protection measures.

Key concerns highlighted in the report also included inadequate protection against unfair commercial use of undisclosed test and other data generated to obtain marketing approval for pharmaceutical products, as well as the lack of an effective system to address patent issues expeditiously in connection with applications to market pharmaceutical products. The report also noted the need to enact legislation to ratify the 1991 Act of the International Convention for the Protection of New Varieties of Plants and the Trademark Law Treaty. The Chilean Congress ratified the Trademark Law Treaty in September 2010, but implementation is still pending. In addition, the rate of prosecutions and the tendency to apply minimum sentences for counterfeiting and piracy remain a concern, as they may not effectively deter future infringement.

The Chilean government is making an effort to promote publicly the value of protecting IPR, emphasizing the benefits this can bring to innovation, investment, and economic growth. In 2010, the United States and Chile held several meetings to exchange information and review implementation of the IPR provisions of the FTA IPR Chapter.

## **SERVICES BARRIERS**

### **Financial Services**

Chile made WTO financial services commitments in banking services and in most securities and other financial services. However, Chile's WTO Commitment Schedule in the securities sector did not include asset fund management (mutual funds, investment funds, foreign capital investment funds, and pension funds). Except as permitted under the FTA for U.S.-based insurance companies, foreign-based insurance companies that operate from outside Chile cannot offer or contract insurance policies in Chile directly or through intermediaries. However, there are no restrictions on foreign-based insurance companies that wish to open a branch in Chile and begin operations in-country.



# CHINA

## TRADE SUMMARY

The U.S. goods trade deficit with China was \$273.1 billion in 2010, up \$46.2 billion from 2009. U.S. goods exports in 2010 were \$91.9 billion, up 32.2 percent from the previous year. Corresponding U.S. imports from China were \$364.9 billion, up 23.1 percent. China is currently the 3rd largest export market for U.S. goods.

U.S. exports of private commercial services (*i.e.*, excluding military and government) to China were \$15.7 billion in 2009 (latest data available), and U.S. imports were \$8.2 billion. Sales of services in China by majority U.S.-owned affiliates were \$19.5 billion in 2008 (latest data available), while sales of services in the United States by majority China-owned firms were \$432 million.

The stock of U.S. foreign direct investment (FDI) in China was \$49.4 billion in 2009 (latest data available), down from \$52.5 billion in 2008. U.S. FDI in China is led by the manufacturing and banking sectors.

## IMPORT BARRIERS

Prior to its WTO accession in December 2001, China restricted imports through high tariffs and taxes, quotas and other nontariff measures, and restrictions on trading rights, *i.e.*, the right to engage in importing and/or exporting goods. Beginning in 2002, its first year in the WTO, China significantly reduced tariff rates on many products, decreased the number of goods subject to import quotas, expanded the number of Chinese enterprises with trading rights and the products they could import and increased the transparency of its licensing procedures. Subsequently, China has continued to make progress by implementing tariff reductions on schedule, phasing out import quotas and expanding trading rights for foreign enterprises and individuals. Nevertheless, some serious problems remain, such as China's refusal to grant trading rights for certain industries that are listed in the following section.

### Trading Rights

In its Protocol of Accession to the WTO, China committed to substantial liberalization in the area of trading rights. Although China did not fully adhere to the agreed phase-in schedule, it put in place a registration system implementing the required liberalization of trading rights, both for wholly Chinese-owned enterprises and for Chinese-foreign joint ventures, wholly foreign-owned enterprises and foreign individuals, including sole proprietorships. This liberalization is reflected in China's revised Foreign Trade Law, issued in April 2004. It provides for trading rights to be automatically available through a registration process, effective July 1, 2004. In June 2004, the Ministry of Commerce (MOFCOM) issued implementing rules establishing the procedures for registering as a foreign trade operator. U.S. companies have reported few problems with the trading rights registration process.

Consistent with the terms of China's Protocol of Accession to the WTO, the importation of some goods, such as petroleum and sugar, is still reserved for state trading enterprises. In addition, for goods still subject to tariff-rate quotas (TRQ), such as grains, cotton, vegetable oils and fertilizers, China reserves a portion of the in-quota imports for state trading enterprises, while it makes the remaining portion (ranging from 10 percent to 90 percent, depending on the commodity) available for importation through non-state

traders. In some cases, the percentage available to non-state traders increases annually for a fixed number of years. (*For further information, please refer to the section below on Tariff-Rate Quotas.*)

China has continued to restrict the importation (and distribution) of copyright-intensive products such as books, newspapers, journals, theatrical films, DVDs and music, in contravention of its trading rights (and distribution services) commitments, leading the United States to mount a successful WTO challenge to these policies. China has agreed to remove these restrictions by March 2011 in order to comply with the WTO ruling against it. The United States will closely monitor China's implementation of this ruling. (*For further information, please refer to the section below on Audiovisual and Related Services.*)

### **Import Substitution Policies**

When it acceded to the WTO, China agreed to eliminate all subsidies prohibited under Article 3 of the WTO Agreement on Subsidies and Countervailing Measures (Subsidies Agreement), including all forms of subsidies contingent on the use of domestic over imported goods. In its Protocol of Accession to the WTO, China also committed that it would not condition import or investment approvals on whether there are competing domestic suppliers or impose other performance requirements. In anticipation of this commitment, China enacted legal changes in 2000 and 2001 to eliminate local content requirements for foreign investments. Under the prevailing rules, however, investors are still "encouraged" to follow some of the formerly mandated practices. Instances in which the Chinese government has reportedly pursued import substitution or similar policies are described below.

#### *Automotive Parts*

In May 2004, China issued a new automobile industrial policy, the Policy on Development of the Automotive Industry, and subsequently it issued implementing regulations that unfairly discriminated against imported automotive parts and discouraged automobile manufacturers in China from using imported automotive parts in the assembly of vehicles. In 2006, the United States, the EU and Canada initiated dispute settlement proceedings against China at the WTO. The WTO ultimately ruled in favor of the United States. In September 2009, China repealed the challenged measures.

Various U.S. industries are concerned about Chinese policies that may discriminate against foreign products. For example, the U.S. automotive industry is concerned that foreign-invested producers of New Energy Vehicles (NEVs) and NEV parts in China may begin to face discrimination. China is developing new regulations as part of its NEV plan, which encompasses hybrid and battery electric vehicles. Current drafts reportedly specify that automakers that intend to manufacture electric vehicles in China must demonstrate a "mastery" level of proficiency in key parts such as electric vehicle batteries, motors or control systems before receiving a license to produce and sell electric vehicles. In addition, according to reports on current drafts, the Chinese entity that manufactures the vehicle, either a domestic manufacturer or joint venture operation, must demonstrate clear ownership of intellectual property rights to the technologies that enable the "mastery." U.S. industry is concerned that China may implement these proposed requirements by requiring that production of key NEV parts take place in China. These proposed requirements also give rise to concerns that foreign manufacturers of NEVs and NEV parts will be compelled to contribute their intellectual property to their Chinese joint venture operations in order to fully participate in the NEV market.

#### *Steel*

China issued a Steel and Iron Industry Development Policy (Steel Policy) in July 2005. Although many aspects of this Steel Policy have not been implemented, it includes a host of objectives and guidelines that

raise serious concerns. For example, the Steel Policy requires that foreign enterprises seeking to invest in Chinese iron and steel enterprises possess proprietary technology or intellectual property in the processing of steel. Given that foreign investors are not allowed to have a controlling share in steel and iron enterprises in China, this requirement would seem to constitute a *de facto* technology transfer requirement, raising concerns given China's commitments under its Protocol of Accession to the WTO not to condition investment rights or approvals on the transfer of technology. The Steel Policy also appears to discriminate against foreign equipment and technology imports, encouraging the use of local content by calling for a variety of government financial supports for steel and iron projects using newly developed domestic equipment. Even more troubling, however, it calls for the use of domestically produced steel manufacturing equipment and domestic technologies whenever domestic suppliers exist, raising questions, given China's commitment under its Protocol of Accession to the WTO not to condition the right of investment or importation on whether competing domestic suppliers exist. The Steel Policy is also troubling because it prescribes the number and size of steel producers in China, where they will be located, the types of products that will and will not be produced and the technology that will be used. This high degree of government direction and decision-making regarding the allocation of resources into and out of China's steel industry raises concerns because of the commitment that China made in its Protocol of Accession to the WTO that the government would not influence, directly or indirectly, commercial decisions by state-owned or state-invested enterprises.

China's steel production has grown rapidly and at a rate faster than the growth in its domestic steel consumption. China became the largest steel exporting economy in 2006, and its steel exports have increasingly become subject to trade remedy actions by other countries in the past two years. In March 2006, the United States and China held the inaugural meeting of a new U.S.-China Joint Commission on Commerce and Trade (JCCT) dialogue on the steel industry (Steel Dialogue). Since then, the two sides have held three more Steel Dialogue meetings, with the most recent one taking place in October 2008. In bilateral and multilateral meetings, the United States has argued that China has acted to impose different levels of taxes on different exports of steel products and steelmaking inputs in a manner that appears to encourage the export of certain value-added steel products. In response to the financial downturn in the fall of 2008, China rapidly reduced or removed export duties on many, but not all, steel products to encourage exports during a period of steeply declining global demand. In a series of moves over the next several months, China eliminated export duties on additional semi-finished and finished steel products while it also reinstated or increased VAT export rebates. As a result, Chinese steel production reached a record 567 million MT for 2009, a 14 percent increase when compared to 2008. Later, in June 2010, the Ministry of Finance (MOF) and the State Administration of Taxation removed the nine percent VAT export rebate on a limited set of steel products, primarily intermediate hot-rolled products. Because the VAT export rebates on finished pipes, tubes and other tubular products remained in place, the differential VAT treatment between exports of hot-rolled products and tubular products actually increased, which had the effect of further incentivizing the production and export of tubular products.

In March 2009, China issued a stimulus plan to revitalize its steel industry. This plan represents the first major adjustment to the 2005 steel policy. The plan seeks to control steel output volume and to eliminate outdated and inefficient capacity while emphasizing technological improvement. The plan also seeks to stimulate exports, a significant difference from the 2005 steel policy. In addition, the plan calls for further industry consolidation and the creation of large steel enterprises with capacities exceeding 50 million MT.

In June 2010, the State Council published the Opinions on Strengthening Energy Saving and Emission Reduction and Accelerating Structural Adjustment in the Iron and Steel Sector. This measure reiterated existing steel policies, specifically identifying a number of well-known objectives for the sector, such as controlling steel industry growth, strengthening efforts to eliminate outdated capacity, promoting energy savings and emissions reduction, technical innovation, accelerating mergers, disciplining access to iron ore



imports and promoting domestic iron ore mining, and encouraging domestic steel producers to explore mining and steel investments abroad.

In July 2010, the Ministry of Industry and Information Technology (MIIT) released the Regulations and Conditions of Production and Operation of the Iron and Steel Industry. These regulations are intended to support the objectives laid out in the State Council's June 2010 measure. They indicate that small steel mills will be shut down, establish operating standards for larger steelmakers and address issues such as product quality and environmental protection. Steel analysts view these regulations as a prelude to China's next five-year steel plan, expected to be issued in 2011. In August 2010, MIIT published a list of 762 steel mills that were required to close by September 2010 in order to improve the country's energy efficiency. Reportedly, these steel mills represent approximately 35 million MT of crude steelmaking capacity.

Despite China's stated goal of eliminating inefficient steel capacity, and despite slowing growth in domestic steel demand and stagnant demand in export markets, steel production in China in 2010 continued to grow, and steelmaking capacity in China is still projected to grow significantly through 2012. Chinese steel production reached a record 627 million MT for 2010, a nine percent increase when compared to 2009. The United States is working with Canada, Mexico, the EU and other trading partners to monitor and support concrete steps by China to rein in its steelmaking capacity.

#### *Semiconductors*

China's Tenth Five-Year Plan called for an increase in Chinese semiconductor output from \$2 billion in 2000 to \$24 billion in 2010. In pursuit of this policy, China has previously attempted to encourage the development of China's domestic integrated circuit (IC) industry through, among other things, discriminatory VAT policies, although China eliminated these policies in response to a WTO case brought by the United States in March 2004. The United States continues to monitor closely new financial support that China is making available to its domestic IC producers for consistency with the WTO Subsidies Agreement's disciplines.

#### *Fertilizer*

In 2001, China began exempting all phosphate fertilizers except diammonium phosphate (DAP) from the VAT. DAP, a product that the United States exports to China, competes with other phosphate fertilizers produced in China, particularly monoammonium phosphate. Both the United States Government and U.S. producers have complained that China has employed its VAT policies to benefit domestic fertilizer production.

#### *Telecommunications Equipment*

There have been continuing reports of MIIT adopting policies to discourage the use of imported components or equipment. For example, MIIT has reportedly still not rescinded an internal circular issued in 1998 instructing telecommunications companies to buy components and equipment from domestic sources.

In February 2009, China's State Council approved MIIT's stimulus plan to boost the country's electronics and information industries through preferential policies and increased investment, as well as encouraging purchases of components and equipment from domestic sources. The plan aims to advance three key goals: promoting innovation; increasing availability of financing; and fostering the use of information technologies over a three year period. Investment will focus on promoting the adoption of new

technologies such as 3G services and digital television. Additional policy support will also be given to the sector, including VAT rebates for electronics and information product exports.

In addition, the United States has raised concerns about China's framework regulations for information security in critical infrastructure known as the Multi-Level Protection Scheme (MLPS), first issued in June 2007 by the Ministry of Public Security (MPS) and MIIT. The MLPS regulations put in place guidelines to categorize information systems according to the extent of damage a breach in the system could pose to social order, public interest and national security. The MLPS regulations also appear to require, by reference, purchasers' compliance with certain information security technical regulations and encryption regulations that are referenced within the MLPS regulations. If implementing rules for the MLPS regulations are issued and apply broadly to commercial sector networks and IT infrastructure, they could have a significant impact on sales by U.S. information security technology providers in China.

### **Tariffs and Other Import Charges**

China still maintains high duties on some products that compete with sensitive domestic industries. For example, the tariff on large motorcycles is 30 percent. Likewise, most video, digital video and audio recorders and players still face duties of approximately 30 percent. Raisin imports face duties of 35 percent.

### **Tariff Classification**

Chinese customs officers have wide discretion in classifying a particular import. While foreign businesses might at times benefit from their ability to negotiate classification of products into tariff categories with lower import duty rates, lack of uniformity makes it difficult to anticipate border charges.

### **Customs Valuation**

China still has not uniformly implemented the various customs valuation measures issued following its accession to the WTO. U.S. exporters continue to report that they are encountering valuation problems at many ports. According to U.S. exporters, even though the Customs Administration's measures provide that imported goods normally should be valued on the basis of their transaction price, meaning the price the importer actually paid, many Chinese customs officials are still improperly using "reference pricing," which usually results in a higher dutiable value. Reportedly imports of wood products are often subjected to reference pricing.

In addition, some of China's customs officials are reportedly not applying the rules set forth in the Customs Administration's measures as they relate to software royalties and license fees. Following their pre-WTO accession practice, these officials are still automatically adding royalties and license fees to the dutiable value (for example, when an imported personal computer includes pre-installed software), even though the rules expressly direct them to add those fees only if they are import-related and a condition of sale for the goods being valued.

U.S. exporters also have continued to complain that some of China's customs officials are assessing duties on digital products based on the imputed value of the content, such as the data recorded on a floppy disk or CD-ROM. China's own regulations require this assessment to be made on the basis of the value of the underlying carrier medium, meaning the floppy disk or CD-ROM itself.

More generally, U.S. exporters continue to be concerned about inefficient and inconsistent customs clearance procedures in China. These procedures vary from port to port, lengthy delays are not

## **FOREIGN TRADE BARRIERS**

uncommon, and the fees charged appear to be excessive, giving rise to concerns that they are not related to the cost of services rendered as required under GATT 1994.

### **Border Trade**

China's border trade policy also continues to generate MFN and other concerns. China provides preferential import duty and VAT treatment to certain products, often from Russia, apparently even when those products are not confined to frontier traffic as envisioned by Article XXIV of GATT 1994. In June 2003, China began to address these concerns when it eliminated preferential treatment for boric acid and 19 other products. However, several other products continue to benefit from preferential treatment.

### **Antidumping, Countervailing Duty and Safeguard Measures**

Since acceding to the WTO, China has emerged as a significant user of antidumping measures, underscoring the importance of China's full adherence to the transparency and procedural fairness requirements embodied in WTO rules. As of December 2010, China had a total of 113 antidumping measures in place (some of which predate China's membership in the WTO) affecting imports from 17 countries and regions, and 10 antidumping investigations in progress. The greatest shortcomings in China's antidumping practice continue to be in the areas of transparency and procedural fairness.

Most of the rules and regulations that the Ministry of Commerce (MOFCOM) uses to conduct its antidumping investigations were issued by its predecessor agencies – the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) and the State Economic and Trade Commission (SETC). While these measures generally represent good faith efforts to implement the relevant WTO commitments and to improve China's pre-WTO accession measures, they also contain vague language, have gaps in areas of practice and allow inordinate discretion in their application. In July 2009, MOFCOM solicited public comment on draft revisions of its rules on new shipper reviews, antidumping duty refunds and price undertakings. Once finalized, China is obligated to notify these revised rules to the WTO to give Members an opportunity to review the rules for compliance with the WTO Antidumping Agreement and seek any clarifications.

In 2010, respondents from the United States and other WTO Members continued to express concerns about key lapses in transparency and procedural fairness in China's conduct of antidumping investigations. The principal areas of concern include the inadequate disclosure of key documents placed on the record by domestic Chinese producers, insufficiently detailed disclosures of the essential facts underlying MOFCOM decisions, such as the results of on-site verification, dumping margin calculations and evidence supporting injury and dumping conclusions, and inadequate responses to critical arguments or evidence put forward by interested parties.

Meanwhile, as China's antidumping regime has matured, many of the antidumping orders put in place have reached the five-year mark, warranting expiry reviews. As of December 2010, MOFCOM was conducting 9 expiry reviews, two of which involve products from the United States, and several more are scheduled for 2011. To date, every expiry review involving U.S. products has resulted in the measure being extended. Because of the problems that respondents have encountered in China's antidumping investigations, it is critical that China publish rules and procedures specifically governing the conduct of expiry reviews, as required by the WTO Antidumping Agreement. The United States has pressed China to issue regulations governing expiry reviews for more than two years and will continue to do so.

To date, it appears that no interested party has filed for judicial review of a Chinese antidumping proceeding. However, as China continues to launch antidumping investigations and apply antidumping

measures against imports, the opportunity for interested parties to seek judicial review will become more critical.

China initiated its first three countervailing duty investigations in 2009. Each of these investigations involved imports of products from the United States – grain-oriented electrical steel (GOES), poultry and automobiles. China’s conduct in these countervailing duty investigations raises the same types of concerns regarding transparency and procedural fairness as those raised by China’s antidumping practice. The methodologies used by China in these countervailing duty investigations also raise significant concerns, in light of WTO Subsidies Agreement rules. The United States is currently pursuing a WTO case alleging multiple violations of WTO rules in China’s antidumping and countervailing duty investigations of imports of GOES from the United States.

### **Nontariff Barriers**

Nine years after China’s WTO accession, many U.S. industries complain that they face significant nontariff barriers to trade, which are discussed in more detail in various sections below. These barriers include, for example, regulations that set high thresholds for entry into service sectors such as banking, insurance and telecommunications, selective and unwarranted inspection requirements for agricultural imports, and the use of questionable sanitary and phytosanitary (SPS) measures to control import volumes. (*China’s SPS measures are addressed in a separate report issued by USTR entitled “2011 Report on Sanitary and Phytosanitary Measures.”*)

### **Beef**

China continues to maintain OIE-inconsistent market access barriers to U.S. beef and beef product exports. Reopening China’s beef market consistent with science and international standards as well as in a commercially viable manner is an important priority. This issue is discussed in detail in USTR’s annual Report on Sanitary and Phytosanitary Measures.

### **Tariff-Rate Quotas (TRQs)**

As part of its WTO accession commitments, China was to establish large and increasing TRQs for imports of wheat, corn, rice, cotton, wool, sugar, rapeseed oil, palm oil, soybean oil and fertilizer, with most in-quota duties ranging from one percent to nine percent. Under these TRQ systems, China places quantitative restrictions on the amount of these commodities that can enter at a low “in-quota” tariff rate, and any imports over that quantity are charged a prohibitively high duty. Each year, a portion of each TRQ is to be reserved for importation through non-state trading entities. China’s Protocol of Accession to the WTO sets forth specific rules for administration of the TRQs, including increased transparency and reallocation of unused quotas to end users that have an interest in importing. China phased out the vegetable oil TRQs in 2006, but currently maintains a TRQ regime on six agricultural products including wheat, cotton, corn, rice, wool and sugar, as well as three chemical fertilizers, including DAP.

The administration of China’s TRQ system for fertilizer has suffered from systemic problems since China’s WTO accession, including insufficient transparency and administrative guidance affecting how the allocated quota is used. U.S. fertilizer exports to China have declined throughout the post-WTO accession period, due in part to continuing problems with MOFCOM’s administration of the fertilizer TRQ system and in part to Chinese government policies restricting the export of a key fertilizer input, phosphate rock, which has led to overcapacity in China’s domestic fertilizer industry. U.S. fertilizer exports to China totaled \$676 million in 2002, but had fallen to \$48 million by 2009.

## **INTERNAL POLICIES**

### **Non-discrimination**

#### *Wind Power Projects*

At the October 2009 JCCT meeting, China committed to remove a measure imposing local content requirements for wind turbines being manufactured in China. In December 2009, China followed through on this commitment by eliminating this requirement. However, since then, China has imposed criteria for obtaining approval to pursue new wind power projects that, in effect, appear to discriminate against foreign enterprises. For example, China imposes a requirement of prior experience in supplying large-scale wind power projects in China, but foreign-invested enterprises only have prior experience with these projects outside of China.

Throughout 2010, the United States pressed China to revise the criteria being applied to wind power projects. At the December 2010 JCCT meeting, China agreed to modify its criteria for the approval of new wind power projects by no longer requiring foreign enterprises to have prior experience in China in providing large-scale wind power projects and instead recognizing their prior experience outside China. China further agreed that foreign enterprises could submit documentation based on existing installed wind power projects outside China in order to meet technical requirements for eligibility to supply large-scale wind power projects in China.

### **Taxation**

#### *Value-Added Taxes*

China gains a significant amount of annual tax revenue from value-added taxes (VAT). This revenue is shared between the central government, which receives 75 percent, and the local government, which receives 25 percent. In 2009, the central government implemented VAT reforms by changing the VAT from being production-based to being consumption-based. All enterprises and individuals engaged in the sale of goods, provision of processing, repairs and replacement services, and import of goods within China are required to pay the VAT, although there are a few exemptions.

Uneven application of the VAT – which ranges between five percent and 17 percent, depending on the product – continues. Importers from a wide range of sectors report that, because taxes on imported goods are reliably collected at the border, they are sometimes subject to the application of a VAT that their domestic competitors often fail to pay. In addition, China's selective exemption of certain fertilizer products from the VAT has operated to the disadvantage of imports from the United States.

China retains an active and constantly changing VAT rebate program for exports. The effect of many of China's VAT rebate adjustments, which are often used in conjunction with export duties, is to make larger quantities of primary and intermediate products in a particular sector available domestically at lower prices than the rest of the world, giving China's downstream producers of finished products using these inputs a competitive advantage over foreign downstream producers. China discourages the export of the relevant primary and intermediate products by reducing or eliminating VAT rebates and perhaps also imposing export duties on them, resulting in increased domestic supply and lower domestic prices. China's downstream producers, in turn, benefit from these lower input prices as well as full VAT rebates on export of their finished products. In some situations, China has also used its border taxes to encourage the export of certain finished products over other finished products within a sector, especially the steel and aluminum sectors.

## **FOREIGN TRADE BARRIERS**

Following the onset of the global economic crisis in 2008, China expressed a desire to remove barriers to exports as part of its stimulus programs, leading to a reversal of its trend of gradually reducing export VAT rebates. Since then, China has increased export VAT rebates on many products multiple times, including textiles, clothing, bamboo products, toys, furniture, high-technology products, electrical machinery products, electronics, selected steel products, sewing machines, certain agricultural products, selected plastic and glass products, and alcohol. Among the products affected by recent changes in VAT treatment was soda ash. In April 2009, China raised the VAT rebate from zero to nine percent for exports of soda ash, which compete with U.S. exports in important third-country markets.

### *Business Tax on Foreign Services*

Effective January 1, 2009, China issued amendments to its business tax regulations that reinterpreted the scope of taxable services. Previously, taxes were imposed only on taxable services provided within China. Under the amendments, if services are provided to an enterprise, a non-business organization or an individual in China, the service provider is liable for business tax regardless of where the services are performed.

## **EXPORT REGULATION**

### **Export Quotas, Duties and Licenses**

Since its accession to the WTO, China has continued to impose restraints on exports of raw materials – including quotas, duties and related fees, licensing requirements and other restraints – as the Chinese government has continued to guide the development of downstream industries. These export restraints are widespread. For example, China maintains export quotas and sometimes export duties on antimony, bauxite, coke, fluorspar, indium, magnesium carbonate, molybdenum, rare earths, silicon, talc, tin, tungsten, yellow phosphorus and zinc, all of which are of key interest to U.S. producers of downstream products. These types of export restraints can significantly distort trade, and for that reason WTO rules normally outlaw them. In the case of China, the trade-distortive impact is exacerbated because, for many of the raw materials at issue, China is the world's leading producer.

China's export restraints affect U.S. and other foreign producers of a wide range of downstream products, such as steel, chemicals, hybrid and electric cars, energy efficient light bulbs, wind turbines, hard-disc drives, magnets, lasers, ceramics, semiconductor chips, refrigerants, medical imagery, aircraft, refined petroleum products, fiber optic cables and catalytic converters, among numerous others. The export restraints can create serious disadvantages for these foreign producers by artificially increasing China's export prices for the raw material inputs, which also drives up world prices. At the same time, the export restraints can artificially lower China's domestic prices for the raw materials due to significant increases in domestic supply, enabling China's domestic producers of downstream products to produce lower-priced products from the raw materials and thereby creating significant advantages for China's domestic downstream producers when competing against foreign producers of these products both in the China market and in other countries' markets. The export restraints can also create incentives for foreign downstream producers to move their operations and technologies to China.

Despite extensive U.S. engagement in this area, which began shortly after China's WTO accession, China appears to have maintained its policies for these input materials. It appears that, over time, China has increased the artificial advantages afforded to its downstream producers by making the export quotas more restrictive and by imposing or increasing export duties on many raw materials at issue.

In June 2009, the United States and the EU initiated a WTO case challenging export quotas, export duties and other restraints maintained by China on the export of several key raw material inputs for which China is a leading world producer. The materials at issue include bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc. The WTO panel hearing for this case is scheduled to issue its decision publicly in 2011.

In 2010, China's export restraints on rare earths – a collection of 17 different chemical elements used in a variety of green technology products, among other products – generated significant concern among China's trading partners. Even though it controls about 97 percent of the global rare earths market, China has been imposing increasingly restrictive export quotas and export duties on rare earth ores, oxides and metals. In July 2010, China sharply reduced its export quotas, causing world prices for some of the rare earths to rise dramatically higher than China's domestic prices, and further hindering efforts in other countries to develop expertise in the increasingly important downstream manufacturing of green technology products. Then, in September 2010, China reportedly imposed a temporary *de facto* ban on all exports of rare earths to Japan, causing even more concern among China's trading partners. China has since announced more restrictive export quotas on rare earths for 2011, while also increasing export duties on some of the individual rare earths.

### **Export Subsidies**

A general lack of transparency makes it difficult to identify and quantify possible export subsidies provided by the Chinese government. China's subsidy programs are often the result of internal administrative measures and are not publicized. U.S. industry has alleged that subsidization is a key reason that Chinese exports are undercutting prices in the United States and gaining market share. Of particular concern are China's practices in the steel, petrochemical, high technology, forestry and paper products, textiles, hardwood, plywood, machinery and copper and other nonferrous metals industries.

In its Protocol of Accession to the WTO, China committed to eliminate all subsidies prohibited under Article 3 of the WTO Subsidies Agreement, including all forms of export subsidies on industrial and agricultural goods, upon its accession to the WTO in December 2001. To date, China has submitted only one of its annually required subsidies notifications to the WTO's Subsidies Committee. China submitted that notification in April 2006. Although the notification was lengthy, with over 70 subsidy programs reported, it was also notably incomplete, as it failed to notify any subsidies provided by provincial and local government authorities or any subsidies provided by state-owned banks, whether in the form of preferential loans, debt forgiveness or otherwise. In addition, while China notified several subsidies that appeared to be prohibited under WTO rules, it did so without making any commitment to withdraw them, and it failed to notify other subsidies that appeared to be prohibited.

Since then, the United States has pursued three WTO dispute settlement cases against China involving claims of prohibited subsidies. In the first case, initiated in February 2007, the United States, with Mexico as a co-complainant, challenged a number of subsidies that appeared to be prohibited, including both export subsidies and import substitution subsidies. These subsidies benefited a wide range of industries in China, principally through income tax and VAT exemptions and reductions. Following negotiations, China agreed to eliminate all of the prohibited subsidies at issue by January 1, 2008, and, as agreed, China subsequently issued measures that formally eliminated these subsidies effective January 1, 2008. Next, in December 2008, the United States requested WTO dispute settlement consultations regarding China's "Famous Brand" initiatives, with Mexico and subsequently Guatemala joining as co-complainants. Designed primarily to promote the development of global Chinese brand names and increase sales of Chinese branded merchandise around the world, these initiatives appeared to incorporate prohibited export subsidies. Following discussions as China concurrently took steps to repeal or modify the numerous

measures at issue, the parties to the dispute concluded a settlement agreement in December 2009 in which China confirmed that it had eliminated all of the export-contingent benefits in the challenged measures. Finally, in December 2010, following an investigation in response to a petition filed under section 301 of the Trade Act of 1974, as amended, the United States initiated a WTO case challenging what appear to be prohibited import substitution subsidies being provided by the Chinese government to support the production of wind turbine systems in China. Consultations with China at the WTO took place in February 2011.

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

China was listed on the Priority Watch List in the 2010 Special 301 report. Persistent inadequacies in the protection and enforcement of IPR represent barriers to U.S. exports and investment. Key concerns listed in the report included unacceptable levels of retail and wholesale counterfeiting, as well as persistently high-levels of book and journal piracy, end-user piracy of business software and copyright piracy over the Internet. The report describes these enforcement-related concerns and summarizes the legal difficulties rights holders face when attempting to assert their IPR rights in China. The lack of deterrent penalties and other policies, such as barriers to the market for legitimate products, contribute to the poor record on reducing IPR crime in China. The report also recognizes industry concerns about the possibility that laws or policies in a variety of fields might be used to unfairly favor domestic intellectual property (IP) over foreign IP, including procurement preferences for products with domestically developed IP and the treatment of IPR in setting standards.

With respect to copyright piracy and trademark counterfeiting, weaknesses in China's enforcement system – criminal, civil and administrative – contribute to China's poor IPR enforcement record. There are also a number of other obstacles to effective enforcement. High value and volume thresholds must be met in order to initiate criminal prosecution of IPR infringement. U.S. trademark and copyright industries also report that administrative fines are too low, and imposed too infrequently, to be a deterrent. Consequently, infringers view administrative seizures and fines merely as a cost of doing business. Civil damages for infringement are likewise inadequate.

The United States sought to resolve specific concerns about China's high legal thresholds for criminal enforcement, along with other concerns regarding weaknesses in China's laws concerning border enforcement and the denial of copyright protection and enforcement to creative works that are awaiting or have not received Chinese censorship approval. When bilateral attempts to address these concerns did not succeed, the United States requested WTO dispute settlement consultations in April 2007, and the WTO panel composed to hear the case circulated its decision in January 2009, finding for the United States on two out of three claims, and clarifying important legal principles related to the third claim. China did not appeal the panel's rulings and subsequently modified the measures at issue, effective March 2010.

An exacerbating factor contributing to China's poor IPR protection has been China's maintenance of restrictions on the right to import and distribute legitimate copyright-intensive products, such as theatrical films, DVDs, music, books, newspapers and journals. These restrictions impose burdens on legitimate, IPR-protected goods and delay their introduction into the market. These burdens and delays faced by legitimate products create advantages for infringing products and help to ensure that those infringing products continue to dominate markets within China. As discussed above in the sections on Trading Rights and Distribution Services, the United States challenged these restrictions in a WTO dispute filed in April 2007. A WTO panel ruled in favor of the United States on all significant issues in August 2009, and the WTO's Appellate Body rejected China's subsequent appeal on all counts in December 2009. China subsequently agreed to comply with these rulings by March 2011.



On October 1, 2009, the Third Amendment to China's Patent Law, passed in December 2008, went into effect. While many areas of the Patent Law were clarified and improved, rights holders have raised a number of concerns about the new law and its implementing regulations, including concerns about disclosure requirements for genetic resources, inventor remuneration and the scope of, and procedures related to, compulsory licensing, among other matters. The United States will be closely following implementation of these measures in 2011.

The United States and China continued to engage in bilateral efforts to address a variety of IPR issues. JCCT IPR Working Group meetings held in April and November 2010 allowed for constructive dialogue on the intellectual property regimes of both countries. Subsequently, at the December 2010 JCCT meeting, the United States secured a series of commitments from China that will have systemic consequences for the protection of IPR in China. In addition to announcing a six-month campaign to step up enforcement against a range of IPR infringements, China agreed to expand and enhance its software legalization program, to take steps to eradicate the piracy of electronic journals, to work intensively toward adopting more effective rules for addressing Internet piracy and to crack down on landlords who rent space to counterfeiters.

Meanwhile, a troubling trend that emerged more conspicuously in 2009, and continued in 2010, was China's willingness to encourage domestic or "indigenous" innovation at the cost of foreign innovation and technologies. One example, discussed below in the Government Procurement section, involves the Circular Launching the 2009 National Indigenous Innovation Product Accreditation Work, which aimed to improve "indigenous" innovation in computer and other technology equipment by imposing qualifying criteria for government procurement preferences such as the ownership or development of a product's intellectual property in China.

Another example of problematic Chinese indigenous innovation policies is the draft Regulations for the Administration of the Formulation and Revision of Patent-Involving National Standards, which the Standardization Administration of China (SAC) released for public comment in November 2009. These proposed regulations generated concerns because of their expansive scope, questions about the feasibility of certain patent disclosure requirements and the undermining of IP rights through possible compulsory licensing of essential patents included in national standards. If adopted in their current form, these regulations may have the unintended effect of undermining incentives for innovation and, by discouraging rights holders from participating in the development of standards in China, depriving the standards-setting process of potentially superior technology. The United States provided comments to SAC on the proposed regulations and requested that SAC not move forward with the finalization of the regulations and instead consult with stakeholders. SAC reportedly received comments from 300 other interested parties as well. A draft measure with similar provisions was issued by the China National Institute for Standards (CNIS) in February 2010, and the United States subsequently provided comments to CNIS. Throughout 2010, the United States also raised its concerns in meetings with China's regulators, and as of December 2010 neither SAC nor CNIS had moved forward to finalize their draft measures.

## **SERVICES BARRIERS**

The market for services in China has significant growth potential in both the short and long term. However, China imposes restrictions in a number of services sectors that prevent or discourage foreign suppliers from gaining or further expanding market access. For example, for certain sectors, China does not grant new licenses or maintains a licensing review process that is opaque or slow-moving. In certain cases, China imposes foreign equity limitations or other discriminatory measures on foreign suppliers. High minimum capital requirements plague other sectors. China also sometimes applies overly burdensome regulatory regimes or other restrictions.

## **FOREIGN TRADE BARRIERS**

## **Insurance Services**

China continues to maintain certain market access barriers for the insurance sector. Foreign life insurance companies can only be established as joint ventures, with foreign equity capped at 50 percent. China's markets for third party liability automobile insurance and for political risk insurance are closed to foreign participation.

Although China has shown some recent improvement in the insurance sector, U.S. and other foreign companies already established in China continue to have difficulty setting up internal branches in order to expand their operations. The China Insurance Regulatory Commission (CIRC) is not always consistent in following its own deadlines for reviewing and approving internal branch applications from foreign life and non-life companies. Unlike domestic companies, foreign companies also report difficulties in applying for and receiving multiple, concurrent internal branch approvals. The United States will continue to press China to ensure that foreign insurance companies receive the same treatment as domestic insurance companies regarding approvals for new branches and sub-branches. In addition, the United States has urged the relevant Chinese authorities to ensure that China Post, which has been granted a license to supply insurance through its existing network of postal facilities, is not given advantages in terms of how it is regulated and to what extent it is required to provide distribution possibilities for insurance products of other companies.

## **Private Pensions – Enterprise Annuities**

U.S. and other foreign companies have found it difficult to obtain a license to participate in China's market for "enterprise annuities" services (private pensions similar to the U.S. 401(k) system), which will grow in importance as China develops alternatives to its state-funded social security system. China has not granted any new enterprise annuities licenses for more than three years. Even under previous licensing windows, China licensed very few foreign operators and only for limited elements of enterprise annuities services. If China were to re-open its licensing procedure, any license to manage enterprise annuities would need to be obtained from the Ministry of Human Resources and Social Security, which must include the China Banking Regulatory Commission (CBRC), the China Securities Regulatory Commission and CIRC in its decision-making process. The United States will continue to urge China to re-open its licensing process and ensure that any such licensing procedures do not impose quotas on the number of licenses granted to qualified suppliers.

## **Banking Services**

The Regulations for the Administration of Foreign-Funded Banks, issued in November 2006, allow foreign banks to compete in all lines of banking business on the same terms as domestic banks, subject to certain conditions. These regulations require foreign banks to incorporate in China. Moreover, the regulations mandate that only foreign-funded banks that have had a representative office in China for two years and that have total assets exceeding \$10 billion can apply to incorporate in China. After incorporating, these banks only become eligible to offer full domestic currency services to Chinese individuals if they can demonstrate that they have operated in China for three years and have had two consecutive years of profits.

To date, numerous foreign banks have received approval to convert to subsidiaries. In 2008, the first application to issue local currency credit and debit cards was approved, although administrative barriers have hindered the approval of other applications and the actual issuance of RMB credit and debit cards. Although the CBRC announced in 2009 that foreign banks would be allowed to trade and underwrite bonds on the interbank market, relevant Chinese regulatory authorities have yet to issue criteria for participation in underwriting of corporate bonds that would allow qualified foreign banks access to this

market. At the July 2009 U.S.-China Strategic & Economic Dialogue (S&ED) meeting, China reiterated its commitment to allow foreign-invested banks incorporated in China to underwrite bonds on the interbank market on the same terms as domestic banks. However, to date, there have been only limited instances of foreign banks underwriting bonds on the interbank market, given the continued lack of objective criteria for underwriters.

Locally incorporated foreign banks operating in China face numerous administrative barriers to competing on equal terms with Chinese banks. For example, foreign banks have been unable to gain approval to distribute mutual fund and trust fund products to clients, a common practice of Chinese banks. In addition, foreign banks have faced difficulties in attaining licenses to serve as custodians for various types of investment accounts, preventing them from expanding into business lines enjoyed by Chinese banks.

The rules on the establishment of Chinese-foreign joint venture banks remain a concern. China continues to follow a 2003 regulation that defines a “Chinese bank” as one that has less than 25 percent foreign ownership, with no single foreign investor having over 19.9 percent ownership (the so-called 20/25 rule). China draws a distinction between domestic and foreign companies through different treatment and requirements relating to experience in China. Under this bifurcated regulatory structure, if a Chinese bank were to sell over 25 percent of its shares to foreign investors, it would be re-classified as a foreign bank and fall under separate rules, which could possibly reduce its permitted scope of business. While the November 2006 State Council regulations appear to eliminate virtually all significant differences in rules for locally incorporated foreign banks and domestic Chinese banks, no foreign bank to date has been approved for increasing its stake in a Chinese bank above the 25 percent threshold and engaging in the full range of banking business.

### **Securities Services**

In December 2007, as follow up to a U.S.-China Strategic Economic Dialogue (SED) commitment, China lifted its moratorium on new licensing in the securities sector, and several foreign firms subsequently began discussions with potential joint venture partners. Since that time, China has begun to license some new Chinese-foreign joint ventures, and recently approved two Sino-U.S. joint ventures. However, China continues to apply a 33 percent foreign equity limit in this sector (as well as a 49 percent foreign equity limit for the asset management sector). In addition, China’s 2007 rules relating to joint venture securities companies’ expansion of their scope of business contain onerous seasoning requirements that will continue to limit competition in the securities sector to the advantage of Chinese firms.

### **Electronic Payment Services**

In the Services Schedule accompanying its Protocol of Accession to the WTO, China committed to remove market access limitations and provide national treatment for foreign suppliers providing payment and money transmission services, including credit, charge and debit cards, with this commitment becoming effective with regard to the domestic currency (RMB) business of retail clients. China also committed to allow the provision and transfer of financial information, financial data processing, and advisory, intermediation and other financial services auxiliary to payments and money transmission services. These electronic payment and related commitments were to be implemented by no later than December 11, 2006.

In the years leading up to 2006, China’s regulator, the People’s Bank of China (PBOC), had placed severe restrictions on foreign suppliers of electronic payment services, like the major U.S. payment card companies, which typically provide electronic payment services in connection with the operation of electronic networks that process payment transactions involving credit, charge, debit, prepaid and other payment cards. These services enable, facilitate and manage the flow of information and the transfer of

funds from cardholders' banks to merchants' banks. However, the PBOC prohibited foreign suppliers from handling the typical payment card transaction in China, in which a Chinese consumer makes a payment in China's domestic currency. Instead, through a variety of measures, China allows only one domestic entity, China UnionPay (CUP), to supply these services.

After the December 11, 2006 deadline passed without China taking any action, the United States pursued extensive bilateral engagement, which did not resolve U.S. concerns. The United States accordingly requested WTO consultations in September 2010 over China's various restrictions on foreign suppliers of electronic payment services. Consultations were held in October 2010, but those consultations did not resolve the dispute. In February 2011, the United States requested the establishment of a dispute settlement panel to hear the case.

### **Retailing Services**

Although China has made great strides in approving foreign retail outlets, the United States continues to have concerns that China treats domestic companies more favorably than foreign companies regarding zoning and urban development requirements and imposes additional informal minimum capital requirements on foreign suppliers. The United States also would like China to lift ownership restrictions on foreign retailers operating more than 30 stores in China and selling certain commodities.

### **Sales Away From a Fixed Location**

Since 2005, China has significantly liberalized its regime for direct selling services, and a number of foreign direct sellers have received licenses to operate. In October 2009, China finally approved some additional applications for direct selling licenses, the first such approvals since July 2007. This is a welcome step, but the United States will be closely monitoring how future foreign applications are treated. A number of concerns remain, as China maintains unduly burdensome "service center" establishment requirements, caps and other restrictions on sales force compensation, and discriminatory qualification requirements affecting foreign direct sellers.

### **Express Delivery Services**

A number of aspects of China's express delivery regime continue to cause concern for the United States, but work with China's regulator of the sector, the State Postal Bureau (SPB), has resulted in some incremental progress. As part of the 2010 JCCT plenary, the United States obtained assurances from the SPB that it would continue cooperation with relevant Chinese government ministries and agencies to investigate and shut down fake express delivery services (EDS) websites established in China. The SPB also agreed on the importance of protecting data security, an area where the United States and China will continue to strengthen their exchange of ideas. In addition, during the run-up to the JCCT, the United States and the SPB held serious discussions about the need to ensure that China's express delivery industry associations, including the national-level China Express Association (CEA) and the provincial level express associations, do not attempt to mandate self-discipline agreements on express delivery service suppliers that would violate the terms of China's own anti-monopoly legislation.

However, the United States also has been monitoring China's implementation of its 2009 Postal Law and related regulations and standards closely and is concerned that China's regime will not treat foreign and domestic companies equally. For example, it already is clear that the Law excludes foreign suppliers from the important document segment of China's domestic express delivery market. In addition, The United States is also concerned that China may interpret the universal service fund requirement of the law to

require private companies to pay into that fund and, in effect, be forced to subsidize China Post's own express delivery services.

Express delivery firms also faced customs issues in 2010, including a proposed four-hour advance manifest rule that, if implemented, would hobble overnight international deliveries. In addition, in July 2010, the General Administration of Customs (GAC) eliminated the RMB 400 *de minimis* exemption for goods imported to China. As a result, all goods entering China valued below RMB 400 must now provide a 10-digit Harmonized Schedule number, and the importer must apply for a GAC importer registration number. These requirements add administrative burdens to express delivery service providers and slow the shipping process.

On the related issue of air freight forwarding, wholly foreign-owned express delivery companies cannot qualify for an Air Transport Agency license, and therefore do not have the ability to directly load cargo on Chinese domestic or international flights, but instead must work through a Chinese agent. Additional express delivery issues are found in the sections below relating to Aviation and Maritime Services and Logistics Services.

### **Construction, Engineering, Architectural and Contracting Services**

In 2002, the Ministry of Construction (re-named the Ministry of Housing and Urban-Rural Development in 2008) and the Ministry of Foreign Trade and Economic Cooperation (now MOFCOM) issued the Rules on Administration of Foreign-Invested Construction Enterprises (known as Decree 113) and Rules on the Administration of Foreign-Invested Construction Engineering and Design Enterprises (known as Decree 114). Decrees 113 and 114 create concerns for foreign firms by imposing more restrictive conditions than existed prior to China's WTO accession, when they were permitted to work in China on a project-by-project basis pursuant to Ministry of Construction rules. These decrees, for the first time, require foreign-invested enterprises to incorporate in China. The decrees also impose high minimum registered capital requirements as well as technical personnel staff requirements that are difficult for many foreign-invested enterprises to satisfy. Decree 113 also limits the scope of projects (in terms of size and scale) open to participation by foreign-invested enterprises in comparison with the rights enjoyed by domestic companies.

Regarding Decree 113, the United States has urged China to broaden the scope of projects that can be undertaken by foreign-invested enterprises. The United States also is asking China to reduce its minimum capital requirements and/or consider bonding and other guarantee arrangements in lieu of minimum capital.

Implementing rules for Decree 114 became effective in 2007. These rules are important, as U.S. companies have a very strong interest in providing engineering and design services in China. The implementing rules were generally positive, in that they temporarily lifted foreign personnel residency requirements imposed by Decree 114, and recognized the foreign qualifications of technical experts for licensing purposes. U.S. and other foreign companies would like to see these improvements in the implementation of Decree 114 made permanent. In addition, under existing rules, set forth in Circular 202, issued by the Ministry of Construction in August 2007, foreign construction engineering design companies do not have the right to apply for a comprehensive, "Grade A" design license, like domestic companies can do.

Circular 200, issued by the Ministry of Construction in 2004, imposes certain qualification requirements on foreign suppliers of project management services that the industry finds overly burdensome. Specifically, China does not allow foreign companies to provide project management services without already holding construction or design enterprise approvals. If China were to issue implementation rules for Decree 155,

issued jointly by the Ministry of Construction and MOFCOM in 2007, which relates to foreign-invested construction engineering services enterprises, this would provide an important new avenue for foreign companies to supply project management services.

### **Logistics Services**

In March 2008, China announced the establishment of a new Ministry of Transport (MOT) that combined responsibilities formerly held by the Ministry of Communications, the General Administration of Civil Aviation (CAAC) and SPB. The Ministry of Railways continues to administer rail transport separately.

MOT has been slow to approve applications by foreign logistics firms and is unwilling to issue nationwide trucking licenses, which limits the ability of foreign firms to build economies of scale. In addition, local regulations in almost all major Chinese cities limit daytime access by trucks. China's enforcement efforts are often targeted at foreign transport/logistics firms, while local firms are permitted to operate without being in full compliance.

In February 2009, China's State Council announced a support plan for the logistics industry as part of the Chinese Government's industry revitalization plans for ten key industries. Foreign logistics firms with investments in China have raised concerns about inadequate transparency for implementing measures, equitable treatment and efforts to strengthen industry standardization.

There also are growing concerns about the use of inappropriate standards that may hinder market access for logistics firms. Foreign companies have complained about AQSIQ standards issued in April 2005 that are unnecessarily burdensome since they establish artificial classification categories of transport, warehousing and multi-purpose activities. In addition, freight forwarding firms are concerned that their exclusion from these regulatory categories may prevent their participation in standards-setting activities.

### **Aviation Services**

Under the auspices of the SED, the United States and China negotiated an amended bilateral air services agreement, which they signed in July 2007. The agreement brings significant economic benefits to the aviation industry, passengers, shippers and local communities. Among other things, the agreement added ten new daily passenger flights that U.S. carriers could operate to the Chinese gateway cities of Beijing, Shanghai and Guangzhou by 2012, allowed unlimited U.S. cargo flights to any point in China and an unlimited number of U.S. cargo carriers to serve the China market as of 2011, increased from six to nine the number of U.S. passenger carriers that may serve the China market by 2011, and expanded opportunities for U.S. carriers to code-share on other U.S. carriers' flights to China. The agreement also committed the United States and China to launch Open Skies negotiations in 2010. However, China's interpretation of cargo hub provisions in the agreement has resulted in U.S. cargo carriers experiencing difficulties in getting their operating schedules approved by CAAC in China. U.S. and Chinese negotiators are currently involved in a series of technical discussions to resolve this issue.

### **Telecommunications**

Foreign participation in China's telecommunications market, including both basic and value-added telecommunications services, remains very limited. China maintains foreign equity restrictions and a multitude of other barriers in the telecommunications sector, including investment approval procedures that are non-transparent and lengthy. Although China has the world's largest fixed landline, mobile and broadband markets measured by subscribership, the lack of opportunities for foreign service suppliers is striking. China's regulator for the sector, MIIT, while nominally separate from current

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telecommunications operators, maintains extensive influence and control over their operations and the overall structure of the market. China's foreign equity restrictions (a maximum of 49 percent foreign equity for basic telecommunications and 50 percent for value-added telecommunications) severely diminish commercial opportunities in the sector.

Regarding basic telecommunications, not only has there been no new market entry in that sector over the past decade, China forced a consolidation of this sector in 2008, reducing the number of national operators from six to three—China Mobile, China Telecom and China Unicom. China's policy is to permit only foreign joint ventures with existing, state-owned licensees. This policy has further reduced market access opportunities for U.S. suppliers and the potential for additional competition in the Chinese telecommunications market. Although not explicitly stated in rule or policy, China appears to apply an economic needs test to new entrants in this sector to avoid "unhealthy competition." China also shows reluctance to authorize new services or technologies which might compete with the revenue of incumbent operators, such as cable modem service, Voice over Internet Protocol (VoIP) or WiFi over a mobile handset. In September 2008, in response to a long-standing U.S. request, China slightly reduced basic telecommunications capitalization requirements to RMB 1 billion (approximately \$146 million). This level is still excessively high and makes it commercially unattractive for most foreign operators to invest in the sector, particularly for leased line, resale and corporate data services, which require no new building of facilities.

In January 2009, China's MIIT issued 3G licenses based on the three different existing technologies, with a TD-SCDMA license for China Mobile, a W-CDMA license for China Unicom and a CDMA2000 EV-DO license for China Telecom. However, despite the issuance of licenses for all three standards, the Chinese government continued to heavily promote, support and favor the TD-SCDMA standard. For example, China's economic stimulus-related support plan for Information Technology and Electronics, approved by the State Council and published in April 2009, specifically identifies government support for TD-SCDMA as a priority.

In March 2010, U.S. concerns over China's preferential treatment of TD-SCDMA were exacerbated by the inclusion of products based on this technology in the Opinions on Advancing Third-Generation Communications Network Construction, issued by MIIT, the National Development and Reform Commission (NDRC), the Ministry of Science and Technology (MOST), the Ministry of Finance (MOF), the Ministry of Land and Resources, the Ministry of Housing and Urban-Rural Development and the State Administration of Taxation. This measure entitles these products to government procurement preferences, if they are listed in the Catalogue of Indigenous Innovation Products for Government Procurement and if the indigenous innovation product accreditation system is implemented.

Meanwhile, China's insistence on promoting TD-SCDMA has discouraged further innovation. For example, China has been reluctant to permit operators to deploy alternative technologies, including 4G technologies.

Throughout 2010, the United States continued to press China to reaffirm the principle of technology neutrality for current and future services and technologies. In an important development at the December 2010 JCCT meeting, China agreed to technology neutrality for 3G networks and future networks based on new technologies, allowing operators to choose freely among those technologies and without the Chinese government providing any preferential treatment based on the standard or technology used by an operator.

Regarding value-added telecommunications, although there are over 20,000 licensed domestic telecommunications value-added suppliers in China, MIIT has issued, as of December 2009, only 19 value-added licenses to foreign companies, including licenses to five U.S.-affiliated companies. One

difficulty foreign companies face in obtaining a license is the lack of clarity regarding which services a foreign-affiliated firm is permitted to offer. In addition, MIIT seems to classify certain value-added corporate data services (“IP-VPN”) as value-added when offered domestically, but as basic (and thus capped at lower foreign equity levels and subject to higher capitalization requirements) when offered internationally. MIIT has provided no justification for this practice.

China made a draft of its Telecommunications Law available for review and comment on an unofficial basis in the fall of 2009. This draft contains troubling elements, including provisions that would codify China’s foreign equity limitations for the sector, complicating ongoing efforts in the WTO and other fora to encourage China to liberalize this sector, and other issues of concern to industry. China has been working on the draft law for over ten years. MIIT still lacks a specific authorizing statute for its powers.

In 2010, the United States continued to urge China to pursue further market liberalization. Among other issues, the U.S. sought to ensure that China’s plans for allowing telecommunications sector convergence would allow foreign providers a fair opportunity to participate in that market, and that China would allow foreign suppliers to provide international corporate data services under telecommunications value-added licenses.

### **Online Services**

China operates the world’s most comprehensive Internet filtering regime, which affects a broad range of commercial activity conducted via the Internet. Chinese authorities routinely filter Internet traffic entering China, focusing primarily on the content they deem objectionable on political, social, or religious grounds. In 2002, China lifted filters on most major western news sites. Nevertheless, since then, foreign news and other content websites have periodically been blocked, some apparently permanently. While the 2008 Olympics resulted in some previously blocked sites being unblocked, once the Olympics were over, a concerted effort to reassert control appears to have been instituted, through what the Open Net Initiative termed “Control 2.0” and an effort to “set the agenda for coverage, rather than suppress it.”

Changes to Internet filtering can occur without warning or public explanation. While ostensibly to address issues of the public interest enumerated in law, Chinese government authorities may issue lists of banned search terms or banned sites weekly, with little justification or means of appeal, putting Internet-enabled services in a precarious position, caught between complying with the law and implementing apparently arbitrary restrictions.

China’s Internet regulation regime is exceedingly complex. Internet content restrictions for Internet Content Providers, electronic commerce sites and application service providers located in China are governed by a number of measures, not all of which are public. Since 2000, these measures have increased, and press reports note that at least 12 government entities have authority over Internet access and content. Some of these measures restrict who may report news and place limits on what exactly may constitute news. In addition to interfering with news reporting in the traditional sense, these measures may also provide a basis for Chinese authorities to interfere with the normal business reporting operations of non-news organizations, such as multinational corporations, if they use the Internet to keep clients, members, their headquarters and other interested parties informed about events in China.

This complex regulatory regime governing on-line services has resulted in several high-profile cases which have affected foreign firms’ delivery of on-line services, such as search engine and web domain registration. There continues to be uncertainty in a number of other on-line service areas such as mapping and other on-line content distribution methods.



## **Audiovisual and Related Services**

Importation and distribution of books, newspapers, journals, sound recordings, videos, films and television programs remain highly restricted. Inconsistent and subjective application of censorship regulations further impedes market growth for foreign providers. China's large black market for foreign DVDs and other home entertainment video products continues to grow because these market access restrictions create a demand for pirated goods in the absence of legitimately licensed home or theatrical entertainment.

At both the central and regional levels, interconnected agencies under the State Administration for Radio, Film and Television (SARFT) dictate the terms under which films can be produced and distributed. SARFT permits only one film importer and two film distributors (which are both components of the same monopoly managed by SARFT) to operate in China. For theatrical releases, the monopoly importer and distributor dictate the films that will be imported (currently limited by China to 20 revenue-sharing films a year, with remaining films imported only under low, fixed price terms), when they will be released in the market, and the box office revenue-sharing terms in a master contract agreement imposed unilaterally and uniformly on foreign studios by the Chinese government. In addition, the Chinese government sets strict guidelines with respect to the public screening of foreign films. Under Article 44 of the Regulations for the Administration of Films, issued by the State Council in 2001, the total annual screening time for foreign films must not exceed one-third of the total screening time of all films (domestic and foreign).

Television quotas are also highly restrictive. The Administrative Measures on the Import and Broadcast of Extraterritorial Television Programs, effective October 23, 2004, restrict foreign television drama and film programming to no more than 25 percent of total airtime, and other foreign programming to no more than 15 percent of total air time. Foreign programming, including animated programs, is banned between 7:00 P.M. and 10:00 P.M. on terrestrial stations. SARFT's Interim Regulation on Digital Cable TV Pay Channels (November 14, 2003) restricts foreign programming to a maximum of 30 percent of total airtime on pay television channels.

In addition to censorship reviews by Chinese authorities, which can delay the arrival of imported foreign films on Chinese movie screens, the Chinese government has historically decreed "black-out periods" during which no new revenue-sharing blockbuster foreign films may be released in order to prevent competition with Chinese films being released during the same period. Banning the release of new foreign titles or removing popular foreign films during peak seasons not only hurts theatrical revenues but also contributes to increased piracy, as pirates meet immediate consumer demand for foreign titles by offering illegal downloads through the Internet, on pirate optical discs and pirate video-on-demand channels.

Regulations restricting direct distribution by non-Chinese companies of imported theatrical films, home video, public performance video and television products remain. China Film dictates the contractual terms, play dates and other aspects of film exhibition. When Chinese entities contract for the rights to distribute titles in various home video formats, the differentiation between video rights and rights for home use or public use is often ignored; home video products are often used for public performance exhibitions in mini-cinemas and by some pay-television operators providing to hotels.

China Film also continues to require that film prints be made in local laboratories. The requirement pertains to theatrical distribution in most cases, and it applies to home video distribution in all cases. Local printing and duplication requirements reduce rights holders' ability to control the quality of a film copy and may result in increased costs.

For sound recordings, China limits market access opportunities for imported sound recordings in a manner similar to the limitations imposed on films for theatrical release or home viewing. In addition, new

### **FOREIGN TRADE BARRIERS**

barriers were erected in the recent past. The Ministry of Culture's Opinion on the Development and Regulation of Network Music bans foreign ownership of firms supplying digital music services, requiring that entities engaging in the online distribution of sound recordings in China be wholly Chinese-owned entities. In late 2007, this regulation was amplified in new rules established jointly by MIIT and SARFT, explicitly restricting audio and video distribution services (including over electronic networks such as the Internet) to state-owned entities.

As discussed above in the section on Trading Rights, the United States initiated a WTO dispute settlement case against China in April 2007 challenging the importation and distribution restrictions applicable to certain copyright-intensive products, including books, newspapers, journals, theatrical films, videos and sound recordings, and associated services. The WTO panel that heard the case issued its decision in August 2009, ruling in favor of the United States on all significant issues. China appealed the panel's decision in September 2009. The WTO's Appellate Body rejected China's appeal on all counts in December 2009. China subsequently agreed to comply with these rulings by March 2011.

Investment in China's audiovisual sector is highly restricted. For television production, joint ventures or cooperative firms must have a minimum capital requirement of RMB 2 million (\$275,000), and foreign capital is capped at 49 percent. In February 2005, SARFT issued a circular placing further restrictions on foreign partners and requiring two-thirds of the programs of a joint venture or cooperative firm to have Chinese themes.

In August 2005, the State Council issued a directive stating that private capital cannot be used to establish or operate a news agency, newspaper, publishing house, radio station, or television station. The directive also stated that radio and television signal broadcasting and relay station, satellite and backbone networks are closed to private capital.

### **Travel and Tourism Services**

In December 2007, the United States and China signed an MOU to facilitate Chinese group leisure travel to the United States and the marketing in China of U.S. destinations or businesses. The first group of Chinese leisure travelers visited the United States under the MOU in June 2008. In November 2009, the United States and China agreed to implement the second phase of the MOU to include an additional 12 jurisdictions, bringing the total to 21. As part of the December 2010 JCCT, the United States and China agreed to implement the third phase of the MOU, opening the market to three additional provinces in China. The United States will continue to press China to broaden the scope of access to include the remaining provinces.

Foreign travel and tourism firms in China are still restricted from competing under the same conditions as Chinese firms for any aspect of the travel and tourism market not specific to group leisure travel. For example, wholly foreign-owned enterprises and Chinese-foreign joint ventures continue to be restricted in selling outbound travel packages and airline tickets. In addition, China requires all travel agents and airlines to connect into China's nationally owned and operated computer reservation system when booking airline tickets for domestic flights and outbound international flights. China also continues to apply an annual sales requirement on foreign travel agencies, although there are no such requirements for domestic agencies.

### **Education and Training Services**

The Ministry of Education (MOE) continues to restrict participation by foreign educators and trainers. China permits only nonprofit educational activities that do not compete with the MOE-supervised nine

years of compulsory education, thereby inhibiting much-needed foreign investment in the education sector. China also bans foreign companies and organizations from offering educational services via satellite networks. Foreign universities may set up nonprofit operations. However, they must have a Chinese university host and partner to ensure that programs bar subversive content and that informational material that is imported is adapted to suit local conditions.

### **Legal Services**

Foreign law firms face numerous restrictions on the scope and structure of their activities in China, as well as other barriers affecting market access. Current Chinese laws and regulations prohibit foreign firms from practicing Chinese law, which means that they are unable to hire Chinese-qualified lawyers to practice Chinese law as employees of their firms, or otherwise provide advice on Chinese law to clients. China also maintains restrictions on cooperation with Chinese law firms (including investment and profit-sharing restrictions) that further limit market opportunities. Foreign law firms are also barred from directly representing clients in, or even from attending along with local Chinese counsel, regulatory proceedings administered by Chinese government agencies. In addition, foreign law firms are concerned that China may make it even more difficult to provide other legal services (such as advisory and consultation services) that are currently widely regarded as permissible.

China also maintains regulatory requirements for foreign representative legal offices that are not applied to Chinese law firms, as set forth in the December 2001 Regulations on the Administration of Foreign Firm Representative Offices and July 2002 implementing rules. The measures appear to create an economic needs test for foreign law firms seeking to establish representative offices in China. In addition, a foreign law firm may not establish an additional representative office until its most recently established office has been in practice for three consecutive years. China also requires that representatives of foreign law firms must have practiced for no less than two years outside of China as a member of a bar or law society of a WTO Member. New foreign representatives must undergo a lengthy approval process that can take more than one year, during which they must leave the country periodically to renew their visas.

Substantial differences in official tax policies applied to the representative offices of foreign law firms in comparison with taxes applied to Chinese law firms, coupled with inconsistent enforcement policies, represent an additional significant hurdle to supplying legal services in China.

### **INVESTMENT BARRIERS**

The volume of foreign direct investment (FDI) in China rose by 6.3 percent in 2010 amid a marginal one percent increase in FDI flows globally and in spite of China's maintenance of significant investment barriers. According to the United Nations Conference on Trade and Development, China received \$101 billion in FDI in 2010. China was the world's second-largest destination for FDI, after the United States. In 2010, investors continued to complain of a lack of transparency, inconsistently enforced laws and regulations, weak IPR protection, corruption and an unreliable legal system that fails to enforce contracts and judgments.

China's leadership has repeatedly affirmed its commitment to further open China to foreign investment, including a strong statement at the S&ED meeting in May 2010 in which China reiterated its commitment to open trade and investment. However, there is growing concern that other steps China has taken continue to discriminate against or otherwise disadvantage foreign investors. The United States is concerned about the increase in proposed and adopted measures that restrict investment. These restrictions are often accompanied by other problematic industrial policies, such as the increased use of subsidies and the development of China-specific standards. Many of these developments appear to represent

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protectionist tools created by industrial planners to shield inefficient or monopolistic enterprises, particularly those in which the Chinese government has an ownership interest, from competition.

### **Investment Requirements**

Upon its accession to the WTO, China assumed the obligations of the Agreement on Trade Related Investment Measures (TRIMS Agreement), which prohibits trade-related investment measures that violate GATT Article III obligations to treat imports no less favorably than domestic products and GATT Article XI obligations not to impose quantitative restrictions on imports. In its Protocol of Accession to the WTO, China also specifically agreed to eliminate export performance, local content and foreign exchange balancing requirements from its laws, regulations and other measures, and not to enforce the terms of any contracts imposing these requirements. In addition, China agreed that it would no longer condition importation or investment approvals on these requirements or on other requirements such as technology transfer and offsets.

Although China has revised many of its laws and regulations to conform to its WTO investment commitments, some of these measures continue to raise WTO concerns, including those that “encourage” technology transfers to China, without formally requiring them. U.S. companies remain concerned that this “encouragement” in practice can amount to a “requirement,” particularly in light of the high degree of discretion provided to Chinese government officials when reviewing investment applications. Similarly, some laws and regulations “encourage” exportation or the use of local content. Moreover, according to U.S. companies, some Chinese government officials in 2010, even in the absence of encouraging language in a law or regulation, still considered factors such as export performance and local content when deciding whether to approve an investment or to recommend approval of a loan from a Chinese policy bank, which is often essential to the success of an investment project.

### **Investment Guidelines**

#### *Catalogue Guiding Foreign Investment*

China’s foreign investment objectives are primarily defined through its Catalogue Guiding Foreign Investment in Industry, which is revised every few years and was most recently updated in November 2007. The most recent revision of the catalogue suggests that China’s investment policies may be becoming more selective in allowing foreign investment by actively targeting higher value-added sectors (including high technology research and development, advanced manufacturing, energy efficiency, environmental conservation and modern agriculture and services) rather than basic manufacturing. Meanwhile, the catalogue places new restrictions on several industries, including chemicals, automotive parts, rare earths processing, biofuel production and edible oil processing, while the prohibitions and restrictions facing copyright-intensive products, conventionally bred plant seeds and genetically modified plant seeds remain in place. In addition, in the most recent revision, the mining of raw materials such as antimony, fluorite, molybdenum, tin and tungsten was moved from the “restricted” category to the “prohibited” category.

In April 2010, the State Council issued the Opinions on Improving Foreign Capital Utilization. This measure instructs relevant Chinese ministries to amend the Catalogue Guiding Foreign Investment in Industry to encourage foreign investment in high-end manufacturing, high technology, modern services, alternative energies and energy saving and environmentally friendly industries and to restrict foreign investment in industries that are energy intensive, resource intensive, highly polluting, use “obsolete” technology, or have overcapacity. In May 2010, MOFCOM issued a Notice on Relevant Issues about Decentralizing Foreign Investment Approval Authority, which raised the threshold for central MOFCOM

#### **FOREIGN TRADE BARRIERS**

government approval of investments in the “encouraged” category from \$100 million to \$300 million. In October 2010, the State Council issued a Decision on Accelerating the Cultivation and Development of Strategic Emerging Industries, which called for amendments to the catalogue to encourage foreign investment in a set of “strategic emerging” industries similar to those listed in April 2010, including energy conservation and environmental protection, next-generation information technology, biotechnology, high-end equipment manufacturing, alternative energy, advanced materials and alternative energy automobiles.

Using both the JCCT process and the S&ED process, the United States has pressed China to increase the transparency of its revisions to the catalogue. At the May 2010 S&ED meeting, China committed to publish proposed future revisions of the catalogue in advance for public comment. China reportedly plans to issue a revised catalogue in 2011.

#### *Administrative Measures to Restrict Investment*

Over the past few years, Chinese regulators have announced a number of measures limiting the ability of foreign firms to invest in China’s market. For example, in November 2006, the NDRC released a five year plan on foreign investment, which promised greater scrutiny over foreign capital utilization. The plan called for the realization of a “fundamental shift” from “quantity” to “quality” in foreign investment during the period from 2006 to 2010. The state’s focus would change from shoring up domestic capital and foreign exchange shortfalls to introducing advanced technology, management expertise and talent. In addition, the plan specifically encouraged foreign investments contributing to natural resource conservation and environmental protection, and discouraged foreign investment in industries with a high rate of pollution and water resource depletion. The plan also demanded tighter tax supervision of foreign enterprises and sought to restrict foreign firms’ acquisition of “dragon head” enterprises to prevent the “emergence or expansion of foreign capital monopolies,” to protect national economic security and to prevent the “abuse of intellectual property.” As discussed above, in April 2010, the State Council issued the Several Opinions on Further Improving the Work of Utilizing Foreign Investment, which appears to be a step toward implementing part of the five-year plan. While the stated purpose of the measure is to create a better environment for foreign investors in China, it remains to be seen how the policy will be implemented in practice. A new five-year plan on foreign investment is expected to be issued in 2011.

In June 2009, revisions to the Provisions on the Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, which had been issued in 2006, were promulgated by MOFCOM and five other government agencies. Under the 2006 measure, foreign mergers and acquisitions of domestic enterprises that would result in “actual control” of a domestic enterprise in a “key industry” with “potential impact on national economic security” or that would give control of a famous Chinese trademark or traditional Chinese brand to a foreign investor require approval at the central government level by MOFCOM. The 2006 measure also placed MOFCOM in the role of determining if the domestic acquisition target has been appropriately valued. The 2009 revisions neither removed nor provided greater clarity with respect to terms such as “national economic security” and “critical industries,” and also retained the provision permitting denial of a foreign investor’s acquisition if a famous trademark or a traditional Chinese brand is being acquired. Changes in these areas would have provided useful clarity for foreign investors, and the continued lack of precision raises concerns that administrative ambiguity will continue to provide a basis for uneven administration and for differential treatment of Chinese and foreign investors. China is currently in the process of developing an additional review process for foreign mergers and acquisitions of domestic companies to target national security aspects of such transactions, as called for in the 2007 Anti-monopoly Law.

In December 2006, SASAC issued the Guiding Opinion Concerning the Advancement of Adjustments of State Capital and the Restructuring of State-Owned Enterprises. Statements accompanying the release of

this measure identified an expansive list of sectors deemed critical to the national economy. This measure explained that “pillar” and “backbone” industries such as automotive, chemical, construction, electronic information, equipment manufacturing, iron and steel, nonferrous metal, science and technology, and survey and design must maintain relatively strong state control. Reportedly, SASAC officials also identified a separate set of seven strategic sectors in which state capital must play a leading role, including aviation, coal, defense, electric power and grid, oil and petrochemicals, shipping and telecommunications. SASAC committed to restrict foreign participation in these sectors by preventing further foreign investment in state-owned enterprises operating in these sectors. In October 2008, the National People’s Congress issued the Enterprise State-Owned Assets Law, which later took effect in May 2009. Among other provisions, Article 57 of the law states that where state-owned assets are transferred to a foreign investor, the transfer must not harm the national security or public interests of China. It remains unclear how SASAC implements these policies in practice or, in the context of the Enterprise State-Owned Assets Law, how it interprets the “national security” and “public interests” of China. In August 2010, the State Council issued the Opinions on Promoting Enterprise Merger and Restructuring, which promotes consolidation of enterprises in six industries, most of which are dominated by state-owned enterprises, including the automobile, steel, cement, aluminum, rare earths and machinery manufacturing industries. China also continued to employ various sector-specific measures designed to impose new requirements on foreign investors. For example, in January 2010, China imposed a new restriction on foreign investment in the offshore wind market. At that time, China’s National Energy Administration (NEA) and the State Oceanic Administration (SOA) jointly issued the Interim Measures for Offshore Wind Power Development and Construction, which stipulate that offshore wind farm investment projects in China must be undertaken by either a Chinese enterprise or a Chinese majority-controlled enterprise with foreign ownership of no greater than 49 percent. Measures affecting foreign investment in the automotive and steel sectors are discussed above in the section on Import Substitution Policies.

## **Other Investment Issues**

### *Venture Capital and Private Equity*

Foreign venture capital and private equity investments are subject to a variety of regulatory limitations in China. For example, transferring foreign capital into China to fund these investments remains a significant challenge, requiring approval from the State Administration for Foreign Exchange (SAFE). In addition, limited investment exit options have, to some extent, curbed foreign participation in China's venture capital and private equity sectors. Most foreign venture capital and private equity investments in China are housed in offshore holding companies, which, in the past, as with other offshore FDI, could be transferred without Chinese government approval. The Chinese Government issued regulations in 2006, however, that effectively shut down this method of transferring local assets to offshore “special purpose vehicles.” The 2006 regulations require pre-approval by no less than six agencies for a Chinese company to transfer assets offshore to a foreign entity. Since the issuance of these rules, no approvals have been granted. Further, in 2006, China implemented policies that made it more difficult for Chinese firms to list on foreign stock exchanges, while at the same time it facilitated listing on the domestic A-share market. Although private equity investors have successfully listed in the domestic A-share market, these investors face a three year lock-up period during which they may not sell their listed holdings.

### *Holding Companies*

China has relaxed some restrictions on the scope and operations of holding companies, although minimum capital requirements normally make the establishment of a holding company suitable only for corporations with several large investments. Holding companies may manage human resources across their affiliates and also provide certain market research and other services. However, some restrictions on services

provided by holding companies and on holding companies' financial operations, in addition to the ability to balance foreign exchange internally, remain in place. Profit and loss consolidation within holding companies also remains prohibited.

### *Securities Investments*

China continues to open its domestic equity markets to investments from foreign firms. Through the Qualified Foreign Institutional Investor (QFII) program, foreign securities firms may apply for QFII status, which permits limited access to the RMB-denominated A-share market. As of December 2010, China had granted QFII status to 97 foreign entities, with quotas allotted totaling over \$19.7 billion.

### *Access to Capital Markets*

Foreign-invested firms in China are often unable to access domestic and international stock markets, to sell corporate bonds and equity, or to engage in normal merger, acquisition and divestment activity. However, at the U.S.-China Strategic Economic Dialogue (SED) meeting in December 2007, China agreed to allow, in accordance with relevant prudential regulations, qualified foreign-invested companies to issue RMB-denominated stocks, and qualified listed companies to issue RMB-denominated corporate bonds. Coupled with the ability to trade in these asset classes, foreign firms would add substantial expertise, liquidity and competition to the Chinese market.

Foreign exchange transactions on China's capital account can be concluded only through case-by-case review by SAFE and approvals are tightly regulated. To date, foreign firms remain generally satisfied because they are able to repatriate profits. With respect to capital inflows, several foreign firms continue to note difficulties in obtaining government approval to bring in foreign capital to expand their businesses.

## **GOVERNMENT PROCUREMENT**

### **Accession to the WTO Agreement on Government Procurement**

China is not yet a signatory to the WTO Agreement on Government Procurement (GPA). In accordance with its commitment upon accession to the WTO, China became an observer to the WTO Committee on Government Procurement in 2002. China also committed, in its Protocol of Accession to the WTO, to initiate negotiations for accession to the GPA "as soon as possible." China initiated GPA accession by submitting its application for accession and initial offer of coverage in December 2007.

The United States and other GPA Parties noted that significant improvements would be needed in China's initial offer to bring China's coverage to the level of other Parties' coverage. At the October 2009 WTO Government Procurement Committee's meeting, China submitted a report on the coverage that it intended to include in its revised offer, which included the coverage of more entities, goods and services and lower thresholds. At the same time, however, China noted that it was encountering difficulties in completing its revised offer. At the May 2010 S&ED meeting, China committed to submit its revised offer to the WTO's GPA Committee by July 2010, which it subsequently did. While the revised offer reflected some improvements over China's initial offer, the United States and other GPA Parties have noted that a number of improvements are necessary to bring China's coverage to a level comparable to that of the other GPA Parties. The Parties particularly emphasized the need for China to include sub-central entities and certain state-owned enterprises that engage in government activities in its next offer.

At the December 2010 JCCT meeting, the United States was able to obtain China's commitment to accelerate its accession to the GPA, as China agreed to work with provincial and local governments and to

## **FOREIGN TRADE BARRIERS**

submit a robust revised offer of coverage in 2011. In addition, during Chinese President Hu's state visit in January 2011, China agreed that its revised offer would include sub-central entities.

### **Government Procurement Regime**

In January 2003, China implemented a Government Procurement Law (GPL), which generally reflects GPA obligations and incorporates provisions from the United Nations Model Law on Procurement of Goods. However, the GPL also directs central and sub-central government entities to give priority to "local" goods and services, with limited exceptions. According to MOF, China's government procurement for 2009 was approximately \$109 billion, using MOF's definition of government procurement spending, a 24 percent increase over 2008.

In 2010, China circulated two draft measures intended to implement its Government Procurement Law. The first draft measure, the Regulations to Implement the Government Procurement Law, was issued by MOF in January. The United States submitted comments in February, in which, among other things, it expressed concern that the draft measure did not provide a GPA-consistent regime. The United States also expressed concern that the draft measure did not provide more specificity about the conduct of government procurement. The second draft measure, the Administrative Measures for Government Procurement of Domestic Products, was issued for public comment in May by MOF, MOFCOM, NDRC and the General Administration of Customs. In accordance with China's October 2009 JCCT commitment, this draft measure sets out the requirements for a product to qualify as a "domestic product," ensuring that products produced in China by foreign-invested enterprises receive the same treatment as products produced in China. The United States submitted comments on this draft measure in June, in which it expressed concerns about the lack of details regarding how the draft measure would be implemented.

The GPL generally does not cover tendering and bidding for public works and government infrastructure projects. Those projects are subject to a different regulatory regime, established by China's Tendering and Bidding Law (TBL), which entered into force in January 2000. While official figures for procurement covered under the TBL are not available, analysts estimate that this procurement may exceed \$200 billion. In September 2009, the State Council finally circulated NDRC's draft implementing regulations for the TBL for public comment. In October 2009, the United States submitted written comments on these draft regulations in which it emphasized, among other things, the need for greater clarification of the relationship between the TBL and the GPL, and the need to define "domestic products." Final regulations have not yet been issued.

### **Indigenous Innovation Policies**

In December 2007, MOF issued two measures that would substantially restrict the Chinese government's purchase of foreign goods and services. The first measure, the "Administrative Measures on the Government Procurement of Imported Products," severely restricts government procurement of imported foreign products and technologies. The second measure, the "Administrative Measures for Government Procurement on Initial Procurement and Ordering of Indigenous Innovation Products," is directed at restricting government procurement of "indigenous innovation" products to Chinese products developed by domestic enterprises or research institutions. The central government and provincial governments have since followed up by creating catalogues of qualifying "indigenous innovation products," which are periodically updated to include new products. While China may maintain these measures until it completes its GPA accession, the United States has raised strong concerns with regard to them, as they run counter to the liberalization path expected of a WTO Member seeking to accede to the GPA.



In 2009, China reinforced its existing “Buy China” measures at the central, provincial and local government levels. For example, in May 2009, MIIT issued a circular entitled Government Procurement Administration Measures, which applies to MIIT and its direct subsidiaries. The measure requires priority to be given in government procurement to domestic products and services, as well as to indigenous innovation products, except where the products or services cannot be produced or provided in China or are for use outside of China. In May 2009, nine central government ministries and agencies jointly issued the Opinions on Further Strengthening Supervision of Tendering and Bidding Activities in Construction Projects, which included a “Buy China” directive for all projects under China’s stimulus package. This directive specifically requires that priority be given to “domestic products” for all government-invested projects, unless the products are not available in China, cannot be purchased on reasonable commercial terms in China, or are for use abroad.

In November 2009, MOST, NDRC and MOF issued the Circular on Launching the 2009 National Indigenous Innovation Product Accreditation Work, requiring companies to file applications by December 2009 for their products to be considered for accreditation as “indigenous innovation products.” This measure provides for preferential treatment in government procurement to any products that are granted this accreditation, which is based on criteria such as the ownership or development of a product’s intellectual property in China. Subsequently, the United States and U.S. industry, along with the governments and industries of many of China’s other trading partners, expressed serious concerns to China about this measure, as it appears to establish a system designed to provide preferential treatment in government procurement to products developed by Chinese enterprises.

In April 2010, MOST, NDRC and MOF issued a draft measure for public comment, the Circular on Launching 2010 National Innovation Product Accreditation Work. The draft measure would amend certain of the product accreditation criteria set forth in the November 2009 measure, but would leave other problematic criteria intact, along with the accreditation principles, application form and link to government procurement. In addition, the draft measure originally was to become effective the day after comments were due. The United States submitted comments in May 2010, in which it asked China to suspend the implementation of the indigenous innovation accreditation system and to engage in consultations with the United States to address U.S. concerns with the system. To date, the draft measure has not been finalized, and the Chinese authorities have not requested or accepted applications for accreditation.

At the December 2010 JCCT meeting, China took important steps to address U.S. concerns about these indigenous innovation policies. China agreed not to maintain any measures that provide government procurement preferences for goods or services based on the location where the intellectual property is owned or was developed. During Chinese President Hu’s January 2011 state visit, China further committed to delink its innovation policies from the provision of government procurement preferences.

## **ELECTRONIC COMMERCE**

China has experienced dramatic growth in Internet usage since 1999. According to the 26th Internet Survey Report recently published by the China Internet Network Information Center (CNNIC), the number of Internet users in China reached approximately 420 million as of June 2010, representing an Internet penetration rate of 31.8 percent. The majority of these people are accessing the Internet through non-computer means, *i.e.*, cell phones, etc. With regard to broadband, there are reportedly now more than 125 million subscribers in China. Meanwhile, 3G mobile subscribers surpassed 50 million as of January 2011, representing a three-fold increase in one year.

China is experiencing the rapid development of online businesses such as search engines, network education, online advertisements, audio-video service, paid electronic mail, short message, online job

## **FOREIGN TRADE BARRIERS**

searches, Internet consulting, electronic trading and online gaming. However, CNNIC reported that only 28 percent of surveyed Chinese Internet users frequently use the Internet for online shopping services.

The Chinese government recognizes the potential of electronic commerce to promote exports and increase competitiveness and has made some progress toward establishing a viable commercial environment. However, several Chinese ministries have jurisdiction over electronic commerce and impose a range of burdensome restrictions on Internet use (*e.g.*, registration requirements for web pages and arbitrary and nontransparent content controls), stifling the free flow of information and the consumer privacy needed for electronic commerce to flourish. Content is still controlled and encryption is also regulated, as discussed more fully above (in the “Online Services” section), and the frequent blocking of websites (even those of a commercial nature) inhibits the predictability and reliability of using electronic networks as a medium of commerce.

A number of technical problems also inhibit the growth of electronic commerce in China. Rates charged by government approved Internet service providers make Internet access expensive for most Chinese citizens. Slow connection speeds are another problem, although this is changing quickly as broadband connections become more readily available. At the same time, Internet penetration is still relatively low in China, and there is a large urban/rural divide in penetration rates (the urban penetration rate is six times higher than the rural penetration rate), so there is still significant room for growth.

Other impediments to businesses and consumers conducting online transactions in China include the paucity of credit card payment systems (exacerbated by a current monopoly provider of RMB-denominated services), consumer reluctance to trust online merchants, lack of secure online payment systems and inefficient delivery systems. China has also yet to develop a legal framework conducive to the rapid growth of electronic commerce. Laws recognizing the validity of “electronic contracting” tools and stressing the importance of online privacy and security have been proposed but not yet issued. Despite these obstacles, however, a large and growing percentage of Chinese Internet users reportedly have made online purchases.

## **ANTICOMPETITIVE PRACTICES**

### **Competition Policy Laws and Regulations**

China maintains many laws and regulations in the competition policy area. One of China’s principal laws is the Anti-Unfair Competition Law, enacted by the National People’s Congress (NPC) in 1993. This law addresses a variety of matters, as it: (a) prohibits firms from using a trademark, name, or packaging without a license, as well as false advertising and other practices intended to confuse consumers; (b) outlaws bribery, the purchase or sale of business secrets, and predatory pricing; (c) restricts a firm’s ability to tie the sale of one product to another or impose “unreasonable conditions” on purchases; (d) bans collusion and outlaws “spreading false facts” that damage a competitor; and (e) in theory, limits the business practices of legally authorized monopolies and restricts the government’s ability to require that private firms engage in certain commercial transactions with state-owned enterprises.

The national government has legislated that production in certain sectors be concentrated in monopolies or near monopolies or authorized oligopolies. As in some other countries, these enterprises are concentrated in capital intensive sectors, like electricity and transportation, or in industries such as fixed-line telephony and postal services, in which this approach may be used to ensure national coverage. Some of the key laws and regulations include the Law on Electricity (1996), Civil Aviation Law (1995), Regulations on Telecommunication (2000), Postal Law (1986), Railroad Law (1991) and Commercial Bank Law (amended in 2003), among others. The enforcement of these laws and regulations is uneven as a result of

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the challenges inherent in attempting to coordinate their implementation nationally and as a result of inconsistent local and provincial enforcement. More troubling are efforts by government authorities at all levels in China to regulate competition with specific firms, often state-owned enterprises. Official statements frequently suggest that these efforts are tied primarily to employment concerns. However, the ultimate beneficiaries of the resulting measures are often unclear. In addition, local governments frequently enact rules that restrict interprovincial trade. Since the central government has difficulty enforcing its own competition policy measures at the local level, these local government rules continue to restrict market access for certain imported products, raise production costs and limit market opportunities for foreign invested enterprises.

The NPC in August 2007 passed China's first Anti-monopoly Law, which took effect in August 2008, and China is in the midst of drafting implementing regulations. Under this law, an Anti-monopoly Commission with oversight and coordinating responsibilities has been established, drawing its members from several Chinese ministries and agencies. Enforcement responsibilities have been divided among three agencies. MOFCOM has assumed responsibility for reviewing mergers. NDRC has assumed responsibility for reviewing monopoly activities, abuse of dominance and abuse of administrative power when they involve pricing, while SAIC reviews these same types of activities when they are not price related.

After the Anti-monopoly Law was issued, MOFCOM, SAIC, NDRC and other Chinese government ministries and agencies began to formulate implementing regulations, departmental rules and other measures. Generally, these ministries and agencies have been willing to seek public comment on their proposed measures. In commenting on these proposed implementing measures, the United States has urged China to implement the Anti-monopoly Law in a manner consistent with global best practices and with a focus on consumer welfare and the protection of the competitive process, rather than consideration of industrial policy or other non-competition objectives. The United States has also specifically pressed China to ensure that any implementing measures do not create disguised or unreasonable barriers to trade and do not provide less favorable treatment to foreign goods and services or foreign investors and their investments. During the past year, the United States submitted comments on SAIC's revised draft implementing regulations on monopoly agreements, abuse of dominant market position and abuse of administrative power.

The Anti-monopoly Law does contain provisions that have generated concern. For example, it remains unclear how China will implement one provision that requires protection for the lawful operations of state-owned enterprises and government monopolies in industries deemed nationally important. On the other hand, the inclusion of provisions on the abuse of administrative power in the Anti-monopoly Law, which also appear in NDRC's and SAIC's draft implementing regulations, could be important instruments for promoting the establishment and maintenance of increasingly competitive markets in China. In addition, because trade associations in China frequently appear to have strong government ties, the United States has encouraged the Chinese agencies charged with enforcing the Anti-monopoly Law to work with Chinese regulatory agencies with sectoral responsibilities to emphasize the importance of trade associations refraining from engaging in conduct that would violate the Anti-monopoly Law.

Since the Anti-monopoly Law went into effect in 2008, China's administrative enforcement of it has been most active in the merger area overseen by MOFCOM, largely due to the requirement to pre-notify merger transactions. While more than 70 percent of mergers notified to MOFCOM since the law came into effect have involved multinational corporations, all six cases in which approval was granted with conditions have involved offshore transactions between foreign parties rather than transactions between Chinese enterprises. In addition, MOFCOM has formally blocked only one transaction, and that transaction involved a foreign enterprise's attempt to acquire a well-known Chinese enterprise. Although

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MOFCOM's initial merger decisions were brief, over the last year MOFCOM has begun to release more detailed explanations of its merger decisions, some of which have been criticized by U.S. industry observers for lack of adequate bases to find that a merger has or may have the effect of eliminating or restricting competition.

### **Measures Restricting Inward Investment**

In 2006, China began to revise its policies toward inward investment. While insisting that it remains open to foreign investment, China adopted policies that restrict inward investment in a range of "strategic" sectors, which appear designed to shield domestic enterprises from foreign competition. As discussed above in the Investment Barriers section, these policies include the State Council's June 2006 Opinions on the Revitalization of the Industrial Machinery Manufacturing Industries, which calls for China to expand the market share of domestic companies in 16 equipment manufacturing industries.

In addition, in August 2006, the Ministry of Commerce and five other agencies issued revised rules for foreign mergers and acquisitions, which, among other things, establish a vague "national economic security" basis for rejecting proposed transactions as well as an anti-monopoly review for foreign transactions. In November 2006, the NDRC issued a Five Year Plan on foreign investment that seeks to restrict foreign acquisitions of leading Chinese enterprises, prevent the emergence of foreign capital monopolies, protect industrial security and prevent abuse of intellectual property. In December 2006, SASAC published an expansive list of seven "critical economic sectors" in which China should restrict foreign participation, including armaments, electrical power and distribution, oil, chemicals, telecommunications, coal, aviation and shipping. Finally, the Catalogue Guiding Foreign Investment in Industry, as discussed above in the Investment Barriers section, suggests China's policies toward inward investment may be more selective.

Some of these measures maintain or create conflicts of interest by assigning regulatory power to agencies that administer state-owned enterprises competing in the same sectors. In addition, key terms in the new policies, such as "national economic security," remain undefined. The opaque standards and ill-defined processes in these measures have introduced additional ambiguity into China's investment policy.

## **OTHER BARRIERS**

### **Transparency**

#### *Official Journal*

In its WTO accession agreement, China committed to establish or designate an official journal dedicated to the publication of all laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange. China also agreed to publish the journal regularly and to make copies of all issues of the journal readily available to enterprises and individuals. Following its accession to the WTO, however, China did not establish or designate an official journal. Rather, China relied on multiple channels, including ministry websites, newspapers and a variety of journals, to provide information on trade-related measures. Following sustained U.S. engagement, the State Council issued a notice in March 2006 directing all central, provincial and local government entities to begin sending copies of all of their trade-related measures to MOFCOM for immediate publication in the MOFCOM Gazette. The United States subsequently monitored the effectiveness of this notice, both to assess whether all government entities regularly publish their trade-related measures in the MOFCOM Gazette and whether all types of measures are being published. It appeared that adherence to the State Council's notice was far from complete. As a result, the United States continued to engage China bilaterally on the need for a fully

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compliant single official journal, and at the December 2007 SED meeting China reconfirmed its WTO commitment to publish all final trade-related measures in a designated official journal before implementation. Since then, the United States has been monitoring the effectiveness of this commitment, and it appears that most government entities are now regularly publishing their trade-related measures in this journal, although it is still not clear whether all types of trade-related measures are being published. For example, in March 2010, SASAC posted a notice on its website, rather than the MOFCOM Gazette, announcing the issuance of a potentially far-reaching measure, the Interim Provisions on Guarding Central State-Owned Enterprises' Commercial Secrets, effective as of the date of its issuance. SASAC had never solicited public comments on this measure, and did not even make the full text of the measure publicly available until one month later.

### *Public Comment*

In its WTO accession agreement, China committed to provide a reasonable period for public comment on new or modified trade-related laws and regulations before implementing them, except in certain enumerated instances. However, China has been slow to implement this commitment. Following sustained U.S. engagement, the NPC's Standing Committee instituted notice-and-comment procedures for draft laws in April 2008. Two months later, in June 2008, China agreed to publish in advance for public comment, subject to specified exceptions, all trade and economic-related administrative regulations and departmental rules that are proposed for adoption, and provide a public comment period of not less than 30 days from the date of publication. China further agreed to publish such measures for comment in a single location: the Chinese Government Legislative Information Website of the Legislative Affairs Office of the State Council. Since then, the United States has been monitoring the effectiveness of these changes. While the NPC has been regularly publishing draft laws for public comment, and the State Council has also been regularly publishing draft regulations for public comment, it appears that China has had more difficulty implementing China's new policy regarding trade- and economic-related departmental rules. Since June 2008, China has increased the number of proposed departmental rules published for public comment on the State Council's website. However, a significant number of departmental rules are still issued without first having been published for public comment on the State Council's website. While some ministries publish departmental rules on their own websites, they often allow less than 30 days for public comment, making it difficult for foreign interested parties to submit timely and complete comments.

In October 2010, the State Council issued the Opinions on Strengthening the Building of a Government Ruling by Law, which directs ministries and agencies at the central and provincial levels of government to solicit public comment when developing their rules, subject to certain exceptions. The United States will closely monitor whether this measure leads to improvements in the use of notice-and-comment procedures.

## **Legal Framework**

### *Laws and Regulations*

Laws and regulations in China often contain provisions that are relatively general and ambiguous. While this approach allows the Chinese authorities to apply laws and regulations flexibly, it also results in inconsistency and confusion in application. Companies often have difficulty determining whether their activities contravene a particular law or regulation.

In China, regulations are also promulgated by a host of different entities at the central, provincial and local levels, and it is not unusual for the resulting regulations to be at odds with one another. Even though finalized regulations are now routinely published in China, they often leave room for discretionary application and inconsistencies. Indeed, government bureaucracies have sometimes been accused of

selectively applying regulations. China has many strict rules that are often ignored in practice until a person or entity falls out of official favor. Governmental authorities can wield their discretionary power on foreign or disfavored investors or make special demands on them simply by threatening to crack down.

This lack of a clear and consistent framework of laws and regulations can be a barrier to the participation of foreign firms in the Chinese domestic market. A comprehensive legal framework, coupled with adequate prior notice of proposed changes to laws and regulations and an opportunity to comment on those changes, would greatly enhance business conditions, promote commerce and reduce opportunities for corruption. The U.S. Government has provided technical assistance, at the central, provincial and local levels of government in China, in an effort to promote improvements in China's legislative and regulatory drafting processes. In its Protocol of Accession to the WTO, China committed to establish tribunals for the review of all administrative actions relating to the implementation of trade related laws, regulations, judicial decisions and administrative rulings. These tribunals must be impartial and independent of the government authorities entrusted with the administrative enforcement in question, and their review procedures must include the right of appeal. To date, little information is publicly available regarding the frequency or outcomes of reviews before these tribunals.

China also committed, at all levels of government, to apply, implement and administer all of its laws, regulations and other measures relating to trade in goods and services in a uniform and impartial manner throughout China, including in special economic areas. In connection with this commitment, in 2002, China also established an internal review mechanism, now overseen by MOFCOM's Department of WTO Affairs, to handle cases of non-uniform application of laws. The actual workings of this mechanism remain unclear, however.

#### *Commercial Dispute Resolution*

Both foreign and domestic companies often avoid seeking resolution of commercial disputes through the Chinese courts, as skepticism about the independence and professionalism of China's court system and the enforceability of court judgments and awards remains high. There is a widespread perception that judges, particularly outside of China's big cities, are subject to influence by local political or business pressures. Many judges are not trained in the law and/or lack higher education, although this problem decreases at the higher levels of the judiciary.

At the same time, the Chinese government is moving to establish consistent and reliable mechanisms for dispute resolution through the adoption of improved codes of ethics for judges and lawyers and increased emphasis on the consistent and predictable application of laws. For example, Supreme Court rules provide that foreign or Chinese enterprises and individuals may bring cases in the designated courts raising challenges under the Administrative Litigation Law to decisions made by China's administrative agencies relating to international trade matters. The rules also state that when there is more than one reasonable interpretation of a law or regulation, the courts should choose an interpretation that is consistent with the provisions of international agreements to which China has committed, such as the WTO rules.

Despite initial enthusiasm, foreign observers have grown increasingly skeptical of the China International Economic and Trade Arbitration Commission (CIETAC) as a forum for the arbitration of trade disputes. Some foreign firms have obtained satisfactory rulings from CIETAC, but other firms and legal professionals have raised concerns about restrictions on the selection of arbitrators and inadequacies in procedural rules necessary to ensure thorough, orderly and fair management of cases.

Finally, in cases where the judiciary or arbitration panels have issued judgments in favor of foreign-invested enterprises, enforcement of the judgments has often been difficult. Officials responsible for

enforcement are often beholden to local interests and unwilling to enforce court judgments against locally powerful companies or individuals.

### *Labor Issues*

In recent years, China has expanded the scope of its national labor laws and regulations. Three labor laws went into effect in 2008: the Labor Contract Law, which clarifies the rights and obligations of workers and employers to promote better labor relations; the Labor Dispute Mediation and Arbitration Law, which improves and streamlines the labor dispute resolution process; and the Employment Promotion Law, which aims to stimulate employment opportunities. However, China does not appear to adhere to certain internationally recognized labor standards, including the freedom of association and the right to bargain collectively. In addition, reports continue to indicate that China does not effectively enforce its labor laws and regulations concerning issues such as minimum wages, hours of work, occupational safety and health, bans on child labor, forced prison labor and participation in social insurance programs. Effectively enforcing internationally recognized labor standards, and its own labor laws and regulations, would help ensure that China is not promoting trade at the expense of its workers.

Chinese law provides for the right to associate and form a union, but does not allow workers to form or join an independent union of their own choice. Any union formed must affiliate with the official All-China Federation of Trade Unions (ACFTU), which reports to the Communist Party of China. Once a union chapter is established, the enterprise is required to pay fees to the ACFTU, often through the local tax bureau, equaling two percent of total payroll, regardless of the number of union members in the enterprise. The workers at these enterprises are required to accept the ACFTU as their representative; they cannot instead select another union or decide not to have any union representation. In addition, while China's laws on union formation apply equally to domestic enterprises and foreign-invested enterprises, since 2006 the ACFTU has engaged in a campaign to organize ACFTU chapters in foreign-invested enterprises, particularly large multinational corporations. This campaign has generated concerns about discriminatory treatment of foreign-invested enterprises in relation to domestic enterprises.

Meanwhile, skilled workers are in relatively short supply. Restrictions on labor mobility continue to distort labor costs. China is gradually easing restrictions under the country's household registration system, which has traditionally limited the movement of workers within the country, in part due to the recognition that labor mobility is essential to the continued growth of the economy.

### *Corruption*

Many people expected that China's entry into the WTO, which mandated a significant reduction in tariffs, would in turn reduce incentives for smuggling-related corruption. While WTO membership has increased China's exposure to international best practices and resulted in some overall improvements in transparency, corruption remains endemic. Chinese officials themselves admit that corruption is one of the most serious problems the country faces, and China's leadership has called for an acceleration of the country's anti-corruption drive with a focus on closer monitoring of provincial-level officials. According to Chinese state media sources, China launched an anti-corruption campaign in 2006 targeting Communist Party of China officials. According to official reports, the Communist Party's Central Commission for Discipline Inspection (CDIC) punishes and disciplines an average of 130,000-190,000 party officials each year for misdeeds and more serious crimes.

In July 2004, China implemented a new Administrative Licensing Law. This law is designed to increase transparency in the licensing process, an area that has long served as a source of official corruption. This law seeks to ensure the reasonable use of administrative licensing powers to protect the interests of

corporations and individuals and to promote efficient administrative management by requiring government agencies to set up special offices for issuing licenses and to respond to applications within 20 days. Since its 2004 implementation, the law has increased transparency in the licensing process, while reducing procedural obstacles and strengthening the legal environment for domestic and foreign enterprises.

China issued its first law on unfair competition in 1993, and the central government continues to call for improved self-discipline and anticorruption initiatives at all levels of government. While the central government in recent years has pledged to begin awarding contracts solely on the basis of commercial criteria, it is unclear how quickly, and to what extent, the government will be able to follow through on this commitment. U.S. suppliers complain that the widespread existence of unfair bidding practices in China puts them at a competitive disadvantage. This dilemma is less severe in sectors where the United States holds clear technological or cost advantages. Corruption nevertheless undermines the long-term competitiveness of both foreign and domestic entities in the Chinese market.

### *Land Issues*

China's constitution specifies that all land is owned in common by all the people. In practice, agricultural collectives, under the firm control of local Communist Party chairmen, distribute agricultural land to rural residents, while provincial and municipal governments distribute land for residential and industrial use. The State and collectives can either "grant" or "allocate" land-use rights to enterprises in return for the payment of fees, or in some cases without the payment of any fees. Enterprises granted land-use rights are guaranteed compensation if the State asserts eminent domain over the land, while those with allocated rights are not. Granted land-use rights cost more, not surprisingly, than allocated rights. However, the law does not define standards for compensation when eminent domain supersedes granted land-use rights. This situation creates considerable uncertainty when foreign investors are ordered to vacate. The absence of public hearings on planned public projects, moreover, can give affected parties, including foreign investors, little advance warning.

The time limit for land-use rights acquired by foreign investors for both industrial and commercial enterprises is 50 years. A major problem for foreign investors is the array of regulations that govern their ability to acquire land-use rights. Local implementation of these regulations may vary from central government standards, and prohibited practices may occur in one area while the regulations are enforced in another. Most wholly-owned foreign enterprises seek granted land-use rights to state-owned urban land as the most reliable protection for their operations. Chinese-foreign joint ventures usually attempt to acquire granted land-use rights through lease or contribution arrangements with the local partners.

China's National People's Congress passed a Property Rights Law on March 16, 2007, the first comprehensive legal protection for private property since the founding of the People's Republic in 1949. This law, which generated years of controversy in the Chinese government but was never published in draft form, grants equal legal status to private, state and collectively owned property, although at the same time it explicitly affirms the dominant role of public property in the economy. In addition, this law covers the "means of production," such as factories, but agricultural land remains a collective possession subject to 30 year leases. It is unclear at this time how the law will be implemented.

Given the scarcity of land resources in China, the price of land-use rights and land allocation are important considerations from both a market access and competition standpoint and from the perspective of their effect on production and trade. It is therefore of some concern to the United States that the Chinese government is recentralizing control over land administration, with the objective, in part, to ensure that land use-rights are allocated in accordance with a compulsory national land-use plan and state industrial development policies.





# COLOMBIA

## TRADE SUMMARY

The U.S. goods trade deficit with Colombia was \$3.6 billion in 2010, up \$1.7 billion from 2009. U.S. goods exports in 2010 were \$12.0 billion, up 27.4 percent from the previous year. Corresponding U.S. imports from Colombia were \$15.6 billion, up 38.2 percent. Colombia is currently the 20th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Colombia was \$6.7 billion in 2009 (latest data available), up from \$5.6 billion in 2008. U.S. FDI in Colombia is primarily concentrated in the mining and manufacturing sectors.

## TRADE PROMOTION AGREEMENT

The United States-Colombia Trade Promotion Agreement (CTPA) was signed on November 22, 2006. Colombia's Congress approved the CTPA and a protocol of amendment in 2007. The United States has not yet approved the CTPA.

The CTPA is a comprehensive free trade agreement. Under the CTPA, Colombia will immediately eliminate most of its tariffs on U.S. exports, with all remaining tariffs phased out over defined time periods. The CTPA also includes important disciplines relating to: customs administration and trade facilitation; technical barriers to trade; government procurement; investment; telecommunications; electronic commerce; intellectual property rights; transparency; and labor and environmental protection. Under the CTPA, U.S. firms will have better access to Colombia's services sector than other WTO Members have under the General Agreement on Trade in Services (GATS). All service sectors are covered under the CTPA except where Colombia has made specific exceptions.

The Administration has been working to address the outstanding issues related to the CTPA -- issues concerning laws and practices impacting the protection of internationally-recognized labor rights, violence against labor leaders and the prosecution of the perpetrators. The Administration has consulted extensively with Congress and stakeholders concerning these issues. During the week of February 14, 2011, USTR led an interagency mission comprised of the State Department, Labor Department and White House officials to Colombia. On March 10, 2011, Administration officials met with senior Santos Administration officials to engage further on our shared goals to protect labor rights and workers, with further meetings planned as the Administration seeks to resolve the outstanding issues as quickly as possible this year and submit the CTPA for Congressional consideration immediately thereafter.

## IMPORT POLICIES

### Tariffs

Colombia reduced applied import duties on November 5, 2010, for more than 4,000 tariff lines. Decrees 4114 and 4115 listed the reductions. The average nominal import duty was reduced from 12.2 percent to 8.3 percent. Consumer goods, capital goods, and raw materials produced outside of Colombia were the main reduction targets.

Most of Colombia's duties have been consolidated into three tariff levels: zero percent to five percent on capital goods, industrial goods, and raw materials not produced in Colombia; 10 percent on manufactured

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goods, with some exceptions; and 15 percent to 20 percent on consumer and “sensitive” goods. Exceptions include: automobiles, which are subject to a 35 percent duty; beef and rice, which are subject to an 80 percent duty; and milk and cream, which are subject to a 98 percent duty. Whey is currently subject to a 20 percent in-quota duty (3,000 tons) and a 94 percent duty outside the quota. Other agricultural products fall under the Andean Price Band System (APBS) established by Decision 371 of the Andean Community (AC). The AC includes Bolivia, Colombia, Ecuador and Peru. The APBS protects domestic industry with a variable levy by increasing tariffs when world prices fall and lowering tariffs when world prices rise.

The APBS includes 14 product groups and covers more than 150 tariff lines. This system can result in duties exceeding 100 percent, depending on world commodity prices, for important U.S. exports to Colombia, including corn, wheat, soybeans, pork, poultry parts and cheeses. The APBS has been suspended for milk powder, white corn and rice. The APBS also negatively affects U.S. access to Colombian markets for products that contain corn, such as dry pet food. By contrast, processed food imports from Chile and AC Members enter duty-free. The APBS has been suspended for milk powder and rice and was reactivated for white corn (Decree 671 of 2009) after a temporary suspension.

Under the CTPA, Colombia will immediately cease to apply the APBS to imports from the United States. Coupled with a preference clause included in the CTPA, this will help U.S. exports compete more effectively in Colombia’s market. Under the CTPA, over half of the value of current U.S. agricultural exports to Colombia would enter duty-free, including high quality beef, an assortment of poultry products, soybeans and soybean meal, cotton, wheat, whey, and most horticultural and processed food products. U.S. agricultural exporters also will benefit from duty-free access through tariff-rate quotas (TRQs) on corn, rice, poultry parts, and dairy products.

About 80 percent of U.S. exports of consumer and industrial products to Colombia will become duty-free immediately upon implementation of the CTPA, with remaining tariffs phased out within 10 years. Colombia also agreed to join the WTO Information Technology Agreement, which eliminates tariffs on a wide range of information technology products.

### **Nontariff Measures**

Nontariff barriers include discretionary import licensing, which has been used to restrict imports of milk powder (Resolution 2551 of 2002) and poultry parts (Resolution 001 of 1991). The CTPA contains provisions that should address this issue. The Colombian government maintains 67 TRQs, including those for rice, soybeans, yellow corn, white corn, and cotton (Decree 430 of 2004) and requires that importers purchase local production in order to import under the TRQ. Under the CTPA, the Colombian government committed to ensuring that access to the TRQ in-quota quantity will not be conditioned on the purchase of domestic production.

Based on AC Decision 331, Colombia does not permit the importation of used clothing. Importers of used and remanufactured goods may apply for licenses to import products into Colombia under limited circumstances (Resolution 001 of 1995). U.S. industry reports that, in practice, authorities do not grant such licenses, resulting in an effective import prohibition of these products. Decree 4725 of 2005 prohibits the importation of used or refurbished medical equipment that is older than five years, thereby limiting market access for high quality remanufactured products, such as imaging equipment. Under the CTPA, Colombia affirmed that it would not adopt or maintain prohibitions or restrictions on trade in remanufactured goods and that some existing prohibitions on trade in used goods would not apply to remanufactured goods. This will provide significant new export and investment opportunities for firms involved in remanufactured products, such as machinery, computers, cellular phones, and other devices.

### **FOREIGN TRADE BARRIERS**

Colombia assesses a consumption tax on alcoholic beverages through a system of specific rates per degree (percentage point) of alcohol strength (Law 788 of 2002, Chapter V). Arbitrary breakpoints have the effect of applying a lower tax rate to domestically produced spirits and therefore create a barrier for imported distilled spirits. Under the CTPA, Colombia committed to eliminate the breakpoints for imports of distilled spirits within four years of the agreement's entry into force. Additionally, Colombia committed to eliminate practices that have restricted the ability of U.S. distilled spirits companies to conduct business in Colombia.

## **GOVERNMENT PROCUREMENT**

U.S. companies are required to have a local partner in order to qualify for government procurement. Under the CTPA, Colombia agreed to accord national treatment to U.S. goods, services, and suppliers in procurements covered by the Agreement. Under the CTPA, U.S. firms will have greater access to procurement by Colombia's ministries and departments, legislature, courts, and first tier sub-central entities, as well as a number of Colombia's government enterprises, including its oil company. In addition, Colombia will not apply Law 816 of 2003 to CTPA-covered procurements, as that law mandates preferential treatment for tenders that provide Colombian goods or services. U.S. companies have complained about the lack of transparency in government procurement practices.

Colombia is not a signatory to the WTO Agreement on Government Procurement, but it has been an observer to the WTO Committee on Government Procurement since 1996.

## **EXPORT SUBSIDIES**

In a 2008 effort to ease the impact of an appreciating peso, the Colombian government issued tax rebate certificates (known as "CERTs") to exporters in certain sectors. The value of the CERT is equal to four percent of the value of exports of designated goods. No CERTs were issued in 2009 or 2010, although the program remains in place.

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

Colombia was listed on the Watch List in the 2010 Special 301 Report. Colombia continued to improve its efforts against IPR violators through enforcement action. However, there remains a need for further IPR improvements, particularly the need for additional training and resources for agencies involved in enforcing IPR. A key concern cited is the lack of deterrent sentences. Actions are still needed to reduce book and optical media piracy, combat Internet piracy, and to address the need for an effective system to prevent the issuance of marketing approvals for unauthorized copies of patented pharmaceutical products. While improvements in enforcement remain necessary, the Colombian government has made a concerted effort in recent years to combat IPR violations, including through conducting raids to seize counterfeit and pirated products and deter the counterfeiting of pharmaceuticals.

## **SERVICES BARRIERS**

Implementation of the CTPA will require Colombia to accord substantial market access across its entire services regime, subject to a limited number of exceptions. Some restrictions, such as economic needs tests and residency requirements, still remain in sectors such as accounting, tourism, legal services, insurance, distribution services, advertising, and data processing.

## **Legal Services**

Foreign law firms can only operate in Colombia by forming a joint venture with a Colombian law firm and operating under the licenses of Colombian lawyers in the firm.

## **Financial Services**

Insurance companies must maintain a commercial presence to sell policies other than those for international travel or reinsurance. Colombia prohibits the sale of maritime insurance by foreign companies. Foreign banks must establish a subsidiary to operate in Colombia.

Under the CTPA, Colombia will phase in further liberalization in financial services, such as allowing branching by banks and allowing the cross-border supply of international maritime shipping and commercial aviation insurance within four years of the Agreement's entry into force. Under the CTPA, mutual funds and pension funds will be allowed to seek advice from portfolio managers in the United States.

## **Transportation**

Trans-border transportation services are restricted in Colombia. Land cargo transportation must be provided by Colombian citizens or legal residents with a commercial presence in the country and licensed by the Ministry of Transportation. Colombian law permits international companies to provide cabotage services (*i.e.*, transport between two points within Colombian territory) "only when there is no national capacity to provide the service." Under the terms of the CTPA, Colombia committed to allow 100 percent foreign ownership of land cargo transportation enterprises in Colombia.

## **Telecommunications**

Colombia currently permits 100 percent foreign ownership of telecommunications providers and has committed to ensure that competitors can interconnect with Colombian dominant suppliers' fixed networks at nondiscriminatory and cost-based rates.

A U.S. company complained in 2008 about the ability of competitors to obtain non-discriminatory access to the submarine cable landing station owned by incumbent operator Telecom Colombia. In 2009, the Colombian government regulator issued a ruling stating that the cable was an "essential service," clearing the way for the U.S. company to obtain the non-discriminatory access it was seeking.

## **Express Delivery**

Law 1369 of 2009 created Postal Services regulations allowing the Colombian government to cross-subsidize the state-owned postal company, which could give it an unfair competitive advantage over U.S. express courier service companies. U.S. industry reports delays in obtaining licenses and establishing facilities under the 2009 law.

## **INVESTMENT BARRIERS**

Foreign investment in Colombia is accorded national treatment, and 100 percent foreign ownership is permitted in most sectors. Exceptions exist for national security, broadcasting, and the disposal of hazardous waste. In certain cases, the Colombian government does not include arbitration clauses in contracts to which it is a party. Enforcement of arbitration judgments against the Colombian government,

### **FOREIGN TRADE BARRIERS**

as well as municipal and departmental governments, can be very difficult. The CTPA could be of assistance to U.S. investors in both these respects.

Colombia agreed to strong protections for U.S. investors in the CTPA. The CTPA includes provisions that will provide a stable legal framework for U.S. investors operating in Colombia. All forms of investment will be protected under the CTPA. In almost all circumstances, U.S. investors will enjoy the right to establish, acquire, and operate investments in Colombia on an equal footing with domestic investors. The CTPA's investor protections will also be backed by a transparent, binding investor-state arbitration mechanism.



# COSTA RICA

## TRADE SUMMARY

The U.S. goods trade deficit with Costa Rica was \$3.5 billion in 2010, up \$2.6 billion from 2009. U.S. goods exports in 2010 were \$5.2 billion, up 10.3 percent. Corresponding U.S. imports from Costa Rica were \$8.7 billion, up 52.2 percent. Costa Rica is currently the 40th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Costa Rica was \$2.4 billion in 2009 (latest data available), down from \$2.6 billion in 2008. U.S. FDI in Costa Rica is led by the manufacturing and nonbank holding company sectors.

## IMPORT POLICIES

### Free Trade Agreement

On August 5, 2004, the United States signed the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR or Agreement) with five Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua) and the Dominican Republic (the Parties). Under the Agreement, the Parties are significantly liberalizing trade in goods and services. The CAFTA-DR also includes important disciplines relating to: customs administration and trade facilitation; technical barriers to trade; government procurement; investment; telecommunications; electronic commerce; intellectual property rights; transparency; and labor and environmental protection.

The Agreement entered into force for the United States, El Salvador, Guatemala, Honduras, and Nicaragua in 2006 and for the Dominican Republic in 2007. The CAFTA-DR entered into force for Costa Rica on January 1, 2009.

In 2008, the Parties implemented amendments to several textile-related provisions of the CAFTA-DR, including, in particular, changing the rules of origin to require the use of U.S. or regional pocket bag fabric in originating apparel. The Parties also implemented a reciprocal textile inputs sourcing rule with Mexico. Under this rule, Mexico provides duty-free treatment on certain apparel goods produced in a Central American country or the Dominican Republic with U.S. inputs, and the United States will provide reciprocal duty-free treatment under the CAFTA-DR on certain apparel goods produced in a Central American country or the Dominican Republic with Mexican inputs. These changes further strengthen and integrate regional textile and apparel manufacturing and create new economic opportunities in the United States and the region.

In February 2011, the CAFTA-DR Free Trade Commission (FTC), the central oversight body for the agreement, met for the first time in San Salvador, El Salvador. The FTC reviewed the implementation of the agreement and its trade and economic impact on the region and agreed to certain changes to strengthen the agreement's operation. The FTC discussed a broad range of ways to enhance competitiveness in the region and endorsed several initiatives to generate new opportunities for all of the countries to realize the benefits of the CAFTA-DR Agreement, with a heightened focus on small- and medium-sized businesses.

### Tariffs

As a member of the Central American Common Market, Costa Rica applies a harmonized external tariff on most items at a maximum of 15 percent with some exceptions.

## FOREIGN TRADE BARRIERS



However, under the CAFTA-DR, 100 percent of U.S. industrial trade will enter Costa Rica duty-free by 2015. Nearly all textile and apparel goods that meet the Agreement's rules of origin now enter Costa Rica duty-free and quota-free, creating economic opportunities for U.S. and regional fiber, yarn, fabric, and apparel manufacturing companies.

Under the CAFTA-DR, more than half of U.S. agricultural exports now enter Costa Rica duty-free. Costa Rica will eliminate its remaining tariffs on virtually all agricultural products by 2020 (2022 for chicken leg quarters and 2025 for rice and dairy products). For certain agricultural products, tariff-rate quotas (TRQs) will permit some immediate duty-free access for specified quantities during the tariff phase out period, with the duty-free amount expanding during that period. Costa Rica will liberalize trade in fresh potatoes and onions through expansion of a TRQ, rather than by tariff reductions.

### **Nontariff Measures**

Under the CAFTA-DR, Costa Rica committed to improve transparency and efficiency in administering customs procedures, including the CAFTA-DR rules of origin. Costa Rica also committed to ensuring greater procedural certainty and fairness in the administration of these procedures, and all the CAFTA-DR countries agreed to share information to combat illegal transshipment of goods.

Costa Rica implemented the Information Technology Customs Control (TICA) system in 2007 for imports and in early 2009 for exports (other than exports from free trade zones). The TICA system has significantly improved what had been a complex and bureaucratic import process. Under the TICA system, the Costa Rican customs authority has changed its focus from the verification of goods to the verification of processes and data. Customs officials now have up to four years to review the accuracy of import declarations, which allows customs to facilitate the free flow of goods while gathering necessary documentation.

### **GOVERNMENT PROCUREMENT**

The CAFTA-DR requires that procuring entities use fair and transparent procurement procedures, including advance notice of purchases and timely and effective bid review procedures, for procurement covered by the Agreement. Under the CAFTA-DR, U.S. suppliers are permitted to bid on procurements of most Costa Rican government entities, including key ministries and state-owned enterprises, on the same basis as Costa Rican suppliers. The anticorruption provisions in the Agreement require each government to ensure under its domestic law that bribery in matters affecting trade and investment, including in government procurement, is treated as a criminal offense or is subject to comparable penalties.

The government of Costa Rica's "Digital Government" development group, in partnership with the Costa Rican Electricity Institute (ICE) and others, is currently implementing an automated procurement system dubbed "MerLink." Merlink is streamlining procurement procedures and should significantly reduce the risk of corruption or fraud in the procurement process. In September 2010, the United States Trade and Development Agency (USTDA) announced a grant to support the "Digital Government" group by providing a roadmap and guidelines for implementation of a government-wide backbone network and shared data center.

In 2010, a state-owned corporation cited the "public good" in cancelling a contract with a foreign supplier. This may have been the first use of this justification by a state-owned corporation. The foreign supplier is not fully satisfied with the compensation received from the Costa Rican government but does not plan to pursue the matter further.

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

## **EXPORT SUBSIDIES**

Tax holidays are available for investors in free trade zones, unless tax credits are available in an investor's home country for taxes paid in Costa Rica.

Under the CAFTA-DR, Costa Rica may not adopt new duty waivers or expand existing duty waivers that are conditioned on the fulfillment of a performance requirement (*e.g.*, the export of a given level or percentage of goods). However, under the CAFTA-DR, Costa Rica was permitted to maintain such measures through 2009, provided that it maintained the measures in accordance with its obligations under the WTO Agreement on Subsidies and Countervailing Measures. The U.S. Government is working with the government of Costa Rica in an effort to ensure it implements its CAFTA-DR obligation.

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

Costa Rica was again listed on the Watch List in the 2010 Special 301 report. Recent improvements include passage of legislation to strengthen IPR protection and enforcement in Costa Rica, and the publication of regulations to provide for the protection of undisclosed information submitted in support of the registration of new agricultural chemical products. Key concerns cited in the report included the need to assign higher priority to, and allocate greater resources for, combating piracy and counterfeiting, and the need to seek deterrent penalties. Additionally, strengthened enforcement efforts are needed. During 2010, the U.S. Government continued to address these concerns with the Costa Rican government by providing IPR training both to members of the judiciary and staff of the National Property Registry and by continuing an IPR dialogue through the Judicial Branch's training department ("The Judicial School").

The United States will continue to monitor Costa Rica's implementation of its IPR obligations under the CAFTA-DR.

## **SERVICES BARRIERS**

Under the CAFTA-DR, Costa Rica committed to open important segments of its telecommunications market, including private network services, Internet services, and mobile wireless services. Costa Rica's telecommunications market is now open for competition in private network services and Internet services. However, a prospective supplier has encountered serious delays in attempting to obtain the license authorization required to provide Internet services via satellite because Costa Rica's telecommunications regulator, the Superintendencia de Telecomunicaciones (SUTEL) and the telecommunications ministry (MINAET) are working through technical issues. The Costa Rican government has been engaged in an auction process to allocate the radioelectric spectrum necessary to allow for new entrants in the wireless telephony market, and it is expected that competitors will begin to establish operations in 2011. Competition in Costa Rica's mobile telephony market is stymied by pending implementation of a regime to ensure that operators are able to share certain microwave links that are needed to connect base stations to towers throughout the country.

## **INVESTMENT BARRIERS**

The regulatory environment can pose significant barriers to successful investment in Costa Rica. One common problem is inconsistent government action between institutions within the central government or between the central government and the municipal government. Several large U.S. investors have faced

## **FOREIGN TRADE BARRIERS**

the related problem that the central government's approach towards a specific project has changed significantly over time. Another concern for U.S. investors is the frequent recourse to legal challenges before Costa Rica's constitutional court to review whether government authorities have acted illegally or to review the constitutionality of legislation or regulations. Some U.S. investors believe that such challenges have been used at times to thwart their investments or hinder the quick resolution of disputes.

### **ELECTRONIC COMMERCE**

The CAFTA-DR includes provisions on electronic commerce that reflect its importance to global trade. Under the CAFTA-DR, Costa Rica has committed to provide nondiscriminatory treatment of digital products, and not to impose customs duties on digital products transmitted electronically.

### **OTHER BARRIERS**

Some U.S. firms and citizens have found corruption in government, including in the judiciary, to be a concern and a constraint to successful investment in Costa Rica. Administrative and judicial decision making appear at times to be inconsistent, non-transparent, and very time consuming.

# DOMINICAN REPUBLIC

## TRADE SUMMARY

The U.S. goods trade surplus with Dominican Republic was \$2.9 billion in 2010, up \$932 million from 2009. U.S. goods exports in 2010 were \$6.6 billion, up 24.4 percent from the previous year. Corresponding U.S. imports from Dominican Republic were \$3.7 billion, up 10.6 percent. The Dominican Republic is currently the 35th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in the Dominican Republic was \$1.0 billion in 2009 (latest data available), up from \$714 million in 2008. U.S. FDI in the Dominican Republic is primarily in the manufacturing sector.

## IMPORT POLICIES

### Free Trade Agreement

On August 5, 2004, the United States signed the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR or Agreement) with five Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua) and the Dominican Republic (the Parties). Under the Agreement, the Parties are significantly liberalizing trade in goods and services. The CAFTA-DR also includes important disciplines relating to: customs administration and trade facilitation; technical barriers to trade; government procurement; investment; telecommunications; electronic commerce; intellectual property rights; transparency; and labor and environmental protection.

The Agreement entered into force for the United States, El Salvador, Guatemala, Honduras, and Nicaragua in 2006 and for the Dominican Republic in 2007. The CAFTA-DR entered into force for Costa Rica on January 1, 2009.

In 2008, the Parties implemented amendments to several textile-related provisions of the CAFTA-DR, including, in particular, changing the rules of origin to require the use of U.S. or regional pocket bag fabric in originating apparel. The Parties also implemented a reciprocal textile inputs sourcing rule with Mexico. Under this rule, Mexico provides duty-free treatment on certain apparel goods produced in a Central American country or the Dominican Republic with U.S. inputs, and the United States provides reciprocal duty-free treatment under the CAFTA-DR on certain apparel goods produced in a Central American country or the Dominican Republic with Mexican inputs. These changes further strengthen and integrate regional textile and apparel manufacturing and create new economic opportunities in the United States and the region.

In February 2011, the CAFTA-DR Free Trade Commission (FTC), the central oversight body for the agreement, met for the first time in San Salvador, El Salvador. The FTC reviewed the implementation of the agreement and its trade and economic impact on the region and agreed to certain changes to strengthen the agreement's operation. The FTC discussed a broad range of ways to enhance competitiveness in the region and endorsed several initiatives to generate new opportunities for all of the countries to realize the benefits of the CAFTA-DR Agreement, with a heightened focus on small- and medium-sized businesses.

## **Tariffs**

Under the CAFTA-DR, 100 percent of U.S. industrial trade will enter the Dominican Republic duty free by 2015. Nearly all textile and apparel goods that meet the Agreement's rules of origin now enter the Dominican Republic duty-free and quota-free, creating economic opportunities for U.S. and regional fiber, yarn, fabric, and apparel manufacturing companies.

More than half of U.S. agricultural exports enter the Dominican Republic duty-free under the CAFTA-DR. The Dominican Republic will eliminate its remaining tariffs on nearly all agricultural goods by 2020. For certain agricultural products, tariff-rate quotas (TRQs) will permit some immediate duty-free access for specified quantities during the tariff phase out period, with the duty-free amount expanding during that period. Under the CAFTA-DR, the TRQs are to be made available for the entire calendar year, beginning on January 1 of each year. However, in 2008, the Dominican Republic did not issue the TRQs on rice and dry beans until late March; in 2009, the dry bean announcement was not made until May. The United States raised its concerns with Dominican officials and improved the initial TRQ delivery in 2010, but the dry beans TRQs were again issued one month late. Furthermore, the unused TRQs for 2010 should have been reassigned in September so that they could have been used by the end of the year. However, by the end of November 2010, the unused allocations had not been announced, made available, or assigned. In addition, the announcement for the availability of TRQs for 2011 should have already taken place by the writing of this report. However, the January TRQ allocation was late. The Dominican Republic government has promised full, timely delivery of all TRQs in 2011. In order to strengthen the Office of Agricultural Commerce Treaties within the Ministry of Agriculture, the U.S. Government has provided assistance to improve the management of the transparent allocation of TRQs of agricultural imports.

## **Nontariff Measures**

The Dominican Republic's customs policies and procedures frequently provoke complaints by businesses, and arbitrary clearance requirements sometimes delay the importation of merchandise for lengthy periods of time.

The Dominican Ministry of Agriculture continues to use discretionary import permits. The United States continues to raise this concern with Dominican authorities and is working to stop this practice.

The 17 percent tax on the first *matricula* (registration document) for all vehicles, which was set by the government in 2006, remains in effect.

Under the CAFTA-DR, the Dominican Republic committed to improve transparency and efficiency in administering customs procedures, including the CAFTA-DR rules of origin. The Dominican Republic also committed to ensuring greater certainty and fairness in the administration of these procedures, and all the CAFTA-DR countries agreed to share information to combat the illegal transshipment of goods. On October 31, 2005, the United States and the Dominican Republic signed a Customs Mutual Assistance Agreement that allows customs officials to exchange information, intelligence, and documents designed to help prevent customs offenses. The agreement provides a basis for cooperation and investigation in the areas of trade fraud, money laundering, smuggling, export controls, and related security. The United States donated nonintrusive (X-ray) verification equipment that has upgraded and expedited the verification process. The Dominican customs authority is still in the process of expanding the project by either purchasing or leasing additional equipment, as well as through technical assistance.

## **GOVERNMENT PROCUREMENT**

The CAFTA-DR requires that procuring entities use fair and transparent procurement procedures, including advance notice of purchases and timely and effective bid review procedures, for procurement covered by the Agreement. Under the CAFTA-DR, U.S. suppliers are permitted to bid on procurements of most Dominican government entities, including key ministries and state-owned enterprises, on the same basis as Dominican suppliers. The anticorruption provisions in the Agreement require each government to ensure under its domestic law that bribery in matters affecting trade and investment, including in government procurement, is treated as a criminal offense or is subject to comparable penalties. Nevertheless, U.S. suppliers have complained that Dominican government procurement is not conducted in a transparent manner and that corruption is widespread.

The Dominican Republic is not a signatory to the WTO Agreement on Government Procurement.

## **EXPORT SUBSIDIES**

The Dominican Republic does not have export promotion schemes other than the tariff exemptions for inputs given to firms in the free trade zones. Under the CAFTA-DR, the Dominican Republic may not adopt new duty waivers or expand existing duty waivers that are conditioned on the fulfillment of a performance requirement (*e.g.*, the export of a given level or percentage of goods). However, under the CAFTA-DR, the Dominican Republic was permitted to maintain such measures through 2009, provided that it maintained the measures in accordance with its obligations under the WTO Agreement on Subsidies and Countervailing Measures. The U.S. Government is working with the Dominican Republic government in an effort to ensure it implements its CAFTA-DR obligations.

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

The Dominican Republic remained on the Watch List in the 2010 Special 301 report. The Dominican Republic continued its efforts to implement its obligations under the CAFTA-DR, including by improving its government use of licensed software and addressing TV broadcast piracy. However, key concerns cited in the report included the widespread availability of pirated goods and excessive delays in the issuance of patents. The United States also will continue to monitor the Dominican Republic's implementation of its bilateral and multilateral obligations to provide an effective system for protecting against the unfair commercial use and unauthorized disclosure of undisclosed test or other data generated to obtain marketing approvals for pharmaceutical and agrochemical products. In 2010, the United States provided technical assistance to the Ministry of Public Health in implementing a new system that significantly reduced the pharmaceutical marketing approval processing time.

The United States will continue to monitor the Dominican Republic's implementation of its IPR obligations under the CAFTA-DR.

## **OTHER BARRIERS**

Some U.S. firms and citizens have found corruption in government, including in the judiciary, to be a significant concern and a constraint to successful investment in the Dominican Republic. Administrative and judicial decision making at times appear to be inconsistent, non-transparent, and very time consuming. Successful prosecutions of corrupt individuals and a general reduction in the civil case backlog are beginning to inspire business confidence, however.

The United States and other CAFTA-DR Parties continue to confront opposition by some Dominican commercial and producer groups to full implementation of the CAFTA-DR. In particular, Dominican plastic and wire manufacturers as well as agricultural producer groups are applying political pressure to revise the CAFTA-DR to give them more protection against foreign imports.

# DEMOCRATIC REPUBLIC OF THE CONGO

## TRADE SUMMARY

The U.S. goods trade deficit with Congo was \$434 million in 2010, up \$183 million from 2009. U.S. goods exports in 2010 were \$93 million, up 17.5 percent from the previous year. Corresponding U.S. imports from Congo were \$528 million, up 59.6 percent. Congo is currently the 147th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Congo was \$21 million in 2006 (latest data available).

## IMPORT POLICIES

### Tariffs

The Democratic Republic of the Congo (DRC) is a member of the World Trade Organization (WTO), the Central African Economic Community (CEEAC), the Great Lakes Economic Community (CEPGL), the Common Market for Eastern and Southern Africa (COMESA), and the Southern African Development Community (SADC). The DRC does not participate in the COMESA or SADC free trade areas, in part due to the DRC government's strong dependency on revenues from tariffs.

The DRC has been liberalizing its import regime since the early 1990s. According to the WTO, the DRC's average applied tariff rate was 12 percent in 2008 – lower than the applied tariff level in many other central African countries. All of the DRC's tariffs are ad valorem and charged on a cost, insurance and freight (CIF) basis. The tariff structure consists of three bands: five percent for equipment goods, raw materials, agricultural and veterinary supplies and unassembled equipment; 10 percent for large consumable food items, industrial inputs, spare parts and items for social services, such as hospitals and disabled persons; and 20 percent for other finished products.

In addition to tariffs, there are a multitude of taxes collected on imported goods by several government agencies without any coordination. These additional taxes importers pay on goods and services average between 2 percent and 40 percent. Depending on the nature of the goods, the government levies a sales tax (ICA) at a rate that varies between 3 percent and 13 percent. In August 2010, DRC President Kabila signed a decree replacing the ICA with a value added tax (VAT), which will come into effect on January 1, 2012, which the government believes will bring in more revenue to the state treasury.

The principal government agencies in the DRC that collect taxes include the Customs Authority (DGDA), Industrial Incentive Fund (FPI), Office of Maritime Freight Management (OGEFREM), National Office of Transportation (ONATRA), Tax Authority (DGI), General Direction of Administrative Incomes (DGRAD) and the Import-Export control agency (OCC). Some of these agencies, such as the FPI, are not involved in customs activities.

The DGDA collects a tax on imports in the amount of 25 percent of CIF value. The OCC charges a 2 percent tax on the CIF value of all imports exceeding \$10,000 and uses a sliding scale for imports valued at less than \$10,000.



## **Customs Procedures**

Since June 2006, a French-owned company has been the DRC's authorized agent for pre-shipment inspection (PSI) of imports valued at \$2,500 or more. Firms exporting to the DRC must provide the PSI agent with an invoice containing a detailed description of the goods that will be shipped and a statement accepting inspection. Imports that arrive in country without a PSI certificate are charged 40 percent of the Free on Board (FOB) value. Other required shipment documents are a commercial invoice, packing lists, bills of lading/airway bill, import license, pro forma invoice, the U.S. shipper's export declaration, an insurance certificate, and often a certificate of origin.

To streamline customs procedures as well as improve the DRC's investment climate, in August 2010 President Kabila promulgated a new Customs Code. The new Code includes several provisions that will benefit those doing business in the DRC, such as simplified customs procedures, intellectual property rights protection, verification of goods before payment, payment facilities, established special economic areas, and a customs decision appeals process.

## **GOVERNMENT PROCUREMENT**

The DRC's public administration reforms implemented since 2002 have allowed foreign suppliers to bid on government contracts. Foreign firms may be favored in the bidding process because they have easier access to international insurance funding guarantees.

With the sponsorship and technical assistance of the World Bank, a tender board now operates under the supervision of the Ministry of Budget. In April 2010, President Kabila promulgated a new public procurement law, which according to analysts, should facilitate transparency and competitiveness among local and international companies. The World Bank provided financial and technical assistance for development of the new procurement law. It should facilitate participation in procurement by both foreigners and national suppliers.

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

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

Although the 2006 Constitution provides for protection of intellectual property rights (IPR), enforcement of IPR is weak. Pirated books, sound recordings, and visual media are readily available. Privately owned television stations in Kinshasa routinely broadcast U.S. films, apparently without securing exhibition rights from the owners. The government is also unable to prevent most pirated goods from being imported into the country, or to prevent their subsequent distribution and sale. However, the government is considering IPR-related legislation that will improve its enforcement capacity. Additionally, DRC officials have participated in several U.S. government-sponsored training programs organized by the U.S. Patent and Trademark Office.

## **INVESTMENT BARRIERS**

The DRC remains a highly challenging environment in which to do business and the DRC's expensive, slow and burdensome commercial procedures impede the country's integration into the global market trade system.

## **FOREIGN TRADE BARRIERS**

The DRC is slowly emerging from more than three decades of mismanagement, pillaging, and war. All of these factors have negatively impacted the country's physical infrastructure, which constrains the quality, operability, and security of transportation links.

In addition to underdeveloped infrastructure, inadequate contract enforcement, limited access to credit, continued instability in the eastern part of the country, lack of adequate intellectual property rights protection, and high levels of both bureaucracy and corruption continue to constrain private sector development.

Despite these impediments, there are no formal barriers to foreign investment by any private or public company in the DRC. Problems instead lie on the administrative and bureaucratic side, where laws and regulations are often ineffectively enforced. In 2007, the government launched a review of 61 mining contracts entered into prior to 2002 which the government was concerned may have been negotiated in less than transparent circumstances. The review process has itself been characterized by numerous delays and a lack of transparency, with little information provided by the government to foreign (including U.S.) investors.

The one-stop shop, or "guichet unique," was established in 2005 within the National Agency for the Promotion of Investment to simplify the process of registering a company by unifying under one roof the required procedures of various government ministries. However, the body lacks sufficient authority to approve licenses, permits and other requirements, and therefore has had limited success in expediting company registration.

## **OTHER BARRIERS**

### **Corruption**

U.S. businesses often complain about corruption in the DRC, citing it as a principal constraint to doing business. Protracted negotiations with numerous officials are mandatory in commercial matters. The government has passed laws on anticorruption and money laundering, and the DRC is a Party to the UN Anti-Corruption Convention. Nevertheless, bribery is still common in public and private business transactions, especially in the areas of government procurement, dispute settlement, and taxation. Although bribery is illegal in the DRC, enforcement of laws in this area remains a challenge.

### **Bureaucracy**

As is the case in much of the DRC's business environment, many of the country's trade barriers result from complex and poorly codified regulations, a multiplicity of overlapping administrative agencies, and a frequent lack of control by officials responsible for the regulatory environment. Enforcement of regulations varies widely across the country. Many local traders operate private networks for expediting the movement of goods.

To ensure a secure legal and judicial environment in the DRC, Parliament approved a law in December 2009 authorizing the DRC's accession to the Organization for the Harmonization of Business Law in Africa (OHADA), and President Kabila promulgated this law in February 2010. The core purpose of OHADA is to promote economic development and integration between its members, as well as to ensure a secure legal and judicial environment in Africa. The government officially launched the National OHADA Commission in April 2010, and it originally expected to sign and deposit the instrument of OHADA accession by November 2010, with the Treaty taking effect on January 1, 2011. However, as of January 19, 2011, the DRC had still not signed or deposited the instrument of OHADA accession. The reason

## **FOREIGN TRADE BARRIERS**

behind the delay is that President Kabila has required that judges be sufficiently trained in applying the OHADA law before the DRC signs and deposits the instrument of OHADA accession.

# ECUADOR

## TRADE SUMMARY

The U.S. goods trade deficit with Ecuador was \$2.0 billion in 2010, up \$668 million from 2009. U.S. goods exports in 2010 were \$5.4 billion, up 38.3 percent from the previous year. Corresponding U.S. imports from Ecuador were \$7.5 billion, up 41.3 percent. Ecuador is currently the 39th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Ecuador was \$1.3 billion in 2009 (latest data available), up from \$1.1 billion in 2008. U.S. FDI in Ecuador is led by the mining and manufacturing sectors.

## IMPORT POLICIES

On December 29, 2010, the Organic Code for Production, Trade, and Investment (Production Code) came into effect. The new Production Code is intended to stimulate local production and employment within priority economic sectors and geographic areas, while emphasizing the development of small and medium-sized enterprises. The Production Code provides incentives intended to spur local and foreign investment and to promote export expansion and diversification. It covers an array of issues, including import and export policies, customs procedures, investment, labor, and taxes. The Production Code replaces 14 laws, including the Industrial Promotion, Small Business Development, Investment Promotion, Free Zones, Trade and Investments, and Customs laws, and modifies various articles in 10 other laws. Under the Production Code, the Ecuadorian Customs Corporation will become Ecuador's National Customs Service.

The Production Code identifies various trade policy tools available to the government to address various objectives, including: guaranteeing "fundamental rights" contained within Ecuador's Constitution; implementing treaties or international agreements; preserving the environment and biodiversity; responding to unjustifiable and unilateral restrictions applied by other countries to Ecuadorian exports; correcting balance of payments imbalances; preventing illicit trafficking of drugs; avoiding shortages of essential products and controlling the prices of such products; securing supplies of raw materials for domestic producers as part of a government industrial development plan; and protecting nonrenewable natural resources and the national cultural and historic heritage. In addition, the Production Code authorizes the use of trade remedies, including anti-dumping, countervailing duty, and safeguard measures, stating that this will be in accordance with domestic law and international instruments and will ensure market transparency and efficiency and promote competition.

The Production Code also provides that the Ecuadorian government will promote exports through trade liberalization initiatives and the use of tariff preference programs and other advantages provided for under trade agreements. In addition, exporters will receive a refund of value added tax (VAT) and other taxes on local consumption and imports of inputs and raw materials for the production of exports. They will receive financial assistance in export promotion and market development as well. In addition, the Ecuadorian government will create and administer an export credit insurance agency to cover nonpayment risks for the value of exported goods. The government is expected to issue regulations implementing the Production Code by the end of March 2011.

On January 26, 2011, the Ecuadorian government announced the outlines of a plan to reduce the country's trade deficit and implement a policy of strategic import substitution, drawing on mechanisms included in

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the Production Code. Measures the government plans to employ include increased tariffs, importer registration requirements, stricter application of standards and sanitary and phytosanitary requirements, and voluntary import restrictions for various sectors.

## **Tariffs**

When Ecuador joined the WTO in January 1996, it bound most of its tariff rates at 30 percent *ad valorem* or less, except for agricultural products covered by the Andean Price Band System (APBS). In general, Ecuador applies a four-tiered tariff structure with levels of five percent for most raw materials and capital goods; 10 percent or 15 percent for intermediate goods; and 20 percent for most consumer goods. In line with efforts to promote local production in 2008 and 2009, Ecuador increased applied tariffs on 960 items, with some duties reaching the WTO bound rate, while decreasing tariffs on roughly 2,000 products, primarily raw materials and capital goods. According to the WTO, Ecuador's simple applied average tariff is 11.2 percent. For agricultural products the simple average tariff is 18.4 percent, and for non-agricultural products it is 10.1 percent.

Ecuador applies the APBS with respect to more than 150 agricultural products imported from outside the Andean Community (AC), which includes Bolivia, Colombia, Ecuador, and Peru. These products include wheat, rice, sugar, barley, white and yellow corn, soybeans, soybean meal, African palm oil, soy oil, chicken meat, pork meat, and powdered milk, as well as certain products derived from them. The APBS protects domestic industry with a variable levy by increasing tariffs when world prices fall and lowering tariffs when world prices rise.

When Ecuador became a WTO Member, it agreed to phase out its participation in the APBS, starting in January 1996, with a total phase out by December 2001. To date, no steps have been taken to phase out use of the APBS. The extent to which the APBS restricts trade varies by product. For some U.S. exports, such as wheat, barley, malt barley, and their byproducts, the price band total duty (*ad valorem* tariff plus variable levy) is usually below Ecuador's WTO bound tariff and is often zero. However, price band total duties as high as 85.5 percent and 46 percent have been applied to chicken parts and pork, respectively, restricting those imports.

In January 2009, invoking the WTO's balance of payments safeguard provisions, Ecuador imposed quantitative restrictions and a tariff surcharge on a large number of imported products, resulting in tariffs in excess of Ecuador's bound tariff rates. At the request of WTO Members, Ecuador replaced most of the quantitative restrictions with price-based measures in June 2009. Despite its commitment to remove all trade measures imposed for balance of payments purposes no later than January 22, 2010, Ecuador did not fully eliminate the safeguard measures until July 23, 2010.

Effective June 1, 2010, Ecuador instituted mixed tariffs for footwear and textile and apparel products, providing continued protection to these domestic industries, which had benefitted substantially from the balance of payments safeguard measures. Ecuador's Trade and Investment Council, COMEXI, established a mixed tariff of 10 percent *ad valorem* plus a \$6 per pair specific tariff to be applied to 28 tariff lines (at the 8-digit level) corresponding to footwear, and a mixed tariff on imported garments and linens of \$5.50 per kilo plus 10 percent *ad valorem* tariff. It is unclear whether these mixed tariffs exceed Ecuador's WTO-bound tariff rates for these products. The U.S. Government has requested information from the Ecuadorian government concerning how these tariffs are calculated, and the issue is under review in the WTO Council for Trade in Goods.

In addition, Ecuador instituted mixed tariffs of five percent *ad valorem* and specific tariffs ranging from \$39.97 to \$158.14 each for televisions sets, effective July 30, 2010. On July 26, 2010, it replaced a 15

percent *ad valorem* tariff for tires with specific tariffs of \$0.90 and \$1.20 per net kilo for automobile and bus tires, respectively. In July 2010, Ecuador eliminated tariffs for rechargeable batteries to implement energy saving and environmentally focused policies. In October 2010, it established a differentiated *ad valorem* tariff from zero percent to 35 percent for hybrid vehicles, varying by engine size.

On October 11, 2010, Ecuador imposed a safeguard measure on imports of windshields based on a determination of serious injury to the national industry due to increased imports. The safeguard measure will be applied for three years and consists of the application of a \$12.72 specific tariff on top of the current applied 15 percent *ad valorem* tariff; imports from Peru and Chile are exempted from the measure.

Ecuador's second Trade Policy Review within the World Trade Organization will be conducted in November 2011.

### **Tariff-Rate Quotas**

When Ecuador became a WTO Member in 1996, it established tariff-rate quotas (TRQs) for a number of agricultural imports. Products subject to TRQs include wheat, corn, sorghum, barley, malt, wheat and corn starch, glucose, powdered milk, rapeseed oil-cake, fresh and chilled whole turkeys, and frozen chicken parts. The Ecuadorian government's process for TRQ administration lacks transparency, and the U.S. Department of Agriculture (USDA) is currently working with the Ministry of Agriculture (MAG) to address this issue using information management systems.

### **Nontariff Measures**

Importers must register with the Ecuadorian National Customs Service (formerly the Ecuadorian Customs Corporation) to obtain an import code for all products. Although Ecuador has phased out the prior authorization requirement for most imports, it still requires prior authorization from the MAG for imports of more than 80 agricultural items originating in countries other than AC Members (COMEXI Resolution 383 of June 11, 2007). Many of these products are also protected under the APBS (*e.g.*, poultry, beef, dairy, horticultural products, corn, rice, palm oil, and soybean meal). For several types of agricultural imports, the Minister or a designee must provide prior import authorization. The MAG argues that the authorization ensures that sanitary standards and tax rules are followed, but in some instances these justifications do not appear to apply. Subsequent to a visit by MAG officials to USDA in Washington in September 2009, the MAG requested assistance in developing a more transparent and quantifiable system of prior import authorization. Through its PL-480 program, USDA has provided funding to support a MAG initiative to use information management systems for the issuance of import permits.

Another administrative hurdle for agricultural importers is the MAG's use of "Consultative Committees" for import authorizations. Import authorizations usually are subject to crop absorption programs, which were to be eliminated as part of Ecuador's WTO accession in 1996. These Committees, composed primarily of local producers, often advise the MAG against granting import authorizations for products such as corn, soybean meal, dairy products, and meats. The MAG often requires that all local production be purchased at high prices before authorizing imports.

The Ministry of Health must provide prior authorization in the form of a sanitary registration for imported and domestically produced pharmaceuticals, natural products, pesticides, and processed, canned, and packaged foods. Importers have concerns regarding the confidentiality of information they must provide on product formulas and compositions. In addition, importers report that U.S. "Certificates of Free Sale" are not accepted in lieu of sanitary registration but only as one of the many documents required for registration.

Ecuador assesses a special consumption tax (ICE) of 40 percent on imported and domestically produced spirits. However, the taxable base upon which Ecuador assesses the ICE differs for domestic and imported spirits. For domestically produced spirits, the ICE is applied to a base price that excludes all taxes, whereas the base price used to compute the ICE for imported spirits includes the import tax, or duty. In neither case is the excise tax applied to actual transaction values but rather to a base price that either is calculated according to a formula or represents an approximated reference price.

In January 2008, the ICE on a number of products, largely luxury items, was increased. The ICE increased mostly for imported products rather than those produced domestically, such as perfumes, vehicles (tiered increases by vehicle price starting at \$20,000), video games, firearms, airplanes, helicopters, boats, and cable television service.

Since 2007, the Ecuadorian Customs Corporation (now the National Customs Service) has used a risk analysis system rather than Ecuador's existing pre-shipment inspection regime for imports with f.o.b. values of more than \$4,000. Under this system, low risk importers benefit from fewer physical inspections and expedited release of their cargo. In 2007, Ecuador also changed certain customs processes and requirements in an effort to reduce costs and minimize delays for importers. However, in August 2010, the Ecuadorian Customs Corporation instituted a new policy requiring that for every shipment, importers must provide net weight figures per product lot number, rather than prorating the weight of the container by product as was previously allowed.

## **GOVERNMENT PROCUREMENT**

Foreign bidders must register and have a local legal representative in order to participate in government procurement in Ecuador. Bidding on government contracts can be cumbersome and relatively non-transparent. The lack of transparency creates opportunities for manipulation by contracting authorities.

Since 2008, Ecuador's public contracting law has required that priority be given to locally produced and supplied products and services, although foreign suppliers can compete for the contracts. Based on Article 25 of the public contracting law, INCOP (Public Contracting Institute) has established that at least 40 percent of the value of a product must be locally produced to qualify for this preference. The law also created a National Institute of Public Contracting to oversee the transparency and timeliness of the contracting process. In addition, the law eliminated the requirement for contract awardees to obtain approval from the Attorney General and the Controller prior to being awarded a government contract. Bidders are required to register and submit bids for government contracts through an online system (<http://www.compraspublicas.gov.ec>), which the Ecuadorian government expects will improve transparency.

As a general rule, all public institutions are subject to the public contracting law. However, the same law establishes exceptions, including special regimes pursuant to norms set by the President (Article 2); international agreements for the purchase of goods and services (Article 43); exploration and exploitation of hydrocarbons; emergency situations (Article 57); and national security contracts.

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

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

Ecuador was listed on the Watch List in the 2010 Special 301 Report. Ecuador continued to make progress, as cited in the report, by reducing its backlog of applications to register trademarks and for patent

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adjudication. However, key concerns remain, including: weak enforcement of intellectual property rights; lack of effective protection against unfair commercial use of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products; and lack of an effective system to prevent the issuance of marketing approvals for unauthorized copies of patented pharmaceutical products. Although Ecuador has established special IPR units that conduct investigations and execute seizures of pirated and counterfeit products, overall IPR enforcement in Ecuador remains seriously inadequate, resulting in high piracy levels in the software, publishing, recording, and film industries.

In 2009, President Correa signed two presidential decrees establishing a compulsory license policy for patented pharmaceutical products and agricultural chemical products. On April 14, 2010, Ecuador's Intellectual Property Institute (IEPI) granted a compulsory license for a patented drug used in the treatment of HIV/AIDS that is manufactured by a U.S. company. The Ecuadorian company awarded the license has used it to win a government tender to supply imported copies of the patented drug. Two other compulsory license petitions for the same drug were submitted to IEPI; the first petition was never completed, and IEPI is reviewing the other petition, which was filed by the state pharmaceutical company Enfarma. To date, no other compulsory license petitions have been filed with IEPI for either patented pharmaceutical or agricultural chemical products.

## **SERVICES BARRIERS**

### **Telecommunications**

In the area of basic telecommunications, Ecuador has only undertaken WTO commitments for domestic cellular services. Accordingly, it does not have market access or national treatment obligations for other domestic and international telecommunications services, such as fixed-line voice telephony and data transmission services. In addition, Ecuador has not committed to adhere to the pro-competitive regulatory commitments of the WTO Reference Paper.

## **INVESTMENT BARRIERS**

Ecuador's investment climate has become increasingly uncertain as the government's economic policies continue to evolve with implementation of the country's 2008 Constitution. While Ecuador is still relatively open to foreign investment in most sectors, new laws and regulations limit to some extent private sector participation in sectors deemed "strategic," most notably in extractive industries. In addition, inconsistent application and interpretation of its investment laws negatively impacts the transparency and stability of Ecuador's investment regime. This legal complexity increases the risks and costs of doing business in Ecuador.

Ecuador's framework for investment protection is still in flux. In July 2009, Ecuador notified the World Bank's International Centre for Settlement of Investment Disputes (ICSID) that it was withdrawing from the convention establishing the international arbitration center. Ecuador's withdrawal from ICSID became effective January 7, 2010.

In September 2009, the Ecuadorian government requested approval from the country's National Assembly to terminate 13 bilateral investment treaties (BITs), including its BIT with the United States, arguing that they were unconstitutional. On November 24, 2010, Ecuador's Constitutional Court ruled that provisions within Ecuador's BIT with the United States were unconstitutional due to a conflict with Article 422 of the 2008 Constitution. In its ruling, the Court stated that Article 422 of Ecuador's Constitution prohibited the State from concluding treaties or international instruments in which Ecuador would cede sovereign jurisdiction to international arbitration tribunals in commercial disputes between the State and private

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investors and concluded that the BIT with the United States constituted such an instrument. The Constitutional Court has delivered similar rulings on 12 of the 13 BITs under review. Based on the Constitutional Court's rulings, Ecuador's National Assembly has so far approved termination of three of the BITs, not including the BIT with the United States. The Ecuadorian government has not yet officially terminated any of the investment treaties.

Certain sectors of Ecuador's economy are reserved for the State, while equity caps apply in other sectors, such as a 49 percent cap on foreign investment in domestic fishing operations and a 25 percent limit with respect to broadcast stations. Petroleum exploration and development is reserved for the State, but foreign investment can be conducted through contracts with the State. In the past, a number of disputes have arisen related to these contracts and to the laws regulating petroleum exploration and development generally. The Ecuadorian government is currently pursuing a policy that requires all contracts in extractive industries to be in the form of service, or "for fee," contracts, rather than production sharing agreements. On November 23, 2010, the Ecuadorian government completed negotiations with major foreign oil companies to transition from production sharing to service contracts. Negotiations were not successfully concluded with several of the companies; the Ecuadorian government has indicated that it will take over ownership of these operations and pay compensation to the affected companies.

# EGYPT

## TRADE SUMMARY

The U.S. goods trade surplus with Egypt was \$4.6 billion in 2010, an increase of \$1.4 billion from 2009. U.S. goods exports in 2010 were \$6.8 billion, up 30.1 percent from the previous year. Corresponding U.S. imports from Egypt were \$2.2 billion, up 8.3 percent. Egypt is currently the 33rd largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Egypt was \$9.8 billion in 2009 (latest data available), up from \$8.4 billion in 2008.

## IMPORT POLICIES

In recent years, the government of Egypt has gradually liberalized its trade regime and economic policies, although the reform process has been somewhat halting. The government has adopted a wide range of reform measures. However, a number of challenges to opening Egypt's markets remain, including a need to reduce corruption, reform the cumbersome bureaucracy, implement a fully transparent regulatory regime, and eliminate non-science based health, sanitary/phytosanitary and safety standards.

### Tariffs

As part of the government's stimulus package in February 2009, Presidential Decree 51/2009 amended the customs tariff schedule for 255 additional items, lowering or eliminating tariffs on some raw materials and capital and intermediate goods such as inputs for spun and woven products.

The liberalizing reforms undertaken by the government of Egypt in the past six years have reduced the overall weighted tariff average from 14.6 percent to 5.5 percent. Tariffs on the vast majority of goods entering Egypt are below 15 percent. Vehicles, alcohol, and tobacco are the only items on which tariffs are still 40 percent or higher. Tariffs on passenger cars with engines under 1,600cc are taxed at 40 percent; cars with engines over 1,600cc are at 135 percent. In addition, cars with engines over 2,000cc are subject to an additional escalating sales tax of up to 45 percent. All clothing also faces a relatively high tariff, although the rate was reduced from 40 percent to 30 percent in 2007.

Tariffs on most U.S. agricultural product exports to Egypt are five percent or lower; however, a number of processed and high value food products, including poultry meat, face tariff rates ranging from 20 percent to 30 percent.

There is a 300 percent duty on alcoholic beverages for use in the tourism sector, including for hotels, plus a 40 percent sales tax. The general tariff for alcoholic beverages ranges from 1200 percent on beer to 1800 percent on wine to 3000 percent on sparkling wine and spirits.

Foreign movies are subject to duties and import taxes amounting to 46 percent and are subject to sales taxes and box offices taxes higher than those for domestic films.

### Customs Procedures

In 2004, the Ministry of Finance committed to a comprehensive reform of Egypt's customs administration and is reorganizing the Customs Authority to meet international standards. Modern customs centers are

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being established at major ports to test new procedures, such as risk management, and new information technology systems are being implemented to facilitate communications among ports and airports. These systems were to become fully operational in 2009, but were delayed, and their status at this point is unclear.

The Ministry of Finance in August 2008 finalized a draft of a new customs law to streamline procedures and facilitate trade, but the proposed legislation has yet to be submitted to parliament for consideration. Its status at this point is unclear.

### **Import Bans and Barriers**

Passenger vehicles may only be imported into Egypt by their original owners, and the owner must have purchased the car within the first 12 months of its production for it to be eligible for importation. Vitamins and food supplements can only be marketed in Egypt by domestic companies that manufacture them under license or prepare and pack imported ingredients and pre-mixes according to Ministry of Health and Population (MOHP) specifications. Only domestic factories are allowed to produce food supplements and to import raw materials used in the manufacturing process.

The National Nutrition Institute or the Drug Planning and Policy Center of the MOHP register and approve all nutritional supplements, specialty foods, and dietary foods. The definition of specialty foods is very broad and includes processed foods with labels claiming “high in” or “enriched with” vitamins or minerals. The government attempts to complete the approval process in six weeks to eight weeks, but some products face waiting periods of 4 months to 12 months for approval.

Importers must apply for a license for dietary products and renew the license every 1-5 years depending on the product, at a cost of approximately \$1,000. However, if a similar local dietary product is available in the local market, registration for an imported product is sometimes not approved.

The MOHP must approve the importation of new, used, and refurbished medical equipment and supplies to Egypt. This requirement does not differentiate between the most complex computer-based imaging equipment and basic supplies. The MOHP approval process entails a number of demanding steps. Importers must submit a form requesting the MOHP’s approval to import, provide a safety certificate issued by health authorities in the country of origin, and submit a certificate of approval from the U.S. Food and Drug Administration or the European Bureau of Standards. The importer must also present an original certificate from the manufacturer indicating the production year of the equipment and certifying that new equipment is new. All medical equipment must be tested in the country of origin and proven safe. The importer must prove it has a service center to provide after-sales support for the imported medical equipment, including spare parts and technical maintenance.

### **GOVERNMENT PROCUREMENT**

A 1998 law regulating government procurement requires that technical factors, along with price, be considered in awarding contracts. A preference is granted to parastatal companies whose bids are within 15 percent of the price of other bids. In the 2004 Small and Medium-Sized Enterprises (SMEs) Development Law, Egyptian SMEs were given the right to supply 10 percent of the goods and services in every government procurement.

Egyptian law grants potential suppliers certain rights, such as speedy return of their bid bonds and an explanation of why a competing supplier was awarded a contract. However, concerns about a lack of

transparency remain. For example, the Prime Minister retains the authority to determine the terms, conditions, and rules for procurement by specific entities.

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

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

Egypt remained on the Watch List in the 2010 Special 301 Report. Egypt undertook positive efforts, including acceding to various international IPR treaties, such as the Patent Cooperation Treaty, the Madrid Protocol, and the Nice Classification Agreement. Egypt also increased enforcement actions and conducted successful public awareness and training campaigns in 2010, including several operations that resulted in the seizure of large amounts of counterfeit goods. However, piracy and counterfeiting were noted in the Special 301 Report as continuing to be serious problems. Online music piracy has increased, and book and entertainment software piracy remain a concern. The United States continues to urge the Ministry of Health to clarify its commitment to take steps to protect undisclosed test or other data generated to obtain marketing approvals for pharmaceutical products against unfair commercial use and unauthorized disclosure. The United States also continues to seek clarification of the Ministry of Health's commitment to provide an effective system to address patent infringement concerns expeditiously in connection with applications to market pharmaceutical products.

## **SERVICES BARRIERS**

Egypt restricts foreign equity in construction and transport services to 49 percent. In the computer services sector, larger contributions of foreign equity may be permitted, if it is in the national interest. Egypt limits the employment of non-nationals to 10 percent of an enterprise's general workforce, although the Ministry of Manpower and Migration can waive this limitation. In computer-related industries, Egypt requires that 60 percent of top level management must be Egyptian within three years of the start-up date of the venture. According to Egyptian labor law, foreigners cannot be employed as tourist guides.

### **Banking**

No foreign bank seeking to establish a new bank in Egypt has been able to obtain a license in the past 20 years, and in November 2009, the Central Bank Governor reaffirmed that no new banks would be given licenses.

Since banking reform began in 2004, the government has divested itself from many joint venture banks and privatized the government-owned Bank of Alexandria in 2006. However, efforts to restructure the remaining three state-owned banks have been mixed, and the Central Bank rejected privatization of the three banks in 2009 on the grounds that market conditions were not right. The three remaining state owned banks still control at least 40 percent of the banking sector's total assets. The banking reforms of the past six years have succeeded in significantly reducing the share of non-performing loans.

In 2010, in reaction to high meat and poultry prices, the Central Bank relaxed a requirement of 100 percent foreign exchange cover for Letters of Credit issued for the purchase of agricultural and food products, reducing the requirement to 50 percent.

### **Telecommunications**

The state-owned telephone company, Telecom Egypt, continues to hold a *de facto* monopoly on the fixed line network. Despite Egypt's WTO commitments to issue additional licenses, the National

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Telecommunications Regulatory Authority (NTRA) postponed a plan to issue a second license in mid-2008, citing a lack of interest by potential applicants. In its WTO commitments, Egypt reserved for itself the right to condition market entry on an "economic needs test"(ENT) but agreed to decide if the ENT needed to be continued after 2005, subject to consultations between Egypt and WTO Members taking into consideration the progress of the Council on Trade in Services on ENTs. It is unclear whether as a policy matter Egypt continues to apply an ENT when examining license applications. One trade association has complained that Egypt only allows its incumbent operator to provide voice over internet protocol technology. In 2010, the NTRA issued two new licenses for "triple play" services of data, voice, and video to consumers, but these licenses apply only for the provision of such services to newly-constructed gated housing compounds. The mobile phone sector is highly competitive. Three private companies – Etisalat, Mobinil, and Vodafone Egypt– serve the market, though Telecom Egypt holds a minority stake in Vodafone Egypt.

### **Transportation**

The United States - Egypt Air Transport Agreement remains very restrictive and limits the flexibility of airlines to take advantage of commercial opportunities and respond to market conditions. Furthermore, the agreement has no provisions on charter services. Some ad hoc charter flights, however, are conducted to and from Cairo with the explicit approval of the national carrier, Egypt Air. The United States remains interested in replacing the restrictive 1964 agreement with an Open Skies air services agreement.

### **Courier and Express Delivery Services**

Private courier and express delivery service suppliers seeking to operate in Egypt must receive special authorization from the Egyptian National Postal Organization (ENPO). In addition, although express delivery services constitute a separate for-profit, premium delivery market, private express operators are required to pay ENPO a "postal agency fee" of 10 percent of annual revenue on shipments under 20 kilograms. In 2010, ENPO imposed an additional fee on private couriers and express delivery services of £E 5 (\$0.87) on all shipments under 5 kilograms.

## **OTHER BARRIERS**

### **Pharmaceutical Price Controls**

In 2009, the Ministry of Health and Population issued Decree 373 to replace Egypt's "cost-plus" system of pharmaceutical pricing with a new system that would set the price of brand-name drugs in Egypt 10 percent lower than the lowest international sale price for the drug. The decree also sets the price ceiling for generic drugs at 60 percent to 70 percent of the amount of the brand-name drug, which is higher than the average sale price for generics in Egypt. The decree, however, was prevented from taking effect by an April 2010 ruling by the Administrative Court. The Ministry of Health and Population has appealed and the Supreme Administrative Court is expected to rule on the case soon.

# EL SALVADOR

## TRADE SUMMARY

The U.S. goods trade surplus with El Salvador was \$226 million in 2010, an increase of \$29 million from 2009. U.S. goods exports in 2010 were \$2.4 billion, up 20.8 percent from the previous year. Corresponding U.S. imports from El Salvador were \$2.2 billion, up 21.5 percent. El Salvador is currently the 53rd largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in El Salvador was \$3.5 billion in 2009 (latest data available), up from \$3.3 billion in 2008.

## IMPORT POLICIES

### Free Trade Agreement

On August 5, 2004, the United States signed the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR or Agreement) with five Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua) and the Dominican Republic (the Parties). Under the Agreement, the Parties are significantly liberalizing trade in goods and services. The CAFTA-DR also includes important disciplines relating to: customs administration and trade facilitation; technical barriers to trade; government procurement; investment; telecommunications; electronic commerce; intellectual property rights; transparency; and labor and environmental protection.

The Agreement entered into force for the United States, El Salvador, Guatemala, Honduras, and Nicaragua in 2006 and for the Dominican Republic in 2007. The CAFTA-DR entered into force for Costa Rica on January 1, 2009.

In 2008, the Parties implemented amendments to several textile-related provisions of the CAFTA-DR, including, in particular, changing the rules of origin to require the use of U.S. or regional pocket bag fabric in originating apparel. The Parties also implemented a reciprocal textile inputs sourcing rule with Mexico. Under this rule, Mexico provides duty-free treatment on certain apparel goods produced in a Central American country or the Dominican Republic with U.S. inputs, and the United States provides reciprocal duty-free treatment under the CAFTA-DR on certain apparel goods produced in a Central American country or the Dominican Republic with Mexican inputs. These changes further strengthen and integrate regional textile and apparel manufacturing and create new economic opportunities in the United States and the region.

In February 2011, the CAFTA-DR Free Trade Commission (FTC), the central oversight body for the agreement, met for the first time in San Salvador, El Salvador. The FTC reviewed the implementation of the agreement and its trade and economic impact on the region and agreed to certain changes to strengthen the agreement's operation. The FTC discussed a broad range of ways to enhance competitiveness in the region and endorsed several initiatives to generate new opportunities for all of the countries to realize the benefits of the CAFTA-DR Agreement, with a heightened focus on small- and medium-sized businesses.

### Tariffs

As a member of the Central American Common Market, El Salvador applies a harmonized external tariff on most items at a maximum of 15 percent with some exceptions.

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However, under the CAFTA-DR, 100 percent of U.S. industrial trade will enter El Salvador duty-free by 2015. Nearly all textile and apparel goods that meet the Agreement's rules of origin now enter El Salvador duty-free and quota-free, creating economic opportunities for U.S. and regional fiber, yarn, fabric, and apparel manufacturing companies.

Under the CAFTA-DR, more than half of U.S. agricultural exports now enter El Salvador duty-free. El Salvador will eliminate its remaining tariffs on nearly all agricultural products by 2020 (2023 for rice and chicken leg quarters and 2025 for dairy products). For certain agricultural products, tariff-rate quotas (TRQs) will permit some immediate duty-free access for specified quantities during the tariff phase out period, with the duty-free amount expanding during that period. El Salvador will liberalize trade in white corn through expansion of a TRQ, rather than by tariff reductions.

### **Nontariff Measures**

Under the CAFTA-DR, El Salvador committed to improve transparency and efficiency in administering customs procedures, including the CAFTA-DR rules of origin. El Salvador also committed to ensuring greater procedural certainty and fairness in the administration of these procedures, and all the CAFTA-DR countries agreed to share information to combat illegal transshipment of goods. In addition, El Salvador has negotiated agreements with express delivery companies to allow for faster handling of their packages, but the Salvadoran customs administration and U.S. express delivery companies disagree on whether the agreements have been implemented. In particular, U.S. express delivery companies have raised concerns regarding customs clearance delays, acceptance of electronic documents, and the submission of a single manifest covering all goods contained in an express delivery shipment.

In 2009 and again in 2010, El Salvador amended its law regulating the production and sale of alcoholic beverages. The amendments applied an eight percent *ad valorem* tax on domestic products and imports. The amendments also adjusted taxes on alcoholic beverages which are ostensibly based on percentage of alcohol by volume. This tax structure applies a lower rate per percentage of alcohol on alcoholic beverages that are typically produced locally or imported from other Central American countries (*e.g.*, *aguardiente*) than on alcoholic beverages that are imported from non-Central American countries (*e.g.*, whiskey and gin). The U.S. Government has raised concerns with the new legislation with the government of El Salvador and continues to work with that government in an effort to address those concerns.

### **GOVERNMENT PROCUREMENT**

The CAFTA-DR requires that procuring entities use fair and transparent procurement procedures, including advance notice of purchases and timely and effective bid review procedures, for procurements covered by the Agreement. Under the CAFTA-DR, U.S. suppliers are permitted to bid on procurements of most El Salvador government entities, including key ministries and state-owned enterprises, on the same basis as Salvadoran suppliers. The anticorruption provisions in the Agreement require each government to ensure under its domestic law that bribery in matters affecting trade and investment, including in government procurement, is treated as a criminal offense or is subject to comparable penalties.

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

### **EXPORT SUBSIDIES**

El Salvador provides a 6 percent tax rebate on exports shipped outside Central America if the goods have undergone a transformation process that adds at least 30 percent to the original value. In 2010, the

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government announced plans to phase out the rebate in 2011 after the implementation of a new exports support strategy. Firms operating in free trade zones enjoy a 10 year exemption from income tax as well as duty-free privileges.

Under the CAFTA-DR, El Salvador may not adopt new duty waivers or expand existing duty waivers that are conditioned on the fulfillment of a performance requirement (*e.g.*, the export of a given level or percentage of goods). However, under the CAFTA-DR, El Salvador was permitted to maintain such measures through 2009, provided that it maintained the measures in accordance with its obligations under the WTO Agreement on Subsidies and Countervailing Measures. The U.S. Government is working with the government of El Salvador in an effort to ensure it implements its CAFTA-DR obligations.

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

To implement its CAFTA-DR IPR obligations, El Salvador undertook legislative reforms providing for stronger IPR protection and enforcement. Despite these efforts, the piracy of optical media, both music and video, in El Salvador remains a concern. In addition, the business software industry continues to report very high piracy rates for El Salvador. Optical media imported from the United States into El Salvador are being used as duplication masters for unauthorized copies of copyrighted works. The United States has expressed concern to the Salvadoran government about inadequate enforcement of cable broadcast rights and the competitive disadvantage it places on legitimate providers of this service. The United States will continue to monitor El Salvador's implementation of its IPR obligations under the CAFTA-DR.

## **SERVICES BARRIERS**

Under the CAFTA-DR, El Salvador granted U.S. services suppliers substantial access to its services market, including financial services. El Salvador maintains a few barriers to services trade, however: Foreign investors are limited to 49 percent of equity ownership in free reception television and AM/FM radio broadcasting, and notaries must be Salvadoran citizens.

Since July 2008, El Salvador has imposed a \$0.04 per minute tax on international telephone calls that terminate in El Salvador. U.S. telecommunications operators have raised concerns that the increased cost of terminating calls into El Salvador will result in an increase in long distance rates, which will negatively impact U.S. consumers. Until recently, some telephone traffic from Central American countries was exempt due to an existing regional telecommunications agreement, an additional cause for concern. The exemption has now been removed.

## **INVESTMENT BARRIERS**

There are few formal investment barriers in El Salvador, except as noted in the services section above. However, the United States has expressed concerns regarding the impact of duplicative regulations and seemingly arbitrary regulatory decision making processes - such barriers have affected sectors including energy, mining, and retail sales.

## **OTHER BARRIERS**

Some U.S. firms and citizens have found corruption in government, including in the judiciary, to be a significant concern and a constraint to successful investment in El Salvador. Administrative and judicial decision-making appear at times to be inconsistent, non-transparent, and very time consuming.

## **FOREIGN TRADE BARRIERS**



Bureaucratic requirements, such as certification of imported food products, have at times been excessive and unnecessarily complex.

# ETHIOPIA

## TRADE SUMMARY

The U.S. goods trade surplus with Ethiopia was \$637 million in 2010, an increase of \$483 million from 2009. U.S. goods exports in 2010 were \$765 million, up 186.5 percent from the previous year. Corresponding U.S. imports from Ethiopia were \$127 million, down 12.8 percent. Ethiopia is currently the 81st largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Ethiopia was \$2 million in 2009 (latest data available), unchanged from \$2 million in 2008.

## IMPORT POLICIES

Ethiopia is not a Member of the World Trade Organization (WTO), but is in the process of acceding to the WTO. Ethiopia has made progress in drafting new legislation and implementing capacity building measures relevant to WTO membership with the help of technical assistance from a number of donors, including the United States. Ethiopia is a member of the Common Market for Eastern and Southern Africa (COMESA), but does not participate in COMESA's free trade area.

### Tariffs

According to the WTO, Ethiopia's average applied tariff rate was 17.3 percent in 2009. Revenue generation, not protection of local industry, appears to be the primary purpose of Ethiopia's tariffs. Goods imported from COMESA members are granted a 10 percent tariff preference. *Ad valorem* tariffs range from zero percent to 35 percent, with a simple average of 16.8 percent. In February 2007, the government levied a 10 percent surtax on selected imported goods, with the proceeds designated for distribution of subsidized wheat in urban areas due to high food inflation. This surtax is still in place even though inflation rates have been in single digits for over a year. In July 2008, the Ethiopian government introduced an export tariff of up to 150 percent on raw and semi-processed hides and skins in an effort to shift domestic production to higher-value finished leather, hides, and skins. In October 2010, the Ethiopian government applied high export tariffs on raw cotton in order to force more locally-produced cotton into the burgeoning domestic textile industry. High import tariffs are primarily applied to luxury goods such as vehicles.

### Foreign Exchange Controls

Importers face difficulty in obtaining foreign exchange, particularly those importing goods or inputs destined for domestic sales. Ethiopia's central bank (National Bank of Ethiopia) administers a strict foreign currency control regime and has a monopoly on all foreign currency transactions. Ethiopia's currency (birr) is not freely convertible. While larger firms, state-owned enterprises, and enterprises owned by the ruling party have not typically faced major problems obtaining foreign exchange, less well connected importers, particularly smaller, new-to-market firms, face burdensome delays in arranging trade related payments. An importer must apply for an import permit and obtain a letter of credit for the total value of the imports before an order can be placed. Additionally, an importer must provide a clearance certificate from the National Bank of Ethiopia to obtain an import permit.

The acute shortage in Ethiopia's foreign exchange market has stalled overall business in both the private and public sectors. Whereas firms seeking bank letters of credit for imports requiring hard currency previously could acquire them upon demand and with an initial 30 percent deposit, such requests now routinely face waits in excess of three months and require 100 percent payment. The limited supply of foreign exchange in Ethiopia's banks has continued to impact U.S. commercial interests negatively as companies have had difficulty importing essential manufacturing inputs, spare parts, consumer goods, and capital goods from abroad. The repatriation of profits is allowed, but companies may face delays in this process.

## **GOVERNMENT PROCUREMENT**

A significant portion of Ethiopian import transactions are conducted through government tenders. The tender announcements are usually made public to all interested potential bidders, regardless of the nationality of the supplier or the origin of the products or services. Bureaucratic procedures and delays in the decision-making process sometimes impede foreign participation in tenders. U.S. firms have complained about the abrupt cancellation of some tenders, a perceived favoritism toward Chinese suppliers, and a general lack of transparency in the procurement system. Business associations have complained that state-owned and ruling party-owned enterprises have enjoyed *de facto* advantages over private firms in the government procurement process. In 2009, the Ethiopian government created a central procurement agency within the finance ministry in an effort to streamline the procurement process.

As a non-member of the WTO, Ethiopia is not a signatory to the WTO Agreement on Government Procurement.

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

Although Ethiopia has enacted laws regarding copyright and related rights, plant varieties, and trademarks, the Ethiopian Intellectual Property Office (EIPO), which is responsible for all those areas, focuses mainly on protecting Ethiopian copyrighted materials software. EIPO has taken virtually no action to confiscate pirated foreign works in Ethiopia, or to impede the sale of pirated goods. Trademark infringement of major international brands appears to be widespread in Ethiopia.

## **SERVICES BARRIERS**

The state-run Ethiopian Telecommunications Corporation (now known as Ethio Telecom or ET) maintains a monopoly on telecommunications and Internet service and is closed to private investment. An August 2005 directive allows private companies to provide Internet service through the government's infrastructure, but implementing regulations have never been promulgated and ET maintains a *de facto* monopoly on Internet services. In November 2010, France Telecom assumed 50 percent of ET's management operations under a two-year management contract.

## **INVESTMENT BARRIERS**

The banking, insurance, and micro-credit industries are reserved for domestic investors, and access to local finance is limited due to government-imposed lending limits on Ethiopian banks. Other areas of investment reserved exclusively for Ethiopian nationals include broadcasting, domestic passenger air transport services, and forwarding/shipping agency services. Foreign investors are also barred from investing in a wide range of small retail and wholesale enterprises. All land in Ethiopia belongs to the state; there is no private land ownership. Land may be leased from local and regional authorities for up to 99 years. Farm investors have reported land disputes with regional government officials and local

## **FOREIGN TRADE BARRIERS**

residents in various regions. Investment in the defense industry is permitted only in partnership with the Ethiopian government.

## **OTHER BARRIERS**

### **Parastatal and Party-affiliated Companies**

Ethiopian and foreign investors have made general complaints about *de facto* preferences shown to businesses owned by the government or associates of the ruling party, for example, in the form of preferential access to bank credit, foreign exchange, land, procurement contracts, and duty-free imports.

### **Judiciary**

Businesses in Ethiopia assert that its judicial system remains inadequately staffed, inexperienced, and strongly influenced by government officials, particularly with respect to commercial disputes. While property and contractual rights are recognized, and there are commercial and bankruptcy laws, judges often lack an understanding of commercial matters, and scheduling of cases often suffers from extended delays. The Ethiopian government has recently created a separate court to handle commercial disputes in an effort to increase judicial knowledge of these matters and speed up case processing time. There is no guarantee that an award of an international arbitral tribunal will be fully accepted and implemented by Ethiopian authorities. Ethiopia has signed, but never ratified, the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).



# EUROPEAN UNION

## TRADE SUMMARY

The U.S. goods trade deficit with the European Union was \$79.8 billion in 2010, up \$18.6 billion from 2009. U.S. goods exports in 2010 were \$239.8 billion, up 8.7 percent from the previous year. Corresponding U.S. imports from the European Union were \$319.6 billion, up 13.4 percent. European Union countries, together, would rank as the second largest export market for the United States in 2009.

U.S. exports of private commercial services (*i.e.*, excluding military and government) to the European Union were \$171.8 billion in 2009 (latest data available), and U.S. imports were \$121.4 billion. Sales of services in the European Union by majority U.S.-owned affiliates were \$561.4 billion in 2008 (latest data available), while sales of services in the United States by majority European Union-owned firms were \$390.5 billion.

The stock of U.S. foreign direct investment (FDI) in the European Union was \$1.7 trillion in 2009 (latest data available), up from \$1.6 trillion in 2008. U.S. FDI in the European Union is primarily concentrated in the nonbank holding companies, finance/insurance, and manufacturing sectors.

## OVERVIEW

The United States and the European Union (EU) share the largest and most complex economic relationship in the world. The enormous volume of trade and investment is a key pillar of prosperity both in the United States and Europe.

Despite the generally positive character of the U.S.-EU trade and investment relationship, U.S. exporters and investors in some sectors face chronic barriers to entering, maintaining, or expanding their presence in the EU market. Some of the most significant barriers – which have persisted despite repeated efforts to resolve them through bilateral consultations or WTO dispute settlement procedures – have been highlighted in this report for many years. Many are highlighted again in this year's NTE report.

## MARKET ACCESS FOR NON-AGRICULTURAL PRODUCTS

### WTO Information Technology Agreement

In September 2010, the WTO Dispute Settlement Body (DSB) adopted the final report of the panel considering the U.S. claim that the EU violated its tariff commitments under the WTO Information Technology Agreement (ITA) by imposing duties as high as 14 percent on flat panel computer monitors, multifunction printers, and certain cable, satellite, and other set-top boxes. For all three products at issue, the panel concluded that the EU tariffs were inconsistent with its obligations. The United States and EU agreed to a period of nine months and nine days for the EU to comply with the recommendations and rulings of the DSB, ending on June 30, 2011. With EU compliance, the United States expects that U.S. producers of high-tech products will continue to be able to export those products to Europe duty-free, as required under the ITA.

### Pharmaceutical Products

The U.S. pharmaceutical industry has expressed concerns regarding some EU and Member State policies affecting market access for pharmaceutical products, including procedural non-transparency and a lack of

## FOREIGN TRADE BARRIERS

meaningful stakeholder input into policies related to pricing and reimbursement. The United States is following with interest European deliberations on steps to increase the availability of pharmaceutical product information to consumers, as a means of promoting consumer awareness and access to medicines. The United States continues to engage with the EU and individual Member States on these matters. In recent years, the U.S. pharmaceutical industry has raised concerns about pharmaceutical market access and government pricing and reimbursement systems in Austria, Belgium, the Czech Republic, Finland, France, Germany, Hungary, Lithuania, the Netherlands, Poland, Portugal, Spain, and the United Kingdom. Additional detail on some of these countries follows.

### ***Member State Measures***

*Belgium:* U.S. pharmaceutical companies have expressed concern about the lack of adequate transparency in the development and implementation of government cost-containment measures in Belgium. The United States has encouraged the government of Belgium to ensure that policies affecting the pharmaceutical industry are developed and implemented in a transparent manner and that industry is afforded meaningful opportunities to engage with the relevant authorities to address their concerns and to ensure the continuing development of their already significant investment in the Belgian market.

*Czech Republic:* U.S. pharmaceutical companies have expressed concern about the Czech Republic's system for determining pricing and reimbursement levels for pharmaceutical products. The United States has encouraged the Czech government to review its current pricing and reimbursement system to ensure that it does not unfairly limit the access of innovative pharmaceutical products to the Czech market.

*Germany:* U.S. pharmaceutical companies have raised concerns about Germany's 2010 drug pricing reform, including limitations on reimbursement prices and mandatory discounts. The industry is also concerned about certain structural reforms, such as a brief period for assessing whether new products offer additional benefits compared to existing drugs. Over the past year, industry has continued to raise concerns about transparency and a lack of adequate consultation with affected stakeholders in the legislative process. Industry has called for the government to convene a broader stakeholder dialogue on issues such as pricing, regulation, and research and innovation. The United States has encouraged the German government to expand and intensify its dialogue with the pharmaceutical industry, to ensure meaningful opportunities for affected stakeholders to address their concerns with relevant authorities.

*Hungary:* Pharmaceutical manufacturers have expressed concern about Hungary's volume and pricing restrictions, high sector-specific taxes, and delays in reimbursement approvals. The United States has encouraged the Hungarian government to review its pricing and reimbursement system to ensure that affected stakeholders have adequate opportunities to engage with relevant authorities to address their concerns.

*Poland:* U.S. pharmaceutical companies have expressed concerns about the lack of adequate transparency and of meaningful engagement in the development and implementation of government cost containment measures affecting reimbursement and pricing policies in Poland. The United States has encouraged the government of Poland to ensure that policies affecting the pharmaceutical industry are developed and implemented in a transparent manner and that industry is given opportunities to address their concerns and to ensure the continuing development of their already significant investment in the Polish market.

*Portugal:* The U.S. pharmaceutical industry is concerned about a lack of transparency in the development and implementation of government cost-containment measures. Industry representatives also report that they do not have adequate opportunities to engage with the relevant authorities to address their concerns prior to the adoption of policies that affect their ability to participate in the market.

## **Uranium**

The United States is concerned that EU policies may unjustifiably restrict the import into the EU of enriched uranium, the material from which nuclear power reactor fuel is fabricated. Since 1992, the EU has maintained strict quantitative restrictions on imports of enriched uranium. Since 1994, these restrictions have been applied in accordance with the terms of the Corfu Declaration, a joint European Council and European Commission policy statement that has never been made public or notified to the WTO. The Corfu Declaration appears to limit the acquisition of non-EU sources of supply of enriched uranium, imposing explicit quotas on imports of enriched uranium. The EU's Euratom Supply Agency continues to pursue a policy that appears to favor two European enrichers. The United States has raised concerns about the justification for the import quotas and the nontransparent nature of the Corfu Declaration and its application. The United States will closely monitor whether EU agreements under negotiation with Russia in the nuclear area alter EU application of the Declaration.

## **MARKET ACCESS FOR AGRICULTURAL AND FOOD PRODUCTS**

### **Bananas**

In December 2009, the United States and the EU initialed an agreement designed to lead to a settlement of the longstanding dispute over the EU's discriminatory bananas trading regime. In the agreement, the EU agreed not to reintroduce measures that discriminate among foreign bananas distributors and to maintain a non-discriminatory, tariff-only regime for the importation of bananas. The U.S.-EU agreement complements a parallel agreement – the Geneva Agreement on Trade in Bananas (GATB) – between the EU and several Latin American banana-supplying countries, which provides for staged EU tariff cuts to bring the EU into compliance with its WTO obligations. The United States and the Latin American countries signed their respective agreements with the EU in June 2010.

The agreements mark the beginning of a process that – when completed – will culminate with the settling of the various banana disputes and claims against the EU in the WTO. Once the Parties to these agreements conclude their domestic ratification procedures, the agreements will enter into force, at which point the EU will need to request formal WTO certification of its new tariffs on bananas. The GATB provides that once the certification process is concluded, the EU and the Latin American signatories to the GATB will settle their disputes and claims. Once that has occurred, the United States also will settle its dispute with the EU.

### **Husked Rice Agreement**

The United States has ongoing concerns regarding the operation of the U.S.-EU husked rice agreement, which has been in effect since 2005. Discussions on this subject with the European Commission have focused on the annual increase in the import reference volume and the longer-term operation of the tariff adjustment mechanism set out in the agreement. The United States has sought a significant increase in the import reference quantity in the husked rice agreement. The longer-term U.S. objective is to obtain consistent market access for U.S. brown rice at a tariff well below the bound tariff – the tariff rate that generally cannot be exceeded under WTO rules – of 65 Euros per ton.

### **Meursing Table Tariff Codes**

Many processed food products – such as confectionary products, baked goods, and miscellaneous food preparations – are subject to a special tariff code system in the EU. Under this system, often referred to as the Meursing table, the EU charges a tariff on each imported product based on the product's content of

## **FOREIGN TRADE BARRIERS**



milk protein, milk fat, starch, and sugar. As a result, products that the United States and other countries might consider equivalent for tariff classification purposes sometimes receive different rates of duty in the EU depending on the particular mix of ingredients in each product. The difficulty in calculating Meursing duties imposes an unnecessary administrative burden on – and creates uncertainty for – exporters, especially those seeking to ship new products to the EU.

## **EU Enlargement**

In December 2006, the United States entered into negotiations with the EU – within the framework of the GATT 1994 provisions relating to the expansion of customs unions – regarding compensation for certain tariff increases related to Romania and Bulgaria’s EU accession on January 1, 2007. Upon accession to the EU, Romania and Bulgaria were required to change their tariff schedules to conform to the EU’s common external tariff schedule, which resulted in increased tariffs on the importation of certain products, mainly agricultural products. Under GATT Articles XXIV:6 and XXVIII, the United States is entitled to compensation from the EU to offset these tariff increases. In 2011, the United States will continue to seek conclusion of an appropriate bilateral compensation agreement with the EU and to ensure that the agreement is implemented as soon as possible.

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

The EU and its Member States generally provide strong protection for intellectual property rights (IPR). However, U.S. industry has concerns regarding the implementation of key provisions of EU IPR directives and overall IPR protection in some Member States.

In recent years, the European Commission issued communications on strengthening the criminal law framework to combat intellectual property infringement and undertook a renewed effort to introduce an EU-wide patent regime. Despite the fact that patent filing costs have decreased in the EU, patent filing and maintenance fees in the EU and its Member States remain significantly higher than in other countries, including the United States.

The United States continues to have concerns about the EU’s system for the protection of Geographical Indications (GIs), which raises issues of national treatment and adversely impacts trademarks and widely accepted generic terms for food products. The EU adopted its current GI regulation for food products, Council Regulation (EC) 510/06, in response to findings by the WTO Dispute Settlement Body that the EU GI system impermissibly discriminated against non-EU products and persons. The Dispute Settlement Body also agreed with the United States that the EU could not create broad exceptions to trademark rights guaranteed by the TRIPS Agreement. The United States continues to have some concerns about this amended regulation, and intends to monitor carefully current initiatives to modify it. These concerns extend equally to Council Regulation (EC) 479/08, which relates to wines, and to Commission Regulation (EC) 607/09, which relates, *inter alia*, to GIs and traditional terms of wine sector products, whose implementation the United States is also carefully monitoring.

With respect to the impact of GIs on generic terms, the United States, along with several other interested WTO Members, was given the opportunity to provide input into a number of recently proposed GIs that threatened to undercut the general use of certain generic terms. The resulting approvals, issued in fall 2010, appear to contain provisions intended to preserve the general use of those terms. The United States will monitor how these GIs are enforced and whether, in fact, the generic terms are preserved. Certain other recently proposed GIs may also provide relevant information on the possible negative impact of EU GIs on generic terms.

The EU and its Member States were active participants in the Anti-Counterfeiting Trade Agreement (ACTA) negotiations, which concluded in November 2010. When it enters into force, ACTA will establish an international framework that will assist Parties in their efforts to effectively combat the infringement of intellectual property rights, in particular the proliferation of counterfeiting and piracy, which undermines legitimate trade and the sustainable development of the world economy.

### ***Member State Measures***

The United States continues to have concerns about IPR protection and enforcement in several Member States. The United States actively engages with the relevant authorities in these countries and will continue to monitor the adequacy and effectiveness of IPR protection and enforcement, including through the annual Special 301 review process.

*Austria:* U.S. copyright holders report that while legal protections are strong in principle, procedural roadblocks prevent copyright holders from blocking online access to pirated works and prevent effective prosecution.

*Bulgaria:* U.S. industry reports growing IPR concerns, particularly with respect to increased Internet piracy; inefficient cooperation between Bulgarian IPR officials and the private sector; delays and conflicts of interest in enforcing patent protection; and difficulties obtaining information from ISPs in Bulgaria to combat piracy on the Internet.

*Czech Republic:* The Czech Republic made significant progress in increasing enforcement in the approximately 50 open air markets that line the Czech borders with Germany and Austria and was removed from the Special 301 Watch List in April 2010. Despite this progress, industry remains concerned about the sustainability of these enforcement efforts. Industry is also concerned that the IPR penalties that have been imposed are not sufficient to deter violations.

*Finland:* Finland was included in the Watch List in the 2010 Special 301 Report. The key concern cited in the report was the lack of product patent protection for certain pharmaceutical products and a regulatory framework that denied adequate protection for some process patents filed before 1995, and those that were pending in 1996. Affected products include many of the top-selling U.S. pharmaceutical products currently on the Finnish market.

*Greece:* Greece was included in the Watch List in the 2010 Special 301 Report. The United States acknowledges some improvements in IPR enforcement in Greece, including actions taken against Internet piracy. However, inadequate IPR protection continues to pose barriers to U.S. exports and investment. Key issues cited in the 2010 report include weak and inconsistent IPR enforcement and a failure to follow through on initiatives begun in 2008 and 2009, including effective implementation of the National Action Plan on IPR.

*Italy:* Italy was included in the Watch List in the 2010 Special 301 Report. The United States welcomes signs of the government's renewed commitment to tackling IPR issues, especially with respect to Internet piracy, including by ratifying the WIPO Internet Treaties along with the other EU Member States. Other problems related to IPR protection and enforcement continue to represent barriers to U.S. exports and investment, however. Key concerns cited in the 2010 report include continued widespread copyright piracy and trademark counterfeiting, growing online piracy of books and journals, the lack of an expeditious legal mechanism for right holders to address piracy on the Internet, and the imposition of sentences that are inadequate to deter IPR violations.

*Latvia:* The United States is encouraged by amendments to Latvia's intellectual property criminal statutes, which will simplify certain aspects of infringement cases and which may result in more successful prosecutions of IPR violations. Latvia hosts a number of file-sharing websites, however, and while the national police and prosecutors have made efforts to take down these sites, they are hampered by a lack of resources, severe backlogs in police forensics labs, and high legal barriers to prosecution. A U.S. software company has also reported that the government of Latvia has permitted significant unauthorized use of its software products in government offices. The United States has engaged the government of Latvia on this issue, stressing the need to include full software licensing in ministry budgets.

*Poland:* Poland was removed from the Watch List in the 2010 Special 301 Report. This was in large part due to Poland's implementation of its national IPR action plan for 2008-2010, which provided for increased enforcement efforts in German border markets where pirated and counterfeit goods have long been sold with impunity. In 2010, Polish authorities began taking random samples at optical disc manufacturing plants to determine whether violations of intellectual property rights were occurring. Piracy of movies, music, and software on the Internet continues, but there has been progress on enforcement. Rights holders continue to have concerns, however, as penalties for IPR infringement still are not being imposed at levels sufficient to deter violations. The government reports that, to address these concerns, it will implement a new national IPR action plan in 2011, including a nationwide standard platform for enforcing intellectual property laws with an emphasis on equipping prosecutors and judges to better enforce against crimes on the Internet.

*Portugal:* Although Portugal regularly conducts inspections at fairs, markets, and festivals, which resulted in the seizure of illegal goods in 2008 worth an estimated 6 million Euros, it does not have strong mechanisms to prevent piracy on the Internet. Legal cases involving IPR often take years to resolve, however, and rarely lead to a conviction. Courts rarely order injunctions stopping the activity in question while a case is pending.

*Romania:* Romania was included in the Watch List in the 2010 Special 301 Report. The United States welcomes positive steps taken in 2009, including increased cooperation between enforcement authorities, such as the National Police and General Prosecutor's Office, the use of a national database to improve interagency coordination on enforcement, coordination with rights holders on enforcement matters, and further positive efforts aimed at ensuring the government's use of licensed software. Deficiencies in IPR protection and enforcement continue to pose barriers to U.S. exports and investment, however. Key concerns cited in the 2010 report include weaknesses in the prosecution of IPR infringers, judicial inefficiency, and a failure to impose deterrent sentences for IPR violations.

*Spain:* Spain was included in the Watch List in the 2010 Special 301 Report. The key concerns cited in the report include significant piracy on the Internet, the failure of the existing legal and regulatory framework to promote cooperation between ISPs and right-holders to reduce online piracy, the Spanish government's weak efforts to change the widespread misperception that the use of peer-to-peer file sharing systems to share copyright infringing materials is legal, and the general failure of Spain's legal system to apply criminal penalties for criminal intellectual property infringement.

In early 2011, after a year of deliberations, Spain enacted legislation that established an administrative mechanism for taking down infringing Internet websites and content. Late amendments to the legislation introduced potentially time-consuming judicial review procedures that could limit the new mechanism's effectiveness in preventing the circulation of infringing digital materials. The United States will carefully monitor the implementation of this legislation in 2011.

*Sweden:* Sweden continues to grapple with widespread piracy on the Internet, but government enforcement efforts have begun to show positive results. Following the entry into force in April 2009 of legislation implementing the EU Enforcement Directive, several major pirate websites left Sweden. Nonetheless, Sweden still hosts some of the largest on-line pirate sites in the world. These were listed in USTR's publication, *Notorious Piracy Markets*, issued on February 28 and posted on the USTR website at <http://www.ustr.gov/about-us/press-office/press-releases/2011/february/ustr-announces-results-special-301-review-notorio>.

## **SERVICES BARRIERS**

### **Telecommunications**

The WTO commitments of EU Member States covering telecommunications services and the EU's Common Regulatory Framework for Electronic Communications Networks and Services (Framework Directive) have encouraged liberalization and competition in the European telecommunications sector. All EU Member States made WTO commitments to provide market access and national treatment for voice telephony and data services. The Framework Directive imposed additional liberalization and harmonization requirements on Member States, and the Commission has acted against Member States that were not implementing the Framework Directive. Implementation of these requirements has been uneven across Member States, however, and significant problems remain in many markets, including with the provisioning and pricing of unbundled local loops, line-sharing, co-location, and the provisioning of leased lines.

Enforcement of existing telecommunications legislation by national regulatory authorities (NRAs) has been characterized by unnecessarily lengthy and cumbersome procedures in France, Italy, and Austria, among others. The European Commission has also found that incumbent telecommunications providers in Germany, Greece, Spain, Italy, Ireland, Austria, Finland, and Sweden have slowed the development of competition by systematically appealing their national regulators' decisions. The major EU telecommunications reform package adopted in December 2009, however, was designed to resolve many of these issues. One of its innovations was the establishment of the Body of European Regulators of Electronic Communications, which is intended to help ensure fair competition and more consistency in the regulation of telecoms markets within the EU by strengthening the Commission's oversight of national regulators. The new rules are supposed to be transposed into the national laws of the 27 Member States by May 2011.

In August 2010 the EU outlined its overall strategy for a flourishing European digital economy by 2020. This European Digital Agenda will be followed up by legislative proposals, which are likely to impact U.S. companies providing telecommunication and broadband services and online content in Europe.

### ***Member State Measures***

*Austria:* Austria continues to move toward a more open and competitive telecommunications market and has implemented the relevant EU directives. Legal reforms effective as of October 2010 anchored the independence of Austria's telecoms regulators. The Austrian NRA carries out market reviews and imposes remedies where necessary. Despite these recent improvements, the NRA is not pro-active in imposing and implementing proposed remedies and decisions. The incumbent telecommunications provider, Telekom Austria, offers fixed-line networks, mobile telephony, and Internet access, including broadband, and is the market leader in all of these areas.

The Austrian mobile market is highly competitive, in contrast to the more concentrated fixed-line market. Retail rates for mobile communications have continued to decrease, but the NRA has reported a steady increase in consumer complaints. The market share of fixed broadband lines held by operators other than Telekom Austria continues to fall because of Telekom Austria's ability to offer bundled services. Price pressure on the wholesale broadband access market is very intense, with alternative operators losing market share. On next generation access (NGA), the NRA has adopted technology-based market definitions that exclude some NGA networks from regulation.

*Finland:* Incumbent Finnish mobile network operators have appealed the determinations of the Finnish NRA that these operators maintain "significant market power" (the basis for price regulation of these operators by the NRA). Appeals in several recent cases have taken as long as three years to five years, which underscores the regulatory uncertainty that foreign network operators currently face.

*Germany:* Germany has made further progress in introducing competition to some sectors of its telecommunications market. However, competitors continue to report difficulties competing with the partially state-owned incumbent, Deutsche Telekom AG (DT), which retains a dominant position in a number of key market segments, including local loop and broadband connections. On the positive side, the passage of the Telecommunications Act in 2003, as well as subsequent amendments, increased competition in the German market, enabling competitors to gain more than 21 percent of the fixed-line telecommunications market (excluding cable and VoIP) and about 41 percent of broadband connections delivered over copper phone lines (i.e. excluding cable and fiber-optic broadband).

In 2006, the German government amended the Telecommunications Act to boost customer protection rules, requiring more transparent pricing and billing, and to introduce liability limitations for service providers. The amended Telecommunications Act includes a provision (paragraph 9a) to authorize the regulatory agency to grant "regulatory holidays" for services in new markets. Competitors repeatedly expressed concerns that DT should not obtain a regulatory holiday with respect to the fiber optic network it is installing in order to provide triple-play services (bundled digital telephone, television, and Internet services). The United States raised concerns on this issue with the German government. The European Commission initiated infringement proceedings immediately after this provision of the amended Act entered into force, and in December 2009 the European Court of Justice ruled that paragraph 9a of the Telecommunications Act infringes European law. Ultimately, the government did not apply paragraph 9a and announced that it will abolish the provision in the upcoming reform of the Telecommunications Act, which will implement the December 2009 EU telecoms package.

One trade association has complained that telecommunications carriers that compete with DT continue to experience long delays in obtaining access to, and use of, wholesale Internet protocol (IP) bit stream access, a service DT is required to offer to competitors. Although DT's reference interconnection offer for this service has been approved by the German federal regulatory agency, Die Bundesnetzagentur, and some contracts have been signed between DT and competitive carriers, there continue to be technical problems in actually obtaining the services, a situation that hampers the ability of competitors to compete in the German market. Competitors also claim that IP Multicast services are currently being offered by DT to its customers, but that DT has failed to include this in its reference interconnection offer. Additionally, competitors complain that DT continues to impede competition by not granting competitors sufficient access to DT's customer information system, which would be necessary to achieve a smooth transfer in the event a DT customer wants to switch to a DT competitor.

*Italy:* Telecom Italia (TI) is the largest telecommunications operator in Italy. Domestic political pressure has prevented foreign operators (e.g., AT&T in 2007) from gaining a controlling interest in this operator. TI owns most of Italy's fixed-line telecommunications infrastructure, and competitors have complained

about the high costs of access and of allegedly unfair practices aimed at retaining customers. In 2009, TI established an independent supervisory board aimed at ensuring equal access to the country's fixed-line infrastructure. In addition, the Italian antitrust authority fined TI twice in 2009 for unfair practices aimed at retaining customers. The fines were reduced following action by TI.

Although TI has expressed interest in upgrading its current broadband infrastructure, it has also voiced concern that the main beneficiaries of TI investment in broadband would be businesses selling goods and services online – in particular, large American companies.

### **Television Broadcasting and Audiovisual Services**

The 2007 EU Directive on Audiovisual Media Services (AVMS) amended and extended the scope of the Television without Frontiers Directive (which already covered traditional broadcasting, whether delivered by terrestrial, cable or satellite means) to also cover audiovisual media services provided on-demand, including via the Internet. European content quotas for broadcasting remain in place. On-demand services are subject to somewhat less restrictive provisions than traditional broadcasting under the AVMS Directive, which does not set any strict content quota, but still requires Member States to ensure that on-demand services encourage production of, and access to, European works. This could be interpreted to refer to the financial contribution made by such services to the production and rights acquisition of European works or to the prominence of European works in the catalogues of video-on-demand services. EU Member States had to transpose the AVMS Directive into their national law by December 19, 2009, but only three countries (Belgium, Romania and Slovakia) had notified the Commission of full implementation by that date. In October 2010 the Commission deemed that 11 Member States had still not adequately implemented all the rules. Cyprus, Estonia, Greece, Finland, Hungary, Lithuania, Luxemburg, Latvia, Poland, Portugal, and Slovenia were therefore requested to update, without delay, their national broadcasting rules. Should they fail to comply the Commission can refer them to the European Court of Justice.

#### ***Member State Measures***

Several EU Member States maintain measures that hinder the free flow of some programming or film exhibitions. A summary of some of the more significant restrictive national practices follows.

*France:* France continues to apply the EU Broadcast Directive in a restrictive manner. France's implementing legislation, which was approved by the European Commission in 1992, requires that 60 percent of programming be European, of which 40 percent must be French. These requirements exceed those of the Broadcast Directive. Moreover, these quotas apply to both the regular and prime time programming slots, and the definition of prime time differs from network to network. The prime time restrictions pose a significant barrier to U.S. programs in the French market. In addition, radio broadcast quotas that have been in effect since 1996 specify that 40 percent of songs on almost all French private and public radio stations must be Francophone.

In addition to the broadcasting quotas, cinemas must reserve five weeks per quarter for the exhibition of French feature films and this is reduced to four weeks per quarter for theaters that include a French short-subject film during six weeks of the preceding quarter. Operators of multiplexes may not screen any one film with more than two prints, or through staggered and interlocking projection techniques, in such a way as to account for more than 30 percent of the multiplex's weekly shows. Theatrically released feature films are not allowed to advertise on television.

*Italy:* In March 2010, Italy approved Broadcasting Law DL 44, which implements EU regulations. This law provides for reserving 50 percent of the programming time (excluding sports, news, game shows, and advertisements) for EU works. Ten percent of transmissions (and 20 percent for state broadcaster RAI) must be reserved for EU works produced during the preceding five years. Within this quota, 20 percent of the time must be reserved for Italian movies.

Broadcasting Law DL 44 also sets limitations on advertising collection by pay and non-pay TV channels, including SKY Italia, a pay-television subsidiary of News Corporation. Some critics maintain that the government has tried to hinder SKY Italia's growth in Italy, such as by delaying its access to digital transmission, in order to protect the market share of Italian domestic competitors.

*Spain:* For every three days that a film from a non-EU country is screened – in its original language or dubbed into one of Spain's languages – one EU film must be shown. This ratio is reduced to four to one if the cinema screens a film in an official language of Spain and keeps showing the film in that language throughout the day. In addition, broadcasters and providers of other audiovisual media services must annually invest five percent of their revenues in the production of European and Spanish films and audiovisual programs. In June 2010, the legislature of the Catalonia region passed a law requiring distributors to dub or subtitle into Catalán one half of the copies of any film dubbed into Spanish and distributed in Catalonia. The law unfairly burdens the creators and distributors of U.S. films, given that dubbing and subtitling requirement does not apply to Spanish-made films and that certain EU-origin films have been exempted.

### **Postal and other Delivery Services**

In February 2008, the EU formally adopted Directive 2008/06/EC, which established the end of 2010 as the deadline for achieving the full opening of postal service markets in EU Member States. Eleven Member States (Cyprus, Czech Republic, Greece, Hungary, Latvia, Lithuania, Luxembourg, Malta, Poland, Romania, and Slovakia) were permitted to delay the opening of their postal markets until 2013. In some Member States, certain regulatory measures continue to raise concerns.

#### ***Member State Measures***

*Germany:* By the end of 2007, Germany had abolished all entry hurdles to the domestic mail and postal services market, becoming one of the first EU Member States to end its postal monopoly. Deutsche Post AG (DPAG) has remained the dominant player since the postal market was opened, but it is no longer the only supplier of standard letter mail below 50 grams. Two significant barriers to entry that adversely affected competition were dismantled in 2010. After the European Court of Justice found in April 2009 that VAT exemption for DPAG conferred an unfair advantage, the European Commission initiated infringement procedures against Germany. In response, the German government amended the VAT exemption in early 2010, and business and bulk mail became subject to VAT in July. VAT exemptions now only apply to services used by individual consumers, such as over-the-counter parcels.

In January 2010, the German Federal Administrative Court ruled that the minimum wage in the postal sector, which was imposed by the government in 2007, was no longer valid. Competitors praised the decision, as the minimum wage had seemingly been set at a level that DPAG had negotiated with the German multi-service trade union, ver.di, and competitors claimed they were not able to participate in the wage-setting process.

## **Legal Services**

Austria, Cyprus, Greece, Hungary, Lithuania, Malta, and Slovakia require EU nationality for full admission to the Bar, which is necessary for the practice of EU and Member State law. Belgium and Finland require EU nationality for legal representation services.

### ***Member State Measures***

*Belgium:* U.S. nationals may practice foreign law in Belgium provided they are associated with qualified members of the Belgian bar. The Belgian Judicial Code provides that only Belgian or EU lawyers can be fully admitted to the bar. An exception exists for foreign non-EU lawyers who meet certain requirements.

*Bulgaria:* The July 2010 amendments to the Bulgarian Bar Act allow law firms registered in the EU to practice in Bulgaria under their original name after they register with the local bar association. Foreign lawyers registered in another EU Member State are also allowed to practice law or register a local office in partnership with other foreign or local lawyers. However, at least one of the partners has to be registered both in Bulgaria and in another EU Member State if the local partnership is to use an internationally-recognized name.

*Czech Republic:* U.S.-educated lawyers may register with the Czech Bar and take an equivalency exam, but they are limited to practicing home country (U.S.) law and international law. In contrast to EU-based law firms, U.S. law firms cannot establish Czech branches to practice law (i.e., operate directly through their home legal entities). Attorneys from U.S. law firms admitted as foreign lawyers, together with Czech lawyers, may establish local partnerships.

*Finland:* Citizens of countries outside the European Economic Area (EEA) can practice domestic and international law and represent clients in court, but they are not entitled to the title of Asianajaja (Attorney at Law). Only a Finn or an EEA citizen who meets certain requirements may be accepted as an Asianajaja. In addition to conferring prestige, the Asianajaja designation helps in the solicitation of clients, because Asianajaja may be held accountable for their actions by the Board of the Bar Association and by the Chancellor of Justice, while other lawyers and legal advisers are not subject to such oversight.

*Hungary:* U.S. lawyers may provide legal services only under a “cooperation agreement” in partnership with a Hungarian legal firm.

*Portugal:* Portuguese law requires that practicing lawyers be members of the Portuguese Bar Association. The Portuguese Bar Association requires that members graduate from a Portuguese or Brazilian law school and that foreign lawyers be citizens of the EU or a country with a reciprocal agreement permitting foreign lawyers to be bar certified.

*Slovakia:* Slovak law requires lawyers holding credentials from, and law firms registered in, non-EU countries to register with the Slovak Bar Association to practice home country and international law in Slovakia. In the past several years, however, no U.S. attorneys have been able to register. The United States is concerned that the Slovak Bar has consistently tried to limit foreign lawyers’ ability to practice law in Slovakia.

## **Accounting and Auditing Services**

*Greece:* A 1997 presidential decree established a method for fixing minimum fees for audits, established restrictions on the use of different types of personnel in audits, and prohibited auditing firms from doing



multiple tasks for a client, thus raising the cost of audit work. While the restrictions in the 1997 Decree apply equally to Greek and foreign accountants, the restrictions are especially burdensome for U.S. and other foreign accounting firms, because they make it difficult for those firms to take full advantage of the capabilities of their staffs and the diversity of their practice areas. This sector is one of several “closed sectors” in Greece that the government is planning to reform.

*Portugal:* Portuguese law requires that practicing accountants and auditors be accredited by one of two Portuguese accounting associations, which both require EU citizenship as a prerequisite for membership.

### **Financial Services**

*Poland:* Foreign financial service suppliers have requested that Poland treat a grouping of independent legal persons as a single taxable person (*i.e.*, VAT grouping), as allowed by the EU VAT Directive. VAT grouping is already employed by the United Kingdom, the Netherlands, Ireland, Germany, Austria, Denmark, Finland, Sweden, Romania, Spain, Belgium, Hungary, and the Czech Republic. VAT grouping would allow financial service providers to recover VAT charges that they incur when making intra-company payments for supplies, including labor costs. As of 2010, Poland has no mechanism for VAT grouping.

### **Energy Services**

*Cyprus:* The ownership of the Public Company for Natural Gas (PCNG) is currently split between the government of Cyprus and the semi-governmental Electricity Authority of Cyprus (EAC) (56 percent to 44 percent, respectively). In the future, to open the market to newcomers, it will be possible for private investors to take a five percent stake in the government’s share of PCNG. On October 13, 2009, the Ministerial Board of the government appointed the PCNG Board of Directors. Its chair, until recently, was the Energy Regulator for the Cyprus Energy Regulatory Authority and previously was the General Manager of the EAC. The PCNG has a monopoly over the purchase, importation, processing, and sale of natural gas through a land-based LNG terminal in the Vasilikos area of Cyprus. The EAC’s participation in PCNG reinforces its dominant position in the energy sector. The EAC’s effective control over natural gas prices and power distribution could adversely affect foreign power suppliers.

### **EU Enlargement**

The EU has submitted three notifications to WTO Members concerning the modification of existing commitments under the GATS by newly acceded members of the EU. In accordance with GATS Article XXI, the EU was required to enter into negotiations with any other WTO member that indicated that it was affected by the modification of existing commitments. The United States and EU successfully negotiated a compensation package, which was agreed on August 7, 2006. To date, however, the European Commission has failed to secure the approval of all EU Member States, which is necessary to implement the agreement.

### **INVESTMENT BARRIERS**

The EU requires national treatment for foreign investors in most sectors and, with few exceptions, EU law requires that any company established under the laws of one Member State must receive national treatment in all other Member States, regardless of the company’s ultimate ownership. As discussed below, however, EU law does impose some restrictions on U.S. and other foreign investments and, in many instances, individual Member State policies and practices have had a more significant impact on U.S. investment than EU-level policies.

### **FOREIGN TRADE BARRIERS**

Prior to the adoption of the Lisbon Treaty in December 2009, the European Commission shared competence with Member States on investment issues. Member States negotiated their own bilateral investment treaties (BITs) and generally retained responsibility for their investment regimes, while the EU negotiated investment provisions in EU economic agreements. Article 207 of the Lisbon Treaty brings foreign direct investment (FDI) under the umbrella of Europe's common commercial policy, making it the exclusive competence of the EU. FDI is not defined in the Treaty, however, leaving many practical implications of the Treaty for EU external investment policy unclear.

In July 2010, the Commission issued two communications aimed at defining a comprehensive EU international investment policy and establishing transitional arrangements for bilateral investment agreements between Member States and third countries. Under these communications, which were presented to the European Parliament and EU Member State governments for endorsement under the co-decision process, the more than 1200 Bilateral Investment Treaties concluded by Member States, including with the United States, will remain valid under international law. The existence of these treaties, however, may raise questions of compatibility with EU law and with the common commercial policy, in particular.

The communications provide that the Commission will review the existing Member States BITs. If the Commission finds clauses that are incompatible with EU law (e.g. transfer clauses that would hamper the implementation of EU financial restrictions against a certain third country), it will ask the Member State to renegotiate such clauses. If this proves impossible, the authorization to maintain the treaty may be withdrawn as a matter of last resort. The United States will monitor the impact of this process on U.S. BITs with the Member States.

### ***Member State Measures***

*Bulgaria:* Local companies in which foreign partners have controlling interests may be asked to provide additional information or meet mandatory requirements in order to engage in certain licensed activities, including production and export of arms and ammunition; banking and insurance; and exploration, development, and exploitation of natural resources. The insolvency rules in Bulgaria's Commercial Code and 2007 changes to its Law on Public Offering of Securities have greatly improved legislative protection for minority shareholders, but enforcement of the law's provisions is inadequate and corporate governance remains weak.

*Cyprus:* Cypriot law imposes significant restrictions on the foreign ownership of real property. Non-EU residents may purchase a single piece of real estate (not to exceed three donums, or roughly one acre) for private use, e.g., a holiday home. Exceptions can be made for projects requiring larger plots of land, but they are rarely granted. Cyprus also restricts ownership of local electronic mass media companies (e.g., television and radio stations, but not print media) to a maximum of 25 percent for EU investors and just five percent for non-EU investors. Under the Registration and Control of Contractors Laws of 2001 and 2004, only citizens of EU Member States have the right to register as construction contractors in Cyprus, and non-EU entities are not allowed to own a majority stake in a local construction company. Non-EU natural persons or legal entities may bid on specific construction projects, but only after obtaining a special license from the Cypriot Council of Ministers.

*Czech Republic:* Prior to 2009, foreigners were permitted under the Czech Foreign Exchange Act to acquire non-agricultural or non-forested property if they registered businesses with the Commercial Register of the Czech Republic. The act was amended in May 2009 to remove the restrictions on the purchase of non-agricultural real estate by foreigners. Restrictions on foreigners purchasing agricultural

and forest lands still apply, although the government has announced plans to eliminate this restriction in 2011.

*France:* There are generally few pre-screening or prior approval requirements for non-EU foreign investment in France. Pursuant to a November 2004 law that streamlined the French Monetary and Financial Code, however, the State Council was directed to define a number of sensitive sectors in which prior approval would be required before acquisition of a controlling equity stake. A December 2005 government decree (Decree 2005-1739 of 30 December 2005) lists 11 business sectors in which the French government has the right to monitor and restrict foreign ownership through a system of “prior authorization.”

The government of France has expressed concern that sovereign wealth funds could buy up “strategic” companies, whose stock prices fell steeply in the wake of the financial crisis. Near the end of 2008, President Sarkozy announced the establishment of a “strategic investment fund,” to assume stakes in companies with “key technologies.” This fund would be run as a “strategic priority” by the Caisse des Depots et Consignations, a state-sponsored financial institution and France’s largest institutional investor, under parliamentary supervision. The French government has also asked the Caisse de Depots et Consignations to work as a domestic buffer against foreign takeovers by increasing its stake in French companies.

The Financial Market Authority (AMF) modified disclosure requirements for corporate takeovers in July 2009. In most cases, the new rules lower the shareholding threshold at which potential acquirers have to make a mandatory tender offer. New AMF regulations add two new thresholds of 15 percent and 25 percent of shares or voting rights to the existing 33 percent threshold. The financial and banking regulatory reform passed in October 2010 replaced the 33 percent threshold by a 30 percent threshold. Tender offer thresholds of 50 percent and 95 percent of shares or voting rights for companies listed on Alternext, the new unregulated market created in 2005, remained unchanged. The AMF regulations took effect on August 1, 2009, while the new 30 percent threshold has yet to be implemented. The Finance Ministry becomes involved in mergers and acquisitions when the government uses its “golden share” in state-owned firms to protect national interests (currently Thales and GDF-Suez only).

*Germany:* In November 2008, the European Commission formally asked Germany to modify the 1960 law privatizing Volkswagen following a European Court of Justice ruling of October 23, 2007 (C-112/05). The Court found that three provisions of the law (automatic representation of public authorities on the board; a 20 percent voting cap; and a 20 percent blocking minority) grant unjustified special rights to German public authorities (i.e., the Land of Lower Saxony and potentially also the German federal government) and that, by maintaining them in force, Germany is in breach of EU Treaty rules on the free movement of capital. An amended law, which still does not modify the 20 percent blocking minority, entered into force in December 2008. A Commission review of possible renewed infringement action is still in progress.

*Greece:* Prospective non-EU investors in Greece’s mining, maritime, air transport, broadcast, and banking sectors are required to obtain licenses and other approvals that are not required of Greek or other EU investors. For example, non-EU investors in the mining industry need special approval from the Greek cabinet for the use and exploitation of mines. Foreigners seeking to purchase land in border areas and on certain islands also need an additional approval from the Ministry of Defense. Greek authorities consider local content and export performance criteria when evaluating applications for tax and investment incentives, although such criteria are not prerequisites for approving investments.

In November 2008, the European Commission sent Greece a formal “reasoned opinion” request to eliminate the restrictions on investment in strategic companies introduced by Greek Law 3631 of 2008. The law in question establishes: (1) an *ex ante* authorization system, under which the acquisition of voting rights by shareholders other than the State is limited to 20 percent, unless prior approval has been granted by the Inter-ministerial Privatization Committee; and (2) an *ex post* approval system, under which certain important corporate decisions, as well as certain decisions concerning specific management matters, need the approval of the Minister for Regional Development and Competitiveness (formerly the Minister of Economy and Finance.) The Commission argues that both authorization systems are disproportionate measures and the restrictions introduced by the law represent unjustified obstacles to EU rules on the free movement of capital and freedom of establishment. The European Commission and Greece are still negotiating a solution to this issue.

A new development bill introduced by the government of Greece in December 2010 provides incentives for investment. The development bill complements another “fast-track” bill, which is aimed at providing rapid approval for investment projects valued at more than 200 billion Euros. While both bills purportedly eliminate bureaucratic barriers to investments, it is not yet clear whether they will eliminate the specific barriers cited above.

*Lithuania:* U.S. citizens and foreign investors report difficulties in obtaining and renewing residency permits. U.S. citizens can stay in Lithuania no more than 90 days without a visa, and no more than 180 days during a single calendar year, with those who stay longer facing fines and deportation. In principle, Lithuanian embassies abroad are able to initiate the application process for residency permits, but in practice, U.S. citizens only are able to begin the residency permit process upon arrival in Lithuania. Decisions by the Migration Office regarding the issuance of residency permits can take up to six months. Non-Lithuanians are generally not able to buy agricultural or forestry land. As part of its EU accession agreement, the Lithuanian government was obligated to eliminate this restriction by 2011. Early in 2010, however, the government started negotiating with the EU on postponing the removal of the restriction until 2013.

*Portugal:* The Portuguese government maintains special stock, commonly called “golden shares,” in partially state-owned companies Portugal Telecom (PT), Galp Energia, and Energias de Portugal (EDP). These special stakes give the government privileges and veto powers on certain strategic decisions. On June 30, 2010, the Portuguese government blocked the sale of PT’s stake in Brazilian mobile phone carrier Vivo by invoking its veto powers, claiming that Vivo was a strategic asset. The government’s action led to a July 2010 decision by the European Court of Justice (ECJ) declaring the government’s special ownership rights in violation of EU law. Despite ongoing ECJ reviews regarding the legality of ownership rights in Galp Energia and EDP, the government has not terminated its “golden shares” in any of the three companies.

*Romania:* Uncertainty and a lack of predictability in the legal and regulatory systems pose a continuing impediment to foreign investors in Romania. Tax laws change frequently, and many companies experience long delays in receiving VAT refunds to which they are legally entitled. Deadlines for government processing and payment of refunds as stipulated by law are often not respected. Companies reported frequent instances in which the government issued new legal decrees or regulations affecting the business climate without following required public transparency and consultation procedures. Tort cases often require lengthy, expensive procedures and judicial rulings are reportedly often inconsistent.

## GOVERNMENT PROCUREMENT

The EU is a party to the WTO Agreement on Government Procurement (GPA), which it implements through the Public Procurement Directive (2004/18). EU Member States also must comply with the EU's obligations under the GPA.

The EU does not cover all of its government procurement under the GPA. U.S. suppliers participate in EU government procurement tenders, but the lack of statistics makes it difficult to accurately assess the level of U.S. and non-EU participation.

In 2004, the EU adopted a revised Utilities Directive (2004/17), covering purchases in the water, transportation, energy, and postal services sectors. This directive requires open, competitive bidding procedures, but discriminates against bids with less than 50 percent EU content that are not covered by an international or reciprocal bilateral agreement. The EU content requirement applies to U.S. suppliers of goods and services in the following sectors: water (production, transport, and distribution of drinking water); energy (gas and heat); urban transport (urban railway, automated systems, tramway, bus, trolley bus, and cable); and postal services.

### *Member State Measures*

*Austria:* U.S. firms continue to report a strong pro-EU bias in government contract awards. U.S. industry asserts that invitations for bids for the Austrian government's vehicle fleet are tailored for German competitors. Additionally, offset requirements can reach up to 200 percent of the value of the contract for major defense purchases. In 2009, the Austrian Government raised the ceiling for non-competitive tenders from 40,000 Euros (\$52,000) to 100,000 Euros (\$130,000). Although Austria's power utilities are majority-government owned, under a European Commission ruling (2008/585/EC), they are exempted from having to issue public tenders for power-generation projects.

*Czech Republic:* U.S. and other foreign companies continue to express concern over the lack of transparency in the public procurement process. Widespread use of bearer shares among Czech and some foreign firms competing for government contracts creates opportunities for conflict of interest, and there is evidence that some winning firms may be owned by government officials. By law, acquisition of non-EU foreign defense materials requires a Czech intermediary, increasing costs and reducing transparency.

*France:* The French government continues to maintain shares in several major defense contractors (EADS 15.06 percent, Safran 30.20 percent, and Thalès 26.51 percent as of December 2010). It is generally difficult for non-European firms to participate in the French defense market and, even where the competition is among European suppliers, French companies are often selected as prime contractors.

*Greece:* Greece imposes onerous qualification requirements on companies seeking to bid on public procurement tenders. Companies must submit documentation from competent authorities indicating that they have paid taxes, have not been in bankruptcy, and have paid in full their social security obligations for their employees. All managing directors and board members of companies that want to participate in procurements must submit certifications from competent authorities that they have not engaged in fraud, money laundering, criminal activity, or similar activities. It is difficult for U.S. firms to comply with these requirements because there are no competent authorities in the United States that issue these types of certifications.

The U.S. Embassy in Athens and the Greek Ministry of Development reached an agreement at the end of 2008 that would allow U.S. companies to submit sworn, notarized, and translated statements from

## FOREIGN TRADE BARRIERS

corporate officers, along with an official statement from the U.S. Embassy in Athens stating that no U.S. federal authority issues the documents otherwise required under Greek procurement law. Despite this agreement, there remains considerable confusion among Greek authorities as to how U.S. firms may comply with these requirements. Greece also continues to require offsets as a condition for the awarding of defense contracts.

The government of Greece announced a new law in late November 2010 that addresses public procurement tenders. The law will establish a National Electronic System for public procurement tenders, which will allow bids and offers to be processed electronically. The law is expected to be signed in early 2011. In December 2010, the Greek Manufacturers Association proposed the creation of a “company ID,” which could be used in public sector procedures with a sworn statement from a company’s legal representative for public procurement tenders. The U.S. government will monitor the evolution of these proposals and their impact on procurement by U.S. companies.

*Hungary:* Inadequate transparency in procurement is a significant problem in Hungary. Hungarian non-governmental organizations continue to advocate reform of campaign finance laws to reduce politically motivated tendering decisions and to help make public procurements more transparent and competitive. The government passed a measure simplifying the Public Procurement Act in 2010, in an effort to enhance the participation of small- and medium-sized enterprises in the procurement process. The government has also said it will enact stronger anti-corruption measures.

*Ireland:* Government procurement in Ireland appears generally open and transparent. U.S. companies contend, however, that they have been successful in only a few national and regional government tenders, particularly for infrastructure-related projects. U.S. firms complain that lengthy processes for budgetary decisions delay procurements, and that unsuccessful bidders often have difficulty obtaining information regarding the basis for a tender award. Once awarded a contract, companies can experience significant delays in finalizing contracts and commencing work. Successful bidders have also found that the implementation of contracts is occasionally delayed due to political interference. U.S. companies have estimated that delayed or abandoned projects have cost them tens of millions of dollars.

*Italy:* Procurement authority is widely dispersed in Italy, with contracting agencies at the national, regional, and local level. Italy’s public procurement sector is often criticized for a lack of transparency. This has created obstacles for some U.S. firms bidding on public contracts. Laws implemented in the mid-1990s reduced corruption, but industry asserts that it still exists, especially at the local level. In 2010, the Italian press reported on alleged corruption involving the abuse of emergency procurement laws.

The Italian Parliament is currently considering an anti-corruption bill that, among other things, would revise some administrative measures that were originally introduced to streamline the public procurement process, but have reportedly generated corrupt practices and abuse. To increase transparency, the Italian Government also plans to publish online information regarding the use of public funds. The information would include data on procurement contracts as well as on the earnings of senior government officials.

*Lithuania:* The public procurement process in Lithuania is not always transparent. There are persistent complaints that some tenders are so narrowly defined that they appear tailored to a specific company. Since 2003, the Lithuanian government has often required offset agreements as a condition for the award of contracts for procurement of military equipment.

*Portugal:* There is a lack of transparency in Portuguese public procurement procedures. U.S. firms report that the Portuguese government tends to favor EU firms, even when bids from U.S. firms are technically

superior or lower in price. U.S. firms appear to be more successful when bidding as part of consortia or as part of joint ventures with Portuguese or other EU firms.

*Romania:* Romania implemented the EU Utilities Directive in national legislation in 2007. Under the Romanian ordinance, public tenders in the water, transportation, energy, and postal services sectors should give preference to bids containing at least 50 percent content from EU Member States or from countries with reciprocal bilateral agreements with the EU – when the difference in price is less than three percent. In addition, Romania requires offsets as a condition for the awarding of defense contracts. Romania revised its public procurement law in 2010, particularly with regard to procedures for handling challenges to contract awards. While an award must still be temporarily suspended if a losing bidder challenges it, the revised law allows contracting authorities to conclude the contract within 11 days after a decision by the National Complaint Council or a court upholding the initial award, even if the challenger chooses to appeal that decision. Should the Complaint Council find the challenge ungrounded, the contracting authority can withhold the contract value from the plaintiff’s bid participation fee as a penalty.

*Slovenia:* U.S. firms continue to express concern that the public procurement process in Slovenia is non-transparent. Other complaints include short time frames for bid preparation, lack of clarity in tendering documentation, and opacity in the bid evaluation process. One specific complaint involves the quasi-judicial National Revision Commission (NRC), which reviews all disputed public procurement cases. The NRC has extraordinary powers to review, amend, and cancel tenders, and it is unclear whether its decisions are subject to judicial appeal. There also are concerns that the NRC favors European, and especially Slovenian, firms under its ambiguous “national interest” standard, regardless of cost or doubts about a firm’s ability to deliver and service its products.

*Spain:* U.S. construction companies assert that Spanish public sector infrastructure projects are closed to them, prompting at least two major U.S. construction firms to shut down their Spanish offices during the construction boom of the past decade due to insufficient business.

*United Kingdom:* The United Kingdom (UK) requires offsets in its defense procurement, but has no set percentage for them. Bidders are free to determine their own level of “industrial participation,” as well as with whom to do business. The UK defense market is, to an increasing extent, defined by the terms of the December 2005 Defense Industrial Strategy (DIS), which highlights specific sectors and capabilities that the government believes are necessary to retain in the UK. In these areas, procurement will generally be based on partnerships between the Ministry of Defense and selected companies. The DIS does not preclude partnerships with non-UK companies, and U.S. companies with UK operations may be invited by the Ministry of Defense to form partnerships in key programs. Outside of those areas of partnership highlighted in the DIS, defense procurement is to a large extent an open and competitive process. There have been examples of noncompetitive procurements in recent years, however.

## **SUBSIDIES**

### **Government Support for Airbus**

Over many years, the governments of France, Germany, Spain, and the United Kingdom have provided subsidies to their Airbus-affiliated companies to aid in the development, production, and marketing of Airbus large civil aircraft. These governments have financed between 33 percent and 100 percent of the development costs for all Airbus aircraft models (launch aid) and have provided other forms of support, including equity infusions, debt forgiveness, debt rollovers, and marketing assistance, including political and economic pressure on purchasing governments. The EU’s aeronautics research programs are driven significantly by a policy intended to enhance the international competitiveness of the European civil

## **FOREIGN TRADE BARRIERS**

aeronautics industry. EU governments have spent hundreds of millions of Euros to create infrastructure for Airbus programs, including 751 million Euros spent by the City of Hamburg to drain the wetlands that Airbus is currently using as an assembly site for the A380 “superjumbo” aircraft. French authorities also spent 182 million Euros to create the AeroConstellation site, which contains additional facilities for the A380. The beneficiary of more than \$6 billion in subsidies, the Airbus A380 is the most heavily subsidized aircraft in history. Some EU governments have also made legally binding commitments of launch aid for the new Airbus A350 aircraft, even though Airbus has barely begun to repay the financing it received for the A380.

Airbus SAS, the successor to the original Airbus consortium, is owned by the European Aeronautic, Defense, and Space Company (EADS), which is now the second largest aerospace company in the world. Accounting for more than half of worldwide deliveries of new large civil aircraft over the last few years, Airbus is a mature company that should face the same commercial risks as its global competitors.

In October 2004, following unsuccessful U.S.-initiated efforts to negotiate a new United States-EU agreement that would end subsidies for the development and production of large civil aircraft, the United States submitted a WTO consultation request with respect to the launch aid and other subsidies that EU governments have provided to Airbus. Concurrent with the U.S. WTO consultation request, the United States also exercised its right to terminate the 1992 United States-EU Bilateral Agreement on Large Civil Aircraft. The WTO consultations failed to resolve the U.S. concerns, however, and a renewed effort to negotiate a solution ended without success in April 2005.

On May 31, 2005, the United States submitted a WTO panel request. The WTO established the panel on July 20, 2005. In June 2010, the dispute settlement panel found in favor of the United States on the central claims. That dispute is now before the WTO Appellate Body. The United States has consistently affirmed its willingness to negotiate an agreement to address WTO-inconsistent subsidization of the development and production of large civil aircraft, even while the WTO litigation proceeds.

### **Government Support for Airbus Suppliers**

*Belgium:* The federal government of Belgium, in coordination with Belgium’s three regional governments, subsidizes Belgian manufacturers that supply parts to Airbus. In the fall of 2006, the EU Commissioner for Competition concluded that Belgium’s 195 million Euro support program exceeded the allowable level of support under EU regulations. The Belgian federal government in June 2007 subsequently reduced its support fund to 150 million Euros, but simultaneously, the Flemish Regional government set up a 50 million euro start-up fund for the aviation sector in Flanders. It is unclear how much assistance already paid to the companies for the A350 program, if any, has been reimbursed. The Belgian commitment to the A380 superjumbo was 195 million Euros, not all of which was disbursed. Belgium claims that its A380 support was structured in accordance with the 1992 bilateral agreement and covers nonrecurring costs.

In the spring of 2009, the Commission once again notified the Belgian government that its 2008-2013 program of federal aid to the aeronautic sector was illegal, but in May 2010, after being provided with supplemental information from the Government, the Commission ruled that the program, for 178 million Euros, was compatible with article 87(3)c of the EC Treaty. Industrial research or experimental development projects linked to the A350 and A380 were cited as examples of projects that could benefit from the program.

*France:* In addition to the launch aid that the French government provided for the development of the A380 and A350 aircraft, France provides aid in the form of reimbursable advances to assist the development by French manufacturers of products such as planes, aircraft engines, helicopters, and on-



board equipment. French appropriations supporting new programs in these areas in 2008 totaled 214.4 million Euros, of which 20.1 million Euros were committed to the A380. In 2009, appropriations for the aeronautical sector amounted to 209 million Euros, including 74 million Euros in support of research and development. Projected appropriations for the 2010 budget are 200.8 million Euros. France's 2011 pending draft budget law provides for 230 million Euros in reimbursable advances for the civil aviation sector.

In 2009, EADS' total European government (U.K., France, Germany, Spain) refundable advances outstanding amounted to 5.3 billion Euros, of which 3.6 billion Euros was for the A380, 1.2 billion Euros for long-range wide body aircraft, and 0.2 billion Euros for Eurocopter.

In July 2008, Airbus, the parastatal Caisse des Dépôts et Consignations, and the Safran Group, announced the launch of the AEROFUND II equity fund, capitalizing 75 million Euros destined for the French aeronautical sector. The equity fund's objective is to support the development of the small- and medium-sized subcontractors that supply the aeronautical sector. In March 2009, the state's investment fund (FSI) and AEROFUND I and II bought nearly 20 percent in DAHER, for 80 million Euros, to help that private aerospace group speed up its development and seize strategic opportunities. On April 14, 2010, the European Commission authorized France to grant reimbursable advances of 35.14 million Euros to Daher-Socata (12.34 million Euros) and Sogerma (22.8 million Euros) for two R&D projects for the future Airbus A 350 XWB. In addition, FSI allocated 2 billion Euros for projects: 1.5 billion Euros for environmentally safe planes of the future and 500 million Euros for aerospace, through a combination of development support, reimbursable advances, and direct equity investments. In 2007, OSEO (the state-backed company that provides financial support to innovative SMEs) signed a contract with the French Civil Aviation Authority for European aerospace project development. In 2010, OSEO announced eighty million Euros in reimbursable advances over two years for French SME sub-contractors and suppliers of large aerospace firms. Zodiac Aerospace received 230 million Euros in reimbursable advances during the August 2008 to August 2009 period. In 2009, Latécoère received 50.4 million Euros in reimbursable advances.

*Spain:* In late 2010, Airbus Operations S.L. and CESA (Spanish Aeronautical Systems Company, S.A.) were awarded grants of 12.89 million Euros and 12.38 million Euros, respectively, as the leaders of two major technical research projects. The government of Spain authorized the grants as part of the projects approved in the sixth edition of the programs to support the National Strategic Consortia for Technical Research (CENIT)

*United Kingdom:* UK government support for Airbus has most recently included investment in the Integrated Wing Program, announced in December 2006. The Department for Business, Innovation and Skills (BIS) and selected regional development agencies will provide half of the funding for the £34 million program, with the remainder drawn from Airbus and participating suppliers. The Integrated Wing Program is one of 12 key technologies identified in the National Aerospace Technology Strategy, which largely directs UK government investment in strategic aerospace capabilities. On September 15, 2008, GKN plc. announced that it was buying Airbus's wing component factory near Bristol, England, for £136 million. The same day, the British government announced that it would provide £60 million in repayable launch aid to the company to help it develop advanced composite wing components for the Airbus A350. The government also announced an additional £50 million in funding to support research and technology development for Airbus wing projects. This money will be paid through the Technology Strategy Board's research and development program.

## **Government Support for Aircraft Engines**

*United Kingdom:* In February 2001, the UK government announced its intention to provide up to £250 million to Rolls-Royce to support development of the Trent 600 and 900, two additional engine models for large civil aircraft. The UK government characterized this engine development aid as an “investment” that would provide a “real rate of return” from future sales of the engines. The European Commission announced its approval of a £250 million “reimbursable advance” without opening a formal investigation into whether the advance constituted illegal state aid under EU law. According to a Commission statement, the “advance will be reimbursed by Rolls-Royce to the UK government in case of success of the program, based on a levy on engine deliveries and maintenance and support activity.” Detailed terms of the approved launch aid were not made public. To date, none of the launch aid for the Trent 600 and 900 has been repaid.

Propulsion is another area considered important to the future of the UK aerospace industry, and BIS has extended support to Rolls-Royce for the development of environmentally friendly engine technologies. This funding is directed through established research funding channels, though the government has provided occasional direct support to Rolls-Royce over the past five years.

*France:* In 2005, the French government-owned engine manufacturer, Snecma SA, merged with Sagem, a technology and communications firm, to form the SAFRAN Group. The government supported the SAFRAN SaM146 propulsive engine program, a turbofan engine produced by the PowerJet joint venture between Snecma of France and NPO Saturn of Russia, with a reimbursable advance of 140 million Euros. In 2009, Safran received new reimbursable advances of 69 million Euros.

## **Other Civil Aircraft**

In July 2008, Bombardier Aerospace announced an investment of £519.4 million in Northern Ireland to support the design and manufacture of the wings for its 110 to 130 seat CSeries family of aircraft. In an agreement with BIS, the Northern Ireland Executive has offered assistance to the investment of £155 million. This includes a maximum of £130 million (Northern Ireland’s contribution of £78 million of repayable Launch Investment assistance for the CSeries and up to £25 million Selective Financial Assistance. The United States is closely monitoring government assistance associated with this program to ensure compliance with WTO rules.

## **CUSTOMS ADMINISTRATION**

Notwithstanding the existence of customs laws that govern all EU Member States, the EU does not administer its laws through a single customs administration. Rather, there is a separate agency responsible for the administration of EU customs law in each of the EU’s 27 Member States. No EU institutions or procedures ensure that EU rules on classification, valuation, origin, and customs procedures are applied uniformly throughout the 27 Member States of the EU. Moreover, no EU rules require the customs agency in one Member State to follow the decisions of the customs agency in another Member State with respect to materially identical issues.

On some questions, where the customs agencies in different Member States administer EU law differently, the matter may be referred to the Customs Code Committee (Committee). The Committee is an entity established by the Community Customs Code to assist the European Commission. The Committee consists of representatives of the Member States and is chaired by a representative of the Commission. While, in theory, the Committee exists to help reconcile differences among Member State practices and thereby help to achieve uniformity of administration, in practice its success in this regard has been limited.

## **FOREIGN TRADE BARRIERS**

Not only are the Committee and other EU-level institutions ineffective tools for achieving the uniform administration and application of EU customs law, but the EU also lacks tribunals or procedures for the prompt review and EU-wide correction of administrative actions relating to customs matters. Instead, review is provided separately by each Member State's tribunals, and rules regarding these reviews can vary from Member State to Member State. Thus, a trader encountering non-uniform administration of EU customs law in multiple Member States must bring a separate appeal in each Member State whose agency rendered an adverse decision.

Ultimately, a question of interpretation of EU law may be referred to the European Court of Justice (ECJ). The judgments of the ECJ have effect throughout the EU. However, referral of questions to the ECJ generally is discretionary, and ECJ proceedings can take years. Thus, obtaining corrections with EU-wide effect for administrative actions relating to customs matters is a cumbersome and frequently time consuming process.

The United States has raised each of the preceding concerns with the EU in various fora, including the WTO Dispute Settlement Body. The concerns have taken on new prominence in light of the expansion of the EU and the focus of the Doha Development Agenda on trade facilitation. In the trade facilitation negotiations, Members are considering proposals that would clarify the requirement of GATT 1994 Article X that all WTO Members – including WTO Members that are customs unions, such as the EU – uniformly apply and give effect to a Member's customs laws, regulations, judicial decisions, and administrative rulings. EU officials claim that the Modernized Community Customs Code (MCCC), which formally entered into force in 2008, will streamline customs procedures and that it will apply uniformly throughout the customs territory of the Community. Implementation of the MCCC is expected to be completed by 2013. The United States will monitor its implementation closely, focusing on its impact on uniform administration of EU customs law.

### ***Member State Measures***

*Romania:* In June 2010, the Romanian Government approved Ordinance 54/2010 which disallowed bonded tax warehouses from storing and applying customs stamps to distilled spirits under duty-deferment measures. The ordinance was enforced 48 hours after its publication with assurances that imports initiated before the implementation date would not be affected; however, the U.S. Distilled Spirits Council complained that prior imports of several U.S. companies were affected. The ordinance's final enforcement rules included some places – customs warehouses and free-trade areas – where products can be stored and customs stamps applied, but excise duties are required on the imported spirits by the 25<sup>th</sup> of each month, regardless of when the product will be sold. Domestic producers reportedly may continue storing their products in warehouses without paying the excise duties until the moment of sale.

## **ELECTRONIC COMMERCE**

U.S. businesses and the U.S. Government continue to monitor potential problems related to data privacy regulation and legal liability for companies doing business over the Internet in the EU.

The EU Data Protection Directive (1995/46) allows the transmission of EU data to third countries only if those countries are deemed by the European Commission to provide an adequate level of protection by reason of their domestic law or their international commitments (Article 25(6)). The Commission has thus far recognized Switzerland, Canada, Argentina, Guernsey, the Isle of Man, and Israel as third countries that provide an adequate level of protection. The United States does not yet benefit from a blanket adequacy finding, but the Commission has recognized a series of specific and limited programs and agreements as providing adequacy. The most all-encompassing of these is the U.S.-EU Safe Harbor

## **FOREIGN TRADE BARRIERS**

Framework, but others include the U.S.-EU Agreement on the Transfer of Air Passenger Name Records to the U.S. Bureau of Customs and Border Protection.

The Safe Harbor Framework provides U.S. companies with a simple, streamlined means of complying with the EU rules. It is the result of an agreement that allows U.S. companies that commit to a series of data protection principles (based on the EU Data Protection Directive), and that publicly state their commitment by “self-certifying”, on a dedicated website (<http://www.export.gov/safeharbor>), to continue to receive personal data from the EU. Signing up to the Safe Harbor is voluntary, but the rules are binding on signatories. A failure to fulfill commitments made under the Safe Harbor framework is actionable either as an unfair or deceptive practice under Section 5 of the Federal Trade Commission Act or, for air carriers and ticket agents, under a concurrent Department of Transportation statute.

Outside of the programs and agreements that explicitly enjoy an adequacy finding, U.S. companies can only receive or transfer employee and customer information from the EU under one of the exceptions to the directive’s adequacy requirements or if they demonstrate that they can provide adequate protection for the transferred data. These requirements can be burdensome for many U.S. industries that rely on data exchange between the United States and the EU.

In recent years, a number of U.S. companies have faced obstacles to winning contracts with European governments and private sector customers because of public fears in the EU that any personal data held by these companies may be collected by U.S. law enforcement agencies. The United States is working to inform European stakeholders on how personal data is protected in the United States.

The United States actively supports the Safe Harbor Framework and encourages EU institutions and Member States to continue to use the flexibility offered by the EU Data Protection Directive to avoid unnecessary interruptions in data flows to the United States. Furthermore, the United States expects the EU and Member States to fulfill their commitment to inform the United States if they become aware of any actions that may interrupt data flows to the United States.

The Commission is currently reviewing the 1995/46 directive as part of a broader review of the framework of data protection legislation in the EU that would encompass both commercial and judicial/law enforcement uses of data. In November 2009, the Commission released a communication outlining its goals and objectives in this review and has indicated that it intends to develop draft legislation by mid-2011 and final legislation by 2012-2013. Given the importance of this issue to the business models of many U.S. companies, the United States is closely monitoring the development of this revised framework legislation to ensure that it does not adversely impact transatlantic trade and investment.

### ***Member State Measures***

*Germany:* Online data privacy has been a subject of intense discussion in Germany in 2010, notably directed towards U.S. companies Google and Facebook. Google’s August 2010 announcement that it would introduce its Street View service in Germany by the end of the year caused a political uproar. The debate prompted the drafting by the Interior Ministry of data privacy legislation aimed at online services and the establishment of a voluntary data privacy codex for geo data services by a major information technology industry association.



# GHANA

## TRADE SUMMARY

The U.S. goods trade surplus with Ghana was \$709 million in 2010, an increase of \$128 million from 2009. U.S. goods exports in 2010 were \$983 million, up 37.3 percent from the previous year. Corresponding U.S. imports from Ghana were \$273 million, up 102.5 percent. Ghana is currently the 78th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Ghana was \$974 million in 2006 (latest data available).

## IMPORT POLICIES

### Tariffs

Ghana is a Member of the World Trade Organization (WTO) and the Economic Community of West African States (ECOWAS). According to the WTO, Ghana's average MFN applied tariff rate is 13 percent. For agricultural goods, the average applied tariff is 17.4 percent, and for non-agricultural products it is 12.3 percent. In 2008, along with other ECOWAS countries, Ghana adopted a common external tariff (CET) with five bands. The five tariff bands are: zero duty on social goods (*e.g.*, medicine, publications); five percent duty on imported raw materials; 10 percent duty on intermediate goods; 20 percent duty on finished goods; and 35 percent duty will be charged on goods in certain sectors that the government seeks to protect, such as poultry and rice. Ghana currently maintains 190 exceptions to the CET, and the highest applied tariff is 20 percent.

### Nontariff Measures

Importers are confronted by a variety of fees and charges in addition to tariffs. Ghana levies a 12.5 percent value added tax (VAT) plus a 2.5 percent National Health Insurance levy on the duty-inclusive value of all imports as well as on locally produced goods, with a few selected exemptions. In addition, Ghana imposes a 0.5 percent ECOWAS surcharge on all goods originating in non-ECOWAS countries and charges 0.4 percent of the free on board (FOB) value of goods (including VAT) for the use of the automated clearing system, the Ghana Community Network (GCN). Further, under the Export Development and Investment Fund Act, Ghana imposes a 0.5 percent duty on all non-petroleum products imported in commercial quantities. Ghana also applies a one percent processing fee on all duty free imports.

Imports are subject to destination inspection and an inspection fee of one percent of cost, insurance, and freight (CIF) of the goods. Importers have indicated that they would prefer a flat fee based on the cost of the services rendered. Destination inspection companies (DICs) are licensed by the Ghanaian government. Inspection by the DICs accounts for the longest delay in import clearance.

In December 2009, the Ghanaian government changed Ghana's excise tax regime on certain non-alcoholic beverages, spirits, imported beer, and tobacco products from a specific excise tax to an *ad valorem* excise tax. Although this amendment eliminated the difference in tax treatment of malt drinks and carbonated soft drinks, it did so by increasing the excise tax on carbonated soft drinks. Subsequently, the Ghanaian government reduced the tax rate on non-alcoholic beverages from 20 percent to 17.5 percent of the wholesale price, excluding transportation costs.

## FOREIGN TRADE BARRIERS

An examination fee of 1 percent is applied to imported vehicles. Imported used vehicles that are more than 10 years old incur an additional tax ranging from 2.5 percent to 50 percent of the CIF value. Ghanaian customs maintains a price list that is used to determine the value of imported used vehicles for tax purposes. There are complaints that this system is not transparent because the price list used for valuation is not publicly available.

Each year, between May and October, there is a temporary ban on the importation of fish, except canned fish, to protect local fishermen during their peak season.

Certificates are required for imports of agricultural, food, cosmetics, and pharmaceutical goods. Permits are required for poultry and poultry product imports. At the time the permit is issued, a non-standardized quantity limit is imposed.

All communications equipment imports require a clearance letter from the National Communications Authority. Securing a clearance letter prior to importation can help avoid delays at the port of entry.

## **EXPORT SUBSIDIES AND OTHER EXPORT PROMOTION PROGRAMS**

The government uses preferential credits and tax incentives to promote exports. The Export Development Investment Fund administers financing at below market rates. The Export Processing Zone (EPZ) Law, enacted in 1995, leaves corporate profits untaxed for the first 10 years of business operation in an EPZ, after which the rate climbs to eight percent (the same rate for non-EPZ companies). Seventy percent of production in the EPZ zones must be exported. The corporate tax rate for non-exporting companies is 25 percent.

## **GOVERNMENT PROCUREMENT**

In 2004, the government established the Public Procurement Authority to administer the public procurement law and enhance transparency and efficiency in the procurement process. Individual government entities have formed tender committees and tender review boards to conduct their own procurement. Large public procurements are made by open tender and non-domestic firms are allowed to participate. A draft guideline that applies to current tenders gives a margin of preference of 7.5 percent to 20 percent to domestic suppliers of goods and services in international competitive bidding. Notwithstanding the public procurement law, companies report that locally funded contracts lack complete transparency. Vendor or foreign-government subsidized financing arrangements appear in some cases to be a crucial factor in certain government procurement actions. Allegations of corruption in the tender process are fairly common.

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

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

Ghana is a signatory to the Berne Convention for their Protection of Literary and Artistic Works, the Paris Convention for the Protection of Industrial Property, the Patent Cooperation Treaty, the World Intellectual Property Organization (WIPO) Copyright Treaty and the African Regional Industrial Property Organization. Ghana has signed the WIPO Performances and Phonograms Treaty (WPPT), but despite being signed in 1997, it has not been entered into force. This issue has been raised in bilateral consultations, and in November 2010 Ghana's Copyright Administrator sent a reminder to the Minister for Foreign Affairs regarding this issue. Since December 2003, Parliament has passed six bills designed to

implement Ghana's obligations under the TRIPS Agreement. The new laws pertain to copyright, trademarks, patents, layout-designs (topographies) of integrated circuits, geographical indications, and industrial designs.

In recent years, IPR owners have filed very few trademark, patent, or copyright infringement cases in local courts. Companies that do initiate cases report prolonged waits for resolution, a possible factor in discouraging other companies from filing cases.

There is virtually no government-initiated enforcement. However the Copyright Office, which is under the Attorney General's Office, periodically initiates raids on markets for pirated works. The Customs Service has collaborated with concerned companies to inspect import shipments.

## **SERVICES BARRIERS**

Ghana's investment code excludes foreign investors from participating in four economic sectors: petty trading; the operation of taxi and car rental services with fleets of fewer than ten vehicles; lotteries (excluding soccer pools); and the operation of beauty salons and barber shops.

Ghana offers access to foreign telecommunications providers for most services but requires that these services be provided through joint ventures with Ghanaian nationals. In May 2010, Ghana announced a floor price of \$0.19 per minute for terminating international calls into Ghana, significantly increasing the cost of terminating international calls into the country from about \$0.13 per minute. All local and international calls are subject to a tax of \$0.06 per minute. In its GATS commitments on basic telecommunications, Ghana has adopted the Reference Paper on Pro-Competitive Regulatory Principles that require it to ensure cost based interconnection with major suppliers.

In the insurance sector, Ghana limits foreign ownership to 60 percent, except for auxiliary insurance services.

## **INVESTMENT BARRIERS**

The effects of a highly regulated economy, a politicized business community, and lack of transparency in certain government operations create elements of risk for potential investors. Entrenched local interests sometimes have the ability to derail or delay new entrants. The political leanings of the Ghanaian partners of foreign investors are often subject to government scrutiny, and ensuring compliance with the U.S. Foreign Corrupt Practices Act remains a challenge.

Foreign investment projects must be registered with the Ghana Investment Promotion Center (GIPC), a process meant to take no more than five business days but that often takes significantly longer. Foreign investments are also subject to the following minimum capital requirements: \$10,000 for joint ventures with a Ghanaian; \$50,000 for enterprises wholly-owned by a non-Ghanaian; and \$300,000 for trading companies (firms that buy/sell finished goods) either wholly or partly owned by non-Ghanaians. Trading companies are also required to employ at least ten Ghanaian nationals.

## **OTHER BARRIERS**

Foreign investors have experienced difficulties and delays in securing required work visas for their non-Ghanaian employees. The process for generating required work permits can be unpredictable and take several months from application to delivery. Foreign investors' access to land can also be challenging.

## **FOREIGN TRADE BARRIERS**



Non-Ghanaians are only permitted to access land on a long-term leasehold basis, while Ghana's complex land tenure system makes establishing clear title on real estate difficult.

Port inefficiencies increase import and export costs. Ghana's Customs Service phased in an automated customs declaration system during the last quarter of 2002 to facilitate customs clearance. Although the new system has reduced the number of days for clearing goods through the ports, inefficiencies remain because complementary services from Ghanaian government agencies, banks, destination inspection companies, and security services have not been established. They are a significant contributing factor to the absence of a direct shipping route to Ghana, which has a significant impact on U.S. exports.

# GUATEMALA

## TRADE SUMMARY

The U.S. goods trade surplus with Guatemala was \$1.2 billion in 2010, an increase of \$507 million from 2009. U.S. goods exports in 2010 were \$4.4 billion, up 14.8 percent from the previous year. Corresponding U.S. imports from Guatemala were \$3.2 billion, up 2.2 percent. Guatemala is currently the 43rd largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Guatemala was \$961 million in 2009 (latest data available), down from \$1.3 billion in 2008.

## IMPORT POLICIES

### Free Trade Agreement

On August 5, 2004, the United States signed the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR or Agreement) with five Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua) and the Dominican Republic (the Parties). Under the Agreement, the Parties are significantly liberalizing trade in goods and services. The CAFTA-DR also includes important disciplines relating to: customs administration and trade facilitation; technical barriers to trade; government procurement; investment; telecommunications; electronic commerce; intellectual property rights; transparency; and labor and environmental protection.

The Agreement entered into force for the United States, El Salvador, Guatemala, Honduras, and Nicaragua in 2006 and for the Dominican Republic in 2007. The CAFTA-DR entered into force for Costa Rica on January 1, 2009.

In 2008, the Parties implemented amendments to several textile-related provisions of the CAFTA-DR, including, in particular, changing the rules of origin to require the use of U.S. or regional pocket bag fabric in originating apparel. The Parties also implemented a reciprocal textile inputs sourcing rule with Mexico. Under this rule, Mexico provides duty-free treatment on certain apparel goods produced in a Central American country or the Dominican Republic with U.S. inputs, and the United States provides reciprocal duty-free treatment under the CAFTA-DR on certain apparel goods produced in a Central American country or the Dominican Republic with Mexican inputs. These changes further strengthen and integrate regional textile and apparel manufacturing and create new economic opportunities in the United States and the region.

In February 2011, the CAFTA-DR Free Trade Commission (FTC), the central oversight body for the agreement, met for the first time in San Salvador, El Salvador. The FTC reviewed the implementation of the agreement and its trade and economic impact on the region and agreed to certain changes to strengthen the agreement's operation. The FTC discussed a broad range of ways to enhance competitiveness in the region and endorsed several initiatives to generate new opportunities for all of the countries to realize the benefits of the CAFTA-DR Agreement, with a heightened focus on small- and medium-sized businesses.

### Tariffs

As a member of the Central American Common Market, Guatemala applies a harmonized external tariff on most items at a maximum of 15 percent with some exceptions.

## FOREIGN TRADE BARRIERS

However, under the CAFTA-DR, 100 percent of U.S. industrial trade will enter Guatemala duty-free by 2015. Nearly all textile and apparel goods that meet the Agreement's rules of origin now enter Guatemala duty-free and quota-free, promoting new opportunities for U.S. and regional fiber, yarn, fabric, and apparel manufacturing companies.

Under the CAFTA-DR, more than half of U.S. agricultural exports now enter Guatemala duty-free. Guatemala will eliminate its remaining tariffs on nearly all agricultural products by 2020 (2023 for rice and chicken leg quarters and 2025 for dairy products). For certain products, tariff-rate quotas (TRQs) permit some immediate duty-free access for specified quantities during the tariff phase out period, with the duty-free amount expanding during that period. Guatemala will liberalize trade in white corn through expansion of a TRQ, rather than by tariff reductions.

### **Nontariff Measures**

Under the CAFTA-DR, Guatemala committed to improve transparency and efficiency in administering customs procedures, including the CAFTA-DR rules of origin. Guatemala also committed to ensuring greater procedural certainty and fairness in the administration of these procedures, and all the CAFTA-DR countries must share information to combat illegal transshipment of goods.

U.S. companies have raised concerns that the Guatemalan customs authority has not provided adequate advance notice regarding administrative changes in documentation requirements for imported shipments, such as information needed on certifications of origin. The United States raised this issue with the customs authority and received assurances that future changes will be communicated in advance and will be available on the tax and customs website: <http://portal.sat.gob.gt/sitio/>. However, in 2010, Guatemala retroactively reviewed some imports from prior years and assessed duties and penalties for certificates of origin that were deemed to have been improperly completed, despite this lack of advance notice. The United States has raised this issue with Guatemalan authorities, but it remains unresolved.

### **GOVERNMENT PROCUREMENT**

In August 2009, the Guatemalan Congress approved reforms to the Government Procurement Law, which simplified bidding procedures, eliminated the fee previously charged to suppliers for bidding documents, and provided an additional opportunity for suppliers to raise objections to the bidding process. Foreign suppliers must submit their bids through locally registered representatives, a process that can place foreign bidders at a competitive disadvantage.

Under the CAFTA-DR, procuring entities must use fair and transparent procurement procedures, including advance notice of purchases and timely and effective bid review procedures, for procurement covered by the Agreement. Under the CAFTA-DR, U.S. suppliers are permitted to bid on most Guatemalan government procurement, including purchases by government ministries and state-owned enterprises, on the same basis as Guatemalan suppliers. The anticorruption provisions of the Agreement require each government to ensure under its domestic law that bribery in matters affecting trade and investment, including in government procurement, is treated as a criminal offense, or is subject to comparable penalties.

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

## **EXPORT SUBSIDIES**

Under the CAFTA-DR, Guatemala may not adopt new duty waivers or expand existing duty waivers that are conditioned on the fulfillment of a performance requirement (*e.g.*, the export of a given level or percentage of goods). However, under the CAFTA-DR, Guatemala was permitted to maintain such measures through December 31, 2009, provided that it maintained the measures in accordance with its obligations under the WTO Agreement on Subsidies and Countervailing Measures. The U.S. Government is working with the Guatemalan government in an effort to ensure it implements its CAFTA-DR obligations.

Guatemala provides tax exemptions to investors in free trade zones and maintains duty drawback programs aimed mainly at garment manufacturing and assembly operations or “*maquiladoras*” (firms that are permitted to operate outside a free trade zone and still receive tax and duty benefits). The Law for the Promotion and Development of Export Activities and Drawback provides tax and duty benefits to companies that import over half of their production inputs/components and export their completed products. Investors in this sector are granted a 10 year exemption from both income taxes and the Solidarity Tax, which is Guatemala’s temporary alternative minimum tax. Additionally, companies are granted an exemption from payment of tariffs and value added taxes on imported machinery, and a one year suspension (extendable to a second year) of the same tariffs and taxes on imports of production inputs and packing material. Taxes are waived when the goods are re-exported.

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

Guatemala was listed on the Watch List in the 2010 Special 301 report. The United States recognized Guatemala’s efforts to increase enforcement actions, including by appointing a new IPR prosecutor and establishing an interagency IPR working group. These efforts have led to an increase in the number of raids, seizures, and prosecutions. The report highlighted the need for continued efforts to implement Guatemala’s obligations under the CAFTA-DR, including those to ensure that proper resources are available for its enforcement activities, to achieve improved coordination among enforcement agencies, and to concentrate its enforcement efforts on manufacturers of pirated and counterfeit goods.

The United States will continue to monitor Guatemala’s implementation of its IPR obligations under the CAFTA-DR.

## **SERVICES BARRIERS**

Guatemala has agreed to ensure reasonable and nondiscriminatory access to essential telecommunications facilities. It also has agreed to ensure that major suppliers provide interconnection at cost-oriented rates. Concerns remain over the ability of the Guatemalan telecommunications regulator – the Superintendency of Telecommunications – to do so. The United States continues to work with the Guatemalan government to ensure compliance with its obligations under the CAFTA-DR.

Foreign enterprises may provide licensed professional services in Guatemala only through a contract or other relationship with an enterprise established in Guatemala.

## **INVESTMENT BARRIERS**

Some U.S. companies operating in Guatemala have complained that complex and unclear laws and regulations continue to constitute practical barriers to investment.

## **FOREIGN TRADE BARRIERS**

## **OTHER BARRIERS**

Some U.S. firms and citizens have found corruption in government, including in the judiciary, to be a significant concern and a constraint to successful investment in Guatemala. Administrative and judicial decision-making appear at times to be inconsistent, non-transparent, and very time consuming.

# HONDURAS

## TRADE SUMMARY

The U.S. goods trade surplus with Honduras was \$677 million in 2010, up \$628 million from 2009. U.S. goods exports in 2010 were \$4.6 billion, up 36.8 percent from the previous year. Corresponding U.S. imports from Honduras were \$3.9 billion, up 18.4 percent. Honduras is currently the 42nd largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Honduras was \$844 million in 2009 (latest data available), up from \$787 million in 2008. U.S. FDI in Honduras is mostly in the manufacturing, finance/insurance, and banking sectors.

## IMPORT POLICIES

### Free Trade Agreement

On August 5, 2004, the United States signed the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR or Agreement) with five Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua) and the Dominican Republic (the Parties). Under the Agreement, the Parties are significantly liberalizing trade in goods and services. The CAFTA-DR also includes important disciplines relating to customs administration and trade facilitation, technical barriers to trade, government procurement, investment, telecommunications, electronic commerce, intellectual property rights, transparency, and labor and environmental protection.

The Agreement entered into force for the United States, El Salvador, Guatemala, Honduras, and Nicaragua in 2006 and for the Dominican Republic in 2007. The CAFTA-DR entered into force for Costa Rica on January 1, 2009.

In 2008, the Parties implemented amendments to several textile-related provisions of the CAFTA-DR, including, in particular, changing the rules of origin to require the use of U.S. or regional pocket bag fabric in originating apparel. The Parties also implemented a reciprocal textile inputs sourcing rule with Mexico. Under this rule, Mexico provides duty-free treatment on certain apparel goods produced in a Central American country or the Dominican Republic with U.S. inputs, and the United States provides reciprocal duty-free treatment under the CAFTA-DR on certain apparel goods produced in a Central American country or the Dominican Republic with Mexican inputs. These changes further strengthen and integrate regional textile and apparel manufacturing and create new economic opportunities in the United States and the region.

In February 2011, the CAFTA-DR Free Trade Commission (FTC), the central oversight body for the agreement, met for the first time in San Salvador, El Salvador. The FTC reviewed the implementation of the agreement and its trade and economic impact on the region and agreed to certain changes to strengthen the agreement's operation. The FTC discussed a broad range of ways to enhance competitiveness in the region and endorsed several initiatives to generate new opportunities for all of the countries to realize the benefits of the CAFTA-DR Agreement, with a heightened focus on small- and medium-sized businesses.

## **Tariffs**

As a member of the Central American Common Market, Honduras applies a harmonized external tariff on most items at a maximum of 15 percent with some exceptions.

However, under the CAFTA-DR, 100 percent of U.S. industrial trade will enter Honduras duty-free by 2015. Nearly all textile and apparel goods that meet the Agreement's rules of origin became duty-free and quota-free immediately, thus creating new opportunities for U.S. fiber, yarn, fabric, and apparel manufacturers.

Under the CAFTA-DR, more than half of U.S. agricultural exports now enter Honduras duty-free. Honduras will eliminate its remaining tariffs on nearly all agricultural products by 2020 (2023 for rice and chicken leg quarters and 2025 for dairy products). For certain products, tariff-rate quotas (TRQs) will permit some immediate duty-free access for specified quantities during the tariff phase out period, with the duty-free amount expanding during that period. Honduras will liberalize trade in white corn through expansion of a TRQ, rather than by tariff reductions.

## **Nontariff Measures**

Under the CAFTA-DR, Honduras committed to improve transparency and efficiency in administering customs procedures, including the CAFTA-DR's rules of origin. Honduras also committed to ensuring greater procedural certainty and fairness in the administration of these procedures, and all CAFTA-DR countries agreed to share with each other information to combat illegal transshipment of goods.

The *Dirección Ejecutiva de Ingresos* (DEI), the Honduran customs and tax authority, has taken over verification of origin certifications from the Ministry of Industry and Trade. The DEI verifies that the origin certifications from producers, exporters, or importers comply with the minimum requirements according to the CAFTA-DR and other international agreements.

## **GOVERNMENT PROCUREMENT**

Under the Government Contracting Law, all public procurement with a value of over one million Lempiras (approximately \$53,000) must be conducted through public competitive bidding. Public procurements with a value between 500,000 and 1 million Lempiras (approximately \$26,000 - \$53,000) can use closed tendering, and contracts less than 500,000 Lempiras (approximately \$26,000) are exempt from the bidding requirements. Implementation of the CAFTA-DR eliminated the requirement that U.S. firms must act through a local agent (with at least 51 percent Honduran ownership) to participate in public tenders.

The CAFTA-DR requires the use of fair and transparent procurement procedures, including advance notice of purchases and timely and effective bid review procedures. Under the CAFTA-DR, U.S. suppliers are permitted to bid on procurements covered by the agreement for most Honduran government entities, including key ministries, on the same basis as Honduran suppliers. The anticorruption provisions in the CAFTA-DR require each government to ensure that bribery in matters affecting trade and investment, including in government procurement, is treated as a criminal offense, or is subject to comparable penalties, under its law. Since the CAFTA-DR came into effect, government agencies have routinely declared "emergencies" to circumvent competitive bidding procedures for public procurements, including for large infrastructure projects.

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

## **EXPORT SUBSIDIES**

There are no known export subsidies provided by the Honduran government, but it provides tax exemptions to firms in free trade zones. Under the CAFTA-DR, Honduras may not adopt new duty waivers or expand existing duty waivers that are conditioned on the fulfillment of a performance requirement (*e.g.*, the export of a given level or percentage of goods). However, Honduras may maintain such duty waiver measures for such time as it is an Annex VII country for the purposes of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). Thereafter, Honduras must maintain any such measures in accordance with Article 27.4 of the SCM Agreement.

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

In 2010 Honduras reestablished its IPR prosecutors' office as an independent entity within the Public Ministry in 2010, reversing a 2009 decision to merge it into the common crimes office. However, the United States remains concerned about the prospects for effective IPR enforcement in Honduras given that its IPR enforcement office lacks necessary personnel and resources to wage a truly effective campaign. The United States will continue to monitor Honduras' implementation of its IPR obligations under the CAFTA-DR.

## **SERVICES BARRIERS**

Under the CAFTA-DR, Honduras granted U.S. services suppliers substantial access to its services market, including financial services.

Hondutel, the government-owned incumbent telecommunications operator, officially lost its monopoly on fixed-line telephony services on December 25, 2005. Although there are regulations in place that allow the government to grant licenses, permits, and concessions for different telecommunications services in Honduras, many services continue to be provided through sub-operator agreements signed between Hondutel and private companies. The Honduran Congress is reviewing several draft telecommunications laws. The United States will continue to monitor efforts to introduce new telecommunications legislation to ensure that any new legislation is consistent with Honduras' obligations under the CAFTA-DR.

## **INVESTMENT BARRIERS**

Honduran law places certain restrictions on foreign ownership of land within 40 kilometers of the coastlines and national boundaries. However, recognizing that the constitutional prohibition of foreign property ownership in Honduras was a barrier to development of tourism and the economic potential of Honduras' coastal and island areas, the Honduran National Congress passed a law in 1990 to allow foreigners to purchase properties in designated tourism zones established by the Ministry of Tourism in order to construct permanent or vacation homes.

Inadequate land title procedures have led to numerous investment disputes involving U.S. nationals who are landowners. Resolution of disputes in court often takes several years. There have been claims of widespread corruption in land sales and property registry and in the dispute resolution process, including claims against attorneys, real estate companies, judges, and local officials. The property registration system is highly unreliable, which represents a major constraint on investment. In addition, the lack of implementing regulations can lead to long delays in the awarding of titles in certain regions. A law passed in April 2008 authorized the government to award certain agricultural lands that have been under dispute for more than two years to squatters with only nominal compensation to legal titleholders. A number of properties owned by U.S. citizens are potentially subject to confiscation under this law.

## **FOREIGN TRADE BARRIERS**



## **OTHER BARRIERS**

Some U.S. firms and citizens have found corruption in government, including in the judiciary, to be a significant concern and a constraint to successful investment in Honduras. Corruption appears to be pervasive in government procurement, issuance of government permits, real estate transactions (particularly land title transfers), performance requirements, and the regulatory system. The telecommunications and energy sectors have proved particularly problematic.

U.S. industry has expressed concern that some investors in Honduras have at times been subject to practices that might be considered anticompetitive. In 2006, the Honduran Congress enacted a competition law, establishing an anti-trust enforcement commission to combat such conduct. Commissioners commenced operations in 2007. From January 2009 through December 2010, six complaints were filed with the commission, and the commission initiated two investigations. All eight cases were investigated; as of December 2010, seven were resolved and one was still pending. In November 2010, after a two-year investigation, the commission fined two cement companies 87 million Lempiras (approximately \$4.6 million) for violating the competition law by engaging in collusive pricing. These issues have affected Honduras's ability to attract foreign investment.

# HONG KONG, SAR

## TRADE SUMMARY

The U.S. goods trade surplus with Hong Kong was \$22.3 billion in 2010, an increase of \$4.8 billion from 2009. U.S. goods exports in 2010 were \$26.6 billion, up 26.2 percent from the previous year. Corresponding U.S. imports from Hong Kong were \$4.3 billion, up 20.5 percent. Hong Kong is currently the 12th largest export market for U.S. goods.

U.S. exports of private commercial services (*i.e.*, excluding military and government) to Hong Kong were \$6.0 billion in 2009 (latest data available), and U.S. imports were \$6.9 billion. Sales of services in Hong Kong by majority U.S.-owned affiliates were \$27.1 billion in 2008 (latest data available), while sales of services in the United States by majority Hong Kong-owned firms were \$4.1 billion.

The stock of U.S. foreign direct investment (FDI) in Hong Kong was \$50.5 billion in 2009 (latest data available), up from \$40.0 billion in 2008. U.S. FDI in Hong Kong is primarily concentrated in the finance/insurance, nonbank holding companies, and wholesale trade sectors.

## IMPORT POLICIES

Hong Kong, China is a special administrative region (SAR) of the People's Republic of China. However, for trade and immigration purposes, Hong Kong is a distinct entity with its own tariffs, trade laws and regulations, and its own seat at the WTO. The Hong Kong government pursues a market-oriented approach to commerce. Hong Kong is a duty free port with few barriers to trade in goods and services and few restrictions on foreign capital flows and investment. Hong Kong had traditionally maintained excise taxes on certain goods, particularly alcoholic beverages, which were among the highest in the world. However, on February 27, 2008, the Hong Kong Financial Secretary announced that the 40 percent excise tax on wine and the 20 percent excise tax on beer and liquor containing less than 30 percent alcohol would be eliminated immediately. The U.S. Government is engaged in a dialogue to work with like-minded governments to encourage Hong Kong to eliminate the remaining 100 percent tax on spirits (more than 30 percent alcohol content).

## COMPETITION POLICY

Hong Kong does not have a comprehensive competition law, although individual regulatory regimes exist for certain sectors. In late 2006, the Hong Kong government established an independent Competition Policy Review Committee to discuss the need, scope, and application of a comprehensive and cross-sector law. Small- and medium-sized enterprises (SMEs) in Hong Kong have expressed strong opposition to the creation of such a law, since it provides for private actions to be brought by persons who have suffered loss or damage (*i.e.*, private enforcement). Some SMEs have expressed concerns that private enforcement will open SMEs to possible harassment by larger companies, and that the law may undermine their flexibility to do business and could increase operating costs. Likewise, the law has been opposed by the large conglomerates that dominate certain sectors of Hong Kong's economy. In May 2008, the Hong Kong government presented the elements of its proposed competition legislation for public discussion and scrutiny. Following closure of the public comment period in August 2008, the Hong Kong government introduced the bill to the Legislative Council in July 2010. The draft law is primarily aimed at eliminating cartel behavior and abuses of dominant market position. Notably, the threshold for presumption of a dominant market position is set quite low, at 40 percent market share. Critics of the bill note that it does not contain provisions dealing with merger control and that it will not apply to government or statutory

## FOREIGN TRADE BARRIERS

bodies such as the Hospital Authority and Housing Authority. For the time being, mergers and acquisitions rules will apply only to the telecommunications sector until the government determines that it is appropriate to broaden the scope of the rules. A Bills Committee on the Competition Bill was formed in October 2010 to analyze the draft. The Bills Committee will continue to meet through April 2012, after which time the Legislative Council may resume debate of the bill, propose amendments and vote on the final draft.

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

The Hong Kong government generally provides robust IPR protection and enforcement. Hong Kong has strong laws in place, a dedicated and effective enforcement capacity, a judicial system that supports enforcement efforts with deterrent fines and prison sentences, and youth education programs that discourage IPR-infringing activities. Hong Kong remains vulnerable, however, to some forms of IPR infringement, such as on-line copyright piracy, including the rapid growth of unauthorized file sharing over peer-to-peer (P2P) networks and end-user business software piracy. Due to the failure of internet service providers and IP rights holder to reach an agreement on a voluntary framework to address on-line infringements, the Hong Kong government restarted its efforts to draft digital IPR protection amendments to the Copyright Ordinance. The Hong Kong government expects to introduce the amendments into the Legislative Council in the 2010-2011 legislative session.

Although Hong Kong Customs routinely seizes IPR infringing products arriving from mainland China and elsewhere, stakeholders report that large quantities of counterfeit pharmaceuticals, luxury goods, and other infringing products continue to enter Hong Kong, destined for both the local market and transshipment to third-party countries. The U.S. Government continues to monitor the situation to ensure that Hong Kong sustains its IPR protection and enforcement efforts and addresses remaining problem areas.

## **SERVICES BARRIERS**

Foreign law firms may practice foreign law in Hong Kong. Foreign law firms that also wish to provide Hong Kong legal services may establish a local Hong Kong practice. The partners of the Hong Kong practice must all be Hong Kong-qualified solicitors, and the number of registered foreign lawyers employed by the Hong Kong practice may not exceed the number of Hong Kong solicitors employed by the Hong Kong firm. Such Hong Kong firms may be associated with, or be branches of, overseas law firms if they meet certain criteria (*e.g.*, at least one partner of the Hong Kong firm must also be a partner in the overseas firm).

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

U.S. industry has expressed concerns about lengthy approval procedures for new pharmaceuticals and the lack of transparency in the Hong Kong Hospital Authority's approval process for new drugs which inhibit their ability to market their products on a timely basis.

# INDIA

## TRADE SUMMARY

The U.S. goods trade deficit with India was \$10.3 billion in 2010, up \$5.6 billion from 2009. U.S. goods exports in 2010 were \$19.2 billion, up 16.9 percent from the previous year. Corresponding U.S. imports from India were \$29.5 billion, up 39.5 percent. India is currently the 17th largest export market for U.S. goods.

U.S. exports of private commercial services (*i.e.*, excluding military and government) to India were \$9.9 billion in 2009 (latest data available), and U.S. imports were \$12.4 billion. Sales of services in India by majority U.S.-owned affiliates were \$9.3 billion in 2008 (latest data available), while sales of services in the United States by majority India-owned firms were \$6.4 billion.

The stock of U.S. foreign direct investment (FDI) in India was \$18.6 billion in 2009 (latest data available), up from \$16.6 billion in 2008. U.S. FDI in India is led by the information, manufacturing, banking, and professional, scientific, and technical services sectors.

## IMPORT POLICIES

U.S. exporters continue to encounter tariff and non-tariff barriers that impede imports of U.S. products, despite the government of India's ongoing economic reform efforts. The United States has actively sought bilateral and multilateral opportunities to open India's market. The USTR and India's Minister of Commerce and Industry chair the United States – India Trade Policy Forum, which meets regularly – including through its five Focus Groups on Agriculture, Innovation and Creativity (*i.e.*, intellectual property rights), Investment, Services, and Tariff and Non-Tariff Barriers – to discuss the full range of bilateral trade and investment issues outlined in this chapter. Other bilateral dialogues, such as the Information Communication Technology Working Group and the Commercial Dialogue, also work to increase U.S. exports by resolving practical issues that affect doing business in India.

### Tariffs and other Charges on Imports

India's tariff structure of general application is composed of a basic customs duty (known as the "peak customs duty" even though many rates are higher), an "additional duty" (also referred to as a "countervailing duty"), and an "extra additional duty" (also referred to as the "special additional duty"). The additional duty, which is applied to all imports except for wine, spirits, or other alcoholic beverages, is applied on top of the basic customs duty, and is intended to correspond to the excise duties (CENVAT) imposed on similar domestic products. The extra additional duty is a 4 percent *ad valorem* duty that applies to all imports, including alcoholic beverages, except those exempted from the duty pursuant to a customs notification. The extra additional duty is calculated on top of the basic customs duty and additional duty.

While India publishes applied tariff and other customs duty rates applicable to imports, to determine the applicable applied tariff or other customs duty rate, importers must cross-reference separate customs and excise tax schedules with any applicable customs or excise notification that may subject the product to higher or lower rates than set forth in the schedules (assuming the importer is able to determine that any such notification exists). This system lacks transparency and imposes significant burdens on importers. Working with a private publisher, the Ministry of Finance has implemented a subscription-based online (<http://www.custadaindia.com/>) and CD database of tariff rates and non-tariff measures.

## FOREIGN TRADE BARRIERS

India's tariff regime is also characterized by pronounced disparities in bound rates (*i.e.*, the rates that under WTO rules generally cannot be exceeded) versus the actual rates charged (the MFN applied rate). According to the WTO, India's average bound tariff rate was 48.6 percent, while its simple MFN average applied tariff for 2009 was 12.9 percent across all goods (World Bank data puts the FY2009-2010 applied rate at 14 percent). Given this large disparity between bound and applied rates, U.S. exporters face tremendous uncertainty because India has considerable flexibility to change tariff rates at any time. While India has bound all agricultural tariff lines in the WTO, over 30 percent of India's non-agricultural tariffs remain unbound, *i.e.*, there is no WTO ceiling on the rate.

India steadily reduced MFN applied tariffs on non-agricultural goods, including a reduction in the government-stipulated basic customs duty on most industrial products to 10 percent in FY2007-08. Despite the explicit goal of moving toward Association of Southeast Asian Nations (ASEAN) tariff rates (approximately 5 percent on average), India has not reduced the basic customs duty in the past three years. India also maintains very high tariff peaks on a number of goods, including flowers (60 percent), natural rubber (70 percent), automobiles and motorcycles (60 percent for new products, 100 percent for used products), coffee (100 percent), poultry (30-100 percent), and textiles (some *ad valorem* equivalent rates exceed 300 percent).

Many of India's bound tariff rates on agricultural products are among the highest in the world, ranging from 100 percent to 300 percent, with an average bound tariff of 114.2 percent. While many Indian applied tariff rates are lower (averaging 32 percent on agricultural goods in 2009), they still represent a significant barrier to trade in agricultural goods and processed foods (*e.g.*, potatoes, apples, grapes, canned peaches, chocolate, cookies, and frozen French fries and other prepared foods used in quick-service restaurants). Goods such as almonds remain subject to high specific duties instead of *ad valorem* rates. The large gap between bound and applied tariffs in the agriculture sector allows India to use tariff policy frequently to adjust the level of protection in the market, creating uncertainty for traders. For example, in April 2008, in an effort to curb inflation, India reduced applied duties on crude edible oils and corn to zero, refined oils to 7.5 percent, and butter to 30 percent. However, in November 2008, India raised crude soy oil duties back to 20 percent and then reduced them again to zero in March 2009.

In order to boost domestic manufacturing, India had taken steps to reduce and simplify the general rate of central excise duty for domestic products (CENVAT), reducing the corresponding "additional duties" paid on imported products. For example, in 2009, as part of an economic stimulus package, India cut the excise duty on most products from 10 percent to 8 percent. Later that year, India implemented dual excise rates of 4 percent and 8 percent *ad valorem*, which actually doubled the 4-percent duty rate on several items (*e.g.*, manmade textiles, ceramic tiles, plywood, wood products, writing ink, zip fasteners, and MP3/MP4 players). The FY 2009-2010 budget, however, reversed the stimulus cut in the general excise duty and set it back to 10 percent, where it remains.

In July 2007, after the United States initiated WTO dispute settlement procedures to challenge the additional duty on alcoholic beverages, India issued a customs notification exempting alcoholic beverages from the additional duty. (Under the prior customs notification, imports of alcoholic beverages were subject to rates of additional duty ranging from 20 percent to 150 percent *ad valorem* and in some cases higher specific duties.) Simultaneously, India raised the basic customs duty on wine from 100 percent to 150 percent. The basic customs duty on distilled spirits remained at 150 percent. When India exempted alcoholic beverages from the additional duty, it announced it was doing so *in lieu* of applying state-level excise duties on wine and spirits. These state-level taxes can result in imported wine and spirits being taxed at a higher rate than like domestic products.

Imports also are subject to state-level value added or sales taxes and the Central Sales Tax as well as various local taxes and charges. In September 2007, India issued a customs notification allowing importers to apply for a refund of the extra additional duty paid on imports subsequently sold within India and for which the importer has paid state-level value added taxes. Importers report that the refund procedures are cumbersome and time consuming. India announced its intention to implement a national goods and services tax (GST) by 2011 that would replace most indirect taxes, including various charges on imports. Implementation of a national GST, however, will first require amending the Indian Constitution.

### **Import Licensing**

India maintains a “negative list” of imported products subject to various forms of non-tariff regulation. The “negative list” is currently divided into three categories: banned or prohibited items (*e.g.*, tallow, fat, and oils of animal origin); restricted items that require an import license (*e.g.*, livestock products and certain chemicals); and “canalized” items (*e.g.*, petroleum products and some pharmaceuticals) importable only by government trading monopolies subject to cabinet approval regarding timing and quantity. India, however, often fails to observe customary transparency requirements such as publication of this information in the Official Gazette or notification to WTO Committees, which can, in practice, act as a barrier to trade.

India allows imports of second-hand capital goods by the end users without requiring an import license, provided the goods have a residual life of five years. Refurbished computer spare parts can only be imported if an Indian chartered engineer certifies that the equipment retains at least 80 percent of its residual life, while refurbished computer parts from domestic sources are not subject to this requirement. India has required import licenses for all remanufactured goods since 2006. India’s official Foreign Trade Policy, last issued in August 2010, treats remanufactured goods the same as second-hand products and provides no criteria for different levels of transformation that would distinguish remanufactured, refurbished, reconditioned, and second-hand goods. As with licensing requirements on other products, U.S. industry representatives report that the requirement is onerous as implemented: the license application requires excessive details; quantity limitations are set on specific part numbers; the delay between application and grant of the license is long and creates uncertainty; and in some cases industry representatives report that they have been unable to obtain a license.

Since 2005, India has subjected imported boric acid to stringent requirements, including arbitrary quantity limitations and conditions applicable only to imports used as insecticide. Traders (*i.e.*, wholesalers) of boric acid for non-insecticidal use remain unable to import boric acid for resale because they are not end users of the product and cannot obtain no-objection certificates (NOCs) from the Ministry of Agriculture. NOCs are required before applying for import permits from the Ministry of Agriculture’s Central Insecticides Board & Registration Committee. Meanwhile, local refiners continue to be able to produce and sell non-insecticidal boric acid, with a requirement only to maintain records showing they are not selling to insecticidal end users.

### **Customs Procedures**

U.S. exporters have raised concerns regarding India’s application of customs valuation criteria to import transactions. India’s valuation procedures allow India’s customs officials to reject the declared transaction value of an import when a sale is deemed to involve a lower price compared to the ordinary competitive price. U.S. exporters have reported that India’s customs valuation methodologies do not reflect actual transaction values and raise the cost of exporting to India beyond applied tariff rates. U.S. companies have also faced extensive investigations related to their use of certain valuation methodologies when importing computer equipment. Companies have reported being subjected to excessive searches and seizures.

India's customs officials generally require extensive documentation, which inhibits the free flow of trade and leads to frequent and lengthy processing delays. In large part this is a consequence of India's complex tariff structure and multiple exemptions, which may vary according to product, user, or intended use. While difficulties persist, India has shown improvement in this area through the automation of trade procedures and other initiatives.

Motor vehicles may be imported through only three specific ports and only from the country of manufacture.

## **GOVERNMENT PROCUREMENT**

Government procurement in India is decentralized, and all state (sub-central) and public sector agencies have their own procurement organizations. Different procurement practices are applied at the central (federal) level, at the state level, and by public sector agencies and enterprises. At the central level, procurement is regulated through executive directives and administered by individual government agencies. The Ministry of Finance's General Financial Rules (GFR) sets out central government general rules and procedures for financial management, procurement of goods and services, and contract management. The GFR includes a Manual on Policies and Procedures for Purchase of Goods. A number of instructions issued by the Central Vigilance Commission (the Indian government's oversight body for government employees) supplement these regulations. Individual government agencies also sometimes issue more detailed instructions and their own handbooks, model forms, and model contracts.

India does not have an authority responsible for overseeing compliance with the procurement procedures. However, a central purchasing agency, the Directorate General of Supplies and Disposal, along with state-level central purchasing organizations, enter contracts with registered suppliers for goods and standard items in conformity with the GFR. Sector-specific procurement policies apply in certain areas, such as defense procurement. India's defense "offsets" program requires companies to invest 30 percent or more of the value of contracts above Rs. 300 crores (\$67 million) in Indian produced parts, equipment, or services. These offset requirements are often so onerous that they dissuade foreign companies from bidding. In addition, it is not uncommon for the Defense Ministry to request significant changes to previously accepted offset proposals. India has indicated that it is preparing to broaden the areas of acceptable offsets but a new policy has not been announced.

India's government procurement practices and procedures are often not transparent. Foreign firms also rarely win Indian government contracts due to the preference afforded to Indian state-owned enterprises and the prevalence of such enterprises. Similarly, the 2006 Micro, Small and Medium Enterprise (MSME) Act authorizes the government to provide procurement preferences to MSMEs. India requires purchase of certain items from MSMEs, but this list has been gradually reduced from a peak of 800 items in the late 1990s to just 21 specific goods and services (*e.g.*, pickles/chutneys, bread, wood furniture, wax candles, safety matches, fireworks). India provides similar preferences to government-registered "small scale industry units" for certain products.

India is not a signatory to the WTO Agreement on Government Procurement (GPA) but became an observer to the WTO Committee on Government Procurement in February 2010. India is currently undertaking internal consultations on potential GPA membership and the formulation of a new regulatory framework for government procurement practices.

## **EXPORT SUBSIDIES**

India's tax exemption for profits from export earnings has been completely phased out, but tax holidays continue for export-oriented enterprises and exporters in Special Economic Zones (SEZs). In addition to these programs, India continues to maintain several other export subsidy programs, including duty drawback programs that appear to allow for drawback in excess of duties levied on imported inputs. India also provides pre-shipment and post-shipment financing to exporters at a preferential rate. India's textile industry enjoys subsidies through various modernization schemes, such as the Technology Upgradation Fund Scheme and the Scheme for Integrated Textile Parks. Numerous other sectors, including paper, rubber, toys, leather goods, and wood products receive subsidies tied to export performance. After several consecutive years of not submitting a subsidies notification, India has recently submitted two notifications to the WTO Committee on Subsidies and Countervailing Measures (SCM Committee), both of which notify only one central government program of preferential tax incentives related to Free Trade Zones, Special Economic Zones, and Export Processing Zones covering the 2003-2009 time period. These notifications were substantially incomplete, as they failed to notify several well-known subsidies programs in India.

The United States submitted a formal request to the SCM Committee in February 2010 requesting a calculation of the export competitiveness of Indian textile and apparel products. The resulting calculation, published in March 2010, indicated that, with respect to textile and apparel products, India had met the definition of "export competitiveness" set out in Article 27.6 of the SCM Agreement. As a result, India must phase out export subsidies for those products over a period of two years, in accordance with the SCM Agreement. Since the calculation, India has announced some reductions in duty drawback rates for textile products. However, India continues to offer subsidies to the textiles and apparel sector designed to promote exports, and has even extended or expanded such programs.

There is a special initiative for agricultural exports in India's Foreign Trade Policy 2009-2014, including a scheme called *Vishesh Krishi Gram Upaj Yojana* (VKGUY – "Special Agriculture Produce Scheme"), aimed at boosting exports of fruits, vegetables, flowers, some forest products, and related value-added products. Under the plan, exports of these items qualify for a duty-free credit that is equivalent to five percent of their free-on-board export value. The credit is freely transferable and can be used to import a variety of inputs and capital goods. To mitigate the impact of the global economic slowdown on exports, the government has made several additional agricultural products eligible under VKGUY, such as soybean meal, marine products, and tea.

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

India was listed on the Priority Watch List in the 2010 Special 301 Report. Key concerns include weak protection and enforcement of intellectual property rights. Although India continues to take potentially positive steps towards establishing a more comprehensive and stable legal framework for the recognition and protection of IPR, India needs to improve its IPR regime by providing stronger protection for copyrights, trademarks, and patents. India also needs to provide effective protection against unfair commercial use of undisclosed test and other data generated to obtain marketing approval for pharmaceutical and agrochemical products.

India has not yet enacted legislation to implement the provisions of the WIPO Internet Treaties. Large-scale copyright piracy, especially in the software, optical media, and publishing industries, continues to be a major problem. While India continues to consider optical disc legislation to combat optical disc piracy, it has not taken steps to introduce such legislation. In addition, India's criminal IPR enforcement regime remains weak. More police action against those engaged in manufacturing, distributing, or selling pirated

## **FOREIGN TRADE BARRIERS**



and counterfeited goods as well as expeditious judicial dispositions for criminal IPR infringement actions and imposition of deterrent-level sentences, is needed.

## **SERVICES BARRIERS**

The Indian government has a strong ownership presence in major services industries such as banking and insurance, while private firms play a preponderant to exclusive role in some of the fastest growing areas of the services sector, including information technology, advertising, car rental, and business consulting. While India has submitted offers for improved services commitments in the WTO Doha Round, these offers do not remove existing limitations or promise new liberalization in key sectors such as telecommunications, financial services, and the legal services sector.

### **Insurance**

India first opened its insurance sector to foreign participation in 1999, and foreign equity is currently limited to 26 percent of paid-up capital. India introduced legislation in late 2008 to allow foreign equity participation to increase to 49 percent and also allow for entry of foreign re-insurers. In 2009, the Insurance Laws (Amendment) Bill went to the Standing Committee on Finance for evaluation where it continues to await re-introduction in the Parliament. As with other sectors being considered by the government for greater FDI liberalization, opposition party lawmakers are concerned that passing the Insurance Bill will result in foreign companies' holdings increasing significantly. As lawmakers consider increasing foreign investment in the sector, many existing investors are approaching ten years of doing business in India. Under current regulations, at the ten-year mark, the foreign partner is required to divest its equity stake down to 26 percent. While the Insurance Regulatory and Development Authority said it plans to publish a clarification of these regulations, foreign investors continue to operate in an extremely uncertain business environment.

### **Banking**

Although India allows privately-held banks to operate in the country, most Indian banks are government-owned and entry of foreign banks is highly regulated. State-owned banks account for roughly 72 percent of the assets and 86 percent of all bank branches in the banking system, although private banks are growing rapidly. Foreign banks may operate in India in one of three forms: a direct branch, a wholly-owned subsidiary, or through a stake in a private Indian bank.

As of September 2010, there were 34 foreign banks with 315 branch offices operating in India under RBI approval, including four U.S. banks with a total of 52 branches. Under India's branch authorization policy, foreign banks are required to submit their internal branch expansion plans on an annual basis, but their ability to expand is severely limited by nontransparent quotas on branch office expansion. Between April 2009 and March 2010 (latest data available), India granted six new foreign branch office licenses.

The Ministry of Finance has conveyed its preference that foreign banks convert their presence into wholly-owned subsidiaries. In the past, foreign banks have not opened wholly-owned subsidiaries because of RBI caps on ownership: Foreign banks are not authorized to own more than 5 percent of on-balance sheet assets of an Indian private bank without approval of the RBI, while individual investors, including foreign investors, cannot own more than 10 percent of any private bank. Total foreign ownership from all sources (FDI, foreign institutional investors, and non-resident Indians) cannot exceed 74 percent. In addition, voting rights are capped at 10 percent. Implementation of the roadmap the RBI developed in 2005 to allow national treatment of foreign banks in India continues to be stalled. The Ministry of Finance and RBI are exploring the feasibility of lifting this indefinite hold on implementation of the roadmap.

## **FOREIGN TRADE BARRIERS**

## **Audiovisual and Communications Services**

Although India has removed most barriers to the import of motion pictures, U.S. companies continue to experience difficulty importing film and video publicity materials and are unable to license movie-related merchandise due to royalty remittance restrictions. The industry also has experienced difficulty importing digital masters of films loaded on electronic medium as opposed to those imported on cinematographic film, owing to a different customs duty structure. In its FY 2010-2011 Annual Budget, India rationalized this by charging a customs duty only on the value of the carrier medium. The same treatment also applies to music and gaming software imported for distribution. In all such cases, the value representing the transfer of intellectual property rights is subject to a service tax.

U.S. companies continue to face difficulties with India's 2005 "Downlink Policy." This policy applies to international content providers that down-link programming from a satellite into India, and requires that they establish a registered office in India or designate a local agent. India reportedly implemented this rule to ensure greater oversight over programming content. However, U.S. companies note that most other countries (including the United States) do not require a license to down-link programming, and that India can control content through its licensed entities (such as cable companies or "Direct to Home" providers). Companies claim that this policy is overly burdensome and should be amended to avoid the resulting taxable presence in India. However, India claims that most companies have now established registered offices there and have complied with the requirements. Thus, India currently is not considering any amendments to the "Downlink Policy."

## **Accounting**

Foreign accounting firms encounter several hurdles to entering the Indian accounting services sector. Before an accountant can practice in India, the accountant must become a member of the Institute of Chartered Accountants of India (ICAI), which requires taking ICAI courses, undergoing practical training at an ICAI accredited organization, and passing an examination. Foreign accounting firms may only practice in India if their home country provides reciprocity to Indian firms. Only firms established as a partnership may provide financial auditing services, and foreign-licensed accountants may not be equity partners in an Indian accounting firm. India's Limited Liability Partnership (LLP) Act of 2008 took effect on March 31, 2009, but has not yet been effective in facilitating foreign participation in LLPs.

Foreign accounting firms are also concerned with proposed Indian Companies Act amendments currently with the Parliamentary Finance Committee. If passed, these amendments would require a mandatory audit firm rotation and increase third party liability, changes that foreign firms fear would disrupt business continuity and represent a departure from the practices employed by most G20 countries.

## **Legal Services**

Foreign law firms are not authorized to open offices in India. Foreign legal service providers may be engaged as consultants in local law firms, but they cannot sign legal documents, represent clients, or be appointed as partners. The Bar Council of India (BCI) is the legal governing body in India. Membership in BCI is mandatory to practice law in India but is limited to Indian citizens.

Recent lawsuits have asked Indian courts to interpret ambiguous provisions of the Advocates Act to limit the ability of foreign attorneys to provide any type of legal services, including not only oral arguments in court, but also drafting advice and counseling on matters of foreign (*i.e.*, non-Indian) law. The Bombay High Court decided in 2009 that such legal advisory activities in India fell under the Advocates Act, and were therefore restricted to Indian lawyers, but urged the government to amend the law. In 2010 the

Association of Indian Lawyers filed a similar challenge against 31 foreign law firms, the BCI, and the Ministry of External Affairs in the Madras High Court, which has repeatedly delayed a decision.

## **Telecommunications**

Despite India's positive steps towards liberalizing and introducing private investment and competition in its telecommunications services market, concerns remain regarding India's limited multilateral commitments in basic and value-added telecommunications services. In addition, many pro-competition recommendations of the independent telecommunications regulatory agency (Telecommunications Regulatory Authority of India - TRAI) have been delayed or rejected by the Department of Telecommunications (DoT) without adequate explanation. A major scandal surrounding the allocation of 2G spectrum erupted in November 2010, based on allegations of extensive government corruption at the Ministry of Communications and Information and Technology (MCIT), and caused uncertainty for foreign and domestic companies alike.

India's national telecommunications policy allows up to 74 percent foreign participation for wireless and fixed national and international long distance services, and several U.S. companies have obtained licenses to provide these services. However, other U.S. companies complain that India's licensing fee (approximately \$500,000 per service) serves as a barrier to market entry for smaller market players.

India maintains limits on FDI and foreign indirect (portfolio) investment in cable networks (49 percent), satellite uplinking (49 percent), "direct-to-home" (DTH) broadcasting (49 percent with FDI limited to 20 percent), and the uplinking of news and current affairs television channels (26 percent). In August 2009, the TRAI recommended to the DoT that FDI for cable networks, DTH, and satellite uplinking should be increased to 74 percent. This recommendation has not yet been implemented.

India issued a series of new requirements for telecommunications service providers (TSP) and equipment vendors in December 2009, March 2010, and July 2010, allegedly in order to maintain the security of its commercial telecommunications networks. The requirements apply to the purchase of imported products and do not apply to products manufactured or developed in India by Indian-owned or -controlled manufacturers. Issued in the form of amendments to telecommunications service licenses, the new regulations imposed an inflexible and unworkable security approval process, mandating the forced transfer of technology to Indian companies, the escrowing of source code, and assurances against malware and spyware during the entire use of the equipment. The United States has emphasized to India that these measures effectively halted billions of dollars worth of trade in telecommunications equipment and were unlikely to advance India's security objectives. Recognizing these concerns, India has suspended implementation of several of these requirements while it works to revise the policies in consultation with relevant stakeholders.

India struggled for over a year to formalize its policies for the allocation of wireless spectrum to serve its rapidly expanding and lucrative wireless telecommunications industry. After several postponements, India conducted long-awaited 3G spectrum and Broadband Wireless Access auctions in May – June 2010 amidst intense competition. The 3G auctions were held for a total of 71 blocks in 22 telecommunications circles of 2X5MHz spectrum in the 2.1GHz band. The auctions raised \$23 billion in revenue, which nearly doubled initial expectations. The high 3G spectrum prices are attributed to uncertainty over 2G spectrum policy, the availability of fewer slots per circle, and the limited spectrum available for auction. However, the prices are likely to make 3G services expensive for consumers, which is contrary to the Indian objective of providing affordable broadband services to rural India. India initially announced that spectrum would be made available to the winning bidders by September 2010, but to date, the winners are still awaiting the release of spectrum previously allocated to the Indian defense services.

## **FOREIGN TRADE BARRIERS**

The Government of India continues to hold equity in three telecommunications firms: a 26 percent interest in the international carrier, VSNL; a 56 percent stake in MTNL, which primarily serves Delhi and Mumbai; and 100 percent ownership of BSNL, which provides domestic services throughout the rest of India. These ownership stakes have caused private carriers to express concern about the fairness of India's general telecommunications policies. For example, valuable wireless spectrum was allocated and set aside for MTNL and BSNL and not subject to competitive bidding. BSNL and MTNL paid the final bid price of the 3G auction, but they received 3G spectrum well ahead of private players.

India does not allow companies to provide Internet telephony over networks connected to the publicly switched telecommunications network unless they obtain a telecommunications license. U.S. industry views this requirement as overly burdensome for companies interested only in providing Internet telephony. Following a public consultation process initiated in May 2008, TRAI forwarded recommendations to the DoT in August 2008, suggesting that the barriers to the provision of Internet telephony be eliminated entirely. In December 2010, the DoT rejected TRAI's recommendations.

U.S. satellite operators have long complained about the closed and protected satellite services market in India. In practice, even though current Indian regulations do not preclude the use of foreign satellites, foreign satellite capacity must be provided through the Indian Space Research Organization (ISRO). That is, the foreign operator must sell its capacity to ISRO, a direct competitor, who then resells it to the customer. This scenario raises a number of concerns: first, it creates additional costs for the consumer (a markup added by ISRO); second, it allows ISRO to negotiate contract terms with the goal (explicitly stated at times) of moving the service to one of ISRO's satellites once capacity is available; and third, the market grows at a rate determined by ISRO.

In the past, TRAI has recommended that India adopt an "open skies" policy and allow competition in the satellite services market, noting that India had already instituted a partial open skies policy with respect to international, very small aperture terminal services connected to the U.S. Internet backbone for Indian Internet service providers. However, to date, India has not adopted TRAI's recommendations for further liberalization.

### **Distribution Services**

The retail sector in India is largely closed to foreign investment. In January 2006, India began allowing FDI in single-brand retail stores, subject to a foreign equity cap of 51 percent and government approval and 100 percent foreign equity with automatic approval in cash and carry (wholesale). FDI in multi-brand retail outlets is not permitted. India in July 2010 invited public comment on a discussion paper on liberalization of FDI in multi-brand retail, receiving extensive comments. On October 25, 2010, India convened an inter-ministerial committee to make a final decision on this matter with several Indian officials making positive statements in favor of some liberalization. However, India has not yet announced a decision, and has declined numerous requests from stakeholders and trading partners to provide an indication of the processes and notional timelines involved in reaching such a decision.

India has periodically interpreted the activities of direct selling companies as violating the Prize Chits and Money Circulation Schemes (Banning) Act of 1978, causing uncertainty. Industry groups would like to see the Department of Industrial Policy and Promotion issue a press note establishing the definition of direct selling and clarifying any ambiguity, including ambiguity related to commissions earned in connection with the sale of products. Allegedly arbitrary legal actions (including raids and seizures of property) were taken in 2006 against a U.S. direct selling company operating in India with Foreign

Investment Promotion Board (FIPB) approval. The case remains with the courts and could go to trial at any time.

### **Postal and Express Delivery**

India's Department of Post supports amending the 1898 Post Office Act. An amendment introduced in 2006 included several provisions with potentially negative effects for private express delivery companies, such as: a provision requiring private delivery service suppliers to contribute to financing the postal operator's universal service obligation; expansion of the postal monopoly to cover all "letters" up to 300 grams; and new limitations on foreign investment in private delivery services, including express delivery, which might force foreign-owned express delivery companies to divest from their current levels of investment in India. The proposed legislation was officially withdrawn in January 2009 due to opposition from many stakeholders, including courier services companies. In mid-2009, the Indian Post Office requested that the Administrative Staff College of India (ASCI), based in Hyderabad, prepare input for another comprehensive postal bill to replace the India Postal Act of 1898. Responding to a request from industry, ASCI met with Express Industry Council of India members in December 2009 in Mumbai to hear their views. ASCI submitted its draft recommendations to the Department of Post in May 2010, and the Department of Post is currently drafting a new bill. The United States continues to urge India to ensure that any new version of the postal bill is drafted in a transparent fashion, in full consultation with stakeholders, and draws on global best practices, including the promotion of free competition and a level playing field for foreign express delivery and other courier services suppliers

### **Education**

Foreign providers of higher education services interested in establishing in India face a number of market access barriers, including a requirement that representatives of states sit on university governing boards; quotas limiting enrollment; caps on tuition and fees; policies that create the potential for double-taxation; and difficulties repatriating salaries and income from research. A draft Foreign Education Providers Bill may address some of these issues, but it remains under review by Parliament.

## **INVESTMENT BARRIERS**

### **Equity Restrictions**

India continues to prohibit or severely restrict FDI in certain politically sensitive sectors, such as agriculture, retail trade, railways, and real estate. Automatic FDI approval in many industries, including bulk manufacturing activities, is now allowed, though investment in some sectors still requires government approval. The Ministry of Commerce and Industry, seeking to liberalize FDI within pre-existing caps, issued new guidelines (Press Notes) in February 2009, which provided that if a company with foreign investment were majority-owned or controlled by resident Indians, then it could conduct "downstream" investment within sectoral caps. Such downstream investments previously had been constrained by the initial investment in the joint venture. However, the new guidelines caused some confusion regarding downstream investments. A subsequent press note failed to clarify the extent to which foreign participation is allowed in downstream investments, which continues to be unclear.

The Department of Industrial Policy and Promotion (DIPP), within the Ministry of Commerce and Industry, issued a consolidated FDI policy in April 2010 with the intention of issuing a revised policy every six months. The first revision was released in October 2010, and DIPP has requested public comment in advance of the next revision. Although DIPP had previously published plain-language FDI

manuals for potential foreign investors, to date it has not published such a manual that reflects the consolidated FDI policy.

India's stringent and nontransparent regulations and procedures governing local shareholding inhibit inbound investment and increase risk to new entrants. Attempts by non-Indians to acquire 100 percent ownership of a locally traded company, which are permissible in principle, face regulatory hurdles that render 100 percent ownership unobtainable under current practice. Price control regulations have further undermined incentives for foreign investors to increase their equity holdings in India.

### **Investment Disputes**

India's poor track record in honoring and enforcing agreements with U.S. investors in the energy sector has improved in recent years. The central government, which has limited jurisdiction over commercial disputes involving matters under state jurisdiction, has sought to have India's states engage with investors in an effort to settle commercial disputes. The United States continues to emphasize that in order for India to be viewed as an attractive and reliable investment climate, India and its political subdivisions need to provide a secure legal and regulatory framework for the private sector, as well as institutionalized dispute resolution mechanisms to expedite resolution of commercial issues. India's over-20 million legal case backlog countrywide (according to a 2008 UN Development Program report) reflects the frequent delay of legal proceedings in India.

### **ANTICOMPETITIVE PRACTICES**

Historically, Indian firms faced few, if any, disincentives to engage in anticompetitive business practices. However, in 2002, the Indian Government enacted the Competition Act, which created the Competition Commission of India (CCI). The CCI began taking on cases in 2009, after delays caused by litigation and legislative amendments. It is in the process of becoming fully staffed. In March 2011, the Government of India announced that the merger provisions of the Act would come into force on June 1, 2011, and also clarified certain aspects of those provisions. At the same time, CCI issued revised draft merger regulations providing more details on how merger reviews will be handled by the agency. The United States continues to work with India to assist the CCI in its efforts to implement the Act, including these merger provisions, in a manner consistent with international best practices.

### **OTHER BARRIERS**

India has an unwritten policy that favors countertrade (a form of trade in which imports and exports are linked in individual transactions). The Indian Minerals and Metals Trading Corporation is the major countertrade body, although the State Trading Corporation also handles a small amount of countertrade. Private companies also are encouraged to use countertrade. Global tenders usually include a clause stating that, all other factors being equal, preference will be given to companies willing to agree to countertrade.

India issued new guidelines in July 2010 as part of the Jawaharlal Nehru National Solar Mission, requiring that eligible projects source certain materials from domestic manufacturers. Future phases of the policy are expected to implement broader local content requirements. These restrictions prevent U.S. exports of certain solar power equipment to India and impede India's access to the high quality materials necessary for its solar projects to obtain financing and meet India's renewable energy objectives.

Potential challenges to making defense sales include the lack of a signed Communication Interoperability and Security Memorandum of Agreement (CISMOA) and a Basic Exchange and Cooperation Agreement (BECA) between the United States and India. A signed CISMOA would provide the framework necessary

### **FOREIGN TRADE BARRIERS**

to ensure that sensitive communication encryption capabilities are adequately protected, and would act as the first step toward making some of the most advanced U.S. communication and jam resistant navigation technologies available to India. A signed BECA would provide a structure for exchange of geospatial data used in sophisticated navigation and cockpit display systems.

In June 2008, India enacted export tariffs of 15 percent on all grades of iron ore and its concentrates but revised the tax to 5 percent in December 2008. In December 2009, India raised this export tax rate to 10 percent, leaving the export duty on iron ore fines at 5 percent. India then increased the export tax on iron ore lumps to 15 percent in April 2010. In July 2010, the Indian state of Karnataka banned the export of iron ore from the state. Exporters have challenged this ban, and as of January 2011, the case is before the Supreme Court of India. Officials from the state of Orissa indicated in January 2011 that they intend to adopt an iron ore export ban as well. Such restrictions affect international markets for raw materials used in steel production. India also requires that exports of high grade iron ore (greater than 64 percent iron content) pass through state trading enterprises, with the state-owned Minerals and Metals Trading Company acting as a clearinghouse. In 2010 India became the world's sixth largest steel producing economy, and it appears the Indian government is using these measures to improve supply and lower prices of inputs used by India's rapidly growing steel industry.

India has adopted similar measures that appear designed to preserve the availability of affordable inputs for its textile and apparel sector. Since April 2010, India has maintained quantitative export restrictions (of 5 million to 5.5 million bales) and export duties (of Rs. 2500 per ton, subsequently increased by a 3 percent *ad valorem* duty) on cotton. At the same time, India established an export quota of 720,000 metric tons on cotton yarn. These measures not only serve to support the Indian domestic textile and apparel sector, but because India is the world's second largest exporter of cotton, they have also contributed significantly to the dramatically increasing world price of cotton and the consequent rise in costs of production for other countries' textile and apparel producers.

# INDONESIA

## TRADE SUMMARY

The U.S. goods trade deficit with Indonesia was \$9.5 billion in 2010, up \$1.7 billion from 2009. U.S. goods exports in 2010 were \$6.9 billion, up 35.9 percent from the previous year. Corresponding U.S. imports from Indonesia were \$16.5 billion, up 27.3 percent. Indonesia is currently the 32nd largest export market for U.S. goods.

U.S. exports of private commercial services (i.e., excluding military and government) to Indonesia were \$1.4 billion in 2009 (latest data available), and U.S. imports were \$425 million. Sales of services in Indonesia by majority U.S.-owned affiliates were \$2.4 billion in 2008 (latest data available), while sales of services in the United States by majority Indonesia-owned firms were \$69 million.

The stock of U.S. foreign direct investment (FDI) in Indonesia was \$16.0 billion in 2009 (latest data available), down from \$16.3 billion in 2008. U.S. FDI in Indonesia is primarily concentrated in the nonbank holding companies and mining sectors.

## IMPORT POLICIES

### Tariffs

In 2010, Indonesia's average MFN applied tariff was 7.6 percent. Over the past two years, Indonesia has raised tariffs on a number of products. In 2010, Indonesia increased applied tariffs for products including medicines, cosmetics, and energy efficient lights. In 2009, Indonesia raised rates on a number of goods that compete with locally manufactured products, including certain chemicals, electronic products, electrical and non-electrical milling machines, iron wire and wire nails, and a range of agricultural products including milk products, animal or vegetable oils, fruit juices, coffee, and tea. Indonesia's simple average bound tariff, *i.e.*, the rate which generally cannot be exceeded under WTO rules, is 37 percent. Most Indonesian tariffs are bound at 40 percent, although bound tariff levels exceed 40 percent or remain "unbound" on automobiles, iron, steel, and some chemical products. U.S. motorcycle exports remain severely restricted by the combined effect of a 60 percent tariff, a luxury tax of 75 percent, a 10 percent value added tax, and the prohibition of motorcycle traffic on Indonesia's highways.

In the agricultural sector, tariffs on more than 1,300 products have bindings at or above 40 percent. Tariffs on fresh potatoes, for instance, are bound at 50 percent, although the applied rate is 25 percent. Indonesia's applied tariff on imported spirits is a prohibitive 150 percent, which is its bound rate. U.S. companies report that the reduction or elimination of tariffs on a wide range of products including beef, cheese, cooking appliances, cookware, and beverage systems would result in tens of millions of dollars in increased sales to Indonesia.

Indonesia has extensive preferential trade relationships with other Asian countries. Under the ASEAN Free Trade Agreement (FTA), import duties from ASEAN countries are applied at zero percent to five percent, except for products specified on an exclusion list. In addition, Indonesia accords preferential market access to Australia, China, Japan, Korea, India, and New Zealand (under ASEAN FTAs) and to Japan (under a bilateral Economic Partnership Agreement). Implementation of the ASEAN-China FTA has been contentious, with domestic industries pressing for more time to implement tariff commitments as well as for the imposition of new non-tariff barriers to offset the reduction in tariff protection. Indonesia also is currently negotiating bilateral agreements with Iran, India, and Australia.

## FOREIGN TRADE BARRIERS



## **Import Licensing**

Exporters to Indonesia must comply with numerous and overlapping import licensing requirements that impede access to Indonesia's market. In 2009, the Indonesian government implemented a sweeping regulation imposing non-automatic import licensing procedures on a broad range of products, including electronics, household appliances, textiles and footwear, toys, and food and beverage products. The measure, known as Decree 56, was extended by Ministry of Trade Regulation 57/2010 in December 2010, and it will remain in effect until December 31, 2012. The extended decree includes a requirement for preshipment verification by designated surveyors at importers' expense and a restriction that limits entry of imports to five designated ports and airports. The Indonesian government was considering extending these licensing provisions to additional products; however, it has informally limited application of the decree to "final consumer goods." The Indonesian government also appears to be exempting select registered importers from certain requirements of this decree. However, the approval process to qualify as a registered importer is opaque, ill-defined, and potentially discriminatory. The United States and other WTO Members have expressed concern about the decree and are seeking its withdrawal.

Effective January 1, 2011, Ministry of Trade Regulation 45/2009 and Regulation 17/2010 introduce a requirement that companies can only import goods for further distribution or goods for their own manufacturing, but not both. The rationale for this policy is unclear, though importers report that it is being applied more stringently on imports destined for distribution than on imports used in the production process, raising concerns that its application is restricting imports.

Since 2002, Indonesia has continued to maintain other additional non-automatic licensing requirements on textiles, clothing, and other "made-up goods" such as curtains and blankets, which limit market access for a wide range of products. Only approved local producers are authorized to import products covered by this regulation, and these products are permitted for use only as inputs in domestic production, not for resale or transfer. Approval must be obtained for both the quantity and timing of imports. The United States continues to press Indonesia to eliminate these requirements.

Additional burdensome product-specific import licensing and registration requirements apply to agricultural products, including beef, sugar, and dairy.

## **Pharmaceutical Market Access**

The United States continues to have serious concerns about barriers to entering Indonesia's pharmaceuticals market. Ministry of Health Decree 1010 requires foreign pharmaceutical companies operating in Indonesia to manufacture locally in order to be considered domestic manufacturers and be qualified to apply for drug approvals. Under this policy, companies can be barred from the Indonesian market even if they are market leaders in globally recognized good manufacturing and distribution practices and provide high quality pharmaceuticals to Indonesian patients in the same manner that Indonesian manufacturers do. An amendment to Decree 245/1990 was signed into law in December, 2010 altering the definition of local manufacturing in Indonesia to include domestic packaging and labeling facilities. The market impact of this revised policy is unclear, as discriminatory aspects of Decree 1010 remain. Of note, Decree 1010 includes a requirement for local manufacturing of all pharmaceutical products that are five years past patent expiration. The U.S. Government has raised its objections to these market access barriers with Indonesia repeatedly and strongly encourages it to resolve these concerns, which restrict market access for U.S. companies, thereby potentially limiting availability of medicines for Indonesian patients.

## **Quantitative Restrictions**

The Indonesian government requires an import permit from the Directorate General of Livestock Services for imports of animal-based food products. In approving import permits, the Indonesian government retains discretion to alter the quantity it allows to enter. U.S. industry estimates the annual trade impact of this restriction to be between \$10 million and \$25 million. The United States will continue to press Indonesia to address U.S. concerns about these practices.

Indonesia bans salt imports during the harvest season. It requires salt importers to be registered and to purchase domestic supplies as well as imports. Indonesia also maintains a seasonal ban on imports of sugar.

Indonesia applies quantitative limits to imported wines and distilled spirits. However, companies can now apply to be designated as registered importers authorized to import alcoholic beverages with an annual quota set by the Ministry of Trade.

Mining firms operating in Indonesia are prevented from exporting unprocessed ore. Under mining law, companies are required to process ore locally in Indonesia before shipping it abroad. The United States will closely monitor implementation of the law to ensure that it does not constitute an export ban on raw materials.

## **Product Registration**

Beginning in late 2008 and continuing throughout 2010, Indonesia's food and drug agency (BPOM) slowed its process of reviewing applications for the registration of food, beverages, and other products including health supplements. Combined with an aggressive enforcement campaign in which large quantities of imported products were seized and destroyed for not being properly registered, the process for registering products has become increasingly burdensome, opaque, and costly to U.S. exporters. Some companies have discontinued or reduced sales to Indonesia as a result of the manner in which BPOM is implementing this requirement.

## **Customs Barriers**

U.S. firms continue to report that Indonesia's Customs Service uses a schedule of reference prices to assess duties on some imports, rather than using actual transaction prices as it committed to do under the WTO Customs Valuation Agreement. Customs makes a valuation assessment based on the perceived risk status of the importer and the average price of a same or similar product imported during the previous 90 days. In addition, the U.S. Government has received complaints from importers about costly delays in customs processing and requests for unofficial payments to customs officers.

In late 2010, the Customs Service changed its procedure for valuing imported motion pictures for customs purposes. Instead of imposing tariffs according to the value of the imported physical media, Indonesian customs is levying duties based on the amounts paid by importers for the exclusive right to distribute films, which results in a dramatic increase in the duties payable and stifles commercial cooperation and trade in this sector. Although the new policy was never publicly announced by the Indonesian Customs Service and its implementation has not been fully explained to traders, the Customs Service is aggressively auditing the accounts of movie companies and imposing severe fines for the underpayment of duties. The United States continues to work with Indonesia to resolve these concerns.

## **Luxury Taxes**

The luxury sales tax on 4,000cc sedans and 4x4 Jeeps or vans is 75 percent, compared with the luxury tax on automobiles with engine capacities of 1500cc or less, which ranges from 10 percent to 30 percent. Passenger cars with engine displacement less than 1500cc comprise 40 percent of the market, including a large group of vehicles predominantly produced in Indonesia that are taxed at a rate of 10 percent.

Indonesia eliminated its luxury tax on imported distilled spirits on April 1, 2010, at the same time that it significantly increased excises taxes on such beverages. The current excise tax regime imposes higher excise taxes on imported spirits than on domestic spirits.

## **State Trading**

In April 2008, the Indonesian government announced that the National Logistics Agency (BULOG) would have exclusive authority to import rice. In doing so, Indonesia cited food security and price management considerations. Imports are not permitted before, during, and immediately after the main harvest period, effectively the first quarter of the year. Private firms can import rice for special purposes only, such as for seed and specialty rice, but they must obtain a special importer identification number issued by the Ministry of Agriculture.

## **GOVERNMENT PROCUREMENT**

Indonesia grants special preferences to encourage domestic sourcing and to maximize the use of local content in government procurement. It also instructs government departments, institutes, and corporations to utilize domestic goods and services to the maximum extent feasible. In February 2009, the Minister of Industry issued a circular “recommending” that civil servants purchase domestic goods and services in their official capacities, as well as in their private purchasing, in order to “improve domestic product usage.” Foreign firms bidding on high value government sponsored projects report that they have been asked to purchase and export the equivalent value of selected Indonesian products if they are awarded the contract.

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

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

Indonesia was placed on the Priority Watch List in the 2010 Special 301 report. Although Indonesia took enforcement efforts against pirated optical disks, other deficiencies in IPR protection and enforcement continue to represent barriers to U.S. exports and investment. Key issues cited in the report include inadequate enforcement against IPR crimes to address continuing widespread copyright piracy and trademark counterfeiting, inadequate numbers of criminal prosecutions, and non-deterrent penalties for those who are convicted.

## **SERVICES BARRIERS**

Indonesia maintains significant and far-reaching trade and investment barriers in many key services sectors. The United States will continue to press Indonesia to address its concerns on these issues.

## **Legal Services**

Only Indonesian citizens may be licensed as a lawyer in Indonesia. Foreign lawyers may only work in Indonesia as “legal consultants” upon approval of the Ministry of Justice and Human Rights. A foreign law firm seeking to enter the market must establish a relationship with a local firm.

## **Express Delivery and Logistics Services**

In September 2009, the Indonesian legislature introduced a new law with restrictions on postal services, broadly defined to include courier, express delivery, and other logistics services. The law requires that postal service providers be majority-owned by Indonesians and that foreign providers limit their activities to provincial capitals with international airports and seaports.

## **Health Services**

Changes to the negative list of foreign investment restrictions in 2010 allow for 67 percent foreign ownership in all regions of Indonesia, in contrast to the previous regulation which limited foreign investors to the cities of Medan and Surabaya. Indonesia restricts foreign health care professionals from practicing in Indonesia. Foreign trained physicians are only allowed to supervise and perform procedures in the course of educating Indonesian physicians.

## **Distribution**

Some U.S. direct selling companies raised concerns that Indonesia’s market is generally closed to investment in the direct selling industry. Although Indonesia allows up to 100 percent foreign equity in the distribution and retail sectors, investors must enter into a “partnership agreement” with a small scale Indonesian enterprise.

## **Cabotage**

Indonesia’s new shipping law requires all vessels operating in Indonesia’s waters to be flagged domestically and manned by Indonesian crews. The new law does not provide for exceptions. This is a particular problem for foreign investors in Indonesia’s energy sector, who will no longer be permitted to bring in the sophisticated rigs and specialized equipment needed to develop large upstream projects. Because of these concerns, the Ministry of Transportation announced a delay in implementation of the new law until May 7, 2011. Nevertheless, foreign investors continue to experience delays in long-term operational planning as it is customary for specialized equipment to be reserved many months in advance. The United States is urging Indonesia to resolve these concerns.

## **Financial Services**

Indonesia allows 99 percent foreign ownership in the banking sector, however, financial service providers may not establish as a branch. In the insurance sector, the 2007 Investment Law introduced a new foreign equity cap of 80 percent for new investors.

## **Energy Services**

In 2009, Indonesia’s upstream oil and gas regulator BP MIGAS began requiring bidders for energy services to have local content of at least 35 percent, even though it is unclear whether Indonesia has the capacity to provide the level of domestic content required by the regulation. Foreign energy services

companies are concerned that these local preference policies severely undermine their ability to make successful bids on contracts and to make decisions about sourcing and personnel that would allow them to function efficiently and profitably in the Indonesian market.

### **Audit and Accounting Services**

Foreign firms cannot practice under international firms' names, although terms such as "in association with" are permissible. Foreign accounting firms must operate through technical assistance arrangements with local firms. Only Indonesian citizens may be licensed as accountants. Foreign agents and auditors may act only as consultants and cannot sign audit reports. Foreign directors, managers, and technical experts/advisors are allowed a maximum stay of two years, with a possible one-year extension. Auditors practicing in the capital markets are prohibited from delivering specified non-audit services such as consulting, bookkeeping, and information system design.

### **Film**

A September 2009 law provides for screen quotas permitting no more than 60 percent of screen time for foreign films, unspecified import restrictions to achieve that quota, prohibitions against the dubbing of foreign films, and prohibitions against foreign companies distributing or exhibiting films. In January 2010, following concerns raised by the United States, the Minister of Culture and Tourism issued a two-year suspension of a regulation requiring all local and imported movies – both theatrical prints and home video copies – to be replicated locally, with penalties on exhibitors for failing to do so.

### **Construction, Architecture and Engineering**

Foreign construction firms are only allowed to be subcontractors or advisors to local firms in areas where the government believes that a local firm is unable to do the work. In addition, for government-financed projects, foreign companies must form joint ventures with local firms.

### **Telecommunications Services**

Indonesia permits up to 65 percent foreign ownership in value added and mobile telecommunications services and up to 49 percent for fixed networks. While this foreign ownership level goes beyond Indonesia's current commitments in its WTO GATS schedule, the limits on fixed services represent a step backward from recent practice under which up to 95 percent ownership was permitted. A Ministry of Communications and Informatics decree issued in 2008 restricts the construction, management, and ownership of cell towers to domestic companies and forced existing investors to exit the market within two years. The United States has registered its serious concerns to Indonesia about these setbacks in Indonesia's investment climate.

### **Education**

Indonesia's Law on Education Legal Entities does not allow foreign investment in higher education in the form of a limited liability company, which conflicts with provisions of the existing Investment Law. In addition, foreign educational personnel require permission from both the Ministry of Education and the Ministry of Manpower. The permission is granted on a case-by-case basis and is only given when there are no Indonesian instructors capable of filling the position.

## **INVESTMENT BARRIERS**

Indonesia maintains significant and far-reaching foreign investment restrictions. Its investment climate continues to be characterized by legal uncertainty, economic nationalism, and disproportionate influence of local business interests seeking control and ownership of existing enterprises and new market opportunities. Through both formal regulation and indirect guidance, foreign companies are compelled to do business with local partners and to purchase goods and services locally.

In an attempt to improve its foreign investment climate, Indonesia in 2007 introduced a new Investment Law intended to improve transparency, as well as provide a range of improved protections for foreign investors including non-discriminatory treatment, protection against expropriation, and recourse to international arbitration in the event of disputes with the government. At the same time, however, the new law significantly increased the number of sectors in which foreign investment is restricted and increased foreign equity limitations in sectors of interest to U.S. investors. These sectors include telecommunications, pharmaceuticals, film and creative industries, and construction. An ongoing process of decentralization, which is intended to reduce burdensome bureaucratic procedures by moving investment-related decisions to provincial and district level governments, has led to some improvements but has also resulted in new restrictive measures that appear to conflict with national laws.

Indonesia continues to review the 2007 Investment Law and its negative list of restricted sectors. Presidential Regulation 36/2010, signed by President Yudhoyono on May 25, 2010, issued long-awaited changes to its negative list delivering legal clarifications in conjunction with limited liberalization. The clarifications include protections from retroactive implementation and promise a continuous review of closed sectors for increased market access. The revisions include modest changes to investment limits in individual sectors including construction, health care, film technical services, and electricity generation, but the revisions also increase restrictions in other sectors such as postal services and the telecommunications tower sector, which is now closed to foreign investment.

Also in 2010, the Indonesian legislature introduced a new horticulture law, which reduced permissible foreign equity in horticulture-related business activities from 95 percent to 30 percent.

### **Energy and Mining**

Several regulatory changes have recently been introduced to increase government control in the energy and mining sectors and to generate higher royalties for the government.

Indonesia enacted a new mining law in December 2008, replacing a “Contract of Work” system with a system of licensing. The legislation creates new risks and burdens for investors. It subjects investments in the sector to all changes in tax and royalties policy, which have often been unpredictable, and allows central and local governments to cancel licenses. Mining companies must give preference to local subcontractors and service companies and are required to process and smelt ore domestically. The new law also reintroduces divestment requirements that have led to investment disputes in the past. While not requiring the conversion of existing contracts to licenses, the new legislation mandates unspecified changes to existing contracts. The Indonesian government has indicated that it does not intend to honor contractually mandated extensions to contracts of work.

The Indonesian government also has attempted to alter unilaterally the terms of energy and mining contracts in the country’s favor. In 2008, certain foreign coal purchasers saw their long-term contracts nullified when the Energy and Mineral Resources Department ordered private Indonesian coal mining firms to renegotiate sales contracts with foreign buyers if the contracts involved long-term fixed price

## **FOREIGN TRADE BARRIERS**

arrangements and if the sale prices were below a government-determined benchmark price. These firms have faced cancelled shipments in cases where foreign buyers have been unwilling or unable to renegotiate their contracts. In addition, throughout the mining sector, companies have reported problems importing exploration and production equipment free of duties or VAT, as provided for in their contracts. Separately, the oil and gas regulator BP MIGAS has threatened to penalize oil and gas firms that do not meet arbitrary production goals.

### **Telecommunications**

In October 2009, the Ministry of Communications and Informatics announced a new decree requiring all telecommunications operators to expend a minimum of 40 percent of their total capital expenditures for network development on locally sourced components or services. The same ministry also issued a decree earlier in 2009 imposing local content requirements of 30 percent to 50 percent on operating and capital expenditures in the wireless broadband sector. The United States continues to press Indonesia to address concerns about these decrees.

### **OTHER BARRIERS**

The Indonesian government and the Corruption Eradication Commission, which coordinates anti-corruption efforts and has the authority to investigate and prosecute high level corruption cases, continue to attempt to address widespread corruption in the country. Still, foreign companies continue to report corruption-related difficulties, including demands for unwarranted fees to obtain required permits or licenses, to expedite processes, or to influence government awards of contracts and concessions. Indonesian courts have a reputation for being inefficient and corrupt, creating serious problems for companies drawn into disputes with local partners and threatening the viability of U.S.-invested enterprises. In some instances, U.S. firms that have sought legal relief after having been allegedly defrauded by local partners or clients have been forced to litigate spurious counterclaims.

# ISRAEL

## TRADE SUMMARY

The U.S. goods trade deficit with Israel was \$9.7 billion in 2010, up \$518 million from 2009. U.S. goods exports in 2010 were \$11.3 billion, up 17.9 percent from the previous year. Corresponding U.S. imports from Israel were \$21.0 billion, up 11.9 percent. Israel is currently the 23rd largest export market for U.S. goods.

U.S. exports of private commercial services (i.e., excluding military and government) to Israel were \$3.6 billion in 2009 (latest data available), and U.S. imports were \$3.9 billion. Sales of services in Israel by majority U.S.-owned affiliates were \$2.3 billion in 2008 (latest data available), while sales of services in the United States by majority Israel-owned firms were \$2.4 billion.

The stock of U.S. foreign direct investment (FDI) in Israel was \$10.0 billion in 2009 (latest data available), up from \$9.7 billion in 2008. U.S. FDI in Israel is primarily concentrated in the manufacturing sector.

### **The United States-Israel Free Trade Area Agreement**

Under the United States-Israel Free Trade Area Agreement (FTA), signed in 1985, the United States and Israel agreed to implement phased tariff reductions culminating in the complete elimination of duties on all products by January 1, 1995. Most tariffs between the United States and Israel have been eliminated as agreed, although tariff and nontariff barriers continue to affect a significant number of key U.S. agricultural product exports.

To address the differing views between the two countries over how the FTA applies to trade in agricultural products, in 1996 the United States and Israel signed an Agreement on Trade in Agricultural Products (ATAP), establishing a program of gradual and steady market access liberalization for food and agricultural products effective through December 31, 2001. Negotiation and implementation of a successor ATAP was successfully completed in 2004. This agreement was effective through December 31, 2008, and granted improved access for select U.S. agricultural products. The ATAP agreement has been extended three times, most recently through December 31, 2011, to allow time for the negotiation of a successor agreement. The ATAP provides U.S. food and agricultural products access to the Israeli market under one of three different categories: unlimited duty free access, duty free tariff-rate quotas (TRQs), or preferential tariffs, which are set at least 10 percent below Israel's Most Favored Nation (MFN) rates.

## IMPORT POLICIES

### **Agriculture**

U.S. agricultural exports that do not enter duty-free under WTO, FTA, and ATAP provisions face restrictions such as a complicated TRQ system and high tariffs. These products include high-value goods that are sensitive for the Israeli agricultural sector, such as dairy products, fresh fruits, fresh vegetables, almonds, wine, and some processed foods. According to industry estimates, elimination of levies on processed foods, including a broad range of dairy products, could result in increased sales by U.S. companies in the range of \$25 million to \$50 million. Removal of quotas and levies on dried fruits could result in increases in sales by U.S. exporters of up to \$10 million. U.S. growers of apples, pears, cherries, and stone fruits estimate that elimination of Israeli trade barriers would lead to an increase



of \$5 million to \$25 million in export sales of these products. Industry estimates that free trade in agriculture could result in U.S. almond exports growing by as much as \$10 million. Removing these levies on food product inputs used in U.S.-based restaurant chains operating in Israel could save these chains millions annually and allow for their expansion.

Further, the ability of U.S. exporters to utilize available TRQ in-quota quantities can be hampered by problems with transparency and other issues with the administration of Israel's TRQs. These issues include a lack of data on quota fill-rates and license allocation issues, such as allocation of small non-commercially viable quota quantities, and administrative difficulties in obtaining licenses for in-quota imports. Under the current ATAP, Israel committed to take steps to improve the administration of TRQs, including engaging in regular bilateral consultations. Israel did not, however, address problems related to TRQ administration during a mid-year reallocation of unused quotas. The negotiations for a successor ATAP will seek to address the outstanding issues with respect to Israel's administration of the TRQs.

*Wine and Spirits Imports:* Under the current ATAP, Israel granted U.S. wine exports an annual TRQ of 200,000 liters of duty-free imports of wine. In addition, U.S. exports in excess of the quota limit are charged a tariff lower than Israel's MFN rate. However, the current method of quota allocation for wine creates a significant challenge for importers of U.S. wine. Quotas are issued arbitrarily; sometimes through a lottery system to groups that do not make use of the licenses they are allocated. Further compounding the problem, the reallocation of quotas at the end of a period often occurs too late to make it commercially viable for another importer to utilize the remaining quota. Wine importers note that the Israeli government does not require Israeli wine producers to follow the detailed labeling requirements of the official standard for wine, while these rules are strictly enforced on imported wines. Sales of U.S. wines to Israel are about \$700,000 per year.

Whiskey and other imported spirits to Israel face a tax known as the *tama*. The Knesset passed legislation in 2010 that will end the collection of the *tama* by 2014.

### **Customs Procedures**

Some U.S. exporters have reported difficulty in claiming preferences for U.S. goods entering Israel under the FTA, specifically related to the presentation of certificates of origin to Israeli customs authorities. In 2010, the United States Government engaged in discussions with Israel to clarify and resolve the situation surrounding the difficulty in claiming preferences under the FTA.

### **GOVERNMENT PROCUREMENT**

Israel is a signatory to the WTO Agreement on Government Procurement (GPA), which covers most Israeli government entities and government-owned corporations. Most of the country's international public tenders are published in the local press.

U.S. firms encounter difficulties in accessing the Israeli government procurement market. Government-owned corporations make extensive use of selective tendering procedures. In addition, the lack of transparency in the public procurement process discourages U.S. companies from participating in major projects and disadvantages those that choose to compete. A proposed regulation not yet passed in the Knesset could impede transparency further by allowing an internal committee within each Israeli government ministry to exempt up to four million shekels (approximately \$1 million) of procurement from public tenders. Enforcement of public procurement laws and regulations in Israel is not consistent.

Israel also has offset requirements that it implements through international cooperation (IC) agreements.

Under IC agreements, foreign companies are required to offset government contracts by agreeing to invest in local industry, co-develop or co-produce with local companies, subcontract to local companies, or purchase from Israeli industry. As of January 1, 2009, the IC offset percentage for procurements covered by Israel's GPA obligations is 20 percent of the value of the contract; for procurements excluded from GPA coverage, including most military procurements, the offset is 35 percent.

U.S. suppliers suspect that the size and nature of their IC proposals can be a decisive factor in close tender competitions, despite an Israeli court decision that prohibits the use of offset proposals in determining the award of a contract. Because small and medium-sized U.S. exporters are often reluctant to commit to make purchases in Israel in order to comply with the IC requirements, their participation in Israeli tenders is limited.

In addition, the inclusion of unlimited liability clauses in many government tenders discourages U.S. firms from competing. When faced with the possibility of significant legal costs for unforeseeable problems resulting from a government contract, most U.S. firms are forced to insure against the risk, which raises their overall bid price and reduces their competitiveness.

The United States-Israel Reciprocal Defense Procurement Memorandum of Understanding (MOU), extended in 1997, is intended to facilitate defense cooperation in part by allowing companies from both countries to compete on defense procurements in both countries on as equal a basis as possible, consistent with national laws and regulations. U.S. suppliers have expressed concern about the lack of transparency and apparent lack of justification for excluding U.S. suppliers from various Ministry of Defense (MOD) tendering opportunities. The MOU, which has benefited Israeli defense industries by opening up the U.S. procurement market to their products, has not significantly opened the market for U.S. suppliers interested in competing for MOD procurements funded by Israel.

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

The United States and Israel reached an understanding on February 18, 2010 on several longstanding issues with Israel's intellectual property rights (IPR) regime for pharmaceutical products. These issues include improving data protection, the terms of patents on pharmaceuticals, and provisions on the publication of patent applications in Israel. The United States is currently working with the Israeli government to implement the agreement.

Separately from the understanding, Israel has signaled a new willingness to make progress on other IPR issues of concern, such as implementing the core requirements of World Intellectual Property Organization (WIPO) "Internet Treaties," (*i.e.*, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty). The United States welcomes this step, and encourages Israel to proceed with full accession to, and implementation of, the WIPO Internet Treaties.

## **SERVICES BARRIERS**

### **Audiovisual and Communications Services**

Only selected private Israeli broadcast television channels are allowed to carry advertising. These channels received broadcast licenses and the advertising privilege in exchange for certain local investment commitments. Israeli law largely prohibits other broadcast channels, both public and private, from carrying advertisements. Foreign channels that air through the country's cable and satellite networks are permitted to carry a limited amount of advertising aimed at a domestic Israeli audience. Currently, the regulations allow foreign channels no more than 25 percent of their total advertising time to target the Israeli market.

## **INVESTMENT BARRIERS**

Investments in regulated sectors, including electronic commerce, banking, insurance, and defense industries, require prior government approval in Israel.

## **ELECTRONIC COMMERCE**

Israel's Electronic Signature Bill regulates signatures on electronic media. Loopholes in the law allow the consumer to decline to pay for any merchandise for which he or she did not physically sign, which serves as a disincentive to the establishment of online businesses. The Ministry of Justice maintains a register of entities authorized to issue electronic certificates attesting to the signature of the sender of an electronic message. The Registrar of Databases, which falls under the authority of the Ministry, requires that any firm or individual holding a client database secure a license to do so.

# JAPAN

## TRADE SUMMARY

The U.S. goods trade deficit with Japan was \$59.8 billion in 2010, up \$15.1 billion from 2009. U.S. goods exports in 2010 were \$60.5 billion, up 18.4 percent from the previous year. Corresponding U.S. imports from Japan were \$120.3 billion, up 25.6 percent. Japan is currently the 4th largest export market for U.S. goods.

U.S. exports of private commercial services (i.e., excluding military and government) to Japan were \$40.9 billion in 2009 (latest data available), and U.S. imports were \$20.8 billion. Sales of services in Japan by majority U.S.-owned affiliates were \$69.8 billion in 2008 (latest data available), while sales of services in the United States by majority Japan-owned firms were \$99.5 billion.

The stock of U.S. foreign direct investment (FDI) in Japan was \$103.6 billion in 2009 (latest data available), up from \$101.9 billion in 2008. U.S. FDI in Japan is mostly in the finance/insurance, manufacturing, and wholesale trade sectors.

## OVERVIEW

The U.S. Government continues close engagement with the Japanese government to urge the removal of a range of trade barriers. This engagement takes place through several means, including through regular, established mechanisms, such as the U.S.-Japan Trade Forum. Furthermore, the U.S.-Japan Economic Harmonization Initiative was established in 2011 as a new forum to promote the harmonization of regulatory and other approaches in ways that facilitate bilateral trade, address individual trade and business environment-related issues, and strengthen bilateral coordination on issues of common interest in the Asia-Pacific region. The U.S. Government will continue to address trade and trade-related concerns through these, as well as other, fora.

## IMPORT POLICIES

### Beef Import System

Japan continues to maintain OIE-inconsistent market access barriers to U.S. beef and beef product exports. Reopening Japan's beef market consistent with science and international standards as well as in a commercially viable manner is an important priority. This issue is discussed in detail in USTR's annual Report on Sanitary and Phytosanitary Measures.

### Rice Import System

Japan's highly regulated and non-transparent importation and distribution system for imported rice limits meaningful access to Japanese consumers. In 1999, Japan established a tariff-rate quota (TRQ) of approximately 682,000 metric tons (milled basis) for imported rice. The Staple Food Department of the Ministry of Agriculture, Forestry and Fisheries (MAFF) manages imports of rice within the TRQ through periodic ordinary minimum access (OMA) tenders and through simultaneous buy-sell (SBS) tenders. Imports of U.S. rice under the OMA tenders are destined almost exclusively for government stocks. MAFF releases these stocks exclusively for non-table rice users in the industrial food processing or feed sector and for re-export as food aid. In calendar year 2010, U.S. rice exports to Japan were valued at \$233 million, representing approximately 319,000 metric tons. Only a small fraction of this rice reaches Japanese consumers identified as U.S. rice, despite industry research showing Japanese consumers would

buy U.S. high quality rice if it were more readily available. The United States expects Japan to continue meeting its WTO import volume commitments.

### **Wheat Import System**

Japan requires wheat to be imported through MAFF's Food Department, which then resells the wheat to Japanese flour millers at prices substantially above import prices. These high prices discourage wheat consumption by increasing the cost of wheat based foods in Japan. In 2007, MAFF revised the wheat import regime to allow more frequent adjustment to the resale price so that prices more closely reflect international price movements. However, the U.S. Government remains concerned by Japan's operation of a state trading entity for wheat and its potential to distort trade.

### **Pork Import Regime**

Japan is the largest export market for U.S. pork on both a volume and a value basis, importing 434,515 metric tons in 2010, worth \$1.6 billion. The import tariff for pork is established by a gate price system that applies a 4.3 percent *ad valorem* tariff when the import value is equal to, or higher than, the administratively established reference price. Imports whose value falls below the reference price pay an additional duty equal to the difference between the import value and the reference price.

### **Beef Safeguard**

Japan negotiated a beef safeguard during the Uruguay Round of multilateral trade negotiations to protect domestic producers in the event of an import surge. The safeguard is triggered when the import volume of beef increases by more than 17 percent from the level of the previous Japanese fiscal year on a cumulative quarterly basis. Once triggered, the safeguard remains in place for the rest of the fiscal year. When triggered, beef tariffs would rise to 50 percent from 38.5 percent.

### **Fish and Seafood Products**

While exports of U.S. fish and seafood to Japan have decreased since 1999, Japan is still an important market for U.S. products, especially when considering Japanese imports of U.S. fish and seafood processed in China and Southeast Asia, in addition to direct exports from the U.S. An overall decrease in Japanese seafood consumption and therefore imports, as well as growing seafood demand in the United States, the EU, and other countries, helps explain the decrease in U.S. fish and seafood exports to Japan.

While Japan's tariffs on seafood imports are generally low, tariffs on several products remain an impediment to U.S. exports. Other market access issues also remain. For example, Japan maintains import quotas on Alaska pollock, Pacific cod, Pacific whiting, mackerel, sardines, squid, and herring. Japan also maintains quotas on pollock and cod roe and surimi. Administration of Japan's import quota system has improved considerably over the years and it is expected that obstacles to U.S. exports of fish and seafood will continue to be reduced. While Japan cut tariffs as a result of the Uruguay Round, it did not change its import quotas at that time. Since then, the administrative burdens of the system have eased.

### **High Tariffs on Beef, Citrus, Dairy, and Processed Food Products**

Japan maintains high tariffs on a number of food products that are important exports for the United States, including red meat, citrus, wine, and a variety of processed foods. Examples of double digit import tariffs include 38.5 percent on beef, 32 percent on oranges during winter months (16 percent in the summer), 40 percent on processed cheese, 29.8 percent on natural cheese, 22.4 percent on shredded mozzarella cheese,

20 percent on dehydrated potato flakes, 17 percent on apples, 10.5 percent on frozen sweet corn, 20.4 percent on cookies, up to 17 percent on table grapes depending on the season of the year, and 15 percent to 57.7 percent on wine depending on the Harmonized Tariff System (HTS) classification. These high tariffs generally apply to food products where Japan has domestic production. Tariff reductions on these and other products continue to be a high priority for the U.S. Government in the WTO Doha Development Agenda agriculture negotiations.

### **Wood Products and Building Materials**

Japan continues to restrict imports of certain manufactured wood products through tariff escalation (*i.e.*, progressively higher tariffs based on the level of processing of the wood product). The elimination of tariffs on wood products remains a long standing U.S. Government objective.

### **Leather/Footwear**

Japan continues to apply a tariff-rate quota (TRQ) on leather footwear that substantially limits imports into Japan's market and it sets these quotas in a non-transparent manner. The U.S. Government continues to seek elimination of these quotas.

## **SERVICES BARRIERS**

### **Japan Post**

The United States remains neutral as to whether Japan Post should be privatized. However, as modifications to the postal financial institutions and network subsidiary could have serious ramifications for competition in Japan's financial market, the U.S. Government continues to monitor carefully the Japanese government's postal reform efforts and to call on the Japanese government to ensure that all necessary measures are taken to achieve a level playing field between the Japan Post companies and private sector participants in Japan's banking, insurance, and express delivery markets.

In the area of express carrier services, the U.S. Government remains concerned by unequal conditions of competition between Japan Post Service and international express delivery providers. The U.S. Government urges Japan to enhance fair competition, including by ensuring that Japan Post Service is subject to customs clearance procedures and costs for competitive services similar to those of other international express delivery service suppliers, and by preventing subsidization of Japan Post Service's international express service with revenue from monopoly postal services. (*For discussion of Japan Post and postal insurance, see "Insurance" under the Services Barriers section.*)

The U.S. Government also continues to emphasize the importance of transparency and disclosure as Japan considers reforms to Japan Post. As a result, the U.S. Government has continued to urge the Japanese government to ensure that the postal reform process is fully transparent, including by providing full and meaningful use of public comment procedures and opportunities for interested parties to express views to related officials and advisory bodies before decisions are made. Timely and accurate disclosure of financial statements and related notes serves a key function in the postal reform process, as does the continued public release of meeting agendas, meeting minutes, and other relevant documents.

### **Insurance**

Japan's private insurance market is the second-largest in the world, after that of the United States, with direct net premiums of approximately \$375.9 billion in Japan fiscal year 2009. In addition to the offerings of Japanese and foreign private insurers, substantial amounts of insurance are also provided to

Japanese consumers by insurance cooperatives (*kyosai*) and the Japan Post Insurance Co., Ltd., a wholly government-owned entity of the Japan Post Group. Given the size and importance of Japan's private insurance market as well as the scope of the obstacles that remain, the U.S. Government continues to place a high priority on ensuring that the Japanese government's regulatory framework fosters an open and competitive insurance market.

*Postal Insurance:* Japan's postal life insurance system remains a dominant force in Japan's insurance market. At the end of Japan fiscal year 2009, there were approximately 50.5 million postal life and postal annuity insurance policies in force, with approximately 4.8 million having been issued by the new Japan Post Insurance, after it began operations on October 1, 2007, and the remainder held as assets of the Public Successor Corporation, but reinsured by Japan Post Insurance. In comparison, 131 million life and annuity policies were in force with all other life insurance companies combined. The U.S. Government has long standing concerns about the postal insurance company's impact on competition in Japan's insurance market and continues to monitor the implementation of reforms closely. The critical objective, from the U.S. Government perspective, is to establish equivalent conditions of competition between the Japan Post companies and the private sector, consistent with Japan's international obligations. A level playing field between the postal insurance company and private sector insurers is critical to cultivate competition, enhance consumer choices, encourage more efficient resource allocation, and stimulate economic growth.

The U.S. Government continues to urge Japan to take a number of steps to ensure equivalent treatment, including, but not limited to: (1) ensuring equal supervisory treatment of Japan Post's financial institutions and private sector companies; (2) implementing adequate measures to prevent cross-subsidization among the newly created Japan Post businesses and related entities, including by ensuring the Japan Post companies' strict compliance with the Insurance Business Law's arm's length rule and by requiring adequate financial disclosures to demonstrate that cross-subsidization is in fact not occurring; and (3) ensuring that the Japan Post Network (the company established to manage Japan's post office network) will provide private companies access to its network comparable to that given to Japan Post entities and will select and distribute financial products of private providers through its network transparently and without discrimination.

The U.S. Government continues to urge Japan not to allow Japan Post to expand the scope of operations for its financial services companies before a level playing field is established. The current restraints on the scope of these operations, including the cap on the amount of insurance coverage and limits to the types of financial activities and products Japan Post could pursue, have helped to limit the extent to which the uneven playing field harms private insurance companies. The U.S. Government is concerned about a March 2010 Japanese cabinet proposal that would weaken these restraints by agreeing to pursue nearly doubling the per-person caps on Japan Post Insurance coverage from 13 million yen to 25 million yen. In addition, it is vital that the process for approving new products be transparent and open to all parties. It is also critical that the process include careful analysis of and that full consideration is given to actual competitive conditions in the market and that private sector views are actively solicited and considered before decisions are made.

As modifications to the postal financial institutions and the postal network subsidiary could have serious ramifications to competition in Japan's financial market, Japan must ensure adequate transparency in implementation of laws and regulations related to Japan Post. The U.S. Government has urged Japan to continue to take a variety of steps to ensure transparency, including: providing meaningful opportunities for interested parties to exchange views with related government officials and members of government-commissioned advisory committees and groups in advance of decisions, including those on new products; and fully utilizing public comment procedures with respect to drafting and implementing regulations,

guidelines, Cabinet Orders, and other measures. Timely and accurate disclosure provides important information as well as independent means to track and validate the reform process.

After passing legislation in December 2009 that froze the sale of Japanese government-held stock in the Japan Post group companies, the Japanese Government submitted legislation to the Diet in April 2010 that would roll back certain other aspects of Japan's postal reforms that went into effect in 2007. This legislation passed the Diet's lower house in May 2010 but failed to pass the upper house before the Diet session ended. The Japanese Government reintroduced the legislation in October 2010, and it was carried over in the Diet session starting in January 2011. The U.S. Government has expressed concerns that the draft legislation would give additional competitive advantages to the Japan Post group companies, such as preferential regulatory and tax treatment. The U.S. Government has urged the Japanese government as it proceeds with its legislative process to fully address long-standing level playing field concerns, consistent with Japan's WTO obligations, and to ensure full transparency in the policymaking process, including providing meaningful opportunities for comments from U.S. companies.

*Kyosai*: Insurance businesses run by cooperatives, or *kyosai*, hold a substantial share of insurance business in Japan. Some *kyosai* are regulated by their respective agencies of jurisdiction (the Ministry of Agriculture, Forestry and Fisheries or the Ministry of Health, Labor and Welfare, for example) instead of by the Financial Services Agency (FSA), which regulates all private sector insurance companies. These separate regulatory schemes create a non-transparent regulatory environment and afford *kyosai* critical business, regulatory, and tax advantages over their private sector competitors. The U.S. Government believes *kyosai* must be subject to the same regulatory standards and oversight as their private sector counterparts to ensure a level playing field, including being brought under FSA supervision.

The Japanese government has taken some important steps since 2006 to bring more oversight to unregulated *kyosai*. Under these regulatory reforms, previously unregulated *kyosai* were required to apply to the FSA for new legal status by April 2008. Some of the cooperatives, which elected to become full-fledged insurance companies, have been held to the same regulatory standards as private sector insurers. Others opted to become Small Amount Short Term Insurance Providers (SASTIP), which limits their product range and size and holds the firms accountable to different requirements than those applied to private sector insurance companies. The remaining unregulated *kyosai* that were required to close their businesses by the end of March 2009 have done so. The FSA is to review the SASTIP system within five years from the date of its enforcement (before April 2011) and in doing so, the FSA will provide, as necessary, information on the review and meaningful opportunities for input from insurance companies, including foreign insurance companies, and other parties concerned.

However, the U.S. Government has been concerned regarding moves by the Japanese government in 2010 to reverse its previous progress. For example, to deal with the issue of *kyosai* business operated by public interest corporations, which were required to meet the requirements of the SASTIP system by November 2013, the Japanese government passed legislation in November 2010 to revise the Insurance Business Law (IBL) with exemptions to allow certain existing types of public interest corporations to continue *kyosai* business for the time being. The law calls for certain public interest corporations that already existed at the time of the 2005 IBL revision to continue conducting *kyosai* business under a new category called "authorized specified insurance providers." It also calls for such *kyosai* businesses to be supervised by the ministry or agency that currently supervises the public interest corporations instead of by the FSA. In addition, Japan government passed legislation in May 2010 that provided an exemption for certain unregulated *kyosai*, such as the Parent and Teacher Association *kyosai*, to remain outside the jurisdiction of the FSA.

*Policyholder Protection Corporations*: The Life and Non-life Policyholder Protection Corporations (PPCs) are mandatory policyholder protection systems created to provide capital and management support



to insolvent insurers. Legislation was introduced in Japan's Diet in late 2008 to renew the life insurance PPC system prior to its scheduled expiration in April 2009. The new legislation, which passed the Diet in December 2008, renewed the protection system for three additional years until March 2012. It was passed without full deliberations on the effectiveness of the current system, which continues to rely on pre-funding of the PPC by its members and a government "fiscal commitment" in the event that industry funding is insufficient, instead of adopting a system where an insolvency would result in members contributing funds to the PPC as needed (post-funding). The FSA will conduct a review of the system within three years after the enforcement of the legislation. The U.S. Government continues to urge Japan to consider more fundamental changes in the PPC systems, including through full and meaningful deliberations with interested parties before renewal legislation is required.

*Bank Sales:* In December 2007, the Japanese government fully liberalized the range of insurance products eligible for sale through banks. As a follow-up, the U.S. Government promptly asked Japan to review market conduct rules, including the limits on sales of first and third sector products and treatment of customer data (including Insurance Business Law Enforcement Rules, Article 212), to ensure they do not limit the effectiveness of bank sales of insurance or impede consumer convenience and choice. FSA has committed to conduct a review of market conduct rules around December 2010, three years after liberalizing the bank sales channel, and is in the beginning stages of the review process. The U.S. Government continues to call for a fact-based, transparent, and timely review of the bank sales channel with meaningful opportunities for input from interested stakeholders and taking into account global best practices.

*Domestication of Foreign Insurance Operations:* The U.S. Government has recommended that Japan take measures to ensure foreign incorporated companies operating branches in Japan that wish to transfer business operations to a Japan-incorporated entity be able to do so in a seamless manner that protects policyholders and creditors while ensuring business continuity. The U.S. Government continues to urge that the portfolio and transfer provisions of the Insurance Business Law be revised accordingly.

## **Financial Services**

The U.S. Government continues to urge reforms in the financial sector, including in the areas of online financial services, defined contribution pensions, credit bureaus, and sharing of customer information. In addition, the U.S. Government has urged Japan to improve transparency in this sector by taking steps such as enhancing the effectiveness of the no-action letter and related systems, providing written interpretations of Japan's financial laws, and soliciting input from all interested parties on concerns and potential improvements related to the inspection process. While Japan has shown progress in this sector, such as the FSA's continued commitment to its Better Markets Initiative, which includes promoting competition and improving the regulatory environment to make Tokyo more attractive as a financial center, many issues remain.

## **Distribution Services**

The U.S. Government continues to urge Japan to take a variety of steps to improve customs processing and to facilitate other faster and lower-cost solutions in the distribution sector. In this regard, the U.S. Government welcomes Japan's work to formulate an Authorized Economic Operator (AEO) system, which allows exporters with good compliance records to process goods more expeditiously through customs. Exempting AEO exporters from paying the 5 percent consumption tax for cleared cargo would help facilitate more efficient cargo flows. Currently, Japan customs refunds this tax, but an exemption would reduce the administrative burden of filing for a refund. The U.S. Government has also encouraged Japan to raise the Customs Law *de minimis* ceiling from 10,000 yen (about \$100) to a higher level, such as 20,000 yen or higher. The customs clearance process and clearance times could also be further

facilitated by, for example, allowing users of Nippon Automated Cargo and Port Consolidated System (NACCS) to select the Customs Office for declaration, and by allowing customs officials to be co-located at the bonded premises of private companies handling shipments.

## **Telecommunications**

The U.S. Government continues to urge Japan to: ensure fair market opportunities for emerging technologies and business models; ensure a regulatory framework appropriate for addressing converged and Internet-enabled services; and strengthen competitive safeguards on dominant carriers. The U.S. Government also continues to request that Japan improve transparency in rulemaking and ensure the impartiality of its regulatory decision making.

*Fixed-line Interconnection:* In July and November 2008, Japan revised its rules to extend non-discriminatory and cost-oriented interconnection to Internet Protocol (IP)-enabled networks and services. This included classifying the Next-Generation Networks (NGN) of NTT East and NTT West as Category I Designated Telecommunications Facilities, which subjects them to access and pricing provisions that promote competition. In March 2010, Japan's Ministry of Internal Affairs and Communications (MIC) approved both NTT East and NTT West's interconnection based on the Long Run Incremental Cost Method for 2010. In June 2010, MIC also authorized FY 2010 connection fees for the Ethernet data transmission of the NGN operated by NTT East and NTT West. Although MIC continued to push NTT to lower these interconnection rates, they still remain high by international standards.

*Dominant Carrier Regulation:* NTT continues to dominate Japan's fixed line market through its control over almost all "last-mile" connections. As Japan's broadband users transition from digital subscriber line (DSL) (where competition, ensured through regulation, was vibrant) to optical fiber, competitors have raised concerns that the more lightly-regulated fiber-based services will allow NTT to expand its dominant position through control of the fiber-to-the-home (FTTH) market, where it holds a market share of about 75 percent. NTT's ability to bundle its fixed-line services with NTT DOCOMO's mobile service is another cause of concern, as it appears to undermine the rationale for structurally separating the companies. While NTT asserts that there is adequate competition in FTTH service and that consequently unbundling rules should be relaxed, NTT's share of that market has steadily increased over the past few years. The U.S. Government has urged Japan to remain committed to ensuring competition in the telecommunications market, in light of the review of the overall legal structure of NTT, which affects all players participating in markets for converged services.

*Universal Service Program:* Current cross-subsidization of NTT West by NTT East using interconnection revenue (ostensibly to address NTT West's higher network costs resulting from the higher number of rural subscribers) appears redundant given the existence of the universal service fund. The U.S. Government has urged the abolition of this cross-subsidy. A MIC panel is reviewing the universal service system as part of the "Hikari no Michi" (New Broadband Superhighway) plan. Under the present universal service system, NTT East and NTT West are required to maintain subscribers' copper lines. Nonetheless, the panel recognizes a need to avoid letting this requirement become an impediment to development of fiber optic lines. The panel is expected to recommend that the universal service system allow fiber optic IP telephony, which is equivalent in voice quality, reliability, and other factors, to subscribers' existing wireline telephony.

*Mobile Termination:* As in most countries, Japan uses the "Calling Party Pays" system, imposing the entire cost of termination on the calling party (enabling mobile subscribers to benefit from free incoming calls). NTT DOCOMO, the dominant incumbent mobile carrier, announced in February 2010, that it would lower its termination rates by over 10 percent, continuing incremental rate reductions implemented over the past 10 years. In January 2011, NTT DOCOMO announced a decision to cut connection fees for

calls to other wireless service operators by up to 35.6 percent retroactive to April 2010. Mobile interconnection rates, however, still remain high by international standards and particularly compared to fixed-line rates in Japan. Despite recognizing NTT DOCOMO as a dominant carrier in 2002, MIC does not require NTT DOCOMO to publish its costs or explain how its rates are calculated. With new entrants now in the mobile sector, the U.S. Government has continued to monitor actions both by NTT DOCOMO and MIC to ensure effective competition and to urge MIC to consider the advantages of moving to a “bill-and-keep” system that is more economically efficient and where interconnection payments are not exchanged between carriers.

*New Mobile Wireless Licenses:* Starting in 2005, MIC began opening the market to new mobile providers beyond the three main incumbents by assigning blocks of spectrum to a limited number of new wireless entrants. In September 2010, MIC awarded only one license for mobile multimedia broadcasting services, even though the subject spectrum band was able to support two operators. The complexity of the factors MIC used to determine how to evaluate applications raised questions about whether it achieved its stated goal of awarding these licenses based on objective criteria. Given the scarcity of spectrum and high demand for new technologies, the U.S. Government has urged MIC to consider alternative mechanisms, including auctions, that assign commercial spectrum in a timely, transparent, objective, and nondiscriminatory manner that adheres to principles of technology neutrality, particularly for spectrum expected to become available as broadcasters switch to digital television by July 2011. Japan has started to consider introducing an auction system for spectrum allocations, but internal Japanese government taskforce discussions continue on which characteristics of an auction should be implemented and how to incorporate auction methods used in the United States and other countries.

### **Information Technologies (IT)**

*Cloud Computing:* Cloud computing has the potential to increase efficiency and reduce costs in the public and private sectors. Cloud computing and the Internet economy can flourish only if governments permit the free flow of data across borders. The United States, therefore, has urged Japan to adopt the principle of non-discrimination between data services offered inside and outside of Japan. The U.S. Government also has urged the Japanese government to ensure full transparency and consult foreign and domestic industry as rules on data centers and cloud computing are formulated and implemented.

*Health IT:* Government policies that fail to encourage interoperability, technology neutrality, and international harmonization, in addition to providing insufficient reimbursement incentives, inhibit the expansion of Japan’s health IT services sector, an important market for U.S. companies. The U.S. Government has urged Japan to improve the quality and efficiency of healthcare by rapidly implementing health IT that is based on international standards, that promotes technology neutrality and interoperability, and that allows patients greater access to their own health records.

*Privacy:* Separate and inconsistent privacy guidelines among Japanese ministries have created an unnecessarily burdensome regulatory environment with regard to the storage and general treatment of personally identifiable information in Japan. The U.S. Government has urged Japan to introduce greater uniformity in the enforcement of the Privacy Act across the central government through policy standardization and consistent implementation of guidelines. The U.S. Government also has urged the Japanese government to reexamine the provisions and application of the Privacy Act, so as to foster appropriate sharing of data, and to ensure full transparency and consult widely as privacy guidelines for online advertising are developed.

*IT and Electronic Commerce Policymaking:* Insufficient transparency in Japan’s policymaking process for IT and electronic commerce has stifled innovation and competitiveness in Japan and constrained U.S. company access. The U.S. Government has urged Japan to improve its policymaking process by seeking

and considering industry input at all stages of policymaking. This will help foster development of programs that promote technology neutrality, facilitate private sector participation in government-appointed advisory groups, and provide companies with adequate time to offer public comments and adjust to rule changes.

### **Legal Services**

Japan imposes restrictions on the ability of foreign lawyers to provide international legal services in Japan in an efficient manner. The U.S. Government continues to urge Japan to further liberalize the legal services market by, among other issues: allowing foreign lawyers to form professional corporations and establish multiple branch offices in Japan whether or not they have established a professional corporation; and by accelerating the registration process for new foreign legal consultants. The U.S. Government has also requested that Japan take measures to ensure that no legal or Bar Association impediments exist to Japanese lawyers becoming members of international legal partnerships with lawyers outside Japan.

### **Medical Services**

Restrictive regulation limits foreign access to the medical services market, such as the ability of commercial entities, including foreign service providers, to provide full-service, for-profit hospitals.

### **Educational Services**

Excessive regulation remains one of the factors that has discouraged foreign universities from operating branch campuses in Japan, presenting obstacles both in the form of administrative requirements and restrictions on pedagogical choices. Under the United States-Japan Investment Initiative, the Japanese government established a new category "Foreign University, Japan Campus" for foreign accredited institutions of higher education. This designation provides these campuses with benefits similar to those accorded Japanese educational institutions (*e.g.*, student eligibility for student rail passes and student visas), but does not confer the tax benefits enjoyed by Japanese institutions and their students. The U.S. Government continues to urge Japan's Ministry of Education, Culture, Sports, Science and Technology to work with foreign universities to find a nationwide solution that grants tax benefits comparable to Japanese schools and allows them to continue to provide their unique contributions to Japan's educational environment.

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

Japan generally provides strong IPR protection and enforcement. However, the U.S. Government continues to urge Japan to improve IPR protection and enforcement through bilateral consultations and cooperation, as well as in multilateral and regional fora.

For example, while Japan provides a 70 year term of protection for cinematographic works, only a 50 year term is provided for all other works protected by copyright and related rights. In 2010, the U.S. Government continued to urge Japan to extend the term of protection for all the subject matter of copyright and related rights in line with emerging international trends. In addition, amendments to the Copyright Law came into effect in 2010 which, among other things, clarified that the statutory private use exception does not apply in cases where a downloaded musical work or a motion picture is knowingly obtained from an infringing source. The U.S. Government also continues to urge the Japanese government to expand this limitation on the private use exception to cover all works protected by copyright and related rights.

The U.S. Government also has urged Japan to continue to reduce piracy rates, including adopting methods to protect against piracy in the digital environment. Police and prosecutors lack *ex officio* authority to prosecute IPR crimes on their own initiative, without a rights holder's complaint. Japan's Internet Service Provider liability law also needs to be improved in order to provide adequate protection for rights holder's works on the Internet. In addition, Japan's laws should provide effective criminal and civil remedies against unauthorized circumvention of technological protection measures used by rights holders to protect their works, trafficking in tools used to circumvent them, and providing circumvention services.

Japan is also an active participant in the Anti-Counterfeiting Trade Agreement (ACTA) negotiations, which were concluded in November 2010. The ACTA establishes an international framework that will assist parties in their efforts to effectively combat the infringement of intellectual property rights, in particular the proliferation of counterfeiting and piracy, which undermines legitimate trade and the sustainable development of the world economy.

## **GOVERNMENT PROCUREMENT**

Japan is a signatory to the WTO Agreement on Government Procurement (GPA). For procurement of construction services by sub-central and government enterprises covered under the GPA, Japan applies a threshold of approximately \$22.9 million, which is three times the threshold applied by the United States.

### **Construction, Architecture, and Engineering**

U.S. companies annually obtain far less than one percent of projects awarded in Japan's massive public works market, estimated at \$157.2 billion in 2010. Two bilateral public works agreements are in effect: the 1988 United States-Japan Major Projects Arrangements (MPA) (updated in 1991) and the 1994 United States-Japan Public Works Agreement, which includes the Action Plan on Reform of the Bidding and Contracting Procedures for Public Works (Action Plan). The MPA includes a list of 42 projects in which international participation is encouraged. Under the Action Plan, Japan must use open and competitive procedures for procurements valued at or above the thresholds established in the GPA. The United States raises public works issues in the annual Expert-Level Meetings on Public Works under the United States-Japan Trade Forum.

Problematic practices continue to limit the participation of U.S. design/consulting and construction firms in Japan's public works sector, including bid rigging (*dango*), under which companies consult and prearrange a bid winner. (*For more, see "Broadening Measures to Combat Bid Rigging" under the Anticompetitive Practices section.*) The U.S. Government continues to press Japan to take more effective action to address this pervasive problem. The U.S. Government also has continued to urge Japan to remove or narrowly apply the operational safety exemption for railroad procurements covered by the GPA. The U.S. Government continues to monitor Japan's public works sector.

The U.S. Government is paying special attention to several major projects covered by the public works agreements that are of particular interest to U.S. companies as these projects should provide important opportunities for U.S. firms. These include: major expressway projects, including the Gaikan Expressway Project; major public buildings, railroad procurements, urban development and redevelopment projects; planned port facilities expansion projects; major Private Finance Initiative (PFI) projects; and the MPA projects still to be undertaken or completed. The U.S. Government is also monitoring developments related to "green" building, design, and procurement.

## **Information Technologies (IT)**

Lack of transparency, excessive reliance on sole-source contracting, and restrictions on intellectual property ownership, among other factors, hinder the participation of U.S. companies in Japanese government IT procurement. The U.S. Government therefore has urged Japan to introduce greater competition, transparency, and fairness in government procurement of IT through steps such as implementation of national government-wide policies that reflect international technology trends and standards and that follow principles of technology neutrality and interoperability. The U.S. Government is urging that Japanese government procurement of cloud computing services be neutral with respect to the technology used by cloud service providers.

## **INVESTMENT BARRIERS**

Despite being the world's third largest economy, Japan continues to have the lowest inward foreign direct investment (FDI) as a proportion of total output of any major OECD country. Inward foreign merger and acquisition (M&A) activity, which accounts for up to 80 percent of FDI in other OECD countries, also lags in Japan.

While the Japanese government has recognized the importance of FDI to revitalizing the country's economy, its performance in implementing domestic regulatory reforms to encourage a sustained increase in FDI has been uneven. In September 2006, the Japanese government set a goal of doubling the stock of FDI in Japan by 2010 to the equivalent of five percent of Gross Domestic Product (GDP). As of December 2009, this figure stood at 3.9 percent of GDP, well short of the FDI goal. Estimates for FDI levels for December 2010 suggest that figure will remain below 4 percent. Even before the financial crisis of 2008-2009, questions existed regarding the adequacy of measures taken to promote a level of cross border M&A necessary to achieve the government's target. A variety of factors make cross border M&A difficult in Japan. These include: attitudes toward outside investors; inadequate corporate governance mechanisms that protect entrenched management over the interest of shareholders; and a relative lack of financial transparency and disclosure. Japan's Foreign Exchange and Foreign Trade Act governs investment in sectors deemed to have national sovereignty or national security implications.

## **ANTICOMPETITIVE PRACTICES**

Although Japan has taken significant positive steps in recent years to bolster its competition regime, more needs to be done to eliminate and deter cartel activity and bid rigging. At the same time, concerns persist regarding whether the present system for enforcing the Antimonopoly Act (AMA) affords sufficient due process protections. Additional measures to combat anticompetitive behavior and provide for basic due process protections would improve the business environment and ensure that enforcement procedures are fair and transparent.

### **Improving Antimonopoly Compliance and Deterrence**

The AMA provides for both administrative and criminal sanctions against cartel violators. Administrative penalty ("surcharge") levels against hard-core violations have been too low, however, and criminal prosecutions, which should have the strongest deterrent effect against anticompetitive behavior, have been few and penalties against convicted company officials have been weak. The U.S. Government has continually urged Japan to take steps to maximize the effectiveness of enforcement against hard-core violations of the AMA. The Japanese government has taken certain steps to address these concerns, particularly through AMA amendments enacted in June 2009 that, for the most part, came into effect in January 2010. These amendments increased surcharge rates for enterprises that played a leading role in cartel activities by 50 percent, extended the statute of limitations to five years, increased maximum prison

sentences for criminal cartel and bid-rigging violations to five years, and improved the leniency program to encourage reporting of unlawful cartels. The 2009 AMA amendments also provide for mandatory surcharges on enterprises that engage in exclusionary private monopolization, abuse of superior bargaining position, and repeat violations of certain unfair trade practices. The Japan Fair Trade Commission (JFTC) issued guidelines on exclusionary private monopolization on October 28, 2009, after considering public comments. The JFTC's ability to enforce the AMA effectively continues to be hindered by an insufficient number of employees with post-graduate economics training, a factor that undermines JFTC ability to engage in the careful economic analysis necessary to properly evaluate non-cartel behavior. The U.S. Government continues to urge the JFTC to improve its economic analysis capabilities.

### **Improving Fairness and Transparency of JFTC Procedures**

Japan introduced a system in January 2006 that empowered the JFTC to make determinations of AMA violations without a prior formal administrative hearing. Respondents are only afforded the right to seek administrative review of the JFTC decision after the decision is put into place. Although the JFTC allows companies subject to a proposed cease-and-desist or surcharge payment order to review the evidence relied upon by JFTC staff and to submit evidence and make arguments in their defense prior to issuance of a final order, questions have arisen as to whether the current system provides sufficient due process protections. In December 2009, the Japanese government announced its intention to eliminate the *ex post* hearing system and to allow appeals of JFTC orders directly to the Tokyo District Court. Although legislation for those purposes was submitted to the Diet, it has not yet been enacted. The business and legal communities have also raised concerns about the lack of procedural fairness provided by certain aspects of the JFTC's investigative process.

### **Broadening Measures to Combat Bid Rigging**

Japanese officials have implemented a series of measures to address the problem of frequent and persistent bid rigging. Apart from several cases in which the JFTC invoked the 2003 law against bureaucrat-led bid rigging (so-called *kansei dango*), the Ministry of Land, Infrastructure, Transport and Tourism (MLIT) has strengthened administrative sanctions against companies found by JFTC to have engaged in unlawful bid rigging. As of April 2009, MLIT and 13 other central government entities have also introduced an administrative leniency program to complement the JFTC leniency program which is designed to help encourage individuals and companies to report anticompetitive acts. In addition, Japan has put in place a series of measures aimed at ensuring a competitive bidding process for project contracts tendered at the central and local government levels. In June 2007, the Japanese Diet passed legislation, which became effective on December 31, 2009, aimed at controlling post-retirement employment by Japanese government officials in companies they previously helped regulate or with which they were otherwise involved while in government service, the so-called "descent from Heaven" (*amakudari*), which has been a factor in many bid rigging conspiracies. The U.S. Government continues to raise concerns that further measures are needed to prevent conflicts of interest in government procurement, improve efforts to eliminate involvement in bid rigging by government officials and expand administrative leniency programs.

## **OTHER SECTORAL AND CROSS-SECTORAL BARRIERS**

### **Transparency**

Transparency issues remain a top concern of U.S. companies operating in Japan's market. The U.S. Government has strongly urged Japan to adopt new measures to achieve a higher degree of transparency in governmental regulatory and policy-making processes.

*Advisory Groups:* Although advisory councils and other government-commissioned study groups are accorded a significant role in the development of regulations and policies in Japan, the process of forming these groups can be opaque and nonmembers are too often not uniformly offered meaningful opportunities to provide input into these groups' deliberations. The U.S. Government continues to urge Japan to ensure the transparency of advisory councils and other groups convened by the government by adopting new requirements to ensure ample and meaningful opportunities are provided for all interested parties, as appropriate, to participate in, and directly provide input to, these councils and groups.

*Public Comment Procedure (PCP):* Many U.S. companies remain concerned by inadequate implementation of the PCP by Japanese ministries and agencies. Examples include cases where comment periods appear unnecessarily short, as well as cases suggesting comments are not adequately considered given the brief time between the end of the comment period and the issuance of a final rule or policy. The U.S. Government has stressed the need for Japan to ensure its existing PCP is being fully implemented and to make additional revisions to further improve the system.

*Transparency in Regulation and Regulatory Enforcement:* To ensure the private sector has sufficient information about regulations and official interpretations of those regulations that require compliance, the U.S. Government is urging Japan specifically to require its ministries and agencies to make public their regulations and any statements of policy of generally applicable interpretation of those regulations.

### **Commercial Law**

Japan undertook a major reform of its commercial law by enacting a new Corporate Code, which entered into force in May 2006. Among other provisions, the code now permits the use of certain modern merger techniques, including domestic and cross-border triangular mergers. These new provisions, however, have not yet been as effective as had been hoped in facilitating foreign investment into Japan. This may reflect the limited range of tax-advantaged merger tools and corporate governance systems that do not adequately reflect the interests of shareholders.

The U.S. Government continues to urge Japan to identify and eliminate impediments to cross-border mergers and acquisitions, including the availability of reasonable qualifying rules for tax-deferred treatment for many such transactions, and to take measures to ensure that shareholder interests are adequately protected when Japanese companies adopt anti-takeover measures or engage in cross-shareholding arrangements.

The U.S. Government has also continued to urge Japan to improve further its commercial law and corporate governance systems to promote efficient business practices and management accountability to shareholders in accordance with international best practices, such as by facilitating and encouraging active and appropriate proxy voting, ensuring the independence of outside directors and augmenting their role on corporate boards, strengthening protection of minority shareholders by clarifying fiduciary duties of directors and controlling shareholders, and encouraging the stock exchanges to adopt listing rules and guidelines that will improve the corporate governance of listed companies and ensure that the interests of minority shareholders are protected. While the Japanese government has convened study groups to



examine these matters -- two of which in 2009 recommended improvements in systems of corporate governance -- observers have voiced concern that the movement to reform commercial law seems to have stalled since that time.

The U.S. Government continues to look to Japan to amend Article 821 of the Company Law to remedy ambiguities in a manner that prevent adverse effects on U.S. companies seeking to legitimately conduct their primary business in Japan through Japanese branch offices.

### **Automobiles and Automobile Parts**

A variety of nontariff barriers have traditionally impeded access to Japan's automobile and automotive parts market. Overall sales of U.S. made vehicles and parts in Japan remains low, which is a serious concern.

The U.S. Government has expressed concern with the overall lack of access to Japan's automotive market, as well as with specific aspects of Japan's regulatory system that limit the ability of U.S. automobile and related companies to expand business in the Japanese market. For example, U.S. automakers seeking to introduce, for testing and demonstration purposes, automobiles using new technology (*i.e.*, fuel cell vehicles) have faced a lack of transparency and other barriers to certifying these new products in a timely and efficient manner. U.S. automakers also face challenges in bringing vehicles with new safety features into Japan. The U.S. Government continues to urge Japan to address these and other regulatory barriers, as well as to take into full consideration global harmonization efforts as it develops and implements standards and regulations.

In September 2010, Japan phased out its Environmentally-Friendly Vehicle Purchase Program that had provided subsidies to consumers for the purchase of a new vehicle. The U.S. Government had raised a strong concern with the Program because U.S. automobiles imported into Japan using the Preferential Handling Procedure (PHP) certification process were unable to qualify. Although Japan amended the program in January 2010 to provide an opportunity for these automobiles to qualify, the actual number of U.S. models that qualified was greatly limited by Japan's decision to use the U.S. Environmental Protection Agency (EPA) "city" rather than "combined" mileage fuel economy rating, as the criterion for qualification. The U.S. Government raised serious concerns with this decision.

### **Medical Devices and Pharmaceuticals**

Japan's market for medical devices and pharmaceuticals continues to be one of the most important for U.S. medical device and pharmaceutical exports. In 2009, the Japanese market for medical devices and materials was just over \$23.2 billion (down seven percent from 2008 in yen terms). Japan's total imports of U.S. medical devices exceeded \$6.1 billion in 2009, a 26 percent market share. The pharmaceuticals market in Japan was valued at \$93.8 billion (up three percent from 2008 in yen terms) in 2009 and American pharmaceutical firms have achieved a market share approaching 20 percent, or total sales worth \$19 billion.

Despite the size of these markets, many globally available pharmaceuticals and medical devices have not yet been introduced in Japan. There is an average lag time of about two years between the introduction of pharmaceuticals in the United States and their introduction in Japan. Similarly, only about half of all European and American medical devices are available in Japan. Recognizing the need to address this drug and device "lag," which prevents timely patient access to innovative and life-saving technologies, Japan has taken various measures to address these issues such as improving the clinical trials environment and accelerating the review process. Also, Japan has set specific goals to improve access to innovative pharmaceuticals and medical devices such as reducing total review times for new products to 12 months

by April 1, 2012, for pharmaceuticals and to 14 months by April 1, 2014, for medical devices. The U.S. Government continues to urge Japan to ensure that its policies foster the private sector's development of innovative products and improve patient access to such products.

Japan's reimbursement pricing policies for medical devices continue to hinder the introduction of innovative medical technology to the market. In the biennial price revision of April 1, 2010, the Japanese government again tightened enforcement of Foreign Average Price (FAP) Rule by reducing reimbursement prices for new devices to 1.5 times the average price of devices in the United States, Britain, France, and Germany from the previous 1.7 times the average. As Japan considers what reimbursement rules to adopt for the next biennial price revision in April 2012, a number of serious issues have emerged such as the possible addition of Australia to the FAP group of countries, the elimination of the highest price country in FAP calculations, and further reduction of the FAP ratio. In addition, the manner in which exchange rate changes are accounted for in FAP ratios continues to have a negative impact on device prices. The U.S. Government has been urging Japan to eliminate the FAP rule due to its inherent unpredictability and instability. If Japan does not decide to eliminate the FAP rule, the U.S. Government will continue to urge Japan, at a minimum, to ensure that the rules applied to the next biennial reimbursement price revision are no more onerous than the rules used in the last round.

With regard to pharmaceuticals, the U.S. Government welcomes Japan's decision to implement, on a trial basis, a new premium system that minimizes downward price revisions on new drugs for which there are no corresponding generics. The new premium system, considered to be a major breakthrough by both Japanese and foreign drug industries, is expected to promote the introduction of innovative products in Japan. The U.S. Government urges Japan to make the new premium system permanent as it would help increase the predictability and attractiveness of the Japanese market, reduce the drug lag, and promote investment in Japanese life sciences discovery over the long term. The U.S. Government also continues to urge Japan to refrain from implementing other facets of reimbursement policies that hinder the development and introduction of innovative pharmaceuticals such as re-pricing based on market expansion.

Lack of transparency in Japan's drug and medical device reimbursement decision-making processes, including potential additional systemic changes, remains a major concern. The U.S. Government is urging Japan to build further on recent improvements in this area to foster a more open and predictable market.

### **Blood Products**

Japan's 2002 Blood Law established a principle of "self-sufficiency" and includes a Supply and Demand Plan for the government to manage the blood market. The U.S. Government is urging Japan to increase patient access to life-saving blood plasma therapies by refraining from restricting imports of plasma protein products. In addition, the U.S. Government continues to encourage Japan to increase the efficiency of product reviews and ensure that labeling of plasma protein products is non-discriminatory. With respect to reimbursement, the U.S. Government has been urging Japan to develop a reimbursement system for blood products that accounts for the unique nature of plasma protein therapy.

### **Nutritional Supplements**

Japan has taken steps to streamline import procedures and to open its 1.18 trillion yen, or \$13.4 billion, nutritional supplements market, although many significant market access barriers remain. Unusually burdensome restrictions on health claims are a major concern. Only those products approved as Foods for Specified Health Uses (FOSHU) or Foods with Nutrient Function Claims (FNFC) are allowed to have health or structure/function claims. Producers of most nutritional supplements, however, are unable to

obtain FOSHU or FNFC approval due to FOSHU's costly and time consuming approval process and due to the limited range of vitamins and minerals that qualify for FNFC. These processes apply to both imported and domestic products. Other concerns include: long lead times for food additive applications; inability to use many organic solvents for processing ingredients to be used in nutritional supplements; high levels of import duties for nutritional supplements compared to duties on pharmaceuticals containing the same ingredient(s); blocking of shipments at quarantine stations due to naturally occurring traces of substances such as benzoic acid and sorbic acid, which Japan classifies as food additives and does not recognize as naturally occurring in most cases; lack of transparency in new ingredient classification; and lack of transparency in the development of health food-regulations.

### **Cosmetics and Quasi-Drugs**

Japan is the world's second largest market for cosmetics and "quasi-drugs" after the United States. In 2008, U.S. exports of cosmetics and personal care products to Japan were estimated at \$350 million, second only to U.S. exports to France. Despite this market presence by U.S. companies, regulatory barriers continue to limit consumer access to safe and innovative products. Unlike the over-the-counter drug monograph system in the United States, Japan requires premarket approval for certain products classified as quasi-drugs under the Pharmaceutical Affairs Law. The approval process includes requirements that are burdensome, lack transparency, and do not appear to enhance product safety, quality, or efficacy. In addition, restrictions on advertising claims for cosmetics and quasi-drugs prevent companies from conveying product benefits to consumers. Enhanced communication between both the U.S. and Japanese governments and industries has led to some improvements in the Japanese regulatory system. For example, in the fall of 2009, the Japanese government agreed to reduce the amount of paperwork required to import cosmetic products. The U.S. Government continues to urge Japan to address these and other issues.

### **Proprietary Ingredient Disclosure Requirement for Food and Dietary Supplements**

As part of its product classification process for new-to-market food and dietary supplement products, Japan mandates that all ingredients and food additives be listed by name, along with content percentages, and include a description of the manufacturing process. In addition to being burdensome, this process risks the release of proprietary information to competitors.

### **Aerospace**

Japan is among the largest foreign markets for U.S. civil aerospace products. The civil aerospace market in Japan is generally open to foreign firms and some Japanese firms have entered into long term relationships with U.S. aerospace firms. The U.S. Government continues to monitor Japan's development of indigenous aircraft.

Military procurement by the Ministry of Defense (MOD) accounts for approximately half of the domestic production of aircraft and aircraft parts and continues to offer the largest source of demand in the aircraft industry. Although U.S. firms have frequently won contracts to supply defense equipment to Japan (over 90 percent of the annual foreign defense procurement is from the United States), the MOD has a general preference for domestic production or the licensing of U.S. technology for production in Japan to support the domestic defense industry.

Although Japan has considered its main space launch vehicle programs as indigenous for many years, U.S. firms continue to participate actively in those space systems, including Japan's primary space launch vehicle, the HII-A. Japan is also developing a Global Positioning System (GPS) navigation satellite

constellation known as the “quasi-zenith” system. The U.S. Government is working to ensure U.S. companies have full opportunities to participate in Japan’s satellite market.

### **Business Aviation**

Japan's regulatory framework, coupled with infrastructure shortages, impedes the development of business aviation in Japan. Due to the lack of guidelines specific to business aviation, business aircraft are subject to the same regulations that apply to commercial airlines for safety, maintenance, and repair issues administered by the Japan Civil Aviation Bureau (JCAB) of the Ministry of Land, Infrastructure, Transport and Tourism (MLIT). This situation in turn raises the costs of qualification, operation, and maintenance of business aircraft to uneconomical levels. In addition to the regulatory environment, landing rights for business aircraft in Japan are difficult to obtain because of rules that hamper flexible scheduling, especially in the Tokyo area. These factors greatly limit business opportunities in this sector for sales of U.S. aircraft in Japan.

Certain Chubu and Kansai region airports have begun to attract business aircraft, although with modest results thus far. Regional airports are attempting to provide many of the same services business aircraft operators receive in the United States and Europe. Severely restricted hours for landings and take-offs at Haneda Airport in Tokyo (the top preferred business destination for overseas business jets) and the lack of services for private business aircraft at both Narita and Haneda continue to significantly limit travel by business aircraft to and within Japan.

The U.S. Government has continued to urge the JCAB to reexamine the application of civil aviation regulations specific to commercial airlines to business aviation and develop appropriate regulations specific to the business aviation industry that are consistent with the treatment of business aviation in North America, Europe, and other developed economies.

Since 2008, the JCAB has taken some positive steps, including engaging in greater dialogue with the U.S. Government and other stakeholders. A May 2008 JCAB report highlighted the importance of business jets in Japan’s aviation future and noted that Japan lags noticeably behind other countries in business aviation development. The JCAB also laid out a road map for a new business aviation policy, calling for improvements in facilitation, regulatory framework, facilities, and air fields. In July 2008, in its first actual deregulation involving business aviation, the JCAB extended its ETOPS (Extended-range Twin-engine Operational Performance Standard) requirement.

In September 2010, the JCAB announced important liberalization of the rules regarding the use of business aviation at Haneda Airport in conjunction with the new runway that opened the following month. The liberalization includes: permission for daytime use for international flights; an increase of landing and take-off slots; extension of parking periods; same-day request of use; and improvements in passenger convenience. These significant liberalization steps at Japan’s gateway airport are expected to be highly beneficial to international business aviation users. Furthermore, there is ongoing discussion about providing business aviation facilities at Narita Airport in the coming Japanese fiscal year. Continued improvements in the overall regulatory framework for business aviation, however, are still needed.

### **Civil Aviation**

Japan is the United States’ largest aviation partner in the Asia-Pacific region. Consistent with its longstanding policy to promote competition and market access in civil aviation, the U.S. Government signed an Open Skies Memorandum of Understanding (MOU) with Japan on October 25, 2010.

This is a pro-consumer, pro-competition, pro-growth accord. Specifically, this agreement has removed past restrictions on cities that can be served, traffic that can be carried, the number of flights that can be operated, the number of U.S. airlines that can enter the market, and the prices that can be charged, as well as expanding opportunities for cooperative marketing arrangements, including code-sharing.

The U.S. Government welcomed the Japanese government's willingness to negotiate an Open Skies agreement and for the planned expansion of landing and take-off slots at Tokyo's Narita and Haneda airports. The new agreement provides assured opportunities for growth of U.S. airline operations at Narita airport and ensures fair competition for U.S. airlines at Tokyo's Haneda airport, which opened to limited scheduled international air service in October 2010. The U.S. Government has been encouraged by the steps that Japan took in 2010 to increase the number of slots at Tokyo's Narita and Haneda airports and urges Japan to continue to take further steps to increase capacity and reduce overall congestion at these airports.

### **Transport and Ports**

The U.S. Government has had longstanding concerns about barriers to entry to, and the competitiveness of, Japanese ports. Long-term relationships, a lack of transparency, licensing requirements, and other factors have had the effect of greatly limiting the ability of foreign shipping companies from servicing Japan. On January 26, 2011, the Federal Maritime Commission (FMC) terminated a proceeding that it opened in 1995 into restrictive commercial and labor laws and practices in Japanese ports.

The FMC concluded that the restrictive practices it had identified either had been addressed or that market conditions have changed so significantly that the restrictions no longer raise concern. The Commission's record, consistency of reports of U.S.-flag and Japanese shipping companies, now suggest that any remaining potential benefits of continuing the proceeding and its semi-annual reporting requirements no longer justify the accompanying regulatory burdens on the affected ocean carriers. In its Order of January 26, 2011 discontinuing the proceeding, the FMC stated that it still had concerns about licensing requirements for new entrants in the Japanese port terminal industry and the prior consultation rules. The FMC announced that it will remain watchful for unfavorable conditions in the U.S.-foreign oceanborne trade.

# JORDAN

## TRADE SUMMARY

The U.S. goods trade surplus with Jordan was \$200.9 million in 2010, down \$66.9 million from 2009. U.S. goods exports in 2010 were \$1.2 billion, down 1.4 percent from the previous year. Corresponding U.S. imports from Jordan were \$974 million, up 5.4 percent. Jordan is currently the 74th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Jordan was \$57 million in 2009 (latest data available), down from \$114 million in 2008.

## IMPORT POLICIES

### Tariffs and other Charges

Jordan is a member of the WTO and is in the process of reducing its tariffs to comply with its WTO accession commitments. Currently, Jordan's simple average applied tariff is 9.15 percent, with a maximum rate of 30 percent on certain products. Most raw materials and intermediate goods used in industry face zero duties.

Jordan's General Sales Tax law allows the government to impose a "Special Tax" at the time of importation or local production. For example, the government currently imposes a 17.5 percent tax on imported automobiles and trucks.

### Agriculture

Import licenses, or advance approvals to import goods, are required for specific food and agricultural goods. The authorities granting such licenses and approvals are the Ministry of Agriculture and the Ministry of Health.

### Import License

In addition to the special requirements for certain agricultural products, Jordan requires that importers of commercial goods be registered traders or commercial entities. The Ministry of Industry and Trade occasionally issues directives requiring import licenses for certain goods or categories of goods and products in newly emerging or protected sectors. On October 6, 2010, the government of Jordan issued directives requiring a special import license prior to the importation of telecommunications and security equipment.

## GOVERNMENT PROCUREMENT

Jordan is an observer to the WTO Committee on Government Procurement, and is in the process of acceding to the WTO Agreement on Government Procurement (GPA). In 2002, Jordan initiated the process for joining the GPA with the submission of its initial entry offer. It has submitted several revised offers, in responses to requests by the United States and other GPA Parties for improvements. Jordan's accession continued to move forward in 2010.

## **EXPORT SUBSIDIES**

Net profits generated from most export revenue will remain fully exempt from income tax until new regulations are enacted in 2011, except for net profits from exports in the mining sector, exports governed by specific trade protocols, and foreign debt repayment schemes which are subject to income tax. Under WTO rules, the tax exemption was initially set to expire on January 1, 2008. At the request of Jordan, the WTO extended this deadline through December 2015, subject to an annual review.

In addition, 98 percent of foreign inputs used in the production of exports are exempt from customs duties; all additional import fees are assessed on a reimbursable basis.

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

The Jordanian government continues to take steps to provide more comprehensive protection of IPR. It recently appointed a special prosecutor for IPR, and is working to enforce existing laws more effectively. The government also promulgated new regulations, based on existing laws, to improve enforcement and to strengthen penalties. However, enforcement in certain areas (especially digital media) remains weak. Jordanian agencies responsible for IPR enforcement lack resources and capacity. Prosecution efforts should be strengthened, particularly with respect to utilizing *ex officio* authority to bring charges in criminal cases.

## **INVESTMENT BARRIERS**

Current Jordanian laws set limitations on foreign ownership in certain sectors, subject to exceptions where the government deems appropriate. This exceptions policy is viewed as too selective by some potential U.S. investors.

## **ELECTRONIC COMMERCE**

Jordan has adopted some legislation to manage electronic commerce, although there is no composite body of regulations and tax laws covering electronic commerce transactions. Specifically, there is an immediate need for regulations on electronic signatures. No tariffs are collected on electronic transactions.

# KAZAKHSTAN

## TRADE SUMMARY

The U.S. goods trade deficit with Kazakhstan was \$1.1 billion in 2010, up \$195 million from 2009. U.S. goods exports in 2010 were \$737 million, up 22.1 percent from the previous year. Corresponding U.S. imports from Kazakhstan were \$1.9 billion, up 21.3 percent. Kazakhstan is currently the 82nd largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Kazakhstan was \$7.8 billion in 2009 (latest data available).

## WTO Accession

Kazakhstan has been negotiating the terms for its membership in the WTO since January 29, 1996 and hopes to complete work on its accession package this year, or early in 2012. The accession package consists of a Working Party report and Protocol of Accession recording how Kazakhstan will implement WTO provisions; schedules of goods and services market access commitments; and commitments on maximum levels of trade-distorting agricultural support.

While progress on negotiations all but halted in June 2009, after Kazakhstan announced its intent to enter the Belarus-Russia-Kazakhstan Customs Union (CU), measurable progress has been made since negotiations resumed in April 2010. On November 22, the United States and Kazakhstan signed a WTO accession bilateral agreement on goods, and are continuing to negotiate market access for services and on certain sanitary and phytosanitary (SPS) and IPR issues affecting market access. Kazakhstan also has signed bilateral agreements on market access for goods and services with twenty-four WTO Members and is close to completion with the remaining few Members seeking such an agreement.

Kazakhstan's Working Party, which has not met since July 2008, will resume work in mid-2011, focusing on finalizing a draft Working Party report which needs to be updated and revised to reflect the new elements of Kazakhstan's trade regime resulting from CU agreements and legal acts. Kazakhstan must also submit new and revised legislation and CU legal acts intended to implement WTO agreements in many key areas affected by the new CU trade regime, *e.g.*, customs practices, SPS measures, technical barriers to trade (TBT), and licensing. Kazakhstan also has updated its data tables on agricultural domestic supports and export subsidies, and has initiated negotiations with interested members on the establishment of its commitments in these areas.

## IMPORT POLICIES

Belarus, Russia, and Kazakhstan officially established a CU on July 1, 2010, and adopted a harmonized customs code. Kazakhstan implemented a common external tariff (CET) with Belarus and Russia beginning on January 1, 2010. As a result of its membership in the Customs Union, Kazakhstan increased the tariff rate on some 5,400 tariff lines, and its average import tariff in 2010 increased from 6.7 percent to 10.2 percent.

Like other members of the Customs Union, Kazakhstan has zero tariffs on over 900 individual tariff lines, including light aircraft with fewer than 50 passenger seats, high-speed railway locomotives, spare parts for certain type of vehicles, agricultural equipment, food products such as tropical fruits, children's food, coffee, cacao beans, and certain types of metals.



According to CU regulations, there is some flexibility in applying the CET regime. Kazakhstan is allowed to apply tariffs that differ from the CET on 409 tariff lines, although all tariff lines must be harmonized by 2015. These tariffs cover pharmaceuticals, medical equipment, processed aluminum products, nuclear reactors and spare parts for them, raw materials for the petrochemical industry, paper products, rail wagons, combines, tractors, and other products. In addition, in some specific cases, Customs Union member states can increase tariffs on selected goods without the consent of the other customs union members.

As required by Customs Union Decision, Kazakhstan implemented tariff-rate quotas (TRQs) on January 1 on poultry, beef, and pork. U.S. exporters are concerned about the possible trade limiting effects of these TRQs, as well as the way TRQs are calculated and distributed. Kazakhstan will maintain its tariff-rate quotas at 2010 levels.

Kazakhstan increased the number of goods subject to import/export licensing after joining the Customs Union. Precious metals and stones, documents from national archives, and items of cultural value are among the products now subject to licensing.

In October 2010, Kazakhstan introduced a ban on the export of buckwheat, soya beans, oil seeds, animal fat, cooking oil (including soya oil), sunflower oil, rapeseed oil, mustard-seed oil, and other types of oilseed derivatives. This ban will remain in effect through April 15, 2011. Kazakhstan also extended a ban on the export of fuel: the export ban on kerosene, jet fuel, and gasoline will remain in effect until April 15, 2011, and the export ban on benzene was extended through January 1, 2011.

The Law on Investments, enacted in January 2003, provides customs duty exemptions for imported equipment and spare parts, but only if Kazakhstani-produced stocks are unavailable or not up to international standards. In addition, imported equipment and spare parts designated for priority investment projects under the government's industrialization program will also be exempted from customs duties.

U.S. exporters to Kazakhstan have consistently identified the requirement to obtain a "transaction passport" (providing information on, *inter alia*, the importer, contract details, the local bank of the importer/exporter, and the foreign partner) to clear goods through customs as a significant barrier to trade. Transaction passports are designed to stem capital outflows and money laundering by requiring importers to show documents that verify the pricing of import/export transactions. Kazakhstan amended the Law on Currency Control in August 2009, thereby changing the ceiling on transactions from \$10,000 to \$50,000. Despite some internal Kazakhstani opposition to the transaction passport system, the National Bank of Kazakhstan insists that it is necessary to control capital movement and prevent capital flight.

Although Kazakhstani officials have attempted to reform customs agencies, customs administration and procedural implementation remains a significant barrier to trade. In 2010, Kazakhstan ratified the 1990 Istanbul Convention on temporary admission, which will help bring its procedures for temporary admission control into conformity with international standards.

Other reforms allow foreign citizens to import and declare goods at a port of entry without utilizing domestic customs brokers. Previously, foreigners who wished to import goods into Kazakhstan were required by law to have a Kazakhstani partner. That said, foreign citizens may require domestic customs brokers in order to file electronic customs declarations, unless they have software compatible with new Customs Union computer system. New laws also modified provisions regarding *ex-officio* rights for customs officers, and standardized practices for the valuation of goods. These amendments were approved on December 9, 2009, and entered into force on January 1, 2010.

Establishment of the Customs Union also introduced new customs control procedures for importers from non-Customs Union countries. The cost of importing has gone up, due to a rise in import duties and payments for warehouses services. The time it takes to clear customs when importing from third countries has also increased due to new requirements for storage, inspections and customs declarations. The new rules of the CU have complicated Kazakhstan's custom clearance procedures and created additional barriers to trade.

## **GOVERNMENT PROCUREMENT**

The lack of transparency and efficiency in government tenders remains a major challenge for local and foreign companies. The government recognizes this, and is streamlining its procurement process and gradually moving toward an e-procurement system. Since January 1, 2010 standard government procurement of goods and services has been conducted online. According to a representative of the Ministry of Finance, the next step is to conduct tenders and auctions for all types of equipment and services electronically. Integration within the framework of the Customs Union Common Economic Zone (CEZ) may accelerate this process. If this agreement is signed, Customs Union Parties will be required to conduct government procurement electronically after July 1, 2012.

The government's strong support for increased local content is another trend in procurement that impacts U.S. suppliers. In 2009-2010, Kazakhstan amended regulations and laws, including the Law on Government Procurement, to increase the percentage of local content in government procurements. The local content requirement is applied to domestic and foreign operators in Kazakhstan, including government agencies, state-owned enterprises, national holding companies, and subsoil users. The exact proportion of local goods and services is calculated according to a specific formula approved by the Foreign Investors Council. This formula is used to prepare reports on local content for the Prime Minister's Office and the Presidential Administration. Russia and Belarus will be able to enjoy national treatment for government procurement as of January 1, 2014.

According to new government tender requirements, proposals that include a significant percentage of locally produced goods and services will receive preferential treatment. Bidders who wish to qualify for preferential treatment must receive a certificate from the Ministry of Industry and New Technologies and indicate the bidder's local content percentage. Bidders with a higher local content rate get a higher discount, which lowers their bid price. Conversely, tender commissions which ignore local content requirement regulations and do not give discounts to certified bidders will be charged administrative fees and may face administrative prosecution. The Kazakhstani government is elaborating its official concept for the development of local Kazakhstani content. Kazakhstani shares for goods and services are expected to increase over time.

According to new procurement rules for subsoil users, procurement plans must be announced in advance, tender documents must be published in the Kazakh and Russian languages, and tenders must be conducted in Kazakhstan. If the tender is conducted outside Kazakhstan, the costs of the procurement will not be reimbursed to the operator, and the government will have cause to cancel the subsoil license altogether. In addition, the organizer of the tender must discount the price of all Kazakhstani bids by 20 percent. At a minimum, 1 percent of the project budget should be earmarked for training programs and workforce development, including overseas assignments with the lead operator. Qualified Kazakhstani specialists will be listed in a database on the Ministry's website. In theory, if an international oil company needs a certain specialist, it can consult the website, identify a job category, select a specialist, and interview the candidate.

Kazakhstan's largest national companies, owned and managed by National Welfare Fund Samruk-Kazyna, such as Kazakhstan TemirZholy (national railway), KazMunaiGas (national oil and gas

company), KEGOC (electricity transmission company), and their subsidiaries, are subject to these local content requirements, but are thus far exempted from the Law on Government Procurement.

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

To facilitate its WTO accession and attract foreign investment, Kazakhstan is modernizing its legal regime for protecting IPR. In 2009, Kazakhstan adopted several amendments to its IPR law, including the legal recognition of vendors who have the rights to print and digital media. This amendment allows licensed vendors to seek damages from unauthorized dealers selling pirated merchandise. Kazakhstan also amended its patent law to clearly define types of IPR violations, accountability for violators, and to define the relationship between an employer and an employee with respect to an employee's invention.

Kazakhstan has taken steps towards implementing international IPR standards. In 2010, for example, the government introduced amendments to its trademark legislation with a view to complying with TRIPS obligations. Kazakhstan has also ratified 15 of the 24 treaties endorsed by the World Intellectual Property Organization (WIPO). Kazakhstani authorities have stated that Kazakhstan intends to sign several agreements in 2011, including the Agreement on the Repression of False or Deceptive Indications of Source on Goods, and the Agreement Concerning the International Registration of Trademarks. Kazakhstan has also said it intends to ratify the Nairobi Treaty on the Protection of the Olympic Symbol, the Singapore Treaty on the Law of Trademarks, and the Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations.

Pursuant to statutes enacted in November 2005 that authorize stronger penalties, authorities have conducted numerous raids against distributors of pirated products. The government's efforts have helped to expand the Kazakhstani market for licensed, non-infringing products.

Customs controls need to be applied more effectively against imported contraband. Further progress also is needed in the realm of civil enforcement in Kazakhstan. Although civil courts have been used effectively to stem IPR infringement, judges often lack technical expertise in the area of IPR, which is a significant obstacle to further improvement in Kazakhstan's IPR climate.

## **SERVICES BARRIERS**

In accordance with Kazakhstan's law "On National Security," foreign ownership in telecommunications services may not exceed 49 percent and foreign ownership of mass media companies, including news agencies, is limited to 20 percent. Foreign banks and insurance companies are allowed to operate only *via* joint ventures with Kazakhstani companies. Other professional services, including auditing, architectural, urban planning, engineering, integrated engineering, and veterinary services, may be provided only by a legal entity resident in Kazakhstan.

The U.S. satellite industry has complained that the government of Kazakhstan has given preferential treatment to Kazakhstan's national satellite (Kazsat 1, now defunct) in the past and may adopt licensing procedures for very small aperture (VSAT) antennas that would be overly burdensome and expensive. Kazakhstan plans to launch a new national satellite in 2011 or 2012. The U.S. satellite industry also argues that Kazakhstan should not restrict the transport of video programming *via* foreign satellites, or limit the entities with which it can contract directly for these services.

## **INVESTMENT BARRIERS**

Kazakhstan's 2003 Law on Investments provides the legal basis for foreign investment in Kazakhstan. Some U.S. investors have expressed concern about certain aspects of the law, including its investment

contract stability provision, the lack of clear provisions for access to international arbitration, and the narrow definition of what constitutes investment dispute.

Approximately 70 percent of foreign direct investment in Kazakhstan is in the oil and gas sector. The government remains eager to do business with international companies in this sector, but increasingly has required local content in purchases of goods and services for subsoil operations. The methodology to calculate local content is not well defined, Kazakhstani goods do not always fully comply with international standards, and Kazakhstani service suppliers are not always able to provide the technically complex services necessary to support projects in oil and gas sector. Consequently, it has been difficult for companies to comply with government local content requirements. Moreover, companies have reported that local administrators have taken an increasingly inflexible approach to these regulations.

On June 25, 2010, the government established the National Agency for Local Content Development to increase local content in oil and gas activity, monitor subsoil procurement procedures, and assist local producers to produce competitive goods and services. The June 2010 Law on Subsoil and Subsoil Use establishes strict local content requirements and harsh penalties for companies that do not meet them, including the potential cancellation of contracts. The law also includes a preemption clause that guarantees Kazakhstan the right of first refusal when a party seeks to sell any part of its stake in a mineral resource extraction project. The law fully incorporates an October 2007 amendment to the current subsoil law which allows the government to amend or terminate existing subsoil contracts deemed to be of “strategic significance,” where the economic interests of Kazakhstan are deemed to create a “national security risk.”

On August 1, 2009, the government issued Decree No.1213, which listed subsoil fields deemed to have “strategic significance.” The list includes over 100 oil and gas fields, including Tengiz, Kashagan, and Karachaganak, and authorizes the government to amend contracts if it determines that the actions of a subsoil user could lead to a substantial change in Kazakhstan's economic interests or could threaten Kazakhstan's national security. The Decree provides no further guidance on how the government will determine whether there is a substantial change in economic interests or whether there is a threat to national security.

In 2010, the government reintroduced a controversial duty on the export of crude oil that triggered a \$1 billion dispute with the consortium of international oil companies operating the giant Karachaganak condensate field. The duty will negatively impact Kazakhstan's oil exporters.

A draft Law on Natural Gas and Gas Supply would regulate gas transportation, distribution, and pricing, and create a single operator to purchase natural gas. International oil company executives and legal analysts are concerned that the draft legislation would inhibit the development of a domestic gas market in Kazakhstan. They view the bill as part of an overall trend toward greater state control and involvement in the management and marketing of the country's natural resources.

## **OTHER BARRIERS**

There are structural barriers to investment and trade in Kazakhstan, including a weak system of business law, a lack of an effective judicial system for resolving breach of contract, and an unwieldy government bureaucracy. In addition, there is a burdensome tax monitoring system for all companies operating in Kazakhstan. Many companies report the need to maintain excessively large staffs to deal with the cumbersome tax system and frequent inspections. The actions of tax and various regulatory authorities, as well as actions to enforce environmental regulations, can be unpredictable. The government, on occasion, has initiated criminal cases against local employees of foreign firms. Kazakhstani authorities

often require, as part of a foreign firm's contract with the government, that the firm contribute to social programs for local communities.

Widespread corruption at all levels of government is also seen as a barrier to trade and investment in Kazakhstan. It reportedly affects nearly all aspects of doing business in Kazakhstan, including customs clearance, registration, employment of locals and foreigners, payment of taxes, and the judicial system.

# KENYA

## TRADE SUMMARY

The U.S. goods trade surplus with Kenya was \$52 million in 2010, down \$321 million from 2009. U.S. goods exports in 2010 were \$363 million, down 44.5 percent from the previous year. Corresponding U.S. imports from Kenya were \$311 million, up 10.9 percent. Kenya is currently the 100th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Kenya was \$247 million in 2009 (latest data available), up from \$185 million in 2008.

## IMPORT POLICIES

### Tariffs

Kenya is a member of the World Trade Organization (WTO), the Common Market for Eastern and Southern Africa (COMESA), and the East African Community (EAC). Kenya's high import tariffs impede trade, especially in the agricultural sector. The Kenyan government sometimes alters the application of import regulations on agricultural products to reflect fluctuations in domestic supply, and based on political factors. According to the WTO, Kenya's average applied tariff rate was 12.6 percent in 2009 for all products.

Kenya applies the EAC Customs Union Common External Tariff, which includes three tariff bands: zero duty for raw materials and inputs; 10 percent for processed or manufactured inputs; and 25 percent for finished products. "Sensitive" products/commodities, comprising 58 tariff lines, have applied ad valorem rates above 25 percent, including milk and milk products, corn, popcorn, wheat and wheat flour. For some products/commodities, the tariffs vary in different EAC countries.

Due to continuing concerns about food security, the government of Kenya permitted duty-free importation of white maize through January 2010. Corn imported from outside COMESA and EAC normally is assessed a 50 percent ad valorem tariff. President Kibaki ordered this waiver of tariffs on all food items during most of 2009, but these tariffs have since been re-imposed. For 2010, the government of Kenya has reduced the tariff on wheat from 35 percent ad valorem to 10 percent for Kenyan millers importing for milling purposes. The EAC has reduced the ad valorem tariff on rice from 75 percent to \$200 per ton or 35 percent, whichever is higher.

While the U.S. Government welcomed the simplification of the tariff system that resulted from the establishment of the EAC Customs Union in 2005, the United States has raised concerns with Kenya and other EAC members about tariff increases introduced on several U.S. exports. The increased tariffs included a 10 percent tariff on previously duty free unshelled almonds and a 25 percent tariff for shelled almonds and other nuts that had previously been 15 percent. Kenya, however, reduced the import tariff on used clothing from \$0.30/kg or 45 percent, whichever is higher, to \$0.20/kg or 35 percent.

### Nontariff Measures

Kenya has removed many nontariff measures that affect U.S. exports. Kenya justifies those import controls still in existence as necessary to address health, environmental, and security concerns. All Kenyan importers pay an import declaration fee set at 2.25 percent of the customs value of imports and

are required to have the following documents: Pre-Export Verification of Conformity; a Certificate of Conformity; Import Standardization Mark; and valid pro forma invoices from the exporter.

Kenyan law stipulates that all licensed importers of petroleum products participate in a domestic crude processing program. As a result, the Kenya Petroleum Refinery Ltd, a parastatal entity, receives 1.6 million tons of crude oil for refining each year. This represents approximately half of the total petroleum demand in Kenya. Of the remaining demand, a tendering system accounts for 35 percent and the remaining 15 percent is sourced through channels not governed by tendering requirements.

### **Customs Procedures**

Numerous bureaucratic procedures at the Port of Mombasa significantly increase the cost of imported goods. Multiple agencies, including those responsible for customs, police, ports, and standards inspection, subject importers to excessive inspection and clearance procedures. Each day's delay for a truck costs its owner approximately \$400 and delays for a ship costs its owner about \$25,000 per day.

### **EXPORT SUBSIDIES AND OTHER EXPORT PROMOTION PROGRAMS**

The Kenyan government designed the Manufacturing Under Bond (MUB) program to encourage manufacturing for export by exempting enterprises operating under the program from import duties and value added taxes (VAT) on imported plant, machinery, equipment, raw materials, and other imported inputs. The program also provides a 100 percent investment allowance on plant, machinery, equipment, and buildings. The government of Kenya expects goods produced under the MUB system to be exported. If not, the goods are subject to a surcharge of 2.5 percent when sold domestically and imported inputs used in their production are subject to all other tariffs and import charges. The program is open to both local and foreign investors.

Firms operating in Kenya's Export Processing Zones (EPZ) are provided a 10 year corporate tax holiday and 25 percent tax rate thereafter; a 10 year withholding tax holiday on dividend remittances; duty and VAT exemption on all inputs except motor vehicles; 100 percent investment deduction on capital expenditures within 20 years; stamp duty exemption; exemption from various Kenyan laws; exemption from pre-shipment inspection; on-site customs inspection; and work permits for senior expatriate staff. The EPZ law allows manufacturers and service providers to sell up to 20 percent of their output on the domestic market. However, they are liable for all taxes on products sold domestically plus a 2.5 percent penalty.

### **GOVERNMENT PROCUREMENT**

In 2005, Kenya enacted the Public Procurement and Disposal Act (the Act), which provides for a Public Procurement Oversight Authority, established on January 1, 2007. The Minister of Finance appoints and parliament approves its nine-member Oversight Advisory Board.

The government of Kenya designed the Public Procurement and Disposal Act to make procurement more transparent and accountable and established penalties for violations of its provisions. The Act provides that procurement agencies may annually update pre-qualified firms. The Act reserves for Kenyan citizens procurements where the funding is 100 percent from the government of Kenya or a Kenyan state-related entity and the procurement is below 50 million Kenyan shillings (approximately \$650,000) for goods or services and 200 million Kenyan shillings (approximately \$2.6 million) for public works. It also sets the following preferences that are applied in the evaluation of bids: 15 percent for goods manufactured, mined, extracted, or grown in Kenya; 6 percent where locals have below 20 percent of shareholdings; and 8 percent where locals have shareholdings between 20 percent and 50 percent.

The Act allows for restricted tendering under certain conditions, such as when the complexity or specialized nature of the goods or services requires the pre-qualification of suppliers. The Act can impose restrictions on the number of tenders if the time and costs required to examine and evaluate a large number of tenders would be disproportionate to the value of the tender.

The Supplies Management and Practitioners Bill of 2006 became law in October 2007. It addresses a loophole in the Public Procurement and Disposal Act by entrusting only a procurement professional with the responsibility for conducting procurement in any public entity. The Act generally has not yet been implemented.

U.S. firms have had little success in bidding on government projects in Kenya despite technical proficiency and reasonably priced bids. Foreign firms, some without track records, that have won government contracts have partnered with well-connected Kenyan firms.

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

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

Kenya's enforcement of IPR continues to be a serious challenge. Pirated and counterfeit products in Kenya, mostly imported from Asia, present a major impediment to U.S. business interests in the country. Shoes, textile products, office supplies, tubes and tires, medicines, batteries, shoe polish, soaps, and detergents are the most commonly counterfeited items.

According to a survey released by the Kenya Association of Manufacturers (KAM) in late October 2008, piracy and counterfeiting of business software, music, consumer goods, and pharmaceuticals in Kenya cost firms about \$715 million in lost sales annually. KAM estimates that the government loses over \$270 million in potential taxes annually.

The Pharmaceutical Society of Kenya contends that over 50 percent of anti-malaria drugs sold in Kenya are counterfeit. A random survey by the National Quality Control Laboratories and the Pharmacy and Poisons Board concluded that 30 percent of all drugs in Kenya are counterfeit.

Kenya's EPZs have served as a conduit for counterfeit and sub-standard goods. These products enter the EPZ ostensibly as sub-assembly or raw materials, but are actually finished products. These counterfeit and substandard goods also end up in the Kenyan marketplace without paying the necessary taxes. Batteries, in particular, have been a problematic product in the EPZs.

The Kenya Copyright Board (KCB) has the authority to inspect, seize, and detain suspect articles and to prosecute offenses. The KCB is severely understaffed with only three prosecutors and two police officers detailed to the organization. The KCB continues to work jointly with U.S. rights holders in conducting raids.

Kenyan artists have formed organizations to raise the awareness of intellectual property rights and to lobby the government for better enforcement. Two of the most active groups are the Music Copyright Society of Kenya and Kopiken. Kenya's Music Copyright Society claimed in September 2008 that 90 percent of its potential earnings are lost to piracy and urged the Kenya Revenue Authority to require authentication stickers on musicians' releases. IPR enforcement against pirated Kenyan and foreign works remains weak.



The Anti-Counterfeit Bill of 2008 passed Parliament in December 2008. Long sought by the business community, the bill provides for the creation of an Anti-Counterfeit Agency (ACA) and strengthens the ability of law enforcement agencies to investigate and prosecute manufacturers and distributors of counterfeit and pirated goods. The government inaugurated the ACA in December 2009 and operationalized it in June 2010. However, the ACA remains severely underfunded, receiving less than half of its budget request for 2010. KAM continues its strenuous efforts to increase government focus on the counterfeit and piracy issues that negatively impact virtually every legitimate manufacturer in Kenya. In response local authorities working with U.S. rights holders, have seized more than 9,000 counterfeits in Kenya since November 2008.

## **INVESTMENT BARRIERS**

Although the Kenyan judicial system is working to improve its efficiency and timeliness, a backlog of cases burdens the system, including cases that are investment-related. Corruption further reduces the credibility of the judicial system. Companies cite these deficiencies as obstacles to investment, particularly as they make financial institutions reluctant to provide loans for investment in Kenya, and charge higher interest rates when they do. The employment of foreign labor in Kenya is discouraged through the use of fees and security bonds. New foreign investors with expatriate staff are required to submit plans for the gradual phasing out of non-Kenyan employees.

A law passed in 2007 reduced the allowable level of foreign investment in firms listed on the Nairobi Stock Exchange (NSE) from 75 percent to 60 percent. A grandfather clause allows firms that exceed the new limit to maintain existing shareholdings, while investment shares can be increased above the 60percent threshold if the shares reserved for local investors are not fully subscribed, and subject to prior written approval. Foreign investment in a range of industries is subject to sector-specific caps, including in brokerage companies (30 percent), fisheries (49 percent), fund management (51 percent), insurance (66.7 percent), and telecommunications (80 percent). The process for acquiring land in Kenya is cumbersome and opaque, and land titles can be insecure due to past abuses relating to the distribution and redistribution of public land. The Kenyan constitution prohibits foreigners from holding a freehold land title; land may be acquired by foreigners through leasehold only.

Kenya has been slow to open public infrastructure to competition. Reform and partial privatization of the telecommunications, power, and rail sectors have begun, but are proceeding at a slower than scheduled pace. Kenya's Finance ministry has developed rules and regulations for public-private partnerships (PPP) and is in the process of developing a Secretariat to help review and regulate such partnerships. A new PPP law failed to pass Parliament in 2008.

Kenya imposed a universal service fee of up to a maximum one percent of gross revenue on all licensees in the postal sector under the Universal Access and Service Regulation of May 2010. In January 2011, the government of Kenya indicated that it would apply this fee at a 0.5 percent level. Industry has expressed concern with such fees as express delivery services fall outside the universal service obligation.

## **OTHER BARRIERS**

Corruption remains a substantial trade barrier in Kenya. A number of U.S. firms have exited Kenya due, at least in part, to corruption issues. A 2008 Business Climate Index of the East African Business Council revealed that \$10 million in bribes are paid to police and customs officials each year. The International Finance Corporation's Investment Climate Assessment for Kenya rated corruption as a severe or major obstacle by three-quarters of firms surveyed, with two-thirds of respondents expected to pay bribes for government contracts.

# KOREA

## TRADE SUMMARY

The U.S. goods trade deficit with Korea was \$10.0 billion in 2010, down \$588 million from 2009. U.S. goods exports in 2010 were \$38.8 billion, up 35.8 percent from the previous year. Corresponding U.S. imports from Korea were \$48.9 billion, up 24.6 percent. Korea is currently the 7th largest export market for U.S. goods.

U.S. exports of private commercial services (i.e., excluding military and government) to Korea were \$12.6 billion in 2009 (latest data available), and U.S. imports were \$6.4 billion. Sales of services in Korea by majority U.S.-owned affiliates were \$11.0 billion in 2008 (latest data available), while sales of services in the United States by majority Korea-owned firms were \$5.7 billion.

The stock of U.S. foreign direct investment (FDI) in Korea was \$27.0 billion in 2009 (latest data available), up from \$22.4 billion in 2008. U.S. FDI in Korea is led by the manufacturing, finance/insurance, and wholesale trade sectors.

## UNITED STATES-KOREA TRADE AGREEMENT (KORUS)

On December 3, 2010, the United States and the Republic of Korea reached agreement on a landmark trade deal that resolved outstanding issues related to the KORUS. After approval and implementation of this trade agreement, Korea will provide preferential access for U.S. businesses, farmers, ranchers, services providers, and workers to what is currently our seventh largest export market. The KORUS will also help solidify the two countries' long-standing alliance and underscore the U.S. commitment to, and engagement in, the Asia-Pacific region. The new agreements comprising the December 3, 2010 deal (which were signed on February 10, 2011) will level the playing field and enhance market access for U.S. automobile companies and workers by addressing, among other issues, current market access barriers created by Korea's system of automotive safety standards and potential new barriers that may have resulted from proposed Korean fuel economy and greenhouse gas emissions standards. The agreements followed months of close consultations with the U.S. Congress and U.S. stakeholders to identify the most effective approaches for dealing with the outstanding concerns. The Administration believes this trade agreement will bring significant economic and strategic benefits for the United States.

Within five years of the date the KORUS enters into force, 95 percent of bilateral trade in consumer and industrial products would become duty free, and most remaining tariffs would be eliminated within 10 years. The U.S. International Trade Commission estimates that the reduction of Korean tariffs and tariff-rate quotas on goods alone would add \$10 billion to \$12 billion to annual U.S. Gross Domestic Product and up to \$11 billion to annual merchandise exports to Korea. For agricultural products, the trade agreement would immediately eliminate or phase out tariffs and quotas on a broad range of products, with almost two-thirds (by value) of Korea's agriculture imports from the United States becoming duty free upon entry into force. For services, the trade agreement would provide meaningful market access commitments that extend across virtually all major service sectors, including improved access for international delivery services, while creating a path toward future reform of domestic delivery services, and the opening up of the Korean market for foreign legal consulting services. In the area of financial services, the trade agreement would increase access to the Korean market and ensure greater transparency and fair treatment for U.S. suppliers of financial services.

The trade agreement would address non-tariff barriers in a wide range of sectors and includes strong provisions on competition policy, labor, environment, and transparency and regulatory due process.

## **IMPORT POLICIES**

### **Tariffs and Taxes**

Korea's average MFN applied tariff rate in 2009 was 12.1 percent for all products (48.6 percent for agricultural products and 6.2 percent for non-agricultural products) and Korea has bound 94.6 percent of its tariff lines.

Korea maintains particularly high tariffs on a number of high value agricultural and fishery products. Korea imposes tariff rates of up to 30 percent on nuts and 35 percent and higher on most dairy products. Pears, table grapes, juices, starches and peanut butter are subject to tariffs ranging from 45 percent to 54 percent. Tea and peanuts, with some exceptions, are subject to some of the highest tariffs ranging, from 754 percent and 513 percent, respectively, for red ginseng tea and green tea to 230 percent for peanuts. Korea also imposes high tariffs on other products of interest to U.S. industry despite having little or no domestic production, including cherries, certain distilled spirits, frozen corn, frozen french fries, pepperoni, and prepared or mashed potatoes.

Korea has established tariff-rate quotas (TRQs) intended to provide at least a minimum level of access to previously closed markets or to maintain pre-Uruguay Round access. In-quota tariff rates may be very low or zero, but the over-quota tariff rates are often prohibitive. For example, natural and artificial honey are subject to an over-quota tariff rate of 243 percent; skim and whole milk powder - 176 percent; barley - 324 percent; malting barley - 513 percent; potatoes and potato preparations - more than 304 percent; and popcorn - 630 percent. In addition, for some agricultural products, such as corn grits, popcorn, and soy flakes, Korea aggregates raw and value added products under the same quota. Korean domestic industry groups, which administer the quotas, frequently allocate the more favorable in-quota tariff rate to their larger members that import raw ingredients.

Korea uses "adjustment tariffs" on some agricultural, fishery, and plywood products, which increase the applied tariff rates. Most of the adjustment tariffs are imposed on agricultural and seafood products, including frozen croaker, which are products of interest to U.S. exporters. Korea has eliminated tariffs on most or all products in the following sectors: paper; toys; steel; furniture; agricultural equipment; construction equipment; and information technology products (those included in the WTO Information Technology Agreement). Korea has harmonized its chemical tariffs to rates of zero percent, 5.5 percent, or 6.5 percent, depending on the product. Bound tariffs, *i.e.*, the level that generally cannot be exceeded under WTO rules, on textile and apparel products remain relatively high: 30 percent on several man-made fibers and yarns; 30 percent on many fabrics and most made-up and miscellaneous goods (*e.g.*, pillow cases and floor coverings); and 35 percent on most apparel items.

### **Beef**

In April 2008, the United States and Korea signed an agreement to fully re-open Korea's market to U.S. beef and beef products in a manner consistent with international standards and science. In June 2008, following massive public protests in Seoul, Korean beef importers and U.S. exporters reached a voluntary, commercial understanding that temporarily limits U.S. exports to beef and beef products from cattle less than 30 months of age, as a transitional measure, until Korean consumer confidence improves. U.S. beef sales resumed in June 2008. In 2010, U.S. exports of beef and beef products to Korea reached 113,000 metric tons, valued at \$518 million, making Korea the fourth largest U.S. beef export market. This represents a 140 percent increase by value over 2009 sales.

Achieving full market access for U.S. beef and beef product exports to Korea remains a top priority. The U.S. Government will continue to attach importance to the beef issue and will continue to urge Korea to open its market fully, consistent with science and international standards. This issue is discussed in greater detail in USTR's annual Report on Sanitary and Phytosanitary Measures.

## **Rice**

In the Uruguay Round, Korea negotiated a 10 year exception to "tariffication" of rice imports in return for establishing a Minimum Market Access (MMA) quota that was set to expire at the end of 2004. Korea subsequently negotiated a 10-year extension of the MMA arrangement that was approved by its trading partners in April 2005. The extension called for Korea to increase its total rice imports over the succeeding 10 years, from 225,575 metric tons in 2005 to 408,700 metric tons in 2014. Along with the country specific quota commitments to purchase minimum amounts of imports from China, Thailand, and Australia, Korea also agreed to purchase at least 50,076 metric tons annually from the United States until 2014. In addition, the quality of access has improved as rice marketed to consumers as table rice was for the first time included as a portion of the MMA quota. The table rice portion increased from 10 percent of the quota in 2005 to 30 percent in 2010.

Access to the Korean rice market for U.S. exports has improved significantly under this agreement. Under the 2010 MMA, the U.S. rice industry obtained nearly 29 percent of Korea's total MMA imports by winning tenders for 93,720 metric tons of (milled) rice, valued at \$83 million. This amount is 187 percent of the United States' baseline of 50,076 metric tons for the country specific quota. In addition, nearly 30,537 of the 93,720 metric tons were sold as table rice in 2010.

## **GOVERNMENT PROCUREMENT**

Korea is a signatory to the WTO Agreement on Government Procurement (GPA). For procurement of construction services by subcentral and government enterprises covered under the GPA, Korea applies a threshold of over \$23 million, which is three times the threshold applied by the United States. Under the KORUS, U.S. suppliers will have rights to bid on the procurements of more than 50 Korean central government entities, nine more than are covered under the GPA. The agreement also expands procurements to which U.S. suppliers will have access by reducing by nearly one-half the threshold applied under the GPA, from \$203,000 to \$100,000.

### **Encryption Technology for Public Procurement of VoIP Equipment**

In May 2009, the Korean government mandated the use of a Korean encryption standard called "ARIA" in Internet protocol based telephone systems (Voice over Internet Protocol, or VoIP) for ten Korean government agencies responsible for foreign and national security affairs. After the May 2009 announcement, U.S. equipment suppliers faced difficulties in selling VoIP equipment to other Korean public sector entities because many of their requests for proposals (RFPs) also required ARIA, due in part to a widespread perception among procuring offices that ARIA was required for purchases by all government agencies. However, since bilateral trade consultations took place in May 2010, there have been no reports of RFPs requiring ARIA. We will continue to work with Korea to ensure this trend continues.

In July 2009, Korea also implemented a new regulation stipulating that encrypted network equipment must be certified by Korea's National Intelligence Service (NIS) in order to be procured by public sector agencies and that NIS will only certify encryption modules based on ARIA and SEED encryption algorithms, not the AES algorithm that is in widespread use worldwide. Some U.S. suppliers have been unable to sell virtual private network and firewall systems to public sector agencies due to this

restriction. We will continue to urge Korea to ensure that equipment based on widely used international standards has full access to Korea's public sector market.

Another issue relates to the requirement that all public sector VoIP telephone systems receive certification from Korea's Telecommunications Technology Association (TTA) that there is interoperability between telephone sets and the private branch exchanges (PBX—a small scale digital switch or server) that service them. U.S. companies sell telephones together with the PBX systems, which allow the companies to incorporate advanced features such as voice conferencing and messaging. TTA will not certify this type of equipment, arguing that any telephone should function within any PBX. This requirement limits the functionality that can be offered through integrated systems and hampers the ability of foreign firms to access the VoIP market in government procurement contracts. We will continue to press the Korean government to find a way to certify U.S.-designed systems.

## **INDUSTRIAL SUBSIDY POLICY**

Korea's past promotion and support for its semiconductor industry, which eventually resulted in the imposition of countervailing duties by the United States, the European Union, and Japan, is emblematic of concerns in this area.

Historically, the Korea Development Bank (KDB), which as a government-owned entity is not necessarily bound by the same constraints as commercial institutions, has been one of the government's main sources of policy-directed lending to favored industries. The Lee Myung-bak Administration plans to privatize a wide range of state-owned enterprises, including the KDB. As a first step, Korea adopted a holding company system in October 2009 and divided the Korean Development Bank (KDB) into two new companies: (1) KDB; and (2) the Korea Finance Corporation (KFC). While still government-owned, the KDB is to operate as a commercial bank under this restructuring plan, and the KFC will operate as a policy lending bank. The Korean government plans to list the KDB on the Seoul stock exchange in 2011 and on overseas stock markets in 2012. The U.S. Government will continue to monitor the lending policies of the KDB and other government-owned or affiliated financial institutions.

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

Korea generally provides strong intellectual property rights protection and enforcement. Korea's progress on IPR protection and enforcement led to its removal from the Special 301 Watch List in 2009. The United States recognizes the importance the Korean government places on IPR protection, a development that has accompanied Korea's shift to becoming a significant creator of intellectual property. The 2009 amendments to Korea's Copyright Law include measures to deter copyright infringement via file-sharing platforms on the internet. Korea has also demonstrated a renewed commitment to investigating and prosecuting "topsites" (password-protected sites that store copyright infringing data files which are made available to other internet users). An investigation this past year concluded with the seizure of a topsite and the prosecution of its operator. However, concerns remain over new forms of online piracy, corporate end-user software piracy, book piracy in universities, and counterfeiting of consumer products.

Korea was also an active participant in the Anti-Counterfeiting Trade Agreement (ACTA) negotiations, which were concluded in November 2010. The ACTA establishes an international framework that will assist Parties in their efforts to effectively combat the infringement of intellectual property rights, in particular the proliferation of counterfeiting and piracy, which undermines legitimate trade and the sustainable development of the world economy.

## **SERVICES BARRIERS**

### **Screen and Broadcast Quotas**

Korea maintains a screen quota for films requiring that any movie screen show domestic films at least 73 days per year. Korea also maintains a variety of foreign content quotas for terrestrial, cable and satellite television, radio broadcasting, and Internet Protocol television. Overall, foreign programs may not exceed 20 percent of terrestrial television or radio broadcast time or 50 percent of cable or satellite broadcast time on a quarterly basis. Within those overall quotas, Korea maintains annual quotas that further limit broadcast time for foreign films to 75 percent of all films for terrestrial, cable, and satellite broadcasts; foreign animation to 55 percent of all animation content for terrestrial broadcast and 65 percent of all animation content for cable and satellite broadcasts; and popular music to 40 percent of all music content. Another quota, on a quarterly basis, limits content from any one country to 60 percent of the quota available to foreign films, animation, or music. The KORUS would protect against quota increases and ensure that new platforms, such as online video, are not subject to these legacy restrictions.

### **Restrictions on Voiceovers and Local Advertisements**

The Korean Broadcasting Commission's guidelines for implementation of the Broadcasting Act contain restrictions on voiceovers (dubbing) and local advertising for foreign retransmission channels. These prohibitions continue to be of concern to U.S. industry, as they limit the profitability of such channels in the Korean market.

### **Legal Services**

On February 27, 2009, the Korea National Assembly passed the Foreign Legal Consultant Act (FLCA), creating a partial opening of domestic legal services. Under the new law, law firms from countries that have a free trade agreement with South Korea will be able to start consultancy businesses in Korea. The laws allow foreign attorneys with a minimum of three years of work experience to provide consulting services on the law of the jurisdiction in which they are licensed. Before the FLCA, only Korean-licensed lawyers could provide any form of legal advice in Korea, including advice on foreign law.

The Korean government plans to open its legal services market in several stages. The first step created a legal status for foreign legal consultants and allowed foreign law firms to open offices in Korea. Subsequent liberalization stages would address the ability of foreign-licensed lawyers and firms to associate with, partner with, and hire Korean-licensed lawyers.

### **Insurance and Banking**

Korea is the second largest insurance market in Asia and the seventh largest in the world. Korea's laws and regulations permit foreign financial service providers to establish subsidiaries or branches in Korea. Insurance suppliers remain concerned that Korea Post, the National Agricultural Cooperative Federation, and the National Federation of Fisheries Cooperative are regulated by an entity other than the Korean Financial Services Commission and therefore are under different rules that advantage these entities. Lack of transparency in the adoption of financial regulations continues to adversely affect financial services suppliers. Effective implementation of improvements, such as those required under the KORUS, in notice and comment periods and in vague "administrative guidance" should enable financial services suppliers to play a greater role in the regulatory process. The National Assembly adopted the Investment Services and Capital Markets Act in June 2007, and most provisions of the Act entered into force on February 4, 2009. The Act allows financial services companies to introduce new products unless

explicitly prohibited by law and establishes a clear legal basis for newcomers to apply for commercial licenses. In the amendments to the Enforcement Decree of the Financial Investment Services and Capital Markets Act, the government relaxed its requirements regarding private equity funds and introduced a special purpose Acquisition Company in September 2009.

Korea's strict data privacy rules require financial services providers to locate their servers physically in Korea, thus hampering foreign suppliers' ability to take advantage of economies of scale in the region to perform data processing in their daily business activity. Korea's implementation of commitments in the KORUS would help address this concern.

### **Telecommunications**

Korea currently prohibits foreign satellite service providers from selling services (*e.g.*, transmission capacity) directly to end users without going through a company established in Korea. Given the investment restrictions in place (see below) and the fact that establishing a local presence may not make economic sense, this prohibition significantly restricts the ability of foreign satellite service suppliers to compete in the Korean market.

The National Assembly passed legislation in December 2007 to regulate the convergence technology Internet Protocol television (IPTV). In 2008, the newly formed Korea Communications Commission (KCC) began issuing implementing regulations. The U.S. Government is closely monitoring this process with regard to transparency and due process. U.S. companies view some of the licensing requirements under discussion as market restricting, (*e.g.*, applying content quotas to real time IPTV).

### **INVESTMENT BARRIERS**

During his fall 2007 presidential election campaign, one of the key planks of President Lee Myung-bak's economic platform was to take steps to attract more foreign investment to Korea. Since President Lee assumed office in February 2008, foreign investors have noted a greater interest on the part of the government in addressing issues of concern and in removing barriers or disincentives to investment in Korea. The Korean government has maintained this policy despite the increasing global financial and economic turmoil that began in the second half of 2008 and continued into 2009.

Capital market reforms have eliminated or raised ceilings on aggregate foreign equity ownership, individual foreign ownership, and foreign investment in the government, corporate, and special bond markets. These reforms have also liberalized foreign purchases of short-term financial instruments issued by corporate and financial institutions. Some U.S. investors have raised concerns, however, about a lack of transparency in investment-related regulatory decisions, including by tax authorities, highlighting concerns about possible discrimination.

Korea maintains a 49 percent limit on foreign shareholdings of facilities-based telecommunications operators. Foreign investment is not permitted in terrestrial broadcast television operations and the Korean government also restricts foreign ownership of cable television-related system operators, network operators, and program providers to 49 percent. For satellite broadcasts, foreign participation is limited to 33 percent. Foreign satellite retransmission channels are limited to 20 percent of the total number of operating channels. Under the KORUS, Korea would permit U.S. companies within two years to own up to 100 percent of a telecommunications operator in Korea.

In addition to the numerous investment restrictions in key services sectors described above, as well as in the telecommunications sector, Korea maintains other important restrictions on foreign investment. Specifically, Korea prohibits foreign investment in rice and barley farming and imposes a 50 percent

foreign equity limitation on meat wholesaling. Moreover, Korea limits foreign investment in electric power generation, distribution, and sales to 50 percent. It also restricts foreign investment in the areas of news agency services and publishing and printing, where it has foreign equity limitations of 30 percent for enterprises publishing newspapers and 50 percent for enterprises publishing other types of periodicals.

On July 31, 2009, the Finance Ministry announced plans to sell a number of state-owned companies, including Korea Real Estate (KOREIT), Grand Korea Leisure Corporation, Farmland Improvement & Modernization, Korea Asset Investment Trust Co. Ltd., Korea District Heating Corp., and Korea Power Engineering Co. (*See the Industrial Subsidies section for detail on developments related to the Korea Development Bank.*)

The Korean government also operates several Free Economic Zones (FEZs) and has provided a range of investment incentives including tax breaks, tariff free importation, relaxed labor rules (primarily exemptions from workforce quotas for disabled and older workers, and mandatory paid leave), and improved living conditions for expatriates in areas such as housing, education, and medical services. The Korean government has promoted these zones as an important step in making Korea's business environment more open, liberal, and responsive to economic needs.

## **ANTICOMPETITIVE PRACTICES**

The Korea Fair Trade Commission (KFTC) has played an increasingly active role in enforcing Korea's competition law and in advocating for regulatory reform and corporate restructuring. In addition to its authority to conduct investigations and to impose penalties, including broad authority over corporate and financial restructuring, the KFTC can levy heavy administrative fines for violations or for failure to cooperate with investigations.

A number of U.S. companies have expressed concerns that respondents in KFTC investigations have not been afforded a sufficient opportunity to review and respond to the evidence against them, including an opportunity to cross examine those who testify in KFTC investigatory hearings. Concerns have also been raised that procedural rules for KFTC hearings have not been sufficiently transparent and that the KFTC lacks authority to enter into settlement agreements with respondents by mutual agreement.

The KFTC has taken some steps to address these concerns. In March 2009, the KFTC amended its regulations to expand the rights of respondents by allowing respondents to request a resumption of hearings to submit new evidentiary material or if the complexity of the case warrants additional hearings. Furthermore, the examiner's recommended sanction (including details of the surcharge calculation) is now provided in most cases to the respondent along with the examiner's report. The KFTC also amended regulations to increase its operational transparency, requiring examiners to inform claimants promptly of its conclusions and the grounds for those conclusions. To increase transparency for respondents, the KFTC began implementing new procedures in February 2007, requiring the KFTC to provide a respondent with an official notice of investigation in writing, to provide the respondent with detailed information on the purpose, scope, and length of the investigation, and to entitle the respondent to refuse aspects of the investigation it believes goes beyond the notified scope and report any misconduct on the part of examiners.

## **OTHER BARRIERS**

### **Regulatory Reform and Transparency**

Korea has made some improvements to its rulemaking and regulatory system over the past few years.



However, there remains a lack of transparency that cuts across various issues affecting U.S. firms in many different sectors. This continues to be one of the principal problems cited by U.S. businesses seeking to compete in the Korean market.

Korea's Administrative Procedures Act (APA) stipulates that the public comment period for draft regulations subject to the APA shall be no less than 20 days. However, in many cases, the 20-day minimum is insufficient. In addition, in many instances the final versions of regulations do not reflect the comments provided and often offer no explanation for why they were rejected. Under the KORUS, Korea would expand the minimum comment period to 40 days and adhere to a range of other transparency-related obligations, including the obligation to address significant, substantive comments received and to explain substantive revisions made in any final regulation.

### **Motor Vehicles**

Increased access to Korea's automotive market for U.S. suppliers remains a key priority for the U.S. Government. Korea maintains an eight-percent tariff and a range of nontariff barriers, such as discriminatory taxes based on engine size, unique standards, inadequate regulatory transparency, and an inadequate ability of stakeholders to provide input at an early stage into the development of regulations and standards. The United States-Korea trade agreement and the agreements reached on December 3, 2010, contain provisions designed to address many of these nontariff barriers and will contribute greatly to leveling the playing field for U.S. automobiles in the Korean market. *(For more information on nontariff barriers in the motor vehicles sector, see the U.S. Trade Representative's Report on Technical Barriers to Trade.)*

### **Motorcycles**

Although progress has been made over the past several years to resolve U.S. concerns over Korea's noise standard on motorcycles, several market access issues remain including a highway ban on motorcycles, high tariff and tax levels, and the inability of motorcycle owners to obtain ownership titles and obtain financing for a motorcycle purchase that uses the motorcycle as collateral. The Korean National Police commissioned a study on the safety of motorcycles on highways that was concluded in 2010. The study highlights inadequacies in Korea's regulatory and safety practices surrounding the licensing of motorcycle drivers and the proliferation of young, untrained motorcycle riders driving dangerously on city streets. The U.S. Government maintains that heavy motorcycles riding on highways do not pose the same safety concerns as do riders of smaller, lighter motorcycles, and continues to urge Korea to eliminate the ban on riding large motorcycles on highways.

### **Pharmaceuticals**

Cost containment measures under the Drug Expenditure Rationalization Plan (DERP), enacted in December 2006, continue to subject pharmaceutical products to downward price revisions. This affects not only drugs that have entered the market since DERP was adopted, but also products that were approved for reimbursement prior to DERP's adoption. The U.S. Government continues to urge Korea to refrain from implementing reimbursement policies that discourage companies from efficiently introducing advanced medical products to the Korean market and that serve as a disincentive to investment in research and development.

In July 2010, Korea's Ministry of Health and Welfare (MOHW) made a decision to exclude patented and patent-expired drugs from its "Rearrangement of Already Listed Drugs" project. Previously, under the Rearrangement Project, drugs that are listed on Korea's National Health Insurance reimbursement list were re-evaluated for pharmacoeconomic value and generally received price reductions, and concerns had

been raised by U.S. industry that the Rearrangement Project did not properly take into account the value of innovation or previous price reductions on the same drug. MOHW's decision to exclude innovative drugs from this process signaled the Korean government's willingness to accord proper value to innovation and to encourage greater research and development for its pharmaceutical industry.

### **Medical Devices**

U.S. companies have continued to express concern that the lack of adequate transparency in pricing and reimbursement decision making and regulatory processes has been an impediment to efficiently bringing medical devices to the Korean market.

In January 2010, MOHW adopted regulations establishing a new reimbursement system for medical devices, linking a reimbursement price of a medical device to a set single price for each "functional category" of products. MOHW also announced that the new system would reward innovation and improvement in new products by allowing premium pricing above the single set price for each functional category. Since the adoption of the new system in January 2010, however, MOHW has not granted premium pricing to a single product. Because of a general lack of transparency in how decisions regarding premium pricing are made, it is unclear why this is the case when, according to industry, a number of innovative and functionally approved products have been introduced. U.S. industry has raised concerns regarding MOHW's price re-evaluation methodologies, including the use of manufacturing cost and import price for setting the final reimbursement price. The U.S. Government has urged MOHW to engage directly with concerned stakeholders to address their concerns regarding how the new system can be implemented in a way that rewards innovation as originally intended.

The United States-Korea trade agreement includes, among other things, provisions to ensure that Korea's pricing and reimbursement decisions for pharmaceutical products and medical devices appropriately recognize the value of innovation. The Agreement's provisions also ensure that the processes for making these decisions are conducted in a transparent manner and include sufficient notice and comment periods for legal and regulatory changes.

### **Distilled Spirits**

On July 1, 2008, Korea's Liquor Tax Law was revised to provide a 50 percent tax reduction for certain "traditional liquors" including some forms of distilled and diluted spirits. This amendment raised concerns in U.S. industry because of its potential impact on trade by disadvantaging imported, competing liquors that do not fall under the narrow category of "traditional liquors." The Korean government provided assurances that the tax reductions apply only to small volume producers of designated traditional liquors, that the total of potentially qualifying liquors amounts to less than two percent of Korea's beverage alcohol market, and that there are no plans to expand the categories of beverage alcohol that would qualify for such tax reductions. The U.S. Government will continue to monitor Korean actions in this area.



# KUWAIT

## TRADE SUMMARY

The U.S. goods trade deficit with Kuwait was \$2.6 billion in 2010, up \$773 million from 2009. U.S. goods exports in 2010 were \$2.8 billion, up 42.4 percent from the previous year. Corresponding U.S. imports from Kuwait were \$5.4 billion, up 42.3 percent. Kuwait is currently the 52nd largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Kuwait was \$1.4 billion in 2009 (latest data available), down from \$1.5 billion in 2008.

## IMPORT POLICIES

### Tariffs

As a member of the Gulf Cooperation Council (GCC), Kuwait applies the GCC common external tariff of five percent for most products, with a limited number of GCC approved country-specific exceptions. Kuwait's exceptions include 417 food and agriculture items that have zero tariffs. Tobacco products are subject to a 100 percent tariff. According to the WTO, Kuwait's simple average applied tariff is 5.2 percent for agricultural goods and 4.7 percent for non-agricultural goods.

### Import Prohibitions and Licensing

Kuwait prohibits the importation of alcohol and pork products, and requires a special import license for firearms. Previously used medical equipment and automobiles over five years old cannot be imported. The import of books, periodicals, or movies that insult religion and public morals, and all materials that promote political ideology is prohibited.

### Customs

The import clearance process in Kuwait historically has been time consuming, requiring extensive documentation and involving numerous redundancies. In 2010, the Ministry of Commerce and Industry formed a committee to focus on trade facilitation and streamline required paperwork.

Kuwait began implementation of the WTO Customs Valuation Agreement in September 2003.

## GOVERNMENT PROCUREMENT

Kuwait's government procurement policies require the purchase of local products, where available, and prescribe a 10 percent price advantage for local firms in government tenders.

Procurement by the Kuwaiti government and its agencies is regulated by Law No. 37 of 1964 (modified by Laws No. 13 and 31 of 1970 and 1977, respectively) concerning Public Tenders, in which any procurement made by the Kuwaiti government with a value in excess of KD 5,000 (\$17,700) must be conducted through the Central Tenders Committee.

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

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

Kuwait was listed on the Watch List in the 2010 Special 301 Report. The United States welcomes continued progress on enforcement against copyright piracy and trademark counterfeiting, particularly by Customs authorities. However, there are areas of IPR protection and enforcement that continue to represent barriers to U.S. exports and investment. Key issues cited in the report include the lack of deterrent criminal penalties and excessive delays in the enactment of key pieces of IPR related legislation, which have been pending for years. The IPR Department at the Ministry of Commerce and Industry is currently drafting a revised copyright law. The United States has provided technical assistance on this legislation and encourages Kuwait to pass the necessary IPR-related legislation and improve its enforcement efforts.

As part of the GCC Customs Union, the six Member States are preparing a draft common trademark law, as well as a draft common unfair competition law to protect companies from unfair commercial use of undisclosed information submitted for marketing approval of pharmaceutical products. The United States is engaged in a dialogue with GCC technical experts to help ensure that the trademark law and unfair competition law will facilitate Member States' implementation of international and bilateral obligations.

## **SERVICES BARRIERS**

### **Banking**

The banking sector has been opened to foreign investment under the Direct Foreign Capital Investment Law and the Central Bank has granted licenses to ten foreign banks. While foreign banks may operate in Kuwait, they are restricted to opening only one branch and to offering only investment banking services, and are prohibited from competing in the retail banking sector. Furthermore, foreign banks are subject to a maximum credit concentration equivalent to less than half the limit of the largest local bank and are expressly prohibited from directing clients to borrow from external branches of their bank or taking any other measures or arrangements to facilitate such borrowing.

## **INVESTMENT BARRIERS**

Major barriers to foreign investment in Kuwait include: regulations limiting participation of foreign entities from investing in the petroleum and real estate sectors, long bureaucratic delays associated with starting new enterprises, and obstacles created by a business culture heavily influenced by clan and family relationships. Foreign investment in projects involving oil and gas exploration and production are not authorized under Kuwait's Direct Foreign Capital Investment Law. Foreign investment in such oil and gas projects must be approved pursuant to a separate law. While foreign firms are permitted to participate in some downstream activities, the experience of U.S. investors in this sector has not been positive. In November 2008, a U.S. company agreed to establish a plastics joint venture with Petrochemical Industries Co., a subsidiary of Kuwait Petroleum Corporation. However, the Government of Kuwait instructed Kuwait's Supreme Petroleum Council to cancel the joint venture in December 2008 after the deal attracted sharp criticism from some members of Parliament.

## **OTHER BARRIERS**

### **Corporate Tax Policies**

Arbitrary tax assessments are a continuing complaint of foreign companies operating in Kuwait. In 2005, a number of foreign corporations with local distributors received income tax bills from Kuwaiti tax authorities, even though these companies had no direct commercial presence in Kuwait. Some of these

companies have challenged the tax bills in court, and others are working with the U.S. and Kuwaiti governments to seek a legislative or regulatory solution.



# LAOS

## TRADE SUMMARY

The U.S. goods trade deficit with Laos was \$47 million in 2010, up \$24 million from 2009. U.S. goods exports in 2010 were \$12 million, down 41.0 percent from the previous year. Corresponding U.S. imports from Laos were \$59 million, up 36.2 percent. Laos is currently the 188th largest export market for U.S. goods.

The Lao People's Democratic Republic is not a Member of the WTO, but is seeking to join that organization. Laos applied for WTO membership in July 1997 and six Working Party meetings have been held to review the steps Laos is undertaking to bring its trade regime in line with WTO rules.

## IMPORT POLICIES

### Tariffs

Under the terms of the Agreement between the United States and the Lao People's Democratic Republic on Trade Relations (or United States-Lao Bilateral Trade Agreement (BTA)), which entered into force on February 4, 2005, the United States granted Normal Trade Relations treatment to products of Laos, and Laos committed to provide U.S. exports with preferential tariff rates on a range of products and to apply most-favored nation (MFN) treatment to the remainder of imports from the United States. The United States continues to monitor the application of BTA and MFN tariff rates to U.S. products.

### Nontariff Barriers

*Import Restrictions and Licensing Requirements:* All imports are subject to licensing requirements, and most licenses are non-automatic. Among the wide range of products subject to these non-automatic licenses are food and animal feeds, fuels and lubricants, steel bars for construction, print and audiovisual material, cement, and motor vehicles. Only firms licensed as import companies are permitted to import goods into Laos.

*Customs:* Nearly every container that enters Laos at a formal border checkpoint is inspected, and foreign businesses regularly complain of irregularities and corruption in the clearance process. A large proportion of goods entering Laos do so informally due to weak border control. Customs procedures in Laos have improved since the introduction of the ASEAN Harmonized Tariff Nomenclature, but a large number of approvals and informal payments are often still required to get through the process. Laos has committed in its WTO accession negotiations to fully implement transaction value processes by the end of 2011.

*Taxes:* On January 1, 2010 Laos introduced a VAT system to replace the former turnover tax. A VAT of 10 percent is charged on most goods and services when they are supplied in Laos by registered VAT taxpayers. The same VAT rate applies to most imports of goods and services, though some goods and services are exempt. Lao-based businesses with an annual turnover of at least 400 million kip (approximately US\$ 50,000) are obliged to register for VAT and comply with the VAT Law. The same requirement applies to businesses not based in Laos that supply goods or services in the country, regardless of their annual turnover.



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

Laos is working to create a more modern IPR regime but currently provides deficient levels of IPR protection. Overall weak IPR enforcement as a result of an uncoordinated enforcement regime, insufficient resources devoted to enforcement, and a lack of implementing measures for the protection of IPR to continue to represent barriers to U.S. exports and investment. Issues of concern include poor coordination between the National Authority for Science and Technology and the police as well as ineffective IPR enforcement at the border. Laos promulgated its first Intellectual Property Law in January 2008, but implementing regulations have yet to be issued and the law itself will likely require further amendments in order fully implement Lao BTA obligations and eventually the WTO Agreement on Trade Related Aspects of Intellectual Property Rights. In addition, Laos must establish a system of civil litigation and criminal enforcement in addition to the current system of administrative penalties and warnings in order to fully implement its commitments under these agreements.

## **SERVICES BARRIERS**

### **Education**

Foreign entities are prohibited from providing education services in Laos. The Ministry of Education closely monitors the ideological content of curricula.

## **INVESTMENT BARRIERS**

Laos has a challenging investment climate due to a weak rule of law, opaque regulations, and inefficient infrastructure and services, particularly financial services. Required documentation for foreign businesses remains burdensome and effectively separates business activity into foreign and domestic categories. Laos still requires a feasibility study for investment by foreign businesses.

The required annual renewal of a Lao business license is contingent on certification that all taxes have been paid. Foreign investors have complained that taxes are often assessed in an inconsistent and nontransparent manner. U.S. companies have been denied necessary local business licenses despite possessing valid national long-term investment permits. The United States continues to urge the Lao Government to resolve these issues.

## **OTHER BARRIERS**

Both giving and accepting bribes are criminal acts in Laos, punishable by fine and/or imprisonment. Nevertheless, corruption remains a significant and growing concern for investors in Laos. Informal payments to low-level officials to expedite time-sensitive applications, such as business licenses or importation of perishable items, are not uncommon. Attempts have been made by the National Assembly to address endemic corruption, but progress to date has been minimal. Implementing regulations for an anti-corruption law passed in 2005, for example, have yet to be issued.

# MALAYSIA

## TRADE SUMMARY

The U.S. goods trade deficit with Malaysia was \$11.9 billion in 2010, down \$957 million from 2009. U.S. goods exports in 2010 were \$14.0 billion, up 34.4 percent from the previous year. Corresponding U.S. imports from Malaysia were \$25.9 billion, up 11.3 percent. Malaysia is currently the 19th largest export market for U.S. goods.

U.S. exports of private commercial services (i.e., excluding military and government) to Malaysia were \$1.7 billion in 2009 (latest data available), and U.S. imports were \$1.1 billion. Sales of services in Malaysia by majority U.S.-owned affiliates were \$4.1 billion in 2008 (latest data available), while sales of services in the United States by majority Malaysia-owned firms were \$331 million.

The stock of U.S. foreign direct investment (FDI) in Malaysia was \$13.5 billion in 2009 (latest data available), up from \$12.3 billion in 2008. U.S. FDI in Malaysia is led by the manufacturing, mining, and banking sectors.

In 2010, the United States entered into negotiations on a regional Asia-Pacific trade agreement called the Trans-Pacific Partnership (TPP), with the objective of shaping a high-standard, broad-based regional agreement. This agreement will create a potential platform for economic integration across the Asia-Pacific region, a means to advance U.S. economic interests with the fastest-growing economies in the world, and a tool to expand U.S. exports, which are critical to the creation and retention of high-paying, high-quality jobs in the United States. In October 2010 Malaysia joined the United States, Australia, Chile, New Zealand, Peru, Singapore, Brunei and Vietnam as the ninth participant in the TPP negotiations.

## IMPORT POLICIES

### Tariffs and Import Licensing Requirements

Almost all of Malaysia's tariffs are imposed on an *ad valorem* basis, with a simple average applied tariff rate of 8.4 percent in 2010 (up from 7.4 percent in 2009). Duties for tariff lines where there is significant local production are often higher. In general, the level of tariffs is lower on raw materials than for value-added goods. U.S. companies have indicated that tariff reductions on many products would allow them to increase their exports significantly, including on such products as frozen french fried potatoes, other food and confectionary products, and restaurant equipment.

On roughly 80 products – most of which are agricultural goods – Malaysia charges specific duties that represent extremely high effective tariff rates. These tariffs appear to be aimed at protecting small and rural farmers from foreign competition. The simple average *ad valorem* equivalent across all products with a specific tariff is 392 percent. Beverages, alcohol, and wine are subject to an effective tariff of up to 500 percent when import duties and excise taxes are combined.

A large number of Malaysian tariff lines related to import-sensitive or strategic industries (principally in the construction equipment, agricultural, mineral, and motor vehicle sectors) are subject to non-automatic import licensing. Malaysia also maintains performance requirements that must be met to receive a customs waiver for operations in Foreign Trade Zones.

Malaysia has an extensive network of preferential trade relationships. Malaysia has bilateral trade

agreements with Chile, India, Japan, Pakistan, and New Zealand as well as regional agreements, as part of ASEAN, with China, Korea, Japan, India, Australia, and New Zealand. Malaysia is currently negotiating additional preferential trade agreements with Australia and members of the Organization of the Islamic Conference.

### **Tariff-Rate Quotas on Selected Agricultural Products**

Since April 2008, the Malaysian government has maintained tariff-rate quota (TRQ) systems for 17 tariff lines, including live poultry, poultry meat, milk and cream, pork, and round cabbage. These products incur in-quota duties between 10 percent and 25 percent and out-of-quota duties between 40 percent and 168 percent. Before TRQ implementation, the applied tariff rate was zero for these products.

### **Import Restrictions on Motor Vehicles**

Malaysia has maintained tariffs and non-tariff barriers in the automobile sector for more than 25 years. In addition, Malaysian government policies distinguish between “national” cars, (*e.g.*, cars made by domestic producers Proton and Perodua) and “non-national” cars, which include most vehicles assembled in Malaysia by non-Malaysian owned firms. Malaysia also has traffic restrictions and noise standards that affect the usage of large motorcycles.

The Malaysian government has started slowly to dismantle some of its trade restrictive measures in order to implement its commitments under the WTO and the ASEAN Free Trade Agreement (AFTA). Malaysia cut its automobile import duty from 40 percent to 5 percent by 2006 in order to meet its AFTA commitments but then imposed steep excise taxes to compensate for the lost revenue. In January 2007, the ceiling on excise taxes for most vehicle categories was reduced from 125 percent to 105 percent and on motorcycles from 50 percent to 30 percent. In November 2008, the Malaysian government indicated that Malaysia would review the National Auto Policy (NAP) and in January 2010 began implementing certain liberalizing measures. The new policy reduced the intra-ASEAN duty rate from 5 percent to zero percent in January 2010. It lifted the freeze on manufacturing licenses for luxury vehicles, pick-up trucks, commercial vehicles, and hybrid electric vehicles, and promoted green technology by providing a duty exemption and a 50-percent excise tax reduction for the manufacture of hybrid electric vehicles.

Malaysia maintains a system of approved permits (APs) that provides holders with the right to import cars and motorcycles and distribute them locally. The revised NAP extended the phase-out dates for APs to December 31, 2020 from the previous 2010 date. The AP system was designed to provide *bumiputera* (ethnic Malay) companies with easy entry into the automobile and motorcycle distribution and service sector. The AP system acts as a quota by restricting the total number of vehicles that can be imported in a given year, which is currently capped at 10 percent of the market. Moreover, many AP holders sell their permits, with the associated costs passed on to consumers, increasing the price of imported vehicles.

Malaysia continues to use an industrial adjustment fund to provide financial support for the local assembly of vehicles. Automobile companies using components sourced from locally registered manufacturing companies are eligible for tax reductions, raising concerns that this fund revives the local content program that was abolished in 2004. Many foreign carmakers in Malaysia require highly specialized components that cannot be sourced economically from within Malaysia, and are therefore unable to benefit from this fund.

### **Meat Import Licenses**

Malaysia requires licensing for all meat imports and restricts the types of pork and poultry cuts that may be imported. These import permits reportedly are often used to restrict imports of chicken meat and pork

cuts when domestic prices are low. The Department of Veterinary Services often provides import licenses for less than the quantity requested. Malaysia also requires import licenses for wheat flour, wine, eggs, seafood, rice, liquid milk, and other dairy products such as cheese, yogurt, milk powder, ice cream and butter.

## **EXPORT TAXES**

Malaysia taxes exports of palm oil, rubber, and timber products in order to protect domestic processing production. Malaysia is the second largest producer and largest exporter of palm oil and products made from palm oil, and accounted for approximately 15 percent of world production and 30 percent of world trade in vegetable oils in 2010. Malaysia uses export taxes of 10 percent to 30 percent *ad valorem* to discourage the export of crude palm oil and to encourage development of the local refinery sector. Refined palm oil and products are not subject to export taxes. The Malaysian government waives export taxes on exports of crude palm oil to Malaysia-invested foreign vegetable oil refineries, giving Malaysia-invested plants an advantage in foreign markets, including the United States.

## **GOVERNMENT PROCUREMENT**

Malaysia's official policy is to use government procurement to support national public policy objectives, and the government generally favors domestic over foreign companies. These policy objectives include encouraging greater participation of *bumiputera* in the economy, transfer of technology from foreign to domestic industries, reducing the outflow of foreign exchange, providing advantages to local companies in the services sector, and enhancing Malaysia's export capabilities. International tenders generally are invited only when domestic goods and services are not available. The federal government makes extensive use of non-competitive procurement and direct negotiated awards. In domestic procurement, preferences are provided for *bumiputera* suppliers and other domestic suppliers, and foreign companies are generally required to take on a local partner before their tenders will be considered. The U.S. Government continues to raise concerns about the nontransparent nature of the Malaysia's procurement process. Malaysia is not a signatory to the WTO Agreement on Government Procurement.

## **EXPORT SUBSIDIES**

Malaysia maintains several programs that appear to provide export subsidies. Under the Central Bank's export credit refinancing scheme, commercial banks and other lenders provide financing to all exporters at a preferential, below-market rate for both pre-shipment and post-shipment. Malaysia also provides a series of tax and investment incentives to exporters, including those through the Pioneer Status and Investment Tax Allowance programs.

The revised NAP increases the income tax exemption for high value-added exports of motor vehicles and parts. The income tax exemption is based on the percentage increase in the domestic value added of exports. If the domestic value added is at least 30 percent, then 30 percent of the export value is exempt from income tax; if the domestic value added is at least 50 percent, then 50 percent is exempt.

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

Malaysia was placed on the Watch List in the 2010 Special 301 report. Malaysia continues to express a commitment to protecting and enforcing IPR and to pursuing needed legislative and regulatory improvements. Some areas of IPR enforcement, especially in the business software area, improved last year, and industry reports increased responsiveness from the Ministry of Domestic Trade, Cooperatives, and Consumerism to its requests for enforcement actions. However, other areas of IPR protection and enforcement continue to represent barriers to U.S. exports and investment. Key issues cited in the report

include continued widespread piracy and counterfeiting, declining IPR enforcement efforts, and lack of *ex officio* initiated IPR investigations by customs officials, as authorized under Malaysian law. Industry reports that book piracy remains problematic, and copyright piracy over the Internet is rising. The United States continues to encourage Malaysia to accede to the WIPO Internet Treaties and the Budapest Treaty. In addition, the United States continues to urge Malaysia to provide effective protection against unfair commercial use, as well as unauthorized disclosure, of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products, and to provide an effective system to address patent issues expeditiously in connection with applications to market pharmaceutical products.

## **SERVICES BARRIERS**

Malaysia's services sector constitutes 45 percent of the national economy and has been a key driver of economic and job growth in Malaysia for several years. In an effort to establish a knowledge-based economy less reliant on manufactured exports, the government aims to increase the services sector share of GDP to around 60 percent by 2020. In support of this objective, in May 2009, the Najib Administration announced initial liberalization measures covering some 27 service subsectors. Further reforms reportedly are being considered.

### **Telecommunications**

Malaysia made limited GATS commitments on most basic telecommunications services and only partially adopted the WTO Reference Paper on regulatory commitments. Based on Malaysia's GATS commitments, foreign companies are entitled to acquire only up to a 30 percent equity stake in existing licensed public telecommunications operators, and foreign participation is limited to facilities-based suppliers. These limitations are not reflected in Malaysian law, however, but only in ministerial policy. In certain instances, Malaysia has allowed greater than 30-percent equity participation in the telecommunications market, but the manner in which such exceptions are administered is nontransparent and is perceived by foreign suppliers as arbitrary. In some cases, the ministry permits firms to invest up to a certain equity limit, then subsequently asks them to divest to lower levels. The United States will continue to urge Malaysia to bind foreign equity limits to the full extent permissible under Malaysian law, *i.e.*, to 100 percent, to foster a more predictable and hospitable investment climate.

Malaysia has an unwritten prohibition against an Application Service Provider (ASP) selling service to another ASP license holder who would then provide service to its own retail customers. This issue is primarily limited to multi-national corporations that may seek to purchase services which combine value-added services, such as unregulated information technology (*e.g.*, back office point of sale and inventory), with regulated application services (*e.g.*, virtual private network). Given the lack of any clear policy rationale for such a limitation, and its negative impact on suppliers, the United States will continue to press for its elimination.

### **Distribution Services, including Direct Selling**

Guidelines governing distribution services were reviewed and revised in March 2010. These guidelines include requirements for the use of locally produced products. The revised provisions require that at least 30 percent of total products (Stock Keeping Units) displayed on shelf space in department stores, supermarkets, and hypermarkets are to be products manufactured by *bumiputera*-owned small- and medium-sized enterprises. Among other provisions, the number of hypermarkets and superstores is limited based on the number of residents in the "area served" or community.

Locally incorporated direct-selling companies must allow for 30 percent *bumiputera* equity. The Malaysian government also "recommends" local content targets, which effectively translates into a

requirement. Local companies that seek direct selling licenses require paid-in capital of RM1.5 million (approximately \$397,000), while companies with foreign shareholders must have paid-in capital of RM5 million (approximately \$1.3 million).

### **Legal Services**

Foreign lawyers may not practice Malaysian law, nor may they affiliate with local firms or use the name of an international firm. Foreign law firms may not operate in Malaysia except as minority partners with local law firms, and their stake in any partnership is limited to 30 percent. The Attorney General has authority to grant limited exceptions on a case by case basis under the law restricting the practice of Malaysian law to Malaysian citizens or permanent residents who have apprenticed with a Malaysian lawyer; are competent in *Bahasa* Malaysia (the official language); and have a local law degree or are accredited British Barristers at Law, provided the applicant has seven years of legal experience. Malaysian law does not allow for foreign legal consultancy except on a limited basis in the Labuan International Offshore Financial Center (see section on “Financial Services” below).

### **Architectural Services**

A foreign architectural firm may operate in Malaysia only as a joint venture participant in a specific project with the approval of the Board of Architects. Malaysian architectural firms may not have foreign architectural firms as registered partners. Foreign architects may not be licensed in Malaysia but are allowed to be managers, shareholders, or employees of Malaysian firms.

### **Engineering Services**

Foreign engineers may be licensed by the Board of Engineers only for specific projects and must be sponsored by the Malaysian company carrying out the project. In general, a foreign engineer must be registered as a professional engineer in his or her home country, have a minimum of 10 years experience, and have a physical presence in Malaysia for at least 180 days in one calendar year. To obtain temporary licensing for a foreign engineer, a Malaysian company often must demonstrate to the Board that they cannot find a Malaysian engineer for the job. Foreign engineers are not allowed to operate independently of Malaysian partners or serve as directors or shareholders of an engineering consulting company. A foreign engineering firm may establish a non-temporary commercial presence only if all directors and shareholders are Malaysian. Foreign engineering companies may collaborate with a Malaysian firm, but only the Malaysian company may submit the plans for domestic approval.

### **Accounting and Taxation Services**

All accountants seeking to provide auditing and taxation services in Malaysia must register with the Malaysian Institute of Accountants (MIA) before they may apply for a license from the Ministry of Finance. Citizenship or permanent residency is required for registration with the MIA. Foreign accountants and auditors are only allowed to practice with registered Malaysian accountants, with foreigners permitted to hold no more than 40 percent of shares.

### **Financial Services**

While Malaysia relaxed a few barriers in the financial services sector, significant barriers remain to investment in this sector. The foreign equity limitation is 70 percent for domestic Islamic banks, investment banks, insurance companies, and Islamic insurance operators. In principle, foreign equity above 70 percent is considered on a case by case basis for insurance companies if the investment is determined to facilitate the consolidation and rationalization of the insurance industry, although currently

no new licenses are being granted. Foreign equity is limited to 30 percent for domestic conventional banks. The foreign equity limitation is 70 percent for unit trust management companies providing retail services and for stock broking companies.

### **Advertising**

Foreign content in commercials in Malaysia is limited to 20 percent. The Malaysian government in 2007 relaxed enforcement of regulations governing the appearance of foreign actors in commercials shown in Malaysia.

### **Audio-Visual and Broadcasting**

The Malaysian government maintains broadcast content quotas on both radio and television programming. Eighty percent of television programming is required to originate from local production companies owned by ethnic Malays and 60 percent of radio programming must be of local origin. Foreign investment in terrestrial broadcast networks is prohibited and is limited to a 20 percent equity share in cable and satellite operations. As a condition for obtaining a license to operate, video rental establishments are required to have 30 percent local content in their inventories.

## **INVESTMENT BARRIERS**

The Malaysian government retains considerable discretionary authority over individual investments in all sectors and heavily restricts foreign investment in sectors controlled by government-linked companies or in sectors the government deems strategically important. These include financial services, professional services, the oil and gas sector, telecommunications, automotive industries, plantations, and mining. Among the restrictions imposed by the Malaysian government are limitations on foreign equity (generally capped at 30 percent) and requirements that foreign firms enter into joint ventures with local partners.

The Ministerial Functions Act grants relevant ministries broad discretionary powers over the approval of specific investment projects, with each ministry often administering a complex web of regulations and policies. While investors in industries targeted by the government for increased investment can receive assistance obtaining necessary approvals from various regulatory bodies (including, in some cases, a waiver of regulatory requirements), investors in non-priority sectors face significant bureaucratic obstacles.

## **OTHER BARRIERS**

### **Transparency**

The lack of transparency in government decision making and procedures in Malaysia has impeded U.S. firms' access to the Malaysian market. The Malaysian government has taken steps to fight corruption, including through the Anti-Corruption Agency (ACA), which is part of the Office of the Prime Minister. The ACA is authorized to conduct investigations and prosecute cases with the approval of the Attorney General. Few senior officials or politicians have been prosecuted for corruption, however. Malaysia has slipped in its ranking on Transparency International's Corruption Perceptions Index from 26th in 2004 to 56th in 2010. Malaysia has signed, but not yet ratified, the UN Convention Against Corruption.

# MEXICO

## TRADE SUMMARY

The U.S. goods trade deficit with Mexico was \$66.3 billion in 2010, up \$18.6 billion from 2009. U.S. goods exports in 2010 were \$163.3 billion, up 26.7 percent from the previous year. Corresponding U.S. imports from Mexico were \$229.7 billion, up 30.0 percent. Mexico is currently the 2nd largest export market for U.S. goods.

U.S. exports of private commercial services (*i.e.*, excluding military and government) to Mexico were \$21.8 billion in 2009 (latest data available), and U.S. imports were \$13.5 billion. Sales of services in Mexico by majority U.S.-owned affiliates were \$32.1 billion in 2008 (latest data available), while sales of services in the United States by majority Mexico-owned firms were \$3.1 billion.

The stock of U.S. foreign direct investment (FDI) in Mexico was \$97.9 billion in 2009 (latest data available), up from \$89.6 billion in 2008. U.S. FDI in Mexico is primarily concentrated in the nonbank holding companies, manufacturing, and finance/insurance sectors.

## North American Free Trade Agreement

The North American Free Trade Agreement (NAFTA), signed by the United States, Canada, and Mexico, entered into force on January 1, 1994. Under this free trade agreement, NAFTA countries progressively eliminated tariffs and nontariff barriers to trade in goods among them, provided improved access for services, established strong rules on investment, and strengthened protection of intellectual property rights. After signing the NAFTA, the United States, Canada, and Mexico concluded supplemental agreements on labor and environment. Under these agreements, the parties are, among other things, obligated to effectively enforce their environmental and labor laws. The agreements also provide frameworks for cooperation among the parties on a wide variety of labor and environmental issues.

## IMPORT POLICIES

### Tariffs and Market Access

Pursuant to the terms of the NAFTA, on January 1, 2003, Mexico eliminated tariffs on all remaining industrial and most agricultural products imported from the United States. On January 1, 2008, Mexico eliminated remaining tariffs and tariff-rate quotas on all U.S. agricultural exports. (*See the section on agriculture below for additional details on specific farm products.*)

On March 18, 2009, in response to the U.S. cancellation of the United States-Mexico Cross Border Trucking Demonstration Project, Mexico imposed retaliatory tariffs on 89 types of U.S. goods totaling about \$2.4 billion in exports from 40 U.S. states. On August 19, 2010, Mexico added some new products and removed others. The revised list now includes 99 types of products. Approximately 1.5 percent of U.S. exports to Mexico are affected by these tariffs. Among the goods affected, 45 are finished products, including shampoo, books, and jewelry, and 54 are agricultural goods, including hams, apples, grapes, and cheese. Retaliatory tariffs range from five percent on a few goods, including hams and toilet paper, to 25 percent on some cheeses. On March 3, 2010, President Obama and Mexican President Calderón announced that Mexico and the United States had found a clear path to resolving the cross-border long-haul trucking dispute. This path will allow for the establishment of a reciprocal, phased-in program built on the highest safety standards that will authorize both Mexican and United States long-haul carriers to engage in cross-border operations. Once a final agreement is reached, Mexico will suspend its retaliatory tariffs in stages beginning with reducing tariffs by 50 percent at the signing of an agreement and will



suspend the remaining 50 percent when the first Mexican carrier is granted operating authority under the program. Mexico will terminate all current tariffs once the program is normalized.

Mexico imposes a value added tax (VAT) on sales of goods and services. Certain food products are exempt from the VAT. U.S. producers have complained that, while Mexico imposes the VAT on imports of U.S. nutritional supplements, it does not collect the VAT on sales of similar domestic products.

### **Agricultural Products**

The United States exported \$14.6 billion in agricultural products to Mexico in 2010, compared to \$12.9 billion in 2009. Mexico is the United States' third largest agricultural export market.

Antidumping duties have hampered U.S. meat exports, with Mexican policies in this area having reduced the number of U.S. suppliers and altered product trading patterns. Industry representatives assert that significant revenue was lost each year due to antidumping duties in the beef sector. On April 24, 2006, Mexico's Secretariat of Economy (SECON) announced that it would continue to apply the antidumping duties imposed on imports of U.S. beef and beef by-products from certain U.S. exporters and producers for another five years following an expiry review investigation. Following several requests for review of the measure by a major U.S. producer, on April 21, 2009, SECON initiated a changed-circumstance review with respect to that producer. On August 11, 2010, Mexico announced the elimination of antidumping duties.

Mexico is the largest export market for U.S. apples, and U.S. apple exporters had expressed concerns regarding the complex process by which Mexico applied antidumping duties on imports of Red and Golden Delicious apples from the United States. Since the launch of the original investigation in 1997, a series of court challenges and redeterminations by SECON ultimately excluded from the antidumping measure all but certain members of Northwest Fruit Exporters. On October 15, 2009, a binational NAFTA panel, convened at the request of U.S. apple exporters, ordered SECON to revise its final determination to account for significant deficiencies in SECON's methodology. On April 26, 2010, SECON published a Final Action Notice in the *Diario Oficial* announcing its compliance with the binational NAFTA panel order of October 15, 2009, case number MEX-USA-2006-1904-02. SECON's Final Action Notice eliminated antidumping duties imposed on U.S. Red and Golden Delicious apple imports as of March 2, 2010. The United States will continue to monitor this issue.

### **Administrative Procedures and Customs Practices**

U.S. exporters continue to express concerns about Mexican customs' administrative procedures, including: insufficient prior notification of procedural changes; inconsistent interpretation of regulatory requirements at different border posts; alleged under-invoicing of agricultural products; and uneven enforcement of Mexican standards and labeling rules. There have been relatively few specific complaints, however, and Mexican customs has been putting procedures in place to address issues of non-uniform application of requirements at border ports of entry. Agricultural exporters note that Mexican inspection and clearance procedures for some agricultural goods are long, burdensome, nontransparent, and unreliable. Customs procedures for express packages continue to be burdensome, although Mexico has raised the *de minimis* level from \$1 to \$50. Mexican regulations still hold the courier 100 percent liable for the contents of shipments. U.S. exporters have highlighted the benefits of harmonizing the hours of customs operation on the U.S. and Mexican sides of the border, but they cite delays stemming from the lack of preclearance procedures, which the Mexican government claims are not permitted under current law.

In May 2008, without prior notification of procedural changes, the Mexican government implemented a

new requirement to test all chemical samples and shipments being sent to Mexico in gas, liquid, or powder form. While such samples previously could be sent by express delivery service companies, this is prohibited under the 2008 procedures, necessitating the additional cost of using a customs broker. Some chemical exporters report customs broker fees of \$500. This barrier is having a detrimental effect on the competitiveness of U.S. exports of these products. The United States is working with Mexico and the Chemical Industry Association of Mexico to offer alternatives to this burdensome and expensive process. In 2009, to reduce delays and lower export costs, Mexico deployed devices at all 49 ports of entry along the United States-Mexico border in order to test chemical samples. Mexican customs is also considering the use of an importer registry for samples difficult to identify.

## **GOVERNMENT PROCUREMENT**

Mexico's efforts to make its government procurement regime more transparent through policy reform and the application of technology have resulted in increased competition as well as savings for the government. The Mexican government has established several "electronic government" Internet sites to increase the transparency of government processes and to provide guidelines for the conduct of government officials. "Compranet" provides an online interface for conducting government procurement and contracting. Despite these reforms, there is still a need for further regulatory and technological improvements throughout the Mexican government.

The NAFTA limits the total value of contracts that Mexico's parastatal petroleum and electricity monopolies, PEMEX and the Federal Electricity Commission (CFE), respectively, may exclude from coverage under the NAFTA. Mexico provides to the United States and Canada an annual notice of the calculation of the procurement that it sets aside for domestic suppliers, along with the methodology used in the calculation.

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

Mexico was listed on the Watch List in the 2010 Special 301 report. The report noted Mexico's improved enforcement efforts, demonstrated by an increase in the number of raids, arrests, and indictments in 2009, and the imposition of the longest prison sentence on record in Mexico for an IPR violation (six and-a-half years). In addition, bilateral cooperation among agencies charged with intellectual property protection and enforcement was noted as encouraging, especially among those participating in a series of training and exchange programs over the past year. In the Special 301 report, the United States urged Mexico to increase resources devoted to protecting intellectual property and improving coordination among enforcement officials at the federal, state, and municipal levels. Concerns also remained over enforcement procedures and the inconsistent issuance of deterrent penalties. The United States welcomed Mexico's passage of legislation that would provide the Mexican Attorney General's office and certain Mexican enforcement officials with *ex officio* authority to prosecute IPR infringement. Legislation is still needed to provide *ex officio* authority to customs officers. The United States was also encouraged to learn about the steps that Mexico is taking to establish a voluntary recordation system at the border, coupled with new procedures with respect to detention of seized goods at the border. The United States welcomed signs that Mexico may be prepared to move forward with additional legislation to strengthen its IPR regime, including an anti-camcording law and the implementation of the WIPO Internet Treaties. The United States encouraged Mexico to provide effective protection against unfair commercial use, as well as unauthorized disclosure, of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products. The United States also welcomed recent efforts by Mexican authorities to improve Mexico's system to address patent issues in connection with applications to market pharmaceutical products, as the existing system has generated considerable litigation and uncertainty. The United States continues to work with Mexico to resolve IPR concerns through bilateral, regional, and other means of engagement.

Mexico was also an active participant in the Anti-Counterfeiting Trade Agreement (ACTA) negotiations, which were concluded in November 2010.

## **SERVICES BARRIERS**

### **Telecommunications**

The OECD's Communications Outlook 2009 identified Mexico as one of the OECD countries with the highest telecommunications charges. Previous OECD surveys of Mexico have recommended improving mandatory access to the local loop, regulating fixed-to-mobile termination charges, and introducing mandatory roaming to enable smaller mobile companies to use Telcel's (Mexico's largest mobile phone company) network at a regulated price. The OECD and Mexican telecommunications analysts suggest that industry regulator Cofetel (the Federal Telecommunications Commission) needs greater independence both from leading companies in the sector and its parent ministry, the Secretariat of Communications and Transportation (SCT).

The Calderón Administration and the PRI, Mexico's opposition party, agree that increasing competition in Mexico's telecommunications sector is a priority, but implementing policies to this end continues to be a challenge. The Mexican company Telmex and its wireless affiliate Telcel dominate the Mexican telecommunications market and are perceived as exercising disproportionate influence over the legislative process, the courts, and government regulators.

High interconnection rates in both fixed and mobile service remain a problem. While Cofetel has made numerous recent attempts to set lower long distance and mobile termination rates, the companies involved have filed injunctions that delay implementation of Cofetel's actions. Often frustrated in court in its regulatory efforts, the regulators sometimes resort to other means to achieve their goals. For example, SCT, Cofetel, and President Calderón appear determined to withhold modifications to Telmex's concession that would allow the company to provide television services (where Telmex sees its future in voice/video/data convergence) until Telmex makes concessions to further competition in telecommunications.

A Mexican company with U.S. shareholders has also complained that as a result of an interconnection dispute with Telmex (which is currently being resolved in the Mexican courts), Telmex has unilaterally inserted a message into calls to the company's customers indicating that the company has not been paying Telmex's interconnection rate and in the future the calls may not be completed. Telmex has admitted to doing this, claiming that it is necessary in order to protect consumers buying the company's telecommunications services. They also claim that Telmex has intentionally degraded the quality of the circuits it interconnects with Telmex in some areas, and has completely refused to interconnect in other areas. According to the Mexican company with U.S. shareholders, telecommunications regulator Cofetel is aware of these actions, and has asked SCT to impose sanctions on Telmex. However, SCT has not yet taken specific steps to stop Telmex from engaging in these practices.

In 2010, the Federal Competition Commission (Cofeco) concluded a formal investigation into Telmex and Telcel market dominance, finding that these companies indeed have market dominance. Consequently, Cofetel now has a mandate to issue asymmetrical regulations, which impose more stringent requirements on companies that have market dominance. Cofetel had previously proposed such asymmetrical regulations, but Telmex and Telcel challenged them in court, necessitating the investigation by Cofeco.

Although there have been several recent legislative attempts to open the Mexican fixed line telecommunications sector to increased foreign investment, which could increase opportunities for

competitive providers, Telmex has opposed such efforts. Currently, the Foreign Investment Law limits foreign ownership in the wireline segment to 49 percent. The restriction helps shield Telmex in the area of local telephony where the firm already controls nearly 90 percent of the market.

Under Mexican law, foreign companies must form joint ventures with Mexican partners to obtain authorizations (called “concessions” under Mexican law) to provide satellite-based services in Mexico. Mexico requires mobile satellite service operators to construct gateway earth stations in Mexico, ostensibly to satisfy security policies. This requirement serves as a barrier to market entry for new competitors, since such a requirement may make many services economically infeasible.

## **INVESTMENT BARRIERS**

Mexico’s oil and gas sector remains closed to private investment, with the exception of the liquefied natural gas sector and the marketing of petroleum products. Only Mexican nationals may own gas stations.

The Mexican constitution mandates state ownership of hydrocarbons and provides that no concessions or other types of production sharing agreements or risk contracts shall be granted in regard to hydrocarbon exploitation. With declining production, the Mexican Congress has approved reform of the hydrocarbons sector to increase the independence and performance of Pemex, the national oil company, including through the use of incentive-based service contracts.

Other laws limit participation in certain sectors or activities (*e.g.*, forestry) to Mexican nationals. Investment restrictions prohibit foreign ownership of residential real estate within 50 kilometers of the nation’s coasts and 100 kilometers of its land borders (although foreigners may acquire use of residential property in these zones through trusts administered by Mexican banks). A National Foreign Investment Commission reviews foreign investment in Mexico’s restricted sectors, as well as investments in unrestricted sectors in which foreign equity exceeds 49 percent and which have a value greater than \$165 million (adjusted annually based on Mexico’s nominal Gross Domestic Product).

## **ANTICOMPETITIVE PRACTICES**

Mexico revised its competition law in June 2006 to give Cofeco additional authority to regulate market concentration and anticompetitive behavior in both the private and public sectors. Cofeco has administrative enforcement powers but no criminal enforcement powers. The head of Cofeco and key members of the Calderón administration have called for the opening up of sectors of the Mexican economy currently dominated by monopolies or duopolies, and some progress has been made (*see previous section on services barriers*). It remains to be seen whether the law and the administration will be able to make these sectors truly competitive. A new competition law that would enhance Cofeco’s enforcement authority and increase sanctions for anticompetitive behavior and recidivism is under consideration by the Mexican Congress.



# MOROCCO

## TRADE SUMMARY

The U.S. goods trade surplus with Morocco was \$1.3 billion in 2010, an increase of \$100 million from 2009. U.S. goods exports in 2010 were \$1.9 billion, up 19.4 percent from the previous year. Corresponding U.S. imports from Morocco were \$685 million, up 46.4 percent. Morocco is currently the 58th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Morocco was \$311 million in 2009 (latest data available), up from \$263 million in 2008.

## FREE TRADE AGREEMENT

The United States-Morocco Free Trade Agreement (FTA) entered into force on January 1, 2006, and will ultimately eliminate duties on more than 95 percent of all goods. In addition to key U.S. export sectors gaining immediate duty-free access to Morocco, the FTA includes commitments for increased regulatory transparency and a commitment to the protection of intellectual property rights. Through foreign assistance programs, the United States continues to provide Morocco targeted technical assistance supporting FTA compliance and Moroccan regulatory reform.

## IMPORT POLICIES

Morocco has undertaken liberalizing reforms as a member of the WTO and a party to several trade agreements. Under the United States-Morocco FTA, goods of key U.S. sectors, such as information technology, machinery, construction equipment, chemicals, and textiles, enjoy either duty-free or preferential duty treatment when entering Morocco.

### Agriculture

#### *Wheat TRQs*

The FTA allows preferential access to Morocco for U.S. durum and common wheat exports through two TRQs. The Moroccan government's administration of these wheat TRQs led to difficulties for U.S. producers attempting to benefit from the preferential access provided under the FTA. The U.S. Government is continuing its efforts to improve access for U.S. wheat producers.

## GOVERNMENT PROCUREMENT

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

The FTA requires the use of fair and transparent procurement procedures, including advance notice of purchases and timely and effective bid review procedures for covered procurement. Under the FTA, U.S. suppliers are permitted to bid on procurements for most Moroccan central government entities, as well as the vast majority of Moroccan regional and municipal governments, on the same basis as Moroccan suppliers. However, the 45 day and 90 day timeframes given to foreign companies to answer government tenders is often too short, guidance is often vague and channels for distributing information are limited to local newspapers and circulars sent to foreign embassies.

## **SERVICE BARRIERS**

Although U.S. companies enjoy the same treatment in the insurance market as their Moroccan counterparts, the policies and practices of Morocco's insurance regulatory body have effectively prevented U.S. insurance companies from introducing competing products. In practice, only applications that bring new products or "added value" to the sector are likely to be approved, as they must first be reviewed by a Consultative Committee composed principally of other companies active in the sector. While this committee's recommendation is not binding, in practice, the Ministry of Economy and Finance has followed its advice. Pending legislation before Parliament would change the insurance regulation regime, creating an independent regulator separate from the Ministry of Finance. However, the prospects for passage of this bill in the near future are unclear.

## **INVESTMENT BARRIERS**

The United States and Morocco have a Bilateral Investment Treaty (BIT) that entered into force in 1991. The FTA also contains investment provisions including dispute settlement provisions that largely supersede the BIT provisions. Although foreigners are prohibited from owning agricultural land, Morocco does allow for long-term leases of up to 99 years and permits agricultural land to be purchased for non-agricultural purposes.

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

Morocco has enacted legislation to enhance protection for trademarks, copyrights, patents, and undisclosed pharmaceutical and agricultural chemical test data. Elements of the new legislation include provisions concerning disputes over Internet domain names, strong anti-circumvention provisions to prohibit tampering with technologies designed to prevent copyright infringement, and specific protections for temporary copies, which are critical in the digital environment.

The Moroccan Copyright Office has reported that Morocco's capacity to detect and address internet-based IPR violations is insufficient. The Moroccan government has requested technical assistance from the United States and other parties, to enhance its capacity to address copyright infringement.

Morocco was also an active participant in the Anti-Counterfeiting Trade Agreement (ACTA) negotiations, which were concluded in November 2010. The ACTA establishes an international framework that will assist Parties in their efforts to effectively combat the infringement of intellectual property rights, in particular the proliferation of counterfeiting and piracy, which undermines legitimate trade and the sustainable development of the world economy.

## **OTHER BARRIERS**

The greatest obstacles to trade in Morocco are irregularities in government procedures, lack of transparent governmental and judicial bureaucracies, inefficient transport systems, language and other practical barriers, and corruption among junior-level officials. Morocco lags particularly in areas relating to its cumbersome tax and employment regimes, property registration, and investor protections. Although the government is working to liberalize the business environment and improve its business efficiency, foreign corporations still complain about these market access issues.

# NEW ZEALAND

## TRADE SUMMARY

The U.S. goods trade surplus with New Zealand was \$53 million in 2010, shifting from a trade deficit of \$399 million in 2009. U.S. goods exports in 2010 were \$2.8 billion, up 30.7 percent from the previous year. Corresponding U.S. imports from New Zealand were \$2.8 billion, up 8.2 percent. New Zealand is currently the 51st largest export market for U.S. goods.

U.S. exports of private commercial services (i.e., excluding military and government) to New Zealand were \$1.5 billion in 2009 (latest data available), and U.S. imports were \$1.6 billion. Sales of services in New Zealand by majority U.S.-owned affiliates were not available in 2010 (the latest data available is \$3.2 billion in 2007), while sales of services in the United States by majority New Zealand-owned firms were \$209 million.

The stock of U.S. foreign direct investment (FDI) in New Zealand was \$5.8 billion in 2009 (latest data available), up from \$4.8 billion in 2008. U.S. FDI in New Zealand is mostly in the finance/insurance and manufacturing sectors.

In December 2009, the United States announced its intention to enter into negotiations on a regional Asia-Pacific trade agreement called the Trans-Pacific Partnership (TPP), with the objective of shaping a high-standard, broad-based regional agreement. This agreement will create a potential platform for economic integration across the Asia-Pacific region, a means to advance U.S. economic interests with the fastest-growing economies in the world, and a tool to expand U.S. exports, which are critical to U.S. economic recovery and the creation and retention of high-paying, high-quality jobs in the United States. The TPP negotiating partners currently include Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, and Vietnam.

## IMPORT POLICIES

Tariff rates in New Zealand are generally low as a result of several rounds of unilateral tariff cuts that began in the mid-1980s. New Zealand now has one of the lowest average Most-Favored-Nation (MFN) applied tariff rates among industrialized countries at just 2.4 percent. The average applied MFN agricultural tariff was 1.8 percent in 2009. In 2010, approximately 95 percent of imports to New Zealand (by value) entered duty-free. Approximately 58 percent of New Zealand tariff lines are duty free.

New Zealand has also taken significant steps to simplify its tariffs. In October 2008, a new tariff schedule was introduced, which consists mainly of three *ad valorem* rates (0 percent, 5 percent, and 12.5 percent) and six specific rates. On industrial products, 195 specific tariffs were replaced with *ad valorem* rates.

## GOVERNMENT PROCUREMENT

New Zealand is an observer to the WTO Committee on Government Procurement, but is not a signatory to the WTO Agreement on Government Procurement.



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

New Zealand generally provides for strong IPR protection and enforcement. Recent developments include the introduction of a new patent bill. Although the draft bill strongly supports New Zealand's objective of improving its patent system, the United States has concerns over certain elements of the current draft bill. The exclusion from patent eligibility of computer programs is of particular concern as it is unconstitutional with patent eligibility standards in other developed economies and is a departure from New Zealand's current Patents Act. In addition, the proposed bill does not include other provisions in keeping with international best practices. For instance, the bill does not include provisions allowing for patent term restoration, which would enable rights holders to recoup the effective patent term lost due to delays in the marketing approval process. The absence of such a provision makes it more difficult for an innovator to recoup his investment in developing new medical products.

The United States continues to encourage the New Zealand government to accede to and implement the WIPO Performance and Phonograms Treaty and the WIPO Copyright Treaty. New Zealand was an active participant in the Anti-Counterfeiting Trade Agreement (ACTA) negotiations, which were concluded in November 2010. The ACTA establishes an international framework that will assist Parties in their efforts to effectively combat the infringement of intellectual property rights, in particular the proliferation of counterfeiting and piracy, which undermines legitimate trade and the sustainable development of the world economy.

## **SERVICES BARRIERS**

### **Telecommunications**

Mobile termination rates (MTRs) have long been unregulated in New Zealand. New Zealand's dominant telecommunications companies, Vodafone and Telecom, have historically maintained termination rates among the highest of all industrialized countries, and the incumbents appear to have used these rates to put new, smaller mobile entrants at a competitive disadvantage. On a national basis, Vodafone and Telecom control 51 percent and 46 percent of the market respectively.

In June 2009, following an inquiry, the New Zealand Commerce Commission issued a draft determination that cost-based MTR regulation was warranted. Telecom and Vodafone subsequently offered to lower MTRs over the following four years in exchange for the New Zealand government forgoing regulation, which the government was poised to do. When Vodafone announced a new product combining heavily discounted on-net retail prices set below its proposed wholesale mobile termination rates, and off-net prices up to 15 times higher, the New Zealand Government concluded that the voluntary rates were unreasonably above cost and competition would be stifled if the proposals were accepted. On August 4, New Zealand's Minister for Communications Steven Joyce formally accepted the Commerce Commission's recommendation to regulate termination rates, adding mobile termination access services to Schedule 1 of the Telecommunications Act. The Commerce Commission will now go through a process to set wholesale access prices and determine other pro-competitive conditions, potentially regarding on-net/off-net retail price discrimination, with which mobile carriers must comply.

## **INVESTMENT BARRIERS**

### **Investment Screening**

New Zealand screens any foreign investment that would result in the acquisition of 25 percent or more ownership of, or a controlling interest in, "significant business assets" (defined as assets valued at more than NZ\$100 million). In addition, it screens foreign investors or entities that acquire 25 percent or more

of a fishing quota, either directly or through the acquisition of a company that already possesses a quota, and acquisitions of land defined as “sensitive” by the Overseas Investment Act (OIA) 2005.

New implementing rules under the OIA 2005 provide government ministers with increased power to consider a wider range of issues when assessing overseas investment applications involving sensitive land (such as farmland greater than five hectares, land adjoining the foreshore, or conservation land). Under the new rules, two new factors will be assessed under a benefit test: an “economic interests” factor that allows ministers to consider whether New Zealand’s economic interests are “safeguarded,” and a “mitigating” factor that enables ministers to consider whether an overseas investment provides adequate opportunities for New Zealand oversight or involvement.

## **OTHER BARRIERS**

### **Pharmaceuticals**

The U.S. pharmaceutical industry has strong concerns regarding restrictions to access to New Zealand’s pharmaceutical market. The New Zealand government is the primary purchaser of pharmaceuticals in the country. Some U.S. pharmaceutical companies have left the market since the Pharmaceutical Management Agency (PHARMAC) was created in 1993. Within a budget, which is set by the Minister of Health, PHARMAC determines which medicines to fund, negotiates prices with pharmaceutical companies, and sets the subsidy levels and conditions.

Because of PHARMAC’s cost control measures, many new medicines are often limited or delayed in entering the market. Industry representatives criticize PHARMAC for a lack of transparency, timeliness and predictability in the reference pricing process and for unreasonable delays in reimbursing new products. Combined, these issues create an unfavorable environment for innovative medicines. PHARMAC is reportedly working to improve transparency and increase stakeholder involvement in its processes. The pharmaceutical industry has also reached out to partner with the government of New Zealand and other stakeholders to achieve better provision of quality medicines, as well as better health and economic outcomes.



# NICARAGUA

## TRADE SUMMARY

The U.S. goods trade deficit with Nicaragua was \$1.0 billion in 2010, up \$128 million from 2009. U.S. goods exports in 2010 were \$980 million, up 37.0 percent from the previous year. Corresponding U.S. imports from Nicaragua were \$2.0 billion, up 24.4 percent. Nicaragua is currently the 79th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Nicaragua was \$301 million in 2009 (latest data available), up from \$266 million in 2008.

## IMPORT POLICIES

### Free Trade Agreement

On August 5, 2004, the United States signed the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR or Agreement) with five Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua) and the Dominican Republic (the Parties). Under the Agreement, the Parties are significantly liberalizing trade in goods and services. The CAFTA-DR also includes important disciplines relating to: customs administration and trade facilitation; technical barriers to trade; government procurement; investment; telecommunications; electronic commerce; intellectual property rights; transparency; and labor and environmental protection.

The Agreement entered into force for the United States, El Salvador, Guatemala, Honduras, and Nicaragua in 2006 and for the Dominican Republic in 2007. The CAFTA-DR entered into force for Costa Rica on January 1, 2009.

In 2008, the Parties implemented amendments to several textile-related provisions of the CAFTA-DR, including changing the rules of origin to require the use of U.S. or regional pocket bag fabric in originating apparel. The Parties also implemented a reciprocal textile inputs sourcing rule with Mexico. Under this rule, Mexico provides duty-free treatment on certain apparel goods produced in a Central American country or the Dominican Republic with U.S. inputs, and the United States provides reciprocal duty-free treatment under the CAFTA-DR on certain apparel goods produced in a Central American country or the Dominican Republic with Mexican inputs. These changes further strengthen and integrate regional textile and apparel manufacturing and create new economic opportunities in the United States and the region.

In February 2011, the CAFTA-DR Free Trade Commission (FTC), the central oversight body for the agreement, met for the first time in San Salvador, El Salvador. The FTC reviewed the implementation of the agreement and its trade and economic impact on the region and agreed to certain changes to strengthen the agreement's operation. The FTC discussed a broad range of ways to enhance competitiveness in the region and endorsed several initiatives to generate new opportunities for all of the countries to realize the benefits of the CAFTA-DR Agreement, with a heightened focus on small- and medium-sized businesses.

### Tariffs

As a member of the Central American Common Market, Nicaragua applies a harmonized external tariff on most items at a maximum of 15 percent with some exceptions. Approximately 95% of tariff lines are

harmonized at this rate or lower. In response to rising prices, in 2007, Nicaragua issued a series of decrees to unilaterally eliminate or reduce to 5 percent tariffs on many basic foodstuffs and consumer goods. These decrees have been extended every six months and are currently in effect through June 30, 2010.

However, under the CAFTA-DR, 100 percent of U.S. industrial trade will enter Nicaragua duty-free by 2015. Nearly all textile and apparel goods that meet the Agreement's rules of origin now enter Nicaragua duty-free and quota-free, promoting new opportunities for U.S. and regional fiber, yarn, fabric, and apparel manufacturing companies.

Under the CAFTA-DR, more than half of U.S. agricultural exports now enter Nicaragua duty-free. Nicaragua will eliminate its remaining tariffs on nearly all agricultural goods by 2025, including those on pork, rice, and yellow corn. Nicaragua will eliminate its tariffs on chicken leg quarters and rice by 2023 and on dairy products by 2025. For certain products, tariff-rate quotas (TRQs) will permit duty-free access for specified quantities during the tariff phase out period, with the duty-free amount expanding during that period. Nicaragua will liberalize trade in white corn through expansion of a TRQ rather than by tariff reductions.

### **Nontariff Measures**

The Nicaraguan government levies a "selective consumption tax" on some luxury items of 15 percent or less, with a few exceptions. The tax is not applied exclusively to imports; however, domestic goods are taxed on the manufacturer's price, while imports are taxed on the cost, insurance, and freight value. Alcoholic beverages and tobacco products are taxed on the price billed to the retailer.

U.S. companies report that difficulties with the Nicaraguan Customs Administration are a significant impediment to trade. Complaints about the institution concern bureaucratic delays, arbitrary valuation, technical difficulties, corruption, and politicization.

### **GOVERNMENT PROCUREMENT**

The CAFTA-DR requires that procuring entities use fair and transparent procurement procedures, including advance notice of purchases and timely and effective bid review procedures, for procurement covered by the Agreement. Under the CAFTA-DR, U.S. suppliers are permitted to bid on procurements of most Nicaraguan government entities, including key ministries and state-owned enterprises, on the same basis as Nicaraguan suppliers. The anticorruption provisions in the Agreement require each government to ensure under its domestic law that bribery in matters affecting trade and investment, including in government procurement, is treated as a criminal offense or is subject to comparable penalties.

Procurement by government entities not covered by the CAFTA-DR, such as the National Electricity Company, the National Assembly, the National Basic Foods Company, the Ministry of Tourism, the Supreme Court, the Ministry of Energy and Mines, and some public universities, have historically been subject to highly nontransparent and irregular practices, especially the abuse of procedures for emergency tenders that allow the suspension of competitive bidding. In October of 2010, the Nicaraguan National Assembly amended the 1999 Government Procurement Law, also known as Law 323, in order to close loopholes that existed in the previous version. The new law eliminates exclusions to the established bidding process that have allowed favoritism and unfair competition.

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

## **EXPORT SUBSIDIES**

ALBANISA, the state-owned company that imports and distributes Venezuelan petroleum, provides preferential financing to those who agree to export their products to Venezuela.

All exporters receive tax benefit certificates equivalent to 1.5 percent of the free-on-board value of the exported goods. Under the CAFTA-DR, Nicaragua may not adopt new duty waivers or expand existing duty waivers that are conditioned on the fulfillment of a performance requirement (*e.g.*, the export of a given level or percentage of goods). However, Nicaragua may maintain such duty waiver measures for such time as it is an Annex VII country for the purposes of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). Thereafter, Nicaragua must maintain any such measures in accordance with Article 27.4 of the SCM Agreement.

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

To implement its CAFTA-DR IPR obligations, Nicaragua undertook legislative reforms providing for stronger IPR protection and enforcement. Despite these efforts, the piracy of optical media and trademark violations continue to be concerns. The United States has expressed concern to the Nicaraguan government about inadequate IPR enforcement.

The United States will continue to monitor Nicaragua's implementation of its IPR obligations under the CAFTA-DR.

## **SERVICES BARRIERS**

Under the CAFTA-DR, Nicaragua granted U.S. services suppliers substantial access to its services market, including financial services.

Under the CAFTA-DR, Nicaragua committed to opening its telecommunications sector to U.S. investors and services suppliers. The executive branch has proposed legislation that would strengthen the enforcement capacity of the telecommunications regulator (TELCOR) and improve competitive conditions in Nicaragua's telecommunications market. The United States will monitor this process, as well as TELCOR's efforts to implement new telecommunications regulations.

## **INVESTMENT BARRIERS**

During the 1980s, the Nicaraguan government confiscated some 28,000 real properties. Since 1990, thousands of individuals have filed claims for the return of their property or to receive compensation. Where granted, compensation is most commonly provided via low interest bonds issued by the government. As of October 2009, the Nicaraguan government had settled more than 4,600 U.S. citizen claims relating to confiscated property. A total of 563 U.S. claims registered with the U.S. Embassy remain outstanding. The United States continues to press the Nicaraguan government to resolve these outstanding claims.

Since 2009 there has been a significant increase in reports of land invasions. President Ortega has declared on numerous occasions that the government will not act to evict those who have illegally taken possession of private property. Police refuse to intervene in property invasion cases and will not assist in the enforcement of court orders to remove illegal occupants. In addition, Citizen Power Councils (CPCs) affiliated with the ruling FSLN have led some land invasions. The U.S. Government has been working with U.S. citizens to press the Nicaraguan government to protect the right to due process for the lawful owners of property in Nicaragua.

## **FOREIGN TRADE BARRIERS**

Notwithstanding the CAFTA-DR's legal framework for investment, the ongoing occurrence of disputes involving the government of Nicaragua suggests a systemic concern that may negatively impact the investment climate.

## **OTHER BARRIERS**

Some U.S. firms and citizens have found corruption in government, including in the judiciary, to be a significant concern and a constraint to successful investment in Nicaragua. Administrative and judicial decision-making appear at times to be inconsistent, non-transparent, and very time consuming. Courts have frequently granted orders (called "*amparos*") that enjoin official investigatory and enforcement actions indefinitely to protect individuals suspected of white collar crime. Foreign investors are not specifically targeted but often find themselves at a disadvantage in any dispute with Nicaraguan nationals.

### **Law 364**

U.S. companies and the U.S. Chamber of Commerce have concerns that Nicaraguan Law 364, enacted in 2000 and implemented in 2001, retroactively imposes liability on foreign companies that manufactured or used the chemical pesticide DBCP in Nicaragua. DBCP was banned in the United States after the Environmental Protection Agency cancelled its certificate for use (with exceptions) in 1979. U.S. companies have expressed concern that the law and its application under Nicaragua's judicial system lack due process, transparency, and fundamental fairness. In particular, the law allows for retroactive application of no-fault liability related to a specific product, waiver of the statute of limitations, irrefutable presumption of causality, truncated judicial proceedings, the imposition of a \$100,000 nonrefundable bond per defendant as a condition for firms to mount a defense in court, and escrow requirements of approximately \$20 million earmarked for payment of awards and minimum liabilities as liquidated damages (ranging from \$25,000 to \$100,000). Some plaintiffs seek to lay claim to U.S. company assets in other countries. In 2009, a California State court dismissed with prejudice two Nicaraguan DBCP cases, and a federal district court denied recognition of a \$97 million Nicaraguan judgment under Law 364 because the "case did not arise out of proceedings that comported with the international concept of due process." The federal court also found "the presumption of causation in Special Law 364 contradicts known scientific fact." The U.S. Government has been working with the affected U.S. companies and the Nicaraguan government to facilitate resolution of this issue.

# NIGERIA

## TRADE SUMMARY

The U.S. goods trade deficit with Nigeria was \$26.5 billion in 2010, up \$11.0 billion from 2009. U.S. goods exports in 2010 were \$4.0 billion, up 9.6 percent from the previous year. Corresponding U.S. imports from Nigeria were \$30.5 billion, up 59.5 percent. Nigeria is currently the 44th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Nigeria was \$5.4 billion in 2009 (latest data available), up from \$3.3 billion in 2008. U.S. FDI in Nigeria is concentrated in the mining sector.

## IMPORT POLICIES

### Tariffs

Nigeria's most recent tariff review occurred in September 2008, when the Nigerian government issued the 2008-2012 Common External Tariff (CET) Book that harmonizes its tariffs with the Economic Community of West African States (ECOWAS) Common External Tariff (CET). Nigeria had partially implemented the ECOWAS CET since 2005. The 2008-2012 CET has five tariff bands. The five tariff bands include zero duty on capital goods, machinery, and essential drugs not produced locally; 5 percent duty on imported raw materials; 10 percent duty on intermediate goods; 20 percent duty on finished goods; and 35 percent duty on goods in certain sectors that the government seeks to protect. Import duties were reduced on a number of items, including rice, cigars, and manufactured tobacco. Adoption of the 2008-2012 CET is part of the government of Nigeria's economic reforms aimed at improving Nigeria's trade and investment environment and the harmonization of economic policies in the sub region. Resistance remains within the Nigerian government and the private sector to further trade reforms. According to the WTO, Nigeria's average MFN applied tariff rate is 11.2 percent. For agricultural goods the average applied tariff is 15.5 percent and for non-agricultural products it is 10.5 percent.

Companies report that high tariffs, nontransparent valuation procedures, frequent policy changes, and unclear interpretations by the Nigerian Customs Service (NCS) make importing difficult and expensive, and often create bottlenecks for commercial activities. Nigeria's dependence on imported raw materials and finished goods aggravates this problem, affecting both foreign and domestic manufacturers. Reportedly, many importers resort to undervaluing and smuggling to avoid paying full tariffs.

### Nontariff Measures

The government continues to ban certain imports, citing the need to protect local industries. However, in December 2010, the government removed the ban on the importation of textile and other sundry items.

Items remaining on the import prohibition list include bird's eggs, cocoa butter, powder and cakes, pork, beef, live birds, frozen poultry, refined vegetable oil and fats, cassava, bottled water, spaghetti, noodles, fruit juice in retail packs, nonalcoholic beverages (excluding energy drinks), and bagged cement.

### Customs Administration

Nigeria port practices continue to present major obstacles to trade. Importers report erratic application of customs regulations, lengthy clearance procedures, high berthing and unloading costs, and corruption.



These factors can contribute to product deterioration which may result in significant losses for importers of perishable goods. Disputes between Nigerian government agencies over the interpretation of regulations often cause delays, and frequent changes in customs guidelines slow the movement of goods through Nigerian ports. Nigeria practices a destination inspection policy for imports. Under this policy, all imports are inspected on arrival into Nigeria. Such actions delay the clearing process and increase costs.

The Nigerian government recognizes that port delays significantly increase the cost of doing business in Nigeria and plans to implement a 48 hour cargo clearance policy at ports. In this regard, in August 2010, the Minister of Finance established a committee on customs and port reforms to provide recommendations on improving port operations in Nigeria. Plans also exist to automate all customs payments and modernize NCS operations.

Roads entering and leaving ports are decaying, and overuse results in around-the-clock traffic congestion. Ports lack rail systems to transport freight in and out of ports. As a result, congestion leads to ships queuing up to berth at cargo terminals and containers waiting to be transported out of the ports. The bottlenecks resulting from the lack of infrastructure in and around the ports affect the level of efficiency at which goods can be processed for import. Currently, over 15 agencies operate at the ports, further complicating the port clearance process.

## **EXPORT SUBSIDIES AND OTHER EXPORT PROMOTION PROGRAMS**

The Nigerian government administers various export incentive programs, such as tax concessions, export development funds, capital asset depreciation allowances, and foreign currency retention programs, in addition to operating Free Trade Zones and Export Processing Zones. According to the 2008-2012 CET Book, authorities have halted most concessions, waivers, or exemptions. However, the Nigerian Export Promotion Council will continue to implement the Export Expansion Grant scheme to improve non-oil export performance.

## **GOVERNMENT PROCUREMENT**

The Nigerian government has made modest progress on its pledge to conduct an open and competitive bidding process for government procurement. The Public Procurement Act, signed into law in June 2007, established the Bureau of Public Procurement (BPP). The public procurement reforms seek to ensure that the procurement process for public projects adheres to international standards for competitive bidding. The BPP acts as a clearinghouse for government contracts and monitors the implementation of projects to ensure compliance with contract terms and budgetary restrictions. Procurement above 50 million naira (approximately \$333,000) remains subject to review by the BPP. The 36 state governments have also agreed to enact the Public Procurement Act in their respective states.

Foreign companies incorporated in Nigeria receive national treatment in government procurement, government tenders are published in local newspapers, and a "tenders" journal is sold at local newspaper outlets. U.S. companies have won government contracts in several sectors. Unfortunately, some of these companies have had trouble getting paid, often as a result of delays in the national budgetary process.

The National Petroleum Investment and Management Services (NAPIMS) agency must approve all procurement in the energy sector with a value above \$500,000. Slow approval processes can significantly increase the time and resources required for a given project.

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

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

Nigeria is a party to the World Intellectual Property Organization (WIPO) Convention, 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 Patent Law Treaty. Nigeria has also signed the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Legislation intended to implement WTO obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights has been pending in the National Assembly for several years.

The Nigerian government's lack of institutional capacity to address IPR issues is a major barrier to enforcement. Relevant Nigerian government institutions suffer from low morale, poor training, and limited resources. Piracy remains a problem despite Nigeria's active participation in the conventions cited above and the growing interest among Nigerians in seeing their intellectual property protected. Counterfeit automotive parts, pharmaceuticals, business and entertainment software, music and video recordings, and other consumer goods are sold openly. Piracy of books and optical disc products is also a problem. Industry reports contend that intellectual property infringers from other countries appear increasingly active in using Nigeria as a base for the production of pirated goods.

Patent and trademark enforcement remains weak, and judicial procedures are slow and reportedly compromised by corruption. However, the government has taken steps to improve enforcement. Efforts to combat the sale of counterfeit pharmaceuticals, for example, have yielded some results. The United States has provided training to government IP officials through various training programs offered by the United States Patent and Trademark Office's (USPTO) Global Intellectual Property Academy (GIPA) under the Trade and Investment Framework Agreement (TIFA) between the United States and Nigeria.

Nigeria's broadcast regulations do not permit rebroadcast or excerpting of foreign programs unless the station has an affiliate relationship with a foreign broadcaster. This regulation is generally complied with, but some cable providers transmit foreign programs illegally. The National Broadcasting Commission monitors the industry and is responsible for punishing infractions.

Widespread pirating of foreign and domestic videotapes discourages the entry of licensed distributors. In 2004, the Nigerian Copyright Commission (NCC) launched an anti-piracy initiative named "Strategy against Piracy." The Nigerian Police Force, working closely with the NCC, has raided enterprises producing and selling various pirated works such as software, books, and videos. About 29 cases are currently being prosecuted against IPR violators in various courts in the country. The Nigerian Economic and Financial Crimes Commission (EFCC) has also been active in IPR enforcement.

Discussions continue between the Standards Organization of Nigeria and the Chinese government to combat the influx of sub-standard and pirated Chinese products into Nigeria.

## **SERVICES BARRIERS**

Foreign oil and gas services suppliers face a number of barriers in Nigeria, particularly with respect to the movement of personnel. Nigeria imposes quotas on foreign personnel based on the issued capital of firms. Such quotas remain especially strict in the oil and gas sector and may apply to both production and services companies. Oil and gas companies must hire Nigerian workers, unless they can demonstrate that particular positions require expertise not found in the local workforce. Positions in finance and human resources are almost exclusively reserved for Nigerians. Certain geosciences and management positions may be filled by foreign workers with the approval of the NAPIMS agency. Each oil company must negotiate its foreign worker allotment with NAPIMS. Significant delays in this process and in the

approval of visas for foreign personnel present serious challenges to the energy industry in acquiring the necessary personnel for their operations.

According to industry representatives, the Nigerian Content Development Bill (NCDB), which was signed into law on April 23, 2010, will adversely affect a diverse range of actors, which include industry operators, contractors, subcontractors, and service providers. This bill also affects professional services, including legal and financial services.

## **INVESTMENT BARRIERS**

A variety of barriers restrict potential U.S. investment in Nigeria. Potential investors must contend with complex tax administration procedures, confusing land ownership laws, arbitrary application of regulations, corruption, and crime. International monitoring groups routinely rank Nigeria among the most corrupt countries in the world. Nigeria's corruption levels remain high and the EFCC has faltered recently in its actions on the issue. Companies report that the sanctity of contracts is often violated and Nigeria's court system for settling commercial disputes is weak and can be biased. In late 2009, for example, officials of a financial services company and two manufacturing companies were subject to arrest warrants, resulting in the detention of senior officials from all three companies, with the understanding that authorities would drop the cases if the companies met certain conditions.

Investment in the oil and gas sector remains strictly limited to existing joint ventures or production-sharing agreements. A proposed Petroleum Industry Bill (PIB) would change the way Nigeria's oil and gas sector is regulated and funded. The PIB could increase taxes and royalties to the government, at least in the short term, and make it unprofitable to invest in Nigeria's deepwater fields. The international oil companies (IOCs) have approved no major investments in the oil and gas sector since the first quarter of 2009. According to the IOCs, the imposition of price controls on natural gas, the absence of a domestic gas market, and the high cost of building infrastructure to capture and distribute gas have made it economically unviable to end gas flaring. The IOCs must operate as minority partners in joint ventures with the Nigerian National Petroleum Corporation, which consistently fails to provide its share of the required investment.

## **OTHER BARRIERS**

Frequent power outages in Nigeria serve as a major barrier to economic growth. The privatization and reform efforts of the power sector have been stalled since 2005. The Nigerian government has committed to move the power sector reform to completion and establish a healthy investment climate by mid-2011. The results to-date include removing obstacles to private sector investment; implementing a government strategy for the divestiture of the nationally owned distribution and generation companies, establishing a market-based tariff, and addressing the fuel-to-power pricing to market based pricing.

As noted above, poor infrastructure, including power (electricity), water, roads, ports, and railways, also poses a major challenge to doing business in Nigeria. This lack of infrastructure increases production costs and hinders both exports and competition in regional and international markets. In many cases, the increased production costs also make it difficult to compete with imports.

The Nigerian government has attempted to eliminate financial crimes, such as money laundering and advance fee fraud (also known as "419 fraud," after the relevant section of the Nigerian Criminal Code). In June 2006, the Financial Action Task Force removed Nigeria's name from the list of non-cooperating countries and territories in the fight against money laundering and other financial crimes. In May 2007, Nigeria gained entry into the Egmont Group of Financial Intelligence Units.

# NORWAY

## TRADE SUMMARY

The U.S. goods trade deficit with Norway was \$3.8 billion in 2010, up \$950 million from 2009. U.S. goods exports in 2010 were \$3.1 billion, up 11.1 percent from the previous year. Corresponding U.S. imports from Norway were \$6.9 billion, up 22.2 percent. Norway is currently the 48th largest export market for U.S. goods.

U.S. exports of private commercial services (i.e., excluding military and government) to Norway were \$2.8 billion in 2009 (latest data available), and U.S. imports were \$1.5 billion. Sales of services in Norway by majority U.S.-owned affiliates were \$6.5 billion in 2008 (latest data available), while sales of services in the United States by majority Norway-owned firms were \$1.8 billion.

The stock of U.S. foreign direct investment (FDI) in Norway was \$27.0 billion in 2009 (latest data available), up from \$24.4 billion in 2008. U.S. FDI in Norway is primarily concentrated in the mining and manufacturing sectors.

## IMPORT POLICIES

Norway, along with Switzerland, Iceland, and Liechtenstein, is a member of the European Free Trade Association (EFTA). EFTA members, with the exception of Switzerland, participate in the European Union (EU) single market through the European Economic Area (EEA) accord. Norway grants preferential tariff rates to EEA members. As an EEA signatory, Norway assumes most of the rights and obligations of EU member states. The exceptions are in the agricultural and fishery sectors. These sectors are in addition to finance and foreign policy, which are not covered by the EEA accord. As a non-EU member, Norway's ability to influence EU decisions is limited.

As a general matter, Norway has implemented, or is in the process of implementing, most EU trade policies and regulations. Norway's market, except for agricultural products and processed foods, is generally open. Norway has continued to dismantle import tariffs on industrial products on a unilateral basis. The average Most Favored Nation (MFN) tariff on nonagricultural products has fallen from 2.3 percent in 2000 to less than one percent today. More than 95 percent of industrial tariff lines are currently duty-free.

Although Norway maintains a liberal trade and investment regime with respect to industrial products, its agricultural sector remains highly protected, and U.S. exporters of agricultural products face trade barriers that are at least as high as they face in the EU.

### Agricultural Products

Although agriculture accounts only for slightly more than one percent of Gross Domestic Product (GDP), support provided by Norway to its agricultural producers as a percentage of total farm receipts is among the highest in the world. Norway emphasizes the importance of "non-trade concerns," which include food security, environmental protection, rural employment, and the maintenance of human settlement in sparsely populated areas as justification for high domestic support levels. One of Norway's concerns in the WTO Doha Development Round has been the preservation of its highly subsidized agricultural sector.

## **Tariffs**

Norway bound its tariffs for agricultural commodities in 1995 as part of its WTO commitments. Tariffication of agricultural nontariff barriers as a result of the Uruguay Round led to the replacement of quotas with high *ad valorem* or specific tariffs on these products. According to the WTO, Norway's simple average applied tariff is 43.2 percent for agricultural goods and 0.5 percent for non-agricultural goods.

Although Norway is only 50 percent self-sufficient in agricultural production, it maintains a system that assures that domestic producers – farmers as well as producers in the food processing industry – have little competition until all domestic production has been consumed. Tariff rates on agricultural products can range as high as several hundred percent.

Domestic agricultural shortages and price surges are offset by temporary tariff reductions. However, a lack of predictability in tariff adjustments and insufficient advance notification of these adjustments – generally only two days to five days before implementation – favor nearby European suppliers and make imports from the United States, especially of fruits, vegetables and other perishable horticultural products, very difficult. For a number of processed food products, tariffs are applied based on product formula, requiring the Norwegian importer to provide a detailed disclosure of product contents. Many exporters to the Norwegian market refuse to give all requested details and, as a result, their products are subject to maximum tariffs.

## **Tariff-Rate Quotas**

As of 2010, Norway has tariff-rate quotas (TRQs) for 64 agricultural and horticultural products, and the Norwegian Agricultural Authority holds online auctions for the allocation of quotas for 54 of these products. Norwegian importers are primarily interested in TRQs for grains or niche products. However, participating in the auctions is inexpensive, and importers that secure a quota are not required to actually import those products. The Agricultural Authority does not have a system to reallocate any unused quotas.

## **Raw Material Price Compensation**

Although the EEA does not generally apply to agricultural products, it includes provisions on raw material price compensation that are meant to increase trade in processed food. Norway has a special agreement with the EU within the EEA framework that applies a preferential duty on EU processed food products. The agreement covers a wide range of products, including bread and baked goods, breakfast cereals, chocolate and sweets, ice cream, pasta, pizza, soups, and sauces. This regime disadvantages U.S. exporters of these processed foods in access to the Norwegian market.

Norway also maintains a price reduction regime that includes subsidies for using certain domestically-produced raw materials in processed foods. Products for which such subsidies are paid include chocolate, sweets and ice cream (for milk and glucose), and pizza (for cheese and meat). The purpose of the system is to help compensate the domestic food processing industry for the high costs of domestic raw material.

## **Wines and Spirits**

The wine and spirits retail market in Norway is controlled by the government monopoly Vinmonopolet. The monopoly regulates all domestic access to spirits. Wine and spirits sales through ordinary retail stores are not allowed. Both an approved importer/agent and distributor are required in order to enter the market. Gaining approvals to include wines and other alcoholic beverages on Vinmonopolet's retail list is

cumbersome, leading to complaints from U.S. wine exporters about the limited variety of U.S. wines available to Norwegian consumers. Products chosen for sale through Vinmonopolet must meet annual minimum sales quotas or they are dropped from the basic list inventory. Advertising of alcoholic beverages is strictly prohibited.

In 2007, the market share of U.S. wine offered through the Vinmonopolet was less than two percent. U.S. and Norwegian authorities then held constructive discussions on ways to raise awareness and the number of quality U.S. wines sold in Norway. These discussions strongly contributed to Vinmonopolet's decision to have a nationwide focus on U.S. wines in January and February 2009, with a special release of 17 U.S. wines in all its stores and positive features in its magazine Vinbladet. From 2008 to 2009, sales of U.S. wines grew by over 50 percent for reds and 15 percent for whites, and the growth has continued in 2010.

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

Norway was listed on the Watch List in the 2010 Special 301 Report. The key issue cited in the report was the lack of product patent protection for certain pharmaceutical products. U.S. industry has expressed concern that the regulatory framework in Norway regarding process patents filed prior to 1992 – and pending in 1996 – denies adequate patent protection for a number of pharmaceutical products currently on the Norwegian market. The United States will continue to encourage Norway to resolve this issue.

U.S. industry also reports concerns regarding Norway's implementation of the EU's 2001 Copyright Directive that addresses Internet piracy, and regarding private use exceptions under Norway's copyright laws. The Norwegian government is currently drafting revised legislation that would enhance copyright protection.

U.S. and Norwegian authorities held constructive discussions in 2010 regarding several IPR matters, including: pharmaceuticals product patent protection; the need to educate and promote public awareness of illegal internet use; the role of Internet service providers in prohibiting piracy; and the need to dedicate necessary public resources to combat counterfeiting and piracy and to prosecute offenders.

## **SERVICES BARRIERS**

### **Financial Services**

Norway maintains nationality requirements mandating for certain types of financial institutions that at least half the members of the board and half the members of the corporate assembly be nationals and permanent residents of Norway or another EEA nation.

## **INVESTMENT BARRIERS**

Norway generally welcomes foreign investment and grants national treatment to foreign investors, with exceptions in the mining, fisheries, hydropower, maritime and air transport sectors. Foreign companies wishing to own or use various kinds of real property must seek prior approval from the government. In the petroleum sector, Norway's concession process continues to be operated on a discretionary basis, with the government awarding licenses based on subjective factors other than competitive bidding. Direct foreign ownership of hydropower resources is prohibited.



# OMAN

## **TRADE SUMMARY**

The U.S. goods trade surplus with Oman was \$329 million in 2010, an increase of \$110 million from 2009. U.S. goods exports in 2010 were \$1.1 billion, down 2.2 percent from the previous year. Corresponding U.S. imports from Oman were \$773 million, down 14.9 percent. Oman is currently the 76th largest export market for U.S. goods.

## **IMPORT POLICIES**

### **Tariffs**

With the entry into force of the United States-Oman Free Trade Agreement (FTA) on January 1, 2009, Oman provided immediate duty free access on virtually all industrial and consumer products in its tariff schedule and will phase out tariffs on the remaining handful of products by 2019. In addition, upon entry into force of the FTA, Oman provided immediate duty free access for U.S. agricultural products in 87 percent of its agricultural tariff lines. Oman will phase out tariffs on the remaining agricultural products by 2019.

As a member of the Gulf Cooperation Council (GCC), Oman applies the GCC common external tariff of five percent for most non-U.S. products, with a limited number of GCC-approved country-specific exceptions. Oman's exceptions include tariff rates of 100 percent on pork, alcohol, and cigarettes, and 25 percent on edible oils sold in retail packaging, as well as protective duties on a limited number of agricultural products, such as dried lemons, bananas, dates, and ghee. According to the WTO, Oman's simple average applied tariff for non-U.S. products is 12.2 percent for agricultural goods and 4.7 percent for non-agricultural goods.

### **Import Licensing**

Companies that import goods into Oman must be registered with the Ministry of Commerce and Industry. Importation of certain classes of goods, such as alcohol, livestock, poultry, and their respective products, as well as firearms, narcotics, and explosives, requires a special license. Media imports are subject to review and possible censorship.

### **Documentation Requirements**

Only Omani nationals and companies of WTO Members that are registered as importers are permitted to submit documents to clear shipments through customs.

### **Customs**

Some firms have reported difficulties in receiving duty-free treatment under the U.S.-Oman FTA for goods that enter Oman via Dubai.

## **GOVERNMENT PROCUREMENT**

Procuring entities in Oman are required to conduct procurement covered by the FTA in a fair, transparent, and nondiscriminatory manner.



Oman provides a 10 percent price preference to bids that contain a high content of local goods or services, including direct employment of Omani nationals. However, Oman may not apply such price preferences to bids offering goods and services from the United States in procurement covered by the FTA. For most major tenders, Oman invites bids from international firms or firms pre-selected by project consultants. Bidders are requested to be present at the opening of bids, and interested persons may view the process on the Tender Board's website. The U.S. business community reports that the procurement process is often opaque. Of particular concern is the role that consultants play in the government procurement process. At times, consultants appear to steer a procurement decision toward a particular bidder on grounds other than technical qualifications or price. In addition, the business community reports that bidders' costs can sometimes increase dramatically when award decisions are delayed, sometimes for years, or the bidding is reopened with modified specifications and, typically, short deadlines.

Oman's Ministry of Defense may require that companies involved in defense-related transactions participate in its offset program, entitled "Partnership for Development."

Oman is an observer to the WTO Committee on Government Procurement. In accordance with the commitment in its WTO accession, Oman began the process of acceding to the WTO Agreement on Government Procurement (GPA) in 2001, but it has not completed the process.

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

Oman committed to provide strong IPR protection and enforcement in the US – Oman FTA. Oman revised its IPR laws and regulations to implement its FTA commitments, and it acceded to several international IPR treaties. While IPR laws in Oman are generally enforced, cases of on-line piracy – which can be difficult to detect – remain common.

As part of the GCC Customs Union, the six Member States are preparing a draft common trademark law, as well as a draft common unfair competition law to protect companies from unfair commercial use of undisclosed information submitted for marketing approval of pharmaceutical products. The United States is engaged in a dialogue with GCC technical experts to help ensure that the trademark law and unfair competition law will facilitate Member States' implementation of international and bilateral obligations.

## **SERVICES BARRIERS**

### **Banking**

Oman does not permit representative offices or offshore banking.

### **Legal Services**

By a decree from the Ministry of Justice in October 2009, non-Omani attorneys, including U.S. attorneys practicing in Oman, are prohibited from appearing in courts of first instance. Within the next several years, the Ministry of Justice plans to bar foreign lawyers from appearing in all of its courts.

## **INVESTMENT BARRIERS**

Under the FTA, Oman is required to accord MFN treatment and national treatment to U.S. investors, who also have the right to make financial transfers freely and without delay. In addition, Oman is required to apply international law standards for compensation in the event of an expropriation and to submit to international arbitration in the event of an investment dispute. All forms of investment are protected under the FTA, including enterprises, debt, concessions, contracts, and intellectual property rights. As a

result, U.S. investors in almost all circumstances are entitled to establish, acquire, and operate investments in Oman on an equal footing with Omani investors and with investors of third countries. The FTA also prohibits the imposition of certain trade-distorting investment measures, such as requirements to buy Omani rather than U.S. inputs for goods manufactured in Oman.

Concerns remain regarding the ability of U.S. businesses to acquire office space in Oman. Although U.S. investors are permitted to purchase freehold property in designated residential developments, businesses must adhere to more restrictive guidelines when acquiring real estate for commercial offices. With the exception of certain tourism-related property agreements, only companies or enterprises with at least a 51 percent Omani shareholding are permitted to own real estate for the purpose of establishing an administrative office, staff accommodation, warehouse or show room, or other building with a similar purpose. Other enterprises, including foreign majority-owned businesses, must seek “usufruct” rights that enable them to exploit, develop, and use land granted by a third party.



# PAKISTAN

## TRADE SUMMARY

The U.S. goods trade deficit with Pakistan was \$1.6 billion in 2010, up \$65 million from 2009. U.S. goods exports in 2010 were \$1.9 billion, up 17.4 percent from the previous year. Corresponding U.S. imports from Pakistan were \$3.5 billion, up 11.0 percent. Pakistan is currently the 60th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Pakistan was \$517 million in 2009 (latest data available).

## IMPORT POLICIES

Pakistan's overall average applied tariff in 2009 was 13.9 percent. There are 14 different *ad valorem* tariff levels, ranging from 0 - 150 percent. Prior to FY2008-09 (July 2008 – June 2009), specific rates of duty were applied to 44 products. These rates were continued in the FY2009-10 and FY2010-11 budgets.

In FY2008-09, the government of Pakistan (GOP) increased specific tariff rates on 397 non-essential and luxury items from the 15 percent to 25 percent range to the 30 percent to 35 percent range. These items include cosmetics, domestic appliances, luxury food items, and cigarettes. The tariff on cars with 1800cc to 2500cc engine capacity was increased from 90 percent to 100 percent, and from 100 percent to 150 percent on cars with engine capacity from 2500cc to 3000cc. A 50 percent tariff was imposed on imported vehicles with engine capacity less than 850ccs. These tariff rates were continued in the 2010-11 budget. In an effort to protect its domestic automotive parts manufacturers, Pakistan imposes higher tariff rates (50 percent) on imports of automotive part types that compete with domestically manufactured products than on imports of automotive parts that have no domestic competition (35 percent).

The government of Pakistan grants sector-specific duty exemptions, concessions, and other protections through promulgation of Statutory Regulatory Orders (SROs). For example in 2008, certain substances identified as drugs by Pakistan's 1976 Drug Act were granted tax exemptions, while certain other pharmaceutical products not covered under the SRO remained subject to a 15 percent duty. The GOP also provides concessionary tariffs for the import of raw materials used as active ingredients in pharmaceutical production. A list of SROs and other trade policy and regulatory documents can be found on the Federal Board of Revenue's website: <http://www.cbr.gov.pk>.

In January 2000, the Pakistani government implemented a transactional valuation system, in accordance with the WTO's Customs Valuation Agreement. Currently, this system covers roughly 90 percent to 95 percent of imports. A number of traders in the food and consumer products sectors have noted that the system is not uniformly applied. Similarly, a few major U.S. companies in the machinery and materials sector have reported specific concerns that customs officials have erroneously assessed goods based on their minimum values rather than the declared transactional value.

On October 5, 2009, Pakistan began to enforce a 2005 regulation requiring that commercial invoices and packing lists be included inside each shipping container. This procedure is difficult to follow, particularly in cases in which the invoice and packing lists do not originate in the same location as the shipments themselves, cases in which the invoices and packing lists are created after the shipment departs, or cases in which several companies are involved. Importers are charged a penalty of \$58 for non-compliance.

## **GOVERNMENT PROCUREMENT**

Pakistan is not a signatory to the WTO Agreement on Government Procurement. The government uses an open procurement process in which bidders have to register with the government to be awarded contracts in order to ensure that only legitimate businesses bid for public contracts.

The Public Procurement Regulatory Authority (the Authority), established in 2002, is an autonomous body responsible for prescribing and monitoring public sector procurement regulations and procedures. In 2004, the Authority put in place a regulatory framework for public procurement aimed at establishing transparent public procurement practices. According to the framework, international tender notices must be publicly advertised. The framework prohibits sole source contracting tailored to company-specific qualifications. There are no official “buy national” policies. The Authority includes a mechanism for bidders to lodge their complaints, and if the bidders are not satisfied with the response, they may file their case with the relevant court.

Political influence on procurement decisions, charges of official corruption, lack of transparency, and long delays in bureaucratic decision-making have become common in the last two years. Suppliers have reported instances in which the government used the lowest bid as a basis for further negotiations, rather than accepting the lowest bid as required by regulation. In one example of the government’s failure to follow its procurement regulation, Pakistan Railways (PR) purchased over 140 Chinese locomotives that did not meet the PR’s technical requirements. In another example, although it offered the lowest price, the Pakistan Navy refused to accept a bid from a U.S. company for a tender involving the sale of high frequency receivers, and instead announced another round of bids.

## **EXPORT SUBSIDIES**

Pakistan actively promotes the export of Pakistani goods with measures such as tariff concessions on imported inputs and income and sales tax concessions. The majority of Pakistan’s \$6.9 million in other subsidies provided during FY2010-2011 focused on its large wheat sector. In that same period, the government ended freight subsidies and provided a \$3 million interest rate subsidy to the textile spinning sector.

In 1989, Pakistan established its first Export Processing Zone (EPZ) in Karachi. The EPZ provides special fiscal and institutional incentives specifically targeted to encourage the development of export-oriented industries. The government subsequently created EPZs in eight additional locations, including Risalpur in KPK Province, Gujranwala and Sialkot in Punjab, and Saindak, Gwadar, Reko Dek and Duddar in Balochistan. Of these, only Karachi, Risalpur, Sialkot and Saindak are operational.

Principal government incentives for EPZ investors include: exemption from all taxes and duties on equipment, machinery, and materials (including components, spare parts, and packing material); indefinite loss carry-forward; and access to Export Processing Zone Authority One Window services, including facilitated issuance of import permits and export authorizations. Foreign investors are eligible to establish businesses in the EPZ and are guaranteed full repatriation of capital and profits.

The Export Processing Zone Authority (EPZA) has the exclusive right to collect presumptive taxes on exports. Final taxes range between 0.5 percent and 1.25 percent of the total profits. EPZA collects a “development surcharge” of 0.5 percent of the total profits. Companies’ exports are otherwise exempt from all other federal, provincial, and municipal taxes. There are no minimum or maximum limits for investment. However, despite these incentives, most of the EPZs have failed to attract significant investment.

## **FOREIGN TRADE BARRIERS**

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

In 2009, Pakistan was listed on the Special 301 report's Priority Watch List. The report cites weak protection and enforcement of intellectual property rights, particularly as they relate to copyright and pharmaceutical data protection.

While the government took steps in 2009 and 2010 to improve copyright enforcement, especially with respect to optical disc piracy, it appears that only some of the arrests resulted in prosecutions and the few verdicts that were issued resulted in minor prison sentences. Pakistan's Federal Investigation Agency continues to conduct large scale raids. From October 2009 - October 2010, 20 new cases were filed against IPR violators and millions of rupees worth of pirated material were confiscated. However, the failure to successfully prosecute those cases has meant that they had little deterrent effect: of the 41 individuals arrested and charged with IPR infringement during the course of the investigation, only 2 were accused and both were acquitted. Pakistan is now reportedly being used as a conduit for illicit products from Russia, Malaysia, Singapore, China, Bangladesh, and Sri Lanka for onward distribution to third countries. Book piracy also continues to present barriers to legitimate trade and investment.

Pakistan has not made progress in providing effective protection against unfair commercial use of undisclosed test and other data generated to obtain marketing approval for pharmaceutical products. Since 2006, the Government of Pakistan and international and local pharmaceutical companies have been involved in negotiations related to draft regulations on data protection. Although draft data protection regulations were finally formulated in 2009, the regulations remain under Government of Pakistan review and have not been promulgated.

The recently enacted 18th Amendment makes healthcare a provincial responsibility. As a result, data protection regulations now require passage from the provincial assemblies in addition to the National Assembly, further delaying their enactment. Pakistan also lacks an effective system to prevent the issuance of marketing approvals for unauthorized copies of patented pharmaceutical products. In 2009, President Zardari issued an ordinance that removed an 18-month patent application processing deadline, slowing the processing of pending patent applications.

In 2009, the Pakistan Cabinet approved a draft Plant Breeder's Rights Law and an amendment to the Seed Act of 1976. These bills await Parliamentary approval.

## **SERVICES BARRIERS**

Pakistan generally permits foreign investment in services, subject to certain provisions, including a minimum initial capital investment requirement of \$150,000 for most sectors. These provisions do not apply, in particular, to the information technology services sector, which is exempt from the minimum initial investment requirement; nor to banking, which is subject to special rules (*described below*).

Foreign investors may hold equity stakes up to 100 percent and are allowed 100 percent repatriation of profits in most sectors. The previous requirements that foreign investors accumulate 40 percent local equity within 5 years of an initial investment, and the cap on repatriation of profits at 60 percent of total equity or profits, have been abolished. Foreign investors in services and other non-manufacturing sectors are allowed to remit royalties and technical fees, subject to certain conditions. Royalty payments are limited to a minimum of \$100,000 and subsequent royalty payments are capped at 5 percent of net sales for five years.

## **FOREIGN TRADE BARRIERS**

## **Telecommunications**

In 2003, the government of Pakistan deregulated the telecommunications sector in order to comply with its WTO commitments and encourage growth in the sector. The Pakistan Telecommunication Company Limited (PTCL) lost its monopoly on basic telephone services and the government issued 14 licenses to long distance telephone companies (12 of which are currently in use), 84 licenses to 37 local loop companies (of which 13 are operational), and 93 licenses to 16 wireless local loop companies (of which 10 are operational).

The ability of telecommunications companies to operate in Pakistan will continue to depend on access to PTCL infrastructure. In 2005-2006, the government combined 15 value-added services including: Internet service provision, vehicle tracking systems, and data network operations into one license - the Class Value Added Services (CVAS) license. Applicants who applied prior to the announcement of this policy were given the option to either continue their old licenses or convert to CVAS licenses. To date, the government has issued 124 new CVAS licenses and converted 93 old licenses to CVAS. At present, the government does not issue licenses specifically for Voice-over-Internet Protocol (VoIP), but long distance telephone license holders may also provide VoIP services.

## **Banking and Insurance**

Foreign banks that do not have a global tier-1 paid up capital (*e.g.*, equity and retained earnings of \$5 billion or more) or are not from countries that are part of regional groups and associations of which Pakistan is a member (*e.g.*, the Economic Cooperation Organization and the South Asian Association for Regional Cooperation) are capped at a 49 percent equity stake. Locally incorporated banks as well as subsidiaries of foreign banks are required to have a minimum paid up capital (free of losses) of Rs. 10 billion (\$116 million) in order to conduct banking activities in Pakistan.

The parastatal National Insurance Company has the exclusive authority to underwrite and insure public sector firms, assets and properties. However, the government reserves the right to grant exemptions to this requirement pursuant to Section 166 of the Insurance Ordinance 2000. Private sector firms may seek foreign reinsurance facilities to meet up to 65 percent of their re-insurance needs. At least 80 percent of the foreign facilities must be with A-rated foreign companies, and the remainder from reinsurance companies rated BBB or above.

Market domination in the life insurance sector may pose a significant barrier to entry. The state-owned State Life Insurance Company holds over 68 percent of the market, although its market share has been declining over the past several years. Three domestically-owned companies account for 64 percent of the general insurance (property, casualty, and health) market. The State-owned National Insurance Company Limited held over 14 percent of the general insurance market in FY 2009-10.

## **INVESTMENT BARRIERS**

Foreign investors are generally free to establish and own business enterprises in Pakistan with the exception of five restricted sectors arms and munitions, high explosives, currency/mint operations, radioactive substances, and new, non-industrial alcohol plants. There is a \$150,000 minimum foreign investment requirement in non-financial services (except information technology services), and a minimum investment requirement of \$300,000 in agriculture, infrastructure projects, and social services.

## **OTHER BARRIERS**

Businesses operating in Pakistan have repeatedly called for strengthening Pakistan's domestic security. Corruption and a weak judicial system remain prevalent and are substantial disincentives to investment. Pakistani laws targeting corruption include the 1947 Prevention of Corruption Act, the 1973 Efficiency and Discipline Rules, and the 1999 National Accountability Bureau (NAB) Ordinance. Previously, the NAB, the Federal Investigation Agency (FIA), and provincial anti-corruption departments shared official responsibility for combating corruption. In October 2002, Pakistan's Cabinet approved the National Anti-Corruption Strategy (NACS) that identified areas of pervasive corruption and recommended the implementation of reforms to combat corruption. The NACS recognized the NAB as the sole federal anti-corruption agency. In mid-2009, the Supreme Court directed that legislation replace the executive ordinance establishing the NAB, but as of December 2010 the National Assembly has yet to pass the related legislation. Pakistan's executive and judicial branches also have unresolved differences over the appointment of the NAB's chairman.

Contract enforcement can be difficult for U.S. and other foreign investors in Pakistan. For example, a long standing investment dispute between a major U.S. multinational company and a local partner raised concerns about the enforceability of international arbitration awards regarding contracts between private parties. After nearly a decade of litigation, the case was resolved in 2009 only after the local party withdrew its appeal.

In July 2005, Pakistan's Cabinet ratified the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) by ordinance. That ordinance expired in August 2010. Equivalent legislation is currently pending Parliamentary approval. If approved, the legislation is expected to be back dated to September 2010 to ensure continuity.





# PANAMA

## TRADE SUMMARY

The U.S. goods trade surplus with Panama was \$5.7 billion in 2010, an increase of \$1.7 billion from 2009. U.S. goods exports in 2010 were \$6.1 billion, up 41.4 percent from the previous year. Corresponding U.S. imports from Panama were \$379 million, up 25.3 percent. Panama is currently the 36th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Panama was \$7.8 billion in 2009 (latest data available), up from \$6.2 billion in 2008. U.S. FDI in Panama is led by the nonbank holding companies and the banking sectors.

## TRADE PROMOTION AGREEMENT

On June 28, 2007, the United States and Panama signed the United States-Panama Trade Promotion Agreement (TPA). Panama approved the TPA on July 11, 2007. The United States has not yet approved the TPA.

The TPA is a comprehensive free trade agreement. Under the TPA, there would be significant liberalization of trade in goods and services, including financial services. The TPA also includes important disciplines relating to customs administration and trade facilitation, technical barriers to trade, government procurement, investment, telecommunications, electronic commerce, intellectual property rights, and labor and environmental protection. Under the TPA, U.S. firms will have better access to Panama's services sector than Panama provides to other WTO Members under the General Agreement on Trade in Services. All services sectors are covered under the TPA, except where Panama has made specific exceptions. Moreover, Panama agreed to become a full participant in the WTO Information Technology Agreement.

The Administration has been working to address the outstanding concerns regarding Panama's labor regime and its tax transparency rules. Panama implemented several labor reforms in 2010, and the Administration is working with the Panamanian government to implement additional labor reforms. With respect to tax transparency, on November 30, 2010, Panama entered into a Tax Information Exchange Agreement, which, once ratified by Panama's legislature, will provide the United States with access to information from Panama needed to enforce U.S. tax laws. On February 10, 2011, Ambassador Kirk met with the Vice President of Panama to discuss Panama's progress and the steps needed to resolve the remaining labor and tax issues. Senior officials and technical teams met further on February 28 to clarify those issues, and agreed upon actions that, when taken by Panama, will allow the Administration to send the TPA to Congress.

## IMPORT POLICIES

### Tariffs

Panama's average tariff on U.S. industrial and consumer goods is 7 percent, but tariffs on some of these products are as high as 81 percent. Panama's average tariff on U.S. agricultural goods is 15 percent, but some U.S. agricultural exports face tariffs as high as 260 percent.

Panama has made 15 changes to its tariff schedule since TPA negotiations were concluded, reducing its MFN tariffs on several hundred lines of agricultural products, including frozen/pre-cooked French fries, cooking oil, sausages, peanuts and cashews, and bottled natural and mineral water.

Under the TPA, 88 percent of U.S. exports of consumer and industrial goods will enter Panama duty-free, with remaining tariffs phased out over 5 years or 10 years. The TPA includes “zero for zero” immediate duty-free access for key U.S. sectors and products, including agricultural and construction equipment, information technology products, and medical and scientific equipment. Other key U.S. export sectors will also obtain significantly improved access to Panama’s market as duties are phased out, including motor vehicles and parts, paper and wood products, and chemicals.

The TPA provides for immediate duty-free treatment for over 60 percent by value of U.S. agricultural exports to Panama, including high quality beef, certain pork and poultry products, cotton, wheat, soybeans and soybean meal, most fresh fruits and tree nuts, distilled spirits and wine, and a wide assortment of processed products. Duties on other agricultural goods will be phased out within 5 years to 12 years and on the most sensitive products within 15 years to 20 years. The TPA also provides for expanded market access opportunities through tariff-rate quotas (TRQs) for agricultural products such as pork, chicken leg quarters, dairy products, corn, rice, refined corn oil, dried beans, frozen French fries, and tomato products. These TRQs will permit immediate duty-free access for specified quantities that will increase as over-quota duties are phased out over the course of the implementation period. Apparel products made in Panama will be duty-free under the TPA if they use U.S. or Panamanian fabric and yarn. Strong customs cooperation commitments between the United States and Panama under the TPA will allow for verification of claims of origin or preferential treatment, and denial of preferential treatment or entry if claims cannot be verified.

### **Nontariff Measures**

In addition to tariffs, all imports into Panama, except for foods and feeds, are subject to a 7 percent transfer tax levied both on the cost, insurance, and freight value, as well as on import duties and other handling charges. The transfer tax is higher for cigarettes and alcohol. Pharmaceuticals, foods, school supplies, goods that will be re-exported, and all products related to transactions occurring in any free zone when using endorsable documents are exempt from the transfer tax.

Importing entities are required to hold a commercial or industrial license to operate in Panama in order to import manufactured goods into the country without an import license. The commercial or industrial license may be obtained through Panama’s online business registration service (<http://www.panamaemprende.gob.pa>). Importing entities holding such a license are not required to have a separate import license for individual shipments, except for imports of certain controlled products such as weapons, medicine, pharmaceutical products, and certain chemicals.

### **GOVERNMENT PROCUREMENT**

Panamanian Law 22 of 2006, as amended by Law 66 of 2010 among others, regulates government procurement and other related issues. Law 22 was intended to streamline and modernize Panama’s contracting system. It requires publication of all proposed government purchases. Law 22 also established PanamaCompra, an Internet-based procurement system (<http://www.panamacompra.gob.pa>) through which the government of Panama evaluates proposals and monitors the procurement process and holds consultations for public bids, including technical specifications and tender documents. PanamaCompra has been the forum for over 330,000 contracts valued at over \$3.8 billion since it opened in December 2006. The Panamanian government has generally handled procurement in a transparent

manner, although occasionally U.S. companies have complained that certain required procedures have not been followed.

Between January 1 and July 15, 2010, the government of Panama procured approximately \$91 million in goods and services through 1,300 sole-source contracts, which the government justified on grounds of “urgency.” Some of the procurements include expanding the Tocumen International Airport (\$26 million) and channeling the Caldera River (\$11 million). Panamanian business leaders have requested that sole-source contracting be used only on an exceptional basis, and U.S. firms have expressed concern about how the government of Panama establishes and evaluates the criteria used to select a procurement winner.

Panama has an administrative court to handle all public contracting disputes. The rulings of this administrative court are subject to review by Panama’s Supreme Court.

Under the TPA, Panama’s procuring entities will be required to use fair and transparent procurement procedures, including advance notice of purchases and timely and effective bid review procedures, for procurement covered by the TPA. U.S. suppliers will be permitted to bid on procurement above certain thresholds of most Panamanian government entities, including key ministries and state owned enterprises, on the same basis as Panamanian suppliers. In particular, U.S. suppliers will be permitted to bid on procurement by the Panama Canal Authority. Disputes relating to Panama Canal Authority procurement will continue to be addressed through the authority’s existing procedures.

The TPA would also help to strengthen rule of law and fight corruption by requiring Panama to ensure under its domestic law that bribery in matters affecting trade and investment, including in government procurement, is treated as a criminal offense or is subject to non-criminal penalties where criminal responsibility is not applicable.

While Panama committed to become a party to the WTO Government Procurement Agreement at the time it joined the WTO, to date, it remains an observer.

## **EXPORT SUBSIDIES**

Any company may import raw materials or semi-processed goods into Panama duty-free for export production, except for sensitive agricultural products, such as rice, dairy, pork, poultry, corn, and tomato products, or at a duty of 3 percent for domestic consumption or processing (pending certification that there is no national production). Companies are allowed a tax deduction of up to 100 percent of their profits from export operations through 2015, as provided in Law 11 of 2008.

In December 2009, Panama’s National Assembly passed Law 82 of 2009, which creates a Certificate of Promotion of Agricultural Exports (CEFA) program. The CEFA gives incentives to agricultural exporters to reduce packing and transportation costs for specified nontraditional agricultural products. The government of Panama has issued 624 certificates valued at \$4.1 million.

A number of export industries, such as tourism, and special economic areas, such as free trade zones, are also exempt from paying certain types of taxes and import duties. The government of Panama established this policy to attract foreign investment, especially in economically depressed regions, such as the city of Colon. (Companies that benefit from these exemptions are not eligible to benefit from the CEFA program for their exports.) Companies operating in any of Panama’s 15 export processing zones (EPZs) may import inputs duty-free, if products assembled in the zones are to be exported.

Under the TPA, Panama may not adopt new duty waivers or expand existing duty waivers conditioned on the fulfillment of a performance requirement (*e.g.*, the export of a given level or percentage of goods or the use of domestic content in the production of goods).

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

The government of Panama is making efforts to strengthen the enforcement of IPR in Panama. Since 1997, two district courts and one superior tribunal have been exclusively adjudicating antitrust, patent, trademark, and copyright cases. Since January 2003, a specific prosecutor with national authority over IPR cases has consolidated and simplified the prosecution of those cases. Law No. 1 of 2004 added crimes against intellectual property as a predicate offense for money laundering, and Law 14 establishes a five to 12 year prison term, plus possible fines. A Committee for Intellectual Property (CIPI), comprising representatives from five government agencies (Colon Free Zone, Intellectual Property Registry, Ministry of Education, Customs, and the Attorney General), under the leadership of the Ministry of Commerce and Industry, is responsible for development of intellectual property policy in Panama.

The Panamanian government reports that, in 2009, there were 185 convictions for IPR-related violations, and it seized over \$17 million of illicit goods. However, given Panama's role as a transshipment point, U.S. industry remains concerned that Panama may become an important hub in the regional and global trade in pirated and counterfeit goods. Piracy is a significant problem in Panama, and Internet piracy is an emerging problem. For example, unauthorized downloaded movie or music files from the Internet often are used in the creation of pirated optical music and film discs distributed by street vendors.

The TPA would provide for improved standards for the protection and enforcement of a broad range of IPR, including protections for patents, trademarks, undisclosed test and other data submitted to obtain marketing approval for pharmaceuticals and agricultural chemicals, and digital copyrighted products such as software, music, text, and videos; and further deterrence of piracy and counterfeiting.

## **SERVICES BARRIERS**

Under the TPA, Panama will accord U.S. services suppliers substantial access to its services market, including financial services. Panama agreed to provide improved access in sectors like express delivery, and to grant new access in certain professional services that previously had been reserved exclusively to Panamanian nationals. Panama also agreed that portfolio managers in the United States would be able to provide portfolio management services to both mutual funds and pension funds in Panama. Under the TPA, U.S. insurance suppliers will be permitted to operate as a branch or a subsidiary.

One Panamanian telecommunications service supplier with U.S. ownership has reported that it believes that the Panamanian telecommunications regulatory authority, Asociación Nacional de los Servicios Públicos (ASEP), has not complied with the Panamanian law that requires that the rates that telecommunications operators pay to one another to send calls to their respective networks be determined by ASEP using an economic cost model. The company has also complained that there is a lack of transparency in ASEP's decision-making regarding the rates, adversely impacting the company's ability to provide telecommunications services in Panama.

## **INVESTMENT BARRIERS**

While Panama maintains an open investment regime and is generally receptive to foreign investment, the U.S. Government has received numerous property dispute complaints from U.S. investors and individual property holders. Many of these complaints appear to stem from the general lack of titled land in Panama and inadequate government administration of the property system. Panama enacted a law in 2009 (Law

80) that attempts to address the lack of titled land in certain parts of the country. Concerns persist regarding government administration and the ability of the judicial system to resolve these issues.

The United States – Panama Bilateral Investment Treaty (BIT) entered into force in 1991 (with additional amendments in 2001). The BIT ensures that, subject to some exceptions, U.S. investors receive fair, equitable, and nondiscriminatory treatment, and that both Parties abide by international law standards, such as for expropriation and compensation and free transfers.

Investors will continue to have important investment rights and protections under the investment provisions of the TPA. All forms of investment will be protected under the TPA, including enterprises, debt, concessions, contracts, and intellectual property. U.S. investors will enjoy, in almost all circumstances, the right to establish, acquire, and operate investments in Panama on an equal footing with local investors. Among the rights that will be afforded to U.S. investors are due process protections and the right to receive fair market value for property in the event of an expropriation.

## **ELECTRONIC COMMERCE**

Law 43 of 2001 gives electronic signatures the legal equivalence of handwritten signatures. Panama issued Executive Decree 40 of 2009, which defines and regulates electronic documents, electronic signatures, technological documents, and storage services while adopting other measures that will allow the development of electronic commerce. These measures should improve the efficiency of the public sector by eliminating the use of paper documents, stamps, and handwritten signatures. Under the TPA, Panama will be obligated to provide nondiscriminatory treatment of digital products transmitted electronically and not to impose customs duties, fees, or other charges on digital products transmitted electronically. Additionally, the TPA requires Panama to have in place procedures for resolving disputes about trademarks used in Internet domain names.

## **OTHER BARRIERS**

### **Corruption**

The Panamanian judicial system continues to pose a problem for investors due to poorly trained personnel, case backlogs, and a perceived lack of independence from political influence. The Martinelli administration campaigned in 2009 on a promise to “eradicate corruption.” Although the Panamanian government asserts its commitment to combating corruption as part of its overall agenda of institutional reform, it has not yet delivered concrete results. Anticorruption mechanisms, such as asset forfeiture, whistleblower and witness protection, and conflict-of-interest rules, exist. However, the general perception is that anticorruption laws are not applied rigorously, and that government enforcement bodies and the courts have lacked effectiveness in pursuing and prosecuting those accused of corruption, particularly in high profile cases. The anticorruption provisions in the TPA will require Panama to ensure that bribery in matters affecting trade or investment is treated as a criminal offense or is subject to comparable penalties under its law.



# PARAGUAY

## TRADE SUMMARY

The U.S. goods trade surplus with Paraguay was \$1.7 billion in 2010, an increase of \$450 million from 2009. U.S. goods exports in 2010 were \$1.8 billion, up 33.7 percent from the previous year. Corresponding U.S. imports from Paraguay were \$62 million, up 10.2 percent. Paraguay is currently the 63rd largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Paraguay was \$90 million in 2006 (latest data available).

## IMPORT POLICIES

### Tariffs

Paraguay is a member of the MERCOSUR common market, formed in 1991 and comprised of Argentina, Brazil, Paraguay, and Uruguay. MERCOSUR's Common External Tariff (CET) averages 11.5 percent and ranges from 0 percent to 35 percent *ad valorem*, with a limited number of country-specific exceptions. Tariffs may be imposed by each MERCOSUR member on products imported from outside the region that transit at least one MERCOSUR member before reaching their final destination.

Paraguay's import tariffs tend to be much lower than the CET, ranging from 0 percent to 20 percent, with an average applied tariff rate of 8.7 percent in 2009. This is because Paraguay is permitted by MERCOSUR to maintain over 2,600 exceptions to the CET until December 31, 2011. In addition, both Paraguay and Uruguay are permitted to maintain national lists of 100 country-specific exceptions until December 31, 2015.

In December 2009, Paraguay, along with the other MERCOSUR members, approved tariff increases for hundreds of products in the CET, including dairy, textiles, and bags, backpacks, and suitcases. In many cases, the applied tariffs were increased up to WTO bound levels.

### Nontariff Barriers

A number of new procedures and requirements imposed by the government of Paraguay in 2009 could make importation of U.S. products more difficult. Since March 2009, the government of Paraguay has required non-automatic import licenses on personal hygiene products, cosmetics, perfumes and toiletries, textiles and clothing, insecticides, agrochemicals, and poultry. Obtaining a license requires review by the Ministry of Industry and Commerce and sometimes by the Ministry of Health. The process is slow, taking up to 30 days for goods that require a health certification. Once issued, the certificates are valid for 30 days.

Since 2000, Paraguay has prohibited the importation of used clothing and cars over 10 years old.

### Customs Procedures

Paraguay requires specific documentation for exports, such as the commercial receipt, certificate of origin, and cargo manifest, to be certified by the Paraguayan consulate in the country of origin. The United States is urging Paraguay to eliminate these requirements.



Paraguay frequently makes changes in its customs procedures. This makes it difficult for exporters to ensure they are following the most current procedures, which can in turn delay shipments and lead to unexpected costs. The burden of compliance is most often borne by importers.

In 2009, a customs resolution restricted the ports of entry for numerous goods, including household cleaning products and other household goods.

Paraguay requires all companies operating in the country to contract the services of a customs broker. The mandatory use of a customs broker can add significant and unnecessary costs for a company.

## **GOVERNMENT PROCUREMENT**

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

In March 2009, in an effort to encourage local production, the government of Paraguay changed its procurement rules. The government of Paraguay will give preference to a locally produced good even if it is up to 70 percent more expensive than the imported good. Importers of foreign goods can participate in these procurements only where locally manufactured products and service providers are unavailable or the government fails to award a contract to a domestic supplier. The government can also call for tenders from foreign suppliers.

Through the National Direction of Public Contracting (<http://www.contratacionespublicas.gov.py>), any interested supplier may offer products or services and register as a potential supplier in government procurement.

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

The United States continues to monitor implementation of the Memorandum of Understanding between the United States and Paraguay pertaining to IPR protection and enforcement, which was revised in 2009 and will remain in effect through December 2011. While Paraguay has increased the number of raids and seizures of pirated and counterfeit goods, concerns remain because of porous borders, ineffective prosecution of IPR violators, and court sentences that are insufficient to deter infringement. Although a new penal code which became effective in 2009 increases penalties for IPR violations, prosecution of IPR offenders remains weak, and there are few convictions. Concerns also remain about inadequate protection against unfair commercial use of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products and the shortcomings in Paraguay's patent regime.

Through the Millennium Challenge Corporation's Threshold II Program, the Paraguayan government's IPR enforcement unit, the *Unidad Técnica Especializada* or UTE ("Specialized Technical Unit"), is being formalized and strengthened.

## **INVESTMENT BARRIERS**

Under Paraguayan law, foreign companies must demonstrate just cause to terminate, modify, or decide not to renew contracts with Paraguayan distributors. Severe penalties and high fines may result if a court determines that the foreign company ended the relationship with its distributor without first having established that just cause exists. This requirement often leads to expensive out-of-court settlements. In a few cases, the courts have upheld the rights of foreign companies to terminate representation agreements after finding the requisite showing of just cause. However, this law may discourage U.S. investment due to concerns about potential lawsuits and interference with contractual relations. Separately, executive branch ministries, regulatory agencies, the tax agency, and the judiciary often lack the resources,

expertise, or impartiality necessary to carry out their respective mandates, creating uncertainty for investors.



# PERU

## TRADE SUMMARY

The U.S. goods trade deficit with Peru was \$1.7 billion in 2010, an increase of \$961 million from 2009. U.S. goods exports in 2010 were \$6.7 billion, up 37.2 percent from the previous year. Corresponding U.S. imports from Peru were \$5.1 billion, up 20.6 percent. Peru is currently the 34th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Peru was \$6.2 billion in 2009 (latest data available), up from \$4.8 billion in 2008. U.S. FDI in Peru is led by the mining sector.

## TRADE PROMOTION AGREEMENT

The United States and Peru signed the United States-Peru Trade Promotion Agreement (PTPA) on April 12, 2006. Peru's Congress ratified the Agreement in June 2006 and a protocol of amendment in June 2007. On December 14, 2007, the PTPA Implementation Act became law, and the PTPA entered into force on February 1, 2009.

The PTPA is a comprehensive free trade agreement that has significantly liberalized and will continue to liberalize trade in goods and services between the United States and Peru. Under the PTPA, Peru immediately eliminated most of its tariffs on U.S. exports, with all remaining tariffs phased out over defined time periods. The PTPA also includes important disciplines relating to: customs administration and trade facilitation; technical barriers to trade; government procurement; services; investment; telecommunications; electronic commerce; intellectual property rights; transparency; and labor and environmental protection.

## IMPORT POLICIES

### Tariffs

Upon entry into force of the PTPA in February 2009, 80 percent of U.S. exports of consumer and industrial products entered Peru duty free immediately. Remaining tariffs on these goods phase out within 10 years. More than two-thirds of current U.S. agricultural exports also gained immediate duty-free access to Peru. Tariffs on most of the remainder of U.S. agricultural products will phase out within 17 years. All tariffs will end in 17 years. Peru also agreed to eliminate its price band system on trade with the United States upon entry into force of the PTPA.

### Nontariff Measures

The government of Peru already has eliminated many nontariff barriers, and, under the PTPA, is subjecting remaining measures, including subsidies and import licensing requirements, to additional disciplines. Peru currently restricts imports of certain used goods, including used clothing and shoes (except as charitable donations), used tires, cars over five years old, and heavy trucks (weighing three tons or more) over 8 years old. The value added tax does not apply to charitable donations, although this charitable exemption requires prior registration with APCI (The Peruvian Government's Agency for International Cooperation). A 45 percent excise tax applies to used cars and trucks receiving import permits (compared to 20 percent for a new car). If these used cars and trucks undergo refurbishment in an industrial center in the south of the country after importation, no excise tax applies. Under the PTPA, Peru may not adopt or maintain prohibitions or restrictions on trade in remanufactured goods, and Peru

may not apply to remanufactured goods certain existing prohibitions on trade in used goods. This commitment opens new and significant export opportunities for firms involved in remanufactured products such as engines, automotive parts, mining and construction equipment, transportation machinery, medical equipment, and computers.

## **GOVERNMENT PROCUREMENT**

Since 2002, Peru has applied a 20 percent price preference to bids by Peruvian firms in government procurement. However, the price preference may not be applied against U.S. companies bidding in procurement covered by the PTPA. The PTPA requires that procuring entities use fair, nondiscriminatory, and transparent procurement procedures, including advance notice of purchases and timely and effective bid review procedures, for procurement covered by the Agreement. Also, under the PTPA, U.S. suppliers can bid on procurements of most Peruvian central government entities on the same basis as Peruvian suppliers. This includes procurements by state-owned enterprises, such as Peru's oil company and Peru's public health insurance agency. The anticorruption provisions in the PTPA require Peru's domestic law to treat bribery related to trade and investment, including in government procurement, as a criminal offense or subject it to non-criminal penalties where criminal responsibility is not applicable.

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

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

Peru was listed on the Watch List in the 2010 Special 301 report. As a result of the PTPA, Peru enhanced its IPR legal framework significantly to strengthen IPR protection and enforcement. Among other improvements, Peru strengthened its intellectual property office and created a National Strategic Plan to combat counterfeiting and piracy. Notwithstanding the improvements to Peru's IPR legal regime, piracy rates remain high. Inadequate law enforcement contributes to ubiquitous counterfeit clothing, medicines, music, videos, software, and toys. There is also a continuing need for measures to prevent government use of unlicensed software. A further concern is the need for deterrent penalties in criminal IPR cases and against businesses found to have engaged in infringing activity. In addition, there is a need for clarity with respect to Peru's system for protecting undisclosed test or other data submitted to obtain approval of agricultural chemical products.

## **SERVICES BARRIERS**

### **Telecommunications**

In August 2010, Peru's telecommunications regulator (OSIPTEL) established a "glide path" plan to continuously lower the mobile termination rates for all carriers by October 2013. This created a more favorable competitive environment for smaller carriers. While U.S. companies are pleased that the final rate in 2013 will be competitive with the other carriers, they remain concerned that the 2013 rates will be based on the current cost structure, which by 2013 will be higher than actual costs, assuming a continued downward trend in cost per call. Mobile termination rates affect U.S. companies more significantly than the other companies because U.S. companies have a lower market share and therefore more calls terminate on another carrier's network. The United States will continue to monitor the rates and urge OSIPTEL to base the rates on actual, not historical costs.

## **INVESTMENT BARRIERS**

The PTPA establishes a secure and predictable legal framework for U.S. investors operating in Peru. Under the PTPA, U.S. investors and their investments are accorded national and most favored nation treatment, and U.S. investors are permitted to make financial transfers freely and without delay. The PTPA applies international legal standards for expropriation and compensation, and provides for binding international arbitration for the resolution of investment disputes. In most circumstances, the PTPA guarantees U.S. investors the right to establish, acquire, and operate investments in Peru on an equal footing with domestic investors.

Peruvian law prohibits majority foreign ownership in the broadcast media sector. Foreigners are also restricted from owning land or investing in natural resources located within 50 kilometers of its border, though special authorization to operate within those areas may be granted. Under current law, foreign employees may not comprise more than 20 percent of the total number of employees of a local company (whether owned by foreign or Peruvian persons) or more than 30 percent of the total company payroll. Under the PTPA, Peru agreed not to apply most of its nationality-based hiring requirements to U.S. professionals and specialty personnel.

U.S. firms remain concerned that executive branch ministries, regulatory agencies, the tax agency, and the judiciary often lack the resources, expertise, or impartiality necessary to carry out their respective mandates. In the past, U.S. investors have also complained about the reinterpretation of rules and the imposition of disproportionate fines by the tax agency. No new complaints were received in 2010, although some prior claims remain unresolved.

The Peruvian government has tried to address institutional weaknesses in the executive branch and has also made efforts at judicial reform. In July 2005, the Supreme Court issued an edict stating that one cannot challenge binding arbitration awards in the domestic judicial system.



# THE PHILIPPINES

## TRADE SUMMARY

The U.S. goods trade deficit with the Philippines was \$609 million in 2010, down \$418 million from 2009. U.S. goods exports in 2010 were \$7.4 billion, up 27.9 percent from the previous year. Corresponding U.S. imports from the Philippines were \$8.0 billion, up 17.5 percent. The Philippines is currently the 30th largest export market for U.S. goods.

U.S. exports of private commercial services (i.e., excluding military and government) to the Philippines were \$1.8 billion in 2009 (latest data available), and U.S. imports were \$2.5 billion. Sales of services in the Philippines by majority U.S.-owned affiliates were \$2.6 billion in 2008 (latest data available), while sales of services in the United States by majority Philippines-owned firms were \$36 million.

The stock of U.S. foreign direct investment (FDI) in the Philippines was \$5.8 billion in 2009 (latest data available), up from \$5.6 billion in 2008. U.S. FDI in the Philippines is mostly in the manufacturing sector.

## IMPORT POLICIES

### Tariffs

In 2010, the Philippine simple average bound tariff was 25.44 percent and the simple average applied tariff was 6.82 percent. Six percent of Philippine tariffs are applied at or above 15 percent. All agricultural tariffs and just under two-thirds of non-agricultural tariff lines are bound. Products with unbound tariffs include certain automobiles, chemicals, plastics, vegetable textile fibers, footwear, headgear, fish, and paper products.

Higher tariffs – some at 30 percent – are charged on chemical waste, motorcycles, automobiles, and some automotive parts. Additionally, agricultural products with tariff-rate quotas (TRQs) have high in-quota tariffs ranging from 30 percent to 65 percent. Sugar has the highest tariff at 65 percent, followed by rice at 50 percent. Other products with TRQs are poultry, swine, potatoes, coffee and coffee extracts. Meat and edible meat offal, sausages, prepared and preserved meat, cabbages, carrots, manioc (cassava), sweet potatoes, and animal feeds (except dog and cat food) have applied tariffs between 30 percent and 45 percent.

Philippine commitments under the Association of Southeast Asian Nations (ASEAN) Free Trade Agreement eliminated tariffs on approximately 99 percent of all goods for ASEAN trading partners, with higher tariffs for sensitive products, including sugar (38 percent), and rice (40 percent).

### Automobile Sector

The Philippines continues to apply high tariffs on finished automobiles and motorcycles. Finished automobiles and motorcycles are subjected to the highest tariff rates of any nonagricultural product, with a 30 percent tariff on passenger cars, 20 percent to 30 percent on vehicles for the transport of goods, and 15 percent to 20 percent on vehicles for the transport of persons, depending on vehicle weight. Other countries enjoy preferential import tariffs on new vehicle imports under agreements such as the ASEAN Free Trade Agreement and the Japan-Philippines Economic Partnership Agreement.

President Arroyo issued an executive order in April 2010 revising the eight-year-old Motor Vehicle Development Program (MVDP) to promote domestic automobile production and spur regional exports.



Tariffs on components are low and designed to encourage local assembly. A one percent tariff applies to completely knocked-down (CKD) kits imported by MVDP-registered participants, excluding CKDs of alternative fuel vehicles, which are duty-free. Japan and ASEAN nations enjoy a zero percent import tariff on CKDs.

Exporters of qualified Completely Built Units can earn export credits that may be applied to import duties otherwise due on qualifying imported finished automobiles. This system effectively reduces the applied tariff rate to 10 percent. In addition, the Philippines charges value added taxes of 12 percent on vehicle imports and progressive excise taxes based on the price of vehicles. The revised policy also continues the prohibition on imports of used motor vehicles.

The Philippines also bans heavyweight motorcycles from highways. Permitted by most countries, heavyweight motorcycles are designed for highway use, with traffic studies in most other developing countries demonstrating there is no underlying safety rationale for such a ban. These restrictions severely limit the export potential for U.S.-built motorcycles.

### **Safeguards**

The Philippine government continues to levy import duties on ceramic floor and wall tiles, glass products, steel angle bars, and testliner boards, which it justifies as safeguard measures. The Safeguard Measures Act allows interested parties a short five-day comment period; an amendment to extend this period to 30 days has been pending since 2007.

### **Excise Tax on Distilled Spirits**

In March 2010, the United States requested that the WTO establish a dispute settlement panel regarding discriminatory taxes applied by the Philippines to imported distilled spirits. The Philippines applies tax rates to distilled spirits that differ depending on the product from which the spirit is distilled. Distilled spirits made from certain materials that are typically produced in the Philippines, such as sugar and palm, are taxed at a low rate (*e.g.*, 13.59 pesos per proof liter in 2009), whereas imported distilled spirits are taxed at significantly higher rates (from approximately 10 to 40 times higher). The first meeting of the panel in the dispute took place in November 2010.

### **Quantitative Restrictions**

The Philippine government imposes a TRQ known as the Minimum Access Volume (MAV) system on several agricultural products, including corn, pork, and poultry. Since 2005, the Philippine government has maintained final year MAV levels below its Uruguay Round commitments despite a continued rise in market demand for MAV products.

Since 2002, the Philippine government has maintained a special safeguard (SSG) for out-of-quota chicken imports, which effectively doubles the out-of-quota tariff. In the wake of a series of typhoons in 2009, the Philippine Department of Agriculture temporarily suspended the SSG for 8,000 MT of imported chicken, which contributed to the rise in total poultry imports for 2009 and 2010.

### **Customs Barriers**

The Philippine Bureau of Customs is automating some of its core processes through the Electronic-to-Mobile system, which aims to streamline the payment and permits processes at many Philippine government agencies. The Philippines acceded to the World Customs Organization's Revised Kyoto

Convention in June 2010 but will need to revise its Tariff and Customs Code to achieve compliance with the Convention's provisions.

Despite these efforts, reports of corruption and other irregularities in customs processing persist, including undue and costly delays, continued private sector involvement in the valuation process, the use of reference prices rather than declared transaction values, and customs officials seeking the payment of unrecorded facilitation fees. Some exporters report, for instance, that customs does not recognize their free-on-board prices and instead applies a higher dutiable value based on other information. The U.S. Government will continue to work with the Philippine government to address these issues.

## **GOVERNMENT PROCUREMENT**

Government procurement laws and regulations favor Philippine-controlled companies and locally produced materials and supplies in government procurement. The Government Procurement Reform Act of 2003 aimed to consolidate procurement laws, simplify prequalification procedures, introduce objective and nondiscretionary criteria in the selection process, and establish an electronic single portal for government procurement activities. However, implementation remains inconsistent. U.S. companies have expressed concern about delayed procurement decisions, delayed payment, and different interpretations of the procurement law by different Philippine government agencies.

Since 1993, the Philippine government has maintained a countertrade requirement of 50 percent of the price of imports for procurement by government agencies and government-controlled corporations, with penalties for nonperformance of countertrade obligations.

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

## **EXPORT SUBSIDIES**

The Philippines offers a wide array of incentives, such as tax incentives, for export-oriented investment through export processing zones, free port zones, and other special industrial estates registered with the Philippine Economic Zone Authority.

The Philippine government also offers incentives in less-developed economic areas. Companies – including majority foreign-owned companies – may qualify for fiscal incentives for their activities in preferred sectors and geographic areas, as outlined in the Board of Investment's Investment Priorities Plan (IPP). Such incentives include: income tax holidays, tax deductions for wages and some major infrastructure investments, tax and duty exemptions for imported breeding stock and genetic materials, and tax credits on local purchases of breeding stock and materials. An enterprise with less than 60 percent Philippine equity may also enjoy incentives if its projects are classified as “pioneer” under the IPP.

The 2005 WTO trade policy review of the Philippines noted that the Philippines provided tax incentives based on local content requirements under the IPP. Publicly available information regarding the operation of the IPP program indicates that these incentives may still be provided.

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

The Philippines was placed on the Watch List in the 2010 Special 301 report. The United States also conducted an out-of-cycle review in 2010 of the Philippines' IPR protection and enforcement prior to the annual review in 2011. The United States determined on the basis of that review that there were areas of IPR protection and enforcement that continue to represent barriers to U.S. exports and investment. Key

issues addressed in the out-of-cycle review included ineffective enforcement of IPR, continued widespread copyright piracy and trademark counterfeiting, and amendments to the patent law that prohibit patents on certain chemical forms unless the applicant demonstrates increased efficacy.

The United States has encouraged the Philippines' ongoing efforts to address inefficiencies in the judicial system, and to establish specialized regional courts with rules designed to improve the legal consistency in rulings so that rights holders have a reliable avenue for recourse and prosecutions move forward effectively and without delay. While welcoming the enactment of an anti-camcording bill, the United States noted that it has not yet been implemented. The United States also encouraged the Philippines to complete its work on legislative reforms needed to strengthen IPR protection, including the implementation of the WIPO Internet Treaties, which have been pending in the Philippine Congress for years.

## **SERVICES BARRIERS**

### **Basic Telecommunications**

Philippine law defines telecommunications services as a public utility, which limits foreign investment to 40 percent. Foreigners may not serve as executives or managers of telecommunications companies, and the number of foreign directors allowed is tied to the proportion of foreign investment in the company. The United States has urged the Philippines to reclassify telecommunications outside of the utility definition, as it has done for electricity generation. The applicability of the public utility designation to value-added services is particularly burdensome and inconsistent with international practice.

Foreign equity in private radio communications is limited to 20 percent, and foreign ownership of cable television and all other forms of broadcasting and media is prohibited.

### **Financial Services**

The Philippines has not ratified the Fifth Protocol to the WTO GATS, which contains its commitments with respect to financial services.

### **Insurance**

Although regulations permit up to 100 percent foreign ownership in the insurance sector, the Philippines only committed to a maximum of 51 percent equity participation in the GATS.

Generally, only the state-owned Government Service Insurance System (GSIS) may provide coverage for government-funded projects. A 1994 order requires sponsors of build-operate-transfer projects and privatized government corporations to secure their insurance and bonding from the GSIS at least to the extent of the government's interest. Private insurance firms, both domestic and foreign, regard this as a significant market access barrier. All reinsurance companies operating in the Philippines must cede to the industry-controlled National Reinsurance Corporation of the Philippines at least 10 percent of outward reinsurance placements.

### **Banking**

The Philippines applies restrictions on foreign participation in the banking sector in two tiers. Those foreign banks that meet specific requirements, such as diversified ownership, public listing in the country of origin, and global or national rankings, are limited to 60 percent equity of a locally-incorporated

banking subsidiary. However, those banks that do not meet the criteria, as well as non-bank investors, are subject to a lower 40 percent ownership ceiling.

Majority Philippine-owned domestic banks must control at least 70 percent of total banking system assets.

Foreign investments are limited to existing banks due to a central bank moratorium on the issuance of new bank licenses since 1999. Furthermore, foreign banks cannot open more than six branches. As an exception, the four foreign banks operating in the Philippines prior to 1948, which are partially exempt from this limitation, may operate up to six additional branches each.

Financial institutions must set aside loans for certain preferred sectors. The Agri-Agra Law requires banks to earmark at least 25 percent of their loan portfolios for agricultural credit, with at least 10 percent dedicated to agrarian reform program beneficiaries. The Magna Carta for Micro, Small and Medium Enterprises (MSMEs) requires banks to set aside at least 10 percent of their loan portfolios for MSME borrowers. These mandatory lending provisions are more burdensome on foreign banks for a number of reasons, including constrained branch networks and foreign land ownership restrictions that impede their ability to enforce rights over land accepted as collateral.

### **Securities and Other Financial Services**

Foreign equity in securities underwriting and finance companies is limited to 60 percent. With respect to mutual funds, all members of the board of directors must be Philippine citizens, although no foreign ownership restrictions apply. The 2007 Lending Company Regulation Act sets forth majority Philippine ownership for those few classes of credit enterprises not clearly under the scope of other laws.

### **Advertising**

The Philippine Constitution limits foreign ownership of advertising agencies to 30 percent. All executive and managing officers must be Philippine citizens.

### **Public Utilities**

The Philippine Constitution limits foreign investment in the operation and management of public utilities to 40 percent. Philippine law defines public utility to include a range of sectors including water and sewage treatment, electricity transmission and distribution (although, as mentioned earlier, not electricity generation), telecommunications, and transport. All executive and managing officers of such public utility companies must be Philippine citizens and foreign investors may serve on governing bodies only in proportion to their equity.

### **Professional Services**

The Philippine Constitution limits licensing for the practice of professions to Philippine citizens. Under Philippine law, the practice of professions is defined broadly to include law, medicine, nursing, accountancy, engineering, architecture, and customs brokerage.

### **Express Delivery Services**

Foreign equity participation in the domestic express delivery services sector is limited to 40 percent.

## **Retail Trade**

Philippine law restricts foreign investment in small retail ventures to Philippine nationals. Foreigners may own larger retail ventures subject to several requirements, including paid-up capital of \$2.5 million or more; an \$830,000 minimum investment per store; and parent company net worth of over \$200 million. In addition, the retailer must either own at least five retail stores elsewhere or have at least one outlet with capitalization of \$25 million or more. For retailers of high end or luxury products, the minimum investment in each retail store is \$250,000 and the net worth of the parent company must exceed \$50 million.

Foreign retailers are prohibited from engaging in trade outside their accredited stores, such as through the use of carts, sales representatives, or door-to-door selling. Retail enterprises with foreign ownership exceeding 80 percent of equity must offer at least 30 percent of their shares to local investors within eight years of the start of operations through public offering of stock.

## **Civil Aviation**

The Philippine government imposes the Common Carrier Tax and Gross Philippine Billing Tax on foreign airlines operating in the Philippines. The International Air Transportation Association (IATA) asserts that these taxes are discriminatory, are inconsistent with ICAO resolutions, and have contributed to the departure of some foreign carriers from the Philippine market. The Secretary of Tourism, who assumed office in July 2010, has publicly expressed support for the repeal of certain duplicative taxes on foreign airlines.

## **INVESTMENT BARRIERS**

Significant restrictions apply to foreign investment in the Philippines. The February 2010 updated Foreign Investment Negative List enumerates foreign investment restrictions in two parts -- restrictions mandated by the Constitution or specific laws (List A) and restrictions mandated for reasons of national security, defense, public health, safety, and morals (List B). Collectively, the list outlines sectors in which foreign investment is prohibited (*e.g.*, mass media, practice of professions, small-scale mining) or limited (*e.g.*, natural resource extraction, firearms, explosives). Foreign ownership also is limited to 40 percent in small- and medium-sized enterprises (SMEs) with less than \$200,000 in capital. If the SME activity involves advanced technology, or the company employs at least 50 direct employees, the 40 percent ownership restriction applies only to enterprises with \$100,000 capitalization or less.

The business community reports that a lack of transparency in regulations and laws also hinders foreign investment in the Philippines. For example, businesses report that their efforts to comply with taxation laws and regulations are frustrated by the lack of clarity and accessibility of tax information. The business community has also expressed concern about weak enforcement of anti-smuggling laws and regulations as an obstacle to investment.

The 1987 Philippine Constitution prohibits foreigners from owning land in the Philippines, but allows for the leasing of land for 50 years with one 25-year renewal. However, establishing clear ownership to lease land is complicated by an ambiguous deed and property system and inefficient judiciary, such that unresolved land disputes can extend for long periods of time. Some U.S. investors report that unresolved land disputes are a particularly significant barrier to investment in the mineral exploration and processing sector.

## **Trade Related Investment Measures**

The Board of Investments imposes a higher export performance requirement for foreign-owned enterprises (70 percent of production) than for Philippine-owned companies (50 percent). Some investors claim that the Philippine government maintains unwritten “trade balancing” requirements for firms applying for approval of ventures under the ASEAN Industrial Cooperation scheme.

## **OTHER BARRIERS**

Corruption is a pervasive and longstanding problem in the Philippines. Reports of corruption remain common. Foreign and domestic investors express concern over the propensity of Philippine courts and regulators to stray beyond matters of legal interpretation into policymaking and about the lack of transparency in these processes. There also are reports of courts being influenced by bribery and improperly issuing temporary restraining orders to impede legitimate commerce. President Benigno Aquino III, who assumed office in June 2010, ran on a platform of good governance and has vowed to address government corruption as a top priority of his administration.



# QATAR

## TRADE SUMMARY

The U.S. goods trade surplus with Qatar was \$2.7 billion in 2010, an increase of \$492 million from 2009. U.S. goods exports in 2010 were \$3.2 billion, up 16.6 percent from the previous year. Corresponding U.S. imports from Qatar were \$464 million, down 8.2 percent. Qatar is currently the 47th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Qatar was \$7.8 billion in 2007 (latest data available).

## IMPORT POLICIES

### Tariffs

As a member of the Gulf Cooperation Council (GCC), Qatar applies the GCC common external tariff of five percent for most products, with a limited number of GCC-approved country-specific exceptions. Qatar's exceptions include basic food products such as wheat, flour, rice, feed grains, and powdered milk. The tariff on alcoholic beverages and tobacco products is 100 percent. According to the WTO, Qatar's simple average applied tariff is 8.0 percent for agricultural goods and 4.6 percent for non-agricultural goods.

Qatar is not a signatory to the WTO Information Technology Agreement.

### Import Licensing

Qatar requires importers to have an import license for most products, and only issues import licenses to Qatari nationals. Only authorized local agents are allowed to import goods produced by the foreign firms they represent in the local market. However, this requirement may be waived if the local agent fails to provide the necessary spare parts and backup services for the product. Pork and pork derivatives may not be imported.

The government has on occasion established special import procedures via government-owned companies to help ease demand pressures. For example, in 2006, the government established the Qatar Raw Materials Company to import construction materials and sell them to companies in Qatar at a marginal markup (to cover its operating expenses).

### Documentation Requirements

To clear goods from customs zones at ports or land borders in Qatar, importers must submit a variety of documents, including a bill of lading, a certificate of origin, an invoice, and where applicable, an import license. The Qatari embassy, consulate, or chamber of commerce in the United States must authenticate all shipping documents, including the certificate of origin. Commercial consignments lacking a certificate of origin may be allowed, provided the appropriate documentation is submitted within 90 days of entry. In addition, foreign ratification fees are collected by customs officials. All imported beef and poultry products require a health certificate from the United States and a *Halal* slaughter certificate issued by an approved Islamic center in the United States.

In 2008, the Ministry of Business and Trade established a "one-stop shop" to handle all services and relevant documentation for foreign investors and importers present in Qatar. This office assigns a case



manager to each businessperson seeking to reside in Qatar to review, sign, and process the required materials for health and labor regulations, residency permits, and other documents. Qatari customs authorities have prepared a list of importers and exporters who have good records of compliance with customs regulations and are giving them priority in consignment clearance procedures, as of December 2010.

## **GOVERNMENT PROCUREMENT**

Qatar gives preferential treatment to suppliers that use local content in bids for government procurement. When competing for government contracts, tenders for goods with Qatari content are discounted by 10 percent and goods from other GCC countries receive a five percent discount. As a rule, participation in tenders with a value of one million Qatari Riyal (\$275,000) or less is confined to local contractors, suppliers, and merchants registered by the Qatar Chamber of Commerce. The Central Tender Committee posts details on tenders at <http://www.ctc.gov.qa/tender-en.aspx>.

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

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

As part of the GCC Customs Union, the six Member States are preparing a draft common trademark law, as well as a draft common unfair competition law to protect companies from unfair commercial use of undisclosed information submitted for marketing approval of pharmaceutical products. The United States is engaged in a dialogue with GCC technical experts to help ensure that the trademark law and unfair competition law will facilitate Member States' implementation of international and bilateral obligations.

## **SERVICES BARRIERS**

### **Agent and Distributor Rules**

Only Qatari nationals are allowed to serve as local agents, distributors, or sponsors. However, there are exceptions granted for 100 percent foreign-owned firms in the agriculture, industry, tourism, education and health sectors, and some Qatari ministries waive the local agent requirement for foreign companies that have contracts directly with the government of Qatar. The Qatar Distribution Company has the exclusive right to import and distribute alcohol.

## **INVESTMENT BARRIERS**

Foreign equity participation in most sectors of the Qatari economy is limited to 49 percent. The Organization of Foreign Capital Investment Law does allow 100 percent foreign ownership for projects in the agriculture, tourism, education, industry, health, and energy sectors, although prior government approval is required. Full foreign ownership is permitted in the insurance and banking sectors, provided the investment is approved by a decree from the Cabinet of Ministers. In October 2009, the Council of Ministers agreed to amendments to the Investment Law that would allow 100 percent foreign ownership in consultative and technical work services, the information and technology sector, and distribution services. Although an Amiri Decree has been issued, detailed regulations have yet to be finalized.

Foreign ownership of residential property is limited to select real estate projects. The Investment Law permits foreign investors to lease land for up to 50 years, although renewal requires government approval. Foreigners wishing to obtain residency permits require a local sponsor, except for those who own residential or business property in Cabinet-designated "investment areas."

# RUSSIA

## TRADE SUMMARY

The U.S. goods trade deficit with Russia was \$19.7 billion in 2010, up \$6.8 billion from 2009. U.S. goods exports in 2010 were \$6.0 billion, up 11.9 percent from the previous year. Corresponding U.S. imports from Russia were \$25.7 billion, up 41.1 percent. Russia is currently the 37th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Russia was \$21.3 billion in 2009 (latest data available), up from \$20.6 billion in 2008. U.S. FDI in Russia is led by the manufacturing and banking sectors.

## WTO Accession

With the entry into force on January 1, 2010 of the Russia-Kazakhstan-Belarus Customs Union (the Customs Union or CU), Russia turned its focus back to negotiating the terms of its accession to the World Trade Organization (WTO). Russia has completed bilateral market access negotiations with most interested WTO Members, including the United States. In 2010, Russia made significant progress on other issues in the accession negotiations by resolving most of the outstanding bilateral issues with the United States, EU, and other WTO Members, on the terms of its accession.

On the multilateral front, Russia and WTO Members have focused on revising the draft Working Party Report to reflect changes to Russia's trade regime resulting from the introduction of the CU. In the accession negotiations, Russia has made commitments on critical issues such as intellectual property rights (IPR) protection, the levels of certain export duties, and whether Russia's state-owned enterprises would operate on a commercial basis. Discussions are continuing on the adoption and application of sanitary and phytosanitary measures, agriculture (including domestic support levels), rules for requiring import licenses for products with encryption technology and other issues related to how Russia will comply with WTO rules. In addition, Russia's services and goods market access commitments from all 60 of its bilateral agreements must be combined to reflect the best terms for access negotiated by any individual Member with Russia. Finally, Russia must resolve its pending bilateral issues with Georgia.

## IMPORT POLICIES

On January 1, 2010, the Customs Union adopted a common external tariff (CET) with the majority of the tariff rates established at Russia's applied rates and on July 1, 2010, a common CU Customs Code entered into effect. As a consequence, Russia's import tariff levels, non-tariff import measures (*e.g.*, tariff-rate quotas, import licensing and trade remedy procedures) and customs policies (*e.g.*, customs valuation and country of origin determinations) are determined at the CU rather than the national level. On these issues, CU Agreements and CU Commission Decisions establish the basic principles that are then implemented at the national level through domestic laws, regulations and other measures. Customs Union agreements and CU Commission Decisions also cover issues such as border enforcement of intellectual property rights, development of technical regulations and sanitary and phytosanitary measures.

Although the three governments had announced that internal customs barriers between Russia and Belarus would be eliminated by July 1, 2010, this step has not occurred. Internal customs barriers between Russia and Kazakhstan are scheduled to be eliminated as of July 1, 2011.

Russia continues to maintain a number of import restrictions, such as customs charges and fees that exceed the cost of the service provided, and valuation procedures that result in artificially high total tariff charges. Compliance with licensing, registration, and certification regimes is burdensome. Discussions continue on eliminating these and other measures, or modifying them so that they are consistent with WTO requirements and other internationally accepted practices.

### **Tariff-Rate Quotas**

Russia's WTO bilateral market access agreement with the United States sets out a framework, including a time schedule, for negotiations on how meat and poultry goods will be treated up to and after 2009. On December 16, 2009, Russia extended its quota regime through 2012, with significantly reduced in-quota market access for poultry and pork, and a slight increase for beef. The CU now has responsibility for determining the overall TRQ volume for a product and its allocation among the three CU Parties. On November 18, 2010, the CU Commission announced new TRQs for 2011. While the scope of Russia's global poultry TRQ was narrowed by the exclusion of certain tariff lines, the in-quota level was reduced by approximately 40 percent and country-specific allocations were eliminated. Russia retained country specific TRQ allocations for beef, pork and pork trimmings. Russia's frozen beef in-quota allocation for the United States was increased and the in-quota allocation for fresh beef, pork, and pork trimmings was left unchanged.

### **Import and Activity Licenses**

Import licenses and/or activity licenses to engage in wholesaling and manufacturing activities are necessary for the importation of certain products, including alcoholic beverages, pharmaceuticals, products with encryption technology, explosive substances, narcotics, nuclear substances, equipment to be used at nuclear installations and corresponding services, hazardous wastes (including radioactive waste), and some food products (*e.g.*, unprocessed products of animal origin).

Currently, in order to obtain a license to import alcohol or alcoholic products into the Russian Federation, an importer must also obtain an activity license to warehouse and distribute alcohol and alcoholic products even though those activities are not related to importation. In addition, Russia has adopted new technical regulations governing warehousing of alcoholic products. U.S. industry representatives have voiced concerns that enforcement of these new regulations, combined with the Federal Service for Regulation of the Alcohol Market's (FSR) refusal to accept license renewal applications more than 18 calendar days prior to the expiration of the activity license, will result in the expiration or revocation of many activity licenses, rendering any inventory in Russia illegal. According to industry representatives, the FSR's refusal to renew activity licenses in advance of their expiration increases the burden on importers. Even if a renewal is granted within the 18 days, the importer must then apply for an import license from the Ministry of Industry and Trade, acquire excise stamps from the Federal Customs Service, and secure the bank guarantee before importation can occur, leading to the possibility of significant disruptions in supply. Furthermore, pursuant to the new CU licensing regime, importers must obtain an import license for each type of alcoholic product (a requirement previously applied only to imports of vodka, tequila, grappa, and pure ethyl alcohol) under a burdensome and time-consuming process. Cumulatively, U.S. industry estimates that Russia's regulations on importation of alcoholic products have a negative effect of up to \$10 million annually on U.S. exports.

In 2010, the Customs Union issued regulations on the importation of products with encryption technology. Under CU regulations, Russia requires that any product containing high levels of encryption technology be tested and approved by Russia's Federal Security Service before it can be licensed for importation into Russia. This process can often take six months or longer to complete. Products with "low encryption" may be imported after a one-time notification is processed, which is typically completed

in 10 days. Under the CU's narrow definition of "low encryption," however, many mass market items whose cryptographic capabilities cannot be changed by the user fall under the more burdensome licensing procedures. In a November 2006 bilateral agreement, the Russian government agreed to establish a streamlined system for the importation of goods containing encryption technology through the implementation of transparent, nondiscriminatory procedures. Among other elements, the Russian government agreed to allow the importation of many commercially traded goods containing encryption technology after a one-time notification – including, specifically, "mass market" goods -- or in some cases, with the application of no licensing or notification requirements at all. The CU regulations, however, only partially implement these commitments. Leading U.S. technology companies contend that the current system impedes imports, delays the creation of an innovative and knowledge-based economy in Russia, and hampers the further development of research and development centers in Russia. The United States continues to work actively with the Russian government on its import licensing barriers for goods containing encryption technology in order to ensure the full implementation of the terms of the bilateral agreement. (*Additional information on electronic commerce barriers is reported below.*)

### **Customs Issues, Taxes, and Tariffs**

As noted above, on January 1, 2010, Russia, Kazakhstan and Belarus adopted a CET. In 2009, Russia's average "most favored nation" applied tariff rate was 10.5 percent. More specifically, agricultural exports to Russia faced an average applied tariff of 13.2 percent, while industrial exports to Russia faced an average applied rate of 10.1 percent. Import tariffs on automobiles and agricultural and construction equipment continued to present particular obstacles to U.S. exports to Russia in 2010.

In 2009, Russia increased import tariffs in various key areas to protect domestic industries, often citing the global economic crisis as justification. With the adoption of the CU CET on January 1, 2010, Russia made many of those "temporary" duties (*e.g.*, tariffs on automobiles, trucks, combine harvesters, soy meal, selected dairy products, and some construction equipment) permanent. With the adoption of the CET, Russia can no longer unilaterally change tariff rates, but rather must submit proposed import tariff changes for approval by the CU Commission. In 2010, the Customs Union decided to increase tariffs on polycarbonates, dairy items, tropical oils, plastic items, used and recapped tires, wine material, agricultural machines and equipment for ports, and decrease tariffs on paper and paperboard, inputs for production of solar modules, wood sheets for veneering, wolfram and cermet waste and scrap, wine material in bulk, equipment for ports (*e.g.*, cranes and supports), and leased aircraft. Because of a drought in Russia in 2010, the Customs Union Commission suspended import duties for six months on potatoes (normally between five percent and 15 percent), cabbage (normally at 15 percent) and buckwheat (normally at five percent).

Excise taxes apply to a number of "luxury" goods, such as liquor and cigarettes, as well as passenger automobiles. Excise tax rates for alcoholic beverages are increasing significantly: in 2010, excise tax rates rose 10 percent on spirits of more than 9 percent ethyl alcohol; Russia plans to increase those rates by an additional 10 percent in 2011. For spirits of 9 percent and less ethyl alcohol, excise tax rates increased 30.5 percent in 2010 and are scheduled to rise another 20 percent in 2011. The excise tax rates in 2010 for table wine, sparkling wine, and beer rose 34.6 percent, 33.3 percent, and 200 percent, respectively. In 2011, they will increase a further 42.8 percent, 28.6 percent, and 11.1 percent, respectively.

Customs authorities in Russia continue to assess duties on the royalty amounts for the domestic use of imported audiovisual materials, such as television master tapes. U.S. industry has complained that this practice represents a form of double taxation, since royalties are also subject to withholding, income, value added, and remittance taxes. U.S. consumer goods companies have also reported that Russian Customs calculates customs duties based on a value that includes royalty payments made by the

companies' Russian subsidiaries to their overseas parent companies for the use of parent company-owned product trademarks. U.S. companies are disputing these assessments.

Throughout 2010, Russian importers of some U.S. food products reported that Russian customs officials were challenging declared import values, particularly of commodity products for which world prices had recently declined. Instead, customs officials used reference prices, resulting in higher import values, and hence higher duty payments. Initially, Russian customs officials requested additional documentation in order to substantiate the declared value, but the requested documents were often unrelated to the specific commercial transaction at issue, as required under Russian law. Consequently, U.S. firms have been disadvantaged as Russian importers have often shifted to third-country suppliers who would provide the requested documents supporting the declared value. Some U.S. companies are challenging these assessments. In addition, U.S. Government officials have raised concerns about these inconsistent valuation practices with Russian Customs.

U.S. industry also reports that Russia does not publish all regulations, judicial decisions, and administrative rulings of general application to customs matters. In addition, U.S. exporters report that customs enforcement varies by region and port of entry, and that frequent changes in regulations are unpredictable, adding to costs and delays at the border.

U.S. companies continue to face a wide array of nontariff trade barriers when exporting to Russia. Nontariff barriers are a topic of detailed discussions in Russia's WTO accession negotiations and in bilateral United States–Russia discussions.

### **Pharmaceuticals**

As Russia prepares to develop its own innovative pharmaceutical industry, major market access barriers remain. Senior Russian government officials have repeatedly stated that they would like to see more local production of pharmaceuticals, including with foreign active ingredients and formulations. The government's long-term pharmaceutical industry development plan calls for Russian manufacturers to account for at least 50 percent of total sales (based on value) by 2020. On September 28, 2010, Russia passed amendments to the Law on the Circulation of Medicines that provide six years of regulatory data protection, which will enter into effect when Russia becomes a WTO member.

### **Alcohol**

Importers of alcohol face a variety of regulatory measures. There was significant confusion and market disruption in the beginning of 2010 as a result of the new CU regulations that required an import license for all imports of alcohol (by contrast, Russia had previously required an import license only for "white spirits"), and many importers were unable to obtain import licenses. Although General Import Licenses were eventually issued, allowing the resumption of imports, the broader array of products subject to import licensing is yet another barrier to exporting these products to Russia. Another long-standing challenge faced by importers is the requirement that all customs duties, excise taxes, and VAT on alcohol be paid in advance using a bank guarantee and deposit. Because the actual amount of the duties and fees may not be known when the guarantees are obtained, the government of Russia has established fixed guarantee amounts. On occasion, these amounts exceed the final actual amounts due, especially for lower value products. In addition, industry has reported that refunds of these guarantees are sometimes delayed for as long as seven months. The advance payment requirement for duties and taxes, and the length of time the bank guarantee refund is held open, may limit trade volumes due to the amount of money that must be dedicated to these guarantees.

## **EXPORT POLICIES**

Although Russia has eliminated export duties on a few products, it maintains export duties on 386 types of products for both revenue and policy purposes. For example, a variety of agricultural products are subject to export tariffs, such as certain fish products, oilseeds, fertilizers, and wood products. Russia has indicated that it intends to eliminate gradually most of these duties, except for products deemed as strategic, such as hydrocarbons and scrap metals. In November 2010, Russia restored a 10 percent export duty on exports of copper cathode, having lifted it in 2009, claiming the need to protect its downstream users of copper cathode (primarily copper rod and wire producers). Russia also increased the export duty on nickel from five percent to 10 percent in November 2010. Historically, Russia's government has established high export duties on crude oil to encourage domestic refining. However, priority fields in Eastern Siberia and the Caspian Sea enjoy a significant discount on the crude oil export duty. Ongoing discussions within the government may lead to a decrease in the gap between crude oil and refined product export duties in 2011.

Over the last three years, Russia's government has been pursuing a policy of raising export tariffs on coniferous logs and round wood in order to stimulate the development of a domestic wood processing industry and to encourage the export of sawn lumber and value added wood products. At the end of 2010, following intense negotiations with the EU, Russia agreed to postpone through 2011 a planned increase in export duties on raw timber (of special interest to Finland) from the current rate of 25 percent to 80 percent, and agreed to reduce its export duties on timber to levels between 5 percent and 15 percent, depending on the type of timber, upon accession to the WTO.

Severe drought and wild fires led to extensive crop damage in 2010, and on August 15, 2010, the government instituted a ban on all grain and flour exports through January 1, 2011. As traders refused to release their grain at below world prices, Russia extended the ban on grain (but not flour) to July 2011 and has suggested that the ban could last longer.

Russia also has burdensome procedures for obtaining export certificates for some items, including samples collected during research expeditions and raw data. Additionally, Russia has strict licenses to control the export of cultural goods, as well as precious stones and metals.

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

Russia was listed on the Priority Watch List in the 2010 Special 301 Report. Key concerns cited in the Report included Russia's slow implementation of some of its commitments in the November 2006 Agreement between the Government of the United States of America and the government of the Russian Federation on Protection and Enforcement of Intellectual Property Rights (2006 IPR Agreement). In 2010, Russia implemented the legislative commitments in the 2006 IPR Agreement by passing amendments to Russia's IP law – Part IV of the Civil Code – required to implement the TRIPS agreement. These legislative changes included *ex-officio* authority for Russian customs officials to enforce IPRs at the border in the new Law on Customs Regulation, and (as noted earlier) amending the Law on Circulation of Medicines to provide six years of regulatory data protection, which will become effective when Russia is a WTO Member. In the context of the Custom Union, Russia signed a CU agreement authorizing the creation of a Unified Customs Union IPR Register. The agreement establishes the procedure for registering an IP as well as a framework for the customs authorities of each of the CU Parties to cooperate with each other and with rights holders on border enforcement.

Notwithstanding this progress, concerns remain over lack of action regarding the enforcement-related commitments in the 2006 Agreement, in particular the need for such actions as the imposition of criminal penalties to deter piracy and counterfeiting and increased Internet-related IPR enforcement. While Russia

met its 2006 IPR Agreement commitment to establish an accredited collecting society for the Performers and Phonograms category in 2008, U.S. industry has raised concerns regarding the transparency of how royalties are collected and distributed. The U.S. and Russian governments have an ongoing dialogue to obtain the full implementation of this agreement and to help ensure that Russia's legislation is consistent with international norms.

In 2010, Russia's optical disc production capacity continued to exceed domestic demand, raising concerns regarding optical disc piracy. U.S. copyright industries estimate that approximately 65 percent of sound recordings on the Russian market are pirated, resulting in reported losses of nearly \$2 billion in 2009. However, legitimate DVD sales are on the rise, in part due to increased law enforcement action against pirates, including a 2008 ban on camcording in movie theaters, and a growing preference for high quality products. Within the copyright industry, the software sector has enjoyed the benefits of increased enforcement. The Business Software Alliance estimated that from 2004 to 2009 the software piracy rate decreased in Russia from 87 percent to 67 percent, the steepest drop in that time period for any country in the world.

Internet piracy remains a serious and growing concern. Authorities have begun criminal investigations against operators of Russia-based websites. Notably, Russia opened a criminal case against the administrators of interfilm.ru, a website offering pirated copies of movies before or immediately after they open in Russian theaters. Government investigators involved in the case estimate that the site had caused approximately 38.7 billion rubles (\$1.25 billion) in damages. Western and Russian recording companies have won several civil suits against Internet pirates, although resulting damage awards have been minimal by U.S. standards. Gaps remain in Russian legal and enforcement efforts to address Internet piracy, particularly with respect to sound recordings and movies.

U.S. and multinational companies continue to report counterfeiting of trademarked goods, especially of consumer goods, distilled spirits, agricultural chemicals and biotechnology, and pharmaceuticals. While in the past U.S. firms complained about "trademark squatting" by Russian enterprises attempting to appropriate well-known trademarks not active or registered in Russia, rights holders have been increasingly successful in countering "trademark squatting" schemes through the Russian court system or the Russian Federal Service for Intellectual Property, Patents, and Trademarks (Rospatent). In an effort to advance administrative intellectual property protection, a specialized higher patent chamber at Rospatent has brought greater expertise and efficiency to the adjudication of patent and trademark disputes.

## **Enforcement**

Poor enforcement of IPR in the Russian Federation is a pervasive problem. In the November 2006 IPR Agreement, Russia agreed to improve IPR enforcement while the United States agreed to step up IPR training programs and technical assistance for Russian customs and law enforcement officials. In 2009, the U.S. Patent and Trademark Office conducted seven IPR training programs for Russian police, investigators, prosecutors, judges, and customs officials, and in total trained 286 Russian law enforcement officials. Russian Customs has drafted an "IPR Enforcement Handbook", which will be used by all Russian Federal Customs Service (RFCS) officers. With the passage of the new Law on Customs Regulation, this handbook is now out-of-date, but Russia's customs service may provide a "new edition" of the handbook or issue new guidelines for rights holders in the future. Additional training programs are planned for 2011.

In 2010, Russian law enforcement agencies carried out raids on optical disc production facilities suspected of engaging in pirate activities, including major raids in Moscow and surrounding regions. However, most surprise raids are less effective as the date and time of pending raids are often leaked to the optical disc plant in advance. Russian police continue to carry out end-user raids against businesses

using pirated products. Non-governmental organizations report that police have used IPR enforcement as a bullying tactic to elicit bribes or harass them. For the copyright industry, key enforcement goals include the introduction and enforcement of Internet Service Provider liability in Russia, improved oversight and transparency of collecting societies, cracking down on illegal websites, such as allofmp3 clones, and enhancing measures against online social networks, such as vKontakte, that facilitate internet piracy.

The Supreme Arbitration Court has addressed the issue of civil IPR enforcement by submitting to the Duma a draft law that would create a specialized intellectual property rights court. If approved, the first-ever specialized IPR court would start its work by 2012. The creation of a specialized IPR court would have a positive impact on civil IPR enforcement in Russia. The court's judges would come from within the arbitration courts system and have expertise in intellectual property rights cases.

### **Domain Names**

The Russian Coordinating Center of the National Internet Domain (the Coordination Center) issued a regulation, "Provisions on Priority Registration of Domain Names in the PΦ Domain," that stipulates that domain names must either reproduce or match word designations contained in trademarks. Trademark owners with a ".RU" (Russia) domain name can keep the ".RU," but now have the option of obtaining a ".PΦ" (RF) as well. These .PΦ domain names may be registered for a fee of approximately \$20 for a one-year period, with the possibility of subsequent renewal of the domain name's registration annually. While in practice trademark holders are given priority in registering domain names that are similar to their particular trademark, there is still a potential issue with cyber squatting. The Coordination Center did not specify that domain names derived from the trademark holders would be protected.

On November 11, 2010, the second stage of the registration for Cyrillic domain names began. On that day, the Coordination Center registered 184,352 addresses for the general public. Any individual or legal entity registered in the Russian Federation can obtain a domain name through the registration process at the cost of approximately \$20. Previously, priority registration for the Cyrillic domain name zone began in November 2009 for government entities and trademark holders. Only Russian citizens and businesses registered in the country are able to buy domain names. The .PΦ domain has over 500,000 registered addresses. In December, 2010, the Russian government issued a clarification on the auction provision for domain names, suspending the auction for previously unclaimed names until further notice. The issue is still evolving.

### **SERVICES BARRIERS**

Russia's services market is relatively open to U.S. services suppliers, including in areas such as financial services, education, legal services, and distribution, although specific problems remain in particular areas. The ability to provide services to public utilities and certain energy-related services (*see discussion on energy in the section on Investment Barriers*) remains limited. The process for an individual or a company to obtain a license to provide a service remains difficult, and limitations on the form of commercial establishment affect some sectors.

#### **Financial Services and Insurance**

The 1996 federal law "On Banks and Banking Activity" permits foreign banks to establish subsidiaries in Russia. However, Russia does not allow foreign banks to establish branches in Russia. While there is no cap on foreign charter capital in the banking sector, in the insurance sector, foreign insurance firms are subject to a 49 percent equity limitation.



## **Telecommunications**

Many in the industry continue to criticize the lack of transparency in the licensing process in Russia, as well as the five-year to ten-year license validity period, which they argue does not allow them sufficient time to recoup their investment. The scarcity of civilian frequencies has led to competition among Russian mobile operators and impeded the development of new wireless networks in Russia, such as 4G and WiMAX. (Only about 5 percent of Russia's assigned communication frequencies are used for civilian purposes, while 95 percent are reserved for military use.) The government of Russia's efforts to free up and allocate spectrum in order to spur the development of advanced telecommunications are in their initial stages and proceeding slowly. Although Rostelecom initially won 39 of the 40 licenses for frequencies at 2.3 - 2.4 GHz in February and March 2010, in November, 2010, the Ministry of Defense (MOD) blocked the assignment of those frequencies to Rostelecom. Separately, in summer 2010, the government of Russia reportedly intended to award further 2.3-2.4 GHz and 2.5-2.7 GHz frequencies to companies affiliated with the Defense Ministry and Rostelecom. However, the three main incumbent operators (Megafon, MTS and Vimplecom) petitioned Prime Minister Putin in July 2010 to ensure transparency in the allocation of 4G frequencies, leading to postponement of further 4G allocations. Given the lack of an independent telecommunications regulator in Russia, existing private mobile players will face challenges in obtaining spectrum, while companies affiliated with the government are likely to receive preferential treatment. The timeline and process for allocation of 4G mobile spectrum in Russia remain unclear.

In May 2010, Russia issued Directive No. 858 tasking Russia's Ministry of Industry and Trade with developing parameters for telecommunications equipment to ensure that all telecommunications equipment was manufactured within the territory of Russia. Such mandates are consistent with Russia's broad industrial policy of requiring companies to localize their production and use local suppliers. Currently, the amount of Russian-produced telecommunication equipment is quite limited.

U.S. industry reports that certification of new products in the telecommunications industry still suffers from a lack of transparency. Companies in the satellite industry indicate that the lack of transparency also applies to the licensing process for obtaining access to a foreign satellite and that the process itself is overly burdensome. Further, they claim that some of the legal requirements and administrative responsibilities associated with the provision of satellite services appear to be discriminatory, with the Russian government granting a preference for Russian satellite communications systems.

In order to promote GLONASS, the Russian satellite system, the government of Russia is considering a 25 percent import tariff on equipment that has the capability to receive signal from only the U.S.-developed Global Positioning System (GPS), while imported dual GPS/GLONASS receivers would enter with no tariff. The Russian government also plans to mandate that domestic automakers equip their products with GLONASS-based emergency response systems. Additionally, according to the technical regulation on vehicle safety that came into force on September 23, 2010, the design specifications of all special-purpose vehicles (*e.g.*, buses, carriers of dangerous materials) should allow for installation of GLONASS or GLONASS/GPS navigation systems.

## **INVESTMENT BARRIERS**

Russia's foreign investment regulations and notification requirements can be confusing and contradictory, which has an adverse effect on foreign investment. The Russian government has made improving Russia's investment climate a priority, and in August 2010, Deputy Prime Minister Shuvalov was appointed as the country's first investment ombudsman. However, U.S. investors and others continue to cite corruption in commercial and bureaucratic transactions as a barrier to investment. President Medvedev's vow to tackle corruption in Russia included the creation of an Anti-Corruption Council in the

summer of 2008 and an anti-corruption legislation package, which was promulgated in December 2008. However, little progress has been made on implementation.

Telecommunications and media services companies report specific investment restrictions. Russian entities with more than 50 percent foreign ownership are prohibited from sponsoring television and video programs or from establishing television organizations capable of being received in more than 50 percent of Russia's territory or by more than 50 percent of the population. Even tighter investment restrictions have recently been imposed on security firms. As of January 1, 2010, the Law on Private Detective and Security Activities in the Russian Federation prohibits the participation of any foreign capital in a private security operation.

Further obstacles to investment in Russia include inadequate dispute resolution mechanisms, weak protection of minority stockholder rights, the absence of requirements for all companies and banks to adhere to accounting standards consistent with international norms, and the failure of some companies to adopt and adhere to business codes of conduct. Initiatives to address these shortcomings, either through regulation, administrative reform, or government-sponsored voluntary codes of conduct, have made little progress. In July 2010, Russia passed the Law on Consolidated Financial Accounting which requires that, as of 2011, credit, insurance organizations, and other publicly traded companies should prepare their consolidated financial accounting in accordance with international financial reporting standards (IFRS). Effective implementation and enforcement of the law may be undermined, however, by the absence of the necessary by-laws and Russian regulations, in particular, on the recognition of the IFRS and their application in Russia. Inadequate transparency in the implementation of customs, taxation, licensing, and other administrative regulations also discourages investment.

### **National Treatment**

The 1999 Investment Law codifies principles of national treatment for foreign investors, including the right to purchase securities, transfer property rights, pursue rights in Russian courts, repatriate funds abroad after payment of duties and taxes, and receive compensation for nationalizations or illegal acts of Russian government bodies. However, the law goes on to state that federal law may provide for a number of exceptions, including, where necessary, "the protection of the constitution, public morals and health, and the rights and lawful interest of other persons and the defense of the state." These broadly defined exceptions give the Russian government considerable discretion in prohibiting or inhibiting foreign investment in a discriminatory fashion. The 1999 Investment Law includes a "grandfather clause" that stipulates that existing (as of 1999) "priority" foreign investment projects with foreign participation of over 25 percent be protected from unforeseeable changes in the tax regime or new limitations on foreign investment. The law defines "priority" projects as those with a foreign charter capital of more than \$4.1 million and with a total investment of more than \$41 million. However, the lack of corresponding tax and customs regulations means that any protection afforded investors by this clause is only theoretical.

The government enacted the Strategic Sectors Law (SSL) in May 2008. The SSL introduces a list of 42 "strategic" sectors in which purchases of "controlling interests" by foreign investors must be preapproved by the Russian government. Many observers, while welcoming more clarity on the rules, have criticized the SSL for being overly broad in the number of sectors it covers, and raised concerns regarding the approval process. During 2010, Russian government officials, including Prime Minister Putin, called for further liberalization and streamlining of the law. The Federal Antimonopoly Service has already submitted to the Cabinet several proposed amendments, which will soon be sent to the State Duma for approval.

In addition, the government is pursuing steps to privatize state assets, both to increase market forces in the economy and to raise revenue for the federal budget. In June 2010, President Medvedev signed a decree

reducing the number of “strategic” companies from 438 to 200, with a view to selling government shares in the firms removed from this list. On October 17, the Cabinet approved its 2011-2013 Privatization Plan, paving the way for an estimated sell-off of nearly \$60 billion of stakes in more than 850 enterprises. The government of Russia will retain controlling stakes, however, in major Russian companies such as Rosneft, Russia Railways, and banking giants Sberbank and VTB.

To date, the Government Commission on Control of Foreign Investment in the Russian Federation has received around 100 applications for foreign investment, reviewed dozens and disapproved two applications. However, the majority of the approved transactions actually involved Russian investors as many of them are structured using foreign offshore holding companies. Public information was available on the following foreign companies that received approval under the SSL: Coca-Cola and French Danone (food manufacturing); Germany’s Fraport AG (operator of Frankfurt’s airport, for purchase of St. Petersburg’s Pulkovo Airport); Bulgarian Aviation Group (for purchase of Kazan’s airport); France’s Sanofi-Aventis (pharmaceuticals); South African DeBeers (diamond mining, but the deal fell through because of the financial crisis); Italian Alenia Aeronautica (development of Sukhoi Superjet 100); Canadian Barrick Gold and Kinross Gold Corp., and Kazakh Gold (gold mining); and Khartron, which is controlled by the Ukrainian government (space cooperation).

## **Taxes**

From 2002 through 2008, the corporate profits tax was 24 percent, 11 percentage points higher than Russia’s flat 13 percent tax on personal income. However, in late 2008, as an economic stimulus measure, Russia reduced the corporate profits tax rate to 20 percent, effective January 1, 2009. In 2010 Russia decreased the social payments tax for information technology companies from 26 percent to 14 percent. For companies in other sectors, the social payments tax will increase in 2011 from 26 percent to 34 percent. President Medvedev announced in November 2010, however, that the social payments tax should remain at 26 percent for small and medium enterprises in the manufacturing and social sectors for the next two years.

Companies report that VAT refunds to Russia-based exporters, which should be provided within three months after a claim is submitted, often do not occur on time, with customs and tax authorities applying a number of burdensome additional requirements. In addition, leasing companies find that VAT assessed on inputs to exported final products is often not refunded at all, for a number of reasons. In some cases, local tax inspectorates have initiated audits and attempted to seize bank accounts of the leasing companies, thus forcing exporters to seek very expensive and time consuming court enforcement. In fact, anecdotal reports from a variety of Russian and U.S. companies indicate that in many cases, companies have to resort to court action to receive their VAT reimbursements. In addition, during the course of their audits, Federal Tax Service officials now have the authority to confiscate improperly disbursed VAT refunds, with penalties. VAT refunds on exports are also the source of significant fraud, making it even more difficult for legitimate exporters to obtain refunds.

U.S. companies have also raised concerns about Russian tax authorities’ scrutiny of payments that cross Russia’s border, but remain within the structure of the same legal entity. This tax issue has arisen chiefly in two contexts: (1) when a multinational company transfers an employee temporarily to the company’s Russian office from another office outside Russia; and (2) in intra-company payments for the use of intellectual property. Under internationally accepted accounting standards, these normal business practices are handled as an intra-firm payment from one office to the other, or to the headquarters in the case of royalty payments. However, tax inspectors have often disputed such expenses as “economically unjustified” and, consequently, not permissible under the Russian Tax Code. While foreign firms with Russian operations have been careful to ensure that their accounting methods are consistent with the

Russian Tax Code, several foreign firms have been subjected to audits and claims for back taxes in these situations.

### **Energy Sector**

The Strategic Sectors Law and Russian subsoil legislation require government approval for foreign investment in excess of 10 percent in companies operating subsoil plots of “federal significance”, as well as for foreign investment in excess of five percent if the target company is state-owned. “Federal significance” is defined as oil fields with 510 million barrels or more of reserves and natural gas fields with 1.8 trillion cubic feet or more.

In addition, subsoil legislation limits the licensing of strategic fields located on the continental shelf to Russian legal entities at least 50 percent controlled by the government with at least five years of experience in the development of fields on the continental shelf. In November, the Ministry of Natural Resources announced plans to reduce the prior experience requirement for licenses on the continental shelf. Foreign companies may participate in shelf projects as a minority partner.

### **ELECTRONIC COMMERCE**

Electronic commerce is growing rapidly in Russia, and was estimated at \$20 billion in 2010. The volume of online commerce is expected to exceed \$25 billion by 2012. Russia’s law currently does not provide identical legal status to both electronic and paper documents. Because of this discrepancy, electronic settlement of outstanding charges is problematic, and currency control provisions may apply when paying in a currency other than the ruble. The tax aspects of electronic commerce are virtually unexplored, and this area of the law is still developing.

Russia’s Law on Electronic Digital Signatures went into effect on January 14, 2002. This law does not follow the Model Law on Electronic Signatures of the U.N. Commission on International Trade Law, but rather defines electronic signatures narrowly, making public-key technology the sole acceptable digital signature technology. It also requires that hardware and software used in digital signature authentication programs be certified in Russia. This requirement gives the Russian government the right to insist on the decompilation of electronic signature programs. The requirements contained in Russia’s digital signature law, as well as the licensing requirements related to goods with encryption technology, impede trade in goods that could be used to further electronic commerce in Russia.



# SAUDI ARABIA

## TRADE SUMMARY

The U.S. goods trade deficit with Saudi Arabia was \$19.8 billion in 2010, up \$8.6 billion from 2009. U.S. goods exports in 2010 were \$11.6 billion, up 7.4 percent from the previous year. Corresponding U.S. imports from Saudi Arabia were \$31.4 billion, up 42.5 percent. Saudi Arabia is currently the 22nd largest export market for U.S. goods.

U.S. exports of private commercial services (i.e., excluding military and government) to Saudi Arabia were \$4.0 billion in 2009 (latest data available), and U.S. imports were \$503 million. Sales of services in Saudi Arabia by majority U.S.-owned affiliates were not available in 2008 (\$1.5 billion in 2007, latest data available), while sales of services in the United States by majority Saudi Arabia-owned firms were \$5.3 billion.

The stock of U.S. foreign direct investment (FDI) in Saudi Arabia was \$8.1 billion in 2009 (latest data available), up from \$5.2 billion in 2008. U.S. FDI in Saudi Arabia is concentrated mostly in the nonbank holding companies sector.

## IMPORT POLICIES

### Tariffs

As a member of the Gulf Cooperation Council (GCC), Saudi Arabia applies the GCC common external tariff of five percent for most products, with a limited number of GCC-approved country specific exceptions. Saudi Arabia's exceptions include 666 products that may be imported duty-free, including aircraft and most livestock. Saudi Arabia applies a 12 percent tariff on 294 products, in some cases to protect local industries. Certain textile imports are among the products to which the 12 percent rate applies.

The vast majority of food products are subject to a five percent import duty. However, selected processed food products are assessed higher import duties. Saudi Arabia ties import duties to the level of local production of similar products. As a general rule, a maximum import tariff rate of 40 percent is applied when local production of a food or agricultural product exceeds a self-sufficiency level. Currently, a 40 percent import duty rate applies to fresh, dried, and processed dates. Imports of rice, baby milk, and animal feed are subsidized while coffee, tea, and fresh red meat enter the country duty free.

Confectionary products with cocoa and other bulk cocoa products are subject to a 15 percent tariff. Nine types of fresh or chilled vegetables (tomatoes, onions, carrots, cucumbers, marrow, okra, watermelons, melons, and potatoes) are subject to a 25 percent tariff on a seasonal basis. Saudi Arabia also imposes a 100 percent tariff on cigarette and other tobacco imports. According to the WTO, Saudi Arabia's simple average applied tariff is 5.9 percent for agricultural goods and 4.7 percent for non-agricultural goods.

### Import Prohibitions and Licensing

In Saudi Arabia, the importation of certain articles is either prohibited or requires special approval from the appropriate authorities. The importation of alcohol, firearms, pork products, and used clothing is prohibited. Imports of certain products, including agriculture seeds, live animals, books, periodicals, audio or visual media, religious materials that do not adhere to the state-sanctioned version of Islam or that relate to a religion other than Islam, chemicals and harmful materials, pharmaceutical products,

wireless equipment, horses, radio-controlled model airplanes, products containing alcohol, natural asphalt, and archaeological artifacts require special approval. Importation of some media products is subject to censorship.

### **Documentation Requirements**

Some products, most notably agricultural biotechnology products, require a certificate authenticated by the local chamber of commerce in the country of origin attesting to the product's fitness for human consumption and to its sale in the country of origin.

## **GOVERNMENT PROCUREMENT**

Several royal decrees apply to Saudi Arabia's government procurement. Under a 1983 decree, contractors must subcontract 30 percent of the value of any government contract, including support services, to firms that are majority-owned by Saudi nationals. An exemption is granted when no Saudi-owned company can provide the goods and services necessary to fulfill the procurement requirement. Procurement regulations require preferential treatment for products of Saudi origin that satisfy the requirements of the procurement. In addition, Saudi Arabia gives priority in government purchasing to GCC products. These items receive up to a 10 percent price preference over non-GCC products in all government procurements in which foreign suppliers participate. Most Saudi defense contracts are not subject to the general procurement decrees and regulations; instead, they are negotiated on a case-by-case basis.

Foreign suppliers that participate in government procurement are required to establish a training program for Saudi nationals. In addition, the government may favor joint venture companies with a Saudi partner and gives preference to companies that use Saudi goods and services. For large military projects, there is frequently an offset requirement, which is determined on a project-by-project basis.

Foreign companies can provide services to the Saudi government directly without a local agent and can market their services to other public entities through an office that has been granted temporary registration. Foreign suppliers working only for the government, if not already registered to do business in Saudi Arabia, are required to obtain a temporary registration from the Ministry of Commerce and Industry within 30 days of signing a contract.

In 2003, the Saudi Council of Ministers required increased transparency in government procurement. The procurement information to be made public must include the names of the parties, financial value, a brief description, duration, place of execution, and a point of contact.

In its accession to the WTO, Saudi Arabia committed to initiate negotiations for accession to the Agreement on Government Procurement (GPA) when it became a WTO Member. Although Saudi Arabia became an observer to the WTO Committee on Government Procurement in December 2007, it has not yet begun GPA accession negotiations. However, in August 2006, Saudi Arabia published revised government procurement procedures that brought those procedures into line with GPA requirements.

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

In February 2010, the United States removed Saudi Arabia from the Special 301 Watch List in recognition of significant progress that Saudi Arabia had made in the protection and enforcement of IPR. The United States will carefully monitor Saudi Arabia's progress in continuing to improve its IPR regime.

As part of the GCC Customs Union, the six Member States are preparing a draft common trademark law, as well as a draft common unfair competition law to protect companies from unfair commercial use of undisclosed information submitted for marketing approval of pharmaceutical products. The United States is engaged in a dialogue with GCC technical experts to help ensure that the trademark law and unfair competition law will facilitate Member States' implementation of international and bilateral obligations.

## **SERVICES BARRIERS**

### **Insurance**

In recent years, Saudi Arabia has implemented a series of laws regulating the insurance sector, requiring certain types of insurance coverage within the country. In October 2003, the government enacted the Control Law for Co-Operative Insurance Companies, which requires all insurance companies operating in Saudi Arabia to be locally incorporated joint-stock companies (foreign equity is limited to 60 percent, and the remaining 40 percent must be sold in the Saudi stock market) and to operate on a cooperative or mutual basis (*i.e.*, requiring that the profits be distributed between policy holders and the insurance company).

### **Banking**

Saudi Arabia limits foreign ownership in commercial banks to 40 percent of any individual bank operation. In the last few years, Saudi Arabia has taken steps to open up investment banking by granting operating licenses to foreign banks. The Saudi Arabian Monetary Agency (SAMA) granted 10 foreign bank licenses to operate in Saudi Arabia in December 2005. The 2004 Saudi Capital Markets Law provides for the creation of investment banks and brokerages in Saudi Arabia, with foreign participation in these ventures capped at 60 percent. Saudi Arabia passed a regulation in August 2008 allowing nonresidents to invest in swap agreements in the Saudi Stock Exchange, while local brokers and bankers retain legal title to traded shares.

## **INVESTMENT BARRIERS**

All foreign investment into Saudi Arabia requires a license from the Saudi Arabian General Investment Authority (SAGIA). While SAGIA is required to grant or refuse an investment license within 30 days of receiving a complete application, bureaucratic impediments arising in other ministries sometimes delay the process. Companies can also experience bureaucratic delays after receiving licenses from SAGIA, for example, in obtaining a commercial registry or purchasing property. Foreign investment is currently prohibited in 15 manufacturing and service sectors and subsectors, including oil exploration, drilling and production, and manufacturing and services related to military activity.

Direct foreign participation in the Saudi stock market is prohibited. Foreign investors are permitted to purchase shares in bank-operated investment funds, though total foreign participation in these funds is limited to 10 percent of the total value of the fund. Equity held by foreign partners in a joint venture business is limited to 60 percent.





# SINGAPORE

## TRADE SUMMARY

The U.S. goods trade surplus with Singapore was \$11.7 billion in 2010, an increase of \$5.1 billion from 2009. U.S. goods exports in 2010 were \$29.1 billion, up 31.1 percent from the previous year. Corresponding U.S. imports from Singapore were \$17.5 billion, up 11.3 percent. Singapore is currently the 10<sup>th</sup> largest export market for U.S. goods.

U.S. exports of private commercial services (*i.e.*, excluding military and government) to Singapore were \$9.3 billion in 2009 (latest data available), and U.S. imports were \$3.8 billion. Sales of services in Singapore by majority U.S.-owned affiliates were \$32.7 billion in 2008 (latest data available), while sales of services in the United States by majority Singapore-owned firms were \$2.0 billion.

The stock of U.S. foreign direct investment (FDI) in Singapore was \$76.9 billion in 2009 (latest data available), down from \$86.0 billion in 2008. U.S. FDI in Singapore is primarily concentrated in nonbank holding companies and the manufacturing sectors.

In December 2009, the United States announced its intention to enter into negotiations on a regional Asia-Pacific trade agreement called the Trans-Pacific Partnership (TPP), with the objective of shaping a high-standard, broad-based regional agreement. This agreement will create a potential platform for economic integration across the Asia-Pacific region, a means to advance U.S. economic interests with the fastest-growing economies in the world, and a tool to expand U.S. exports, which are critical to U.S. economic recovery and the creation and retention of high-paying, high-quality jobs in the United States. The TPP negotiating partners currently include Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, and Vietnam.

## FREE TRADE AGREEMENT

The United States and Singapore signed a Free Trade Agreement (FTA) on May 6, 2003, which entered into force on January 1, 2004. Since 2003, exports from the United States through 2010 increased 76 percent, with steady growth in exports of medical devices, machinery, and electronics components. The United States and Singapore meet annually to review the implementation of the FTA and resolve outstanding trade issues.

## IMPORT POLICIES

### Import Licenses/Internal Taxes

Singapore maintains a tiered motorcycle operator licensing system based on engine displacement, which, along with a road tax based on engine size, places U.S. exports of large motorcycles at a competitive disadvantage. The import and sale of non-medicinal chewing gum is restricted in Singapore. For social and/or environmental reasons, Singapore levies high excise taxes on distilled spirits and wine, tobacco products, and motor vehicles.

## INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION

In connection with its FTA commitments and obligations under international treaties and conventions, Singapore has developed a generally strong IPR regime. Nevertheless, the United States continues to have concerns regarding the government's IPR enforcement efforts. These concerns include the

transshipment of infringing goods through Singapore, insufficient deterrent penalties for end-user piracy, and the lack of meaningful enforcement against online infringers. Additional IPR concerns have arisen over the pay-television cross-carriage issue, which is detailed below.

Singapore was an active participant in the Anti-Counterfeiting Trade Agreement (ACTA) negotiations, which were concluded in November 2010. The ACTA establishes an international framework that will assist the parties to the agreement in their efforts to effectively combat IPR infringement, in particular the proliferation of counterfeiting and piracy, which undermines legitimate trade.

## **SERVICES BARRIERS**

### **Pay Television**

In March 2010, the Ministry of Information, Communications and the Arts, through its sub-agency, the Media Development Authority, released new regulations to require pay-television providers to “cross carry” exclusive broadcasting content acquired after March 12, 2010. Under the new rules, slated to take effect in mid-2011, a pay television company with an exclusive contract for a channel would be required to offer that content to customers of other pay television companies. Content providers, many of which are U.S.-based, protest that the decision is an unnecessary interference in a competitive market that denies content holders the ability to negotiate freely in the marketplace, and is an overly broad remedy for addressing the perceived problem of content fragmentation. In addition, industry sees the rules as raising serious concerns with respect to Singapore's commitments to protect IPR and the right of content holders to determine access to their product. The United States has requested that Singapore reconsider the cross-carriage measure or at least delay its implementation until further discussions have occurred, both between industry stakeholders and between the governments of Singapore and the United States.

### **Basic Telecommunications**

Facilities-based operators continue to be limited in their ability to take advantage of wholesale pricing for local provider Singapore Telecommunications' (SingTel) “last mile” local leased circuits. When fully completed in 2012, Singapore's next generation national broadband fiber network should allow fuller, more reasonably priced network access to provide telecommunication services to homes and businesses, bypassing the bottleneck of SingTel owned circuits. Sixty percent of Singapore homes have been connected to the network as of the end of 2010.

### **Audiovisual and Media Services**

Singapore restricts the use of satellite dishes and has not authorized direct-to-home satellite television services. Singapore's Media Development Authority must license the installation and operation of broadcast receiving equipment, including satellite dishes.

Distribution, importation, or possession of any “offshore” or foreign newspaper must be approved by the government. Singapore has curtailed or banned the circulation of some foreign publications when it perceived defamation of the Singapore government in the publication.

### **Legal Services**

U.S. and other foreign law firms with offices in Singapore cannot practice Singapore law, employ Singapore lawyers to practice Singapore law, or litigate in local courts, unless specifically approved to do so. Six foreign law firms have been granted “Qualifying Foreign Law Practice” (QFLP) licenses to

practice certain areas of domestic law. However, Singaporean lawyers in a QFLP law firm cannot be full partners or share in worldwide profits with other partners in the firm.

## **Banking**

Singapore maintains legal distinctions between foreign currency transactions conducted in the Asian Dollar Market and Singapore dollar transactions and the type of license held (full, wholesale, or offshore). Except in retail banking, Singapore laws do not distinguish operationally between foreign and domestic banks. Wholesale banks can operate in only one location, unless the Monetary Authority of Singapore approves an additional location.

Foreign banks and other financial institutions that issue credit cards in Singapore are unable to provide ATM services through local networks for holders of those cards. Foreign banks can only provide ATM services to locally issued credit card holders through their own network or through a foreign bank's shared ATM network. Foreign banks do not face the same restrictions for credit cards that they issue outside Singapore.

The Minister in charge of the Monetary Authority of Singapore must provide specific types of approval for acquisitions of the voting shares of a local bank. Although it has lifted the formal ceilings on foreign ownership of local banks and finance companies, the government of Singapore has indicated that it will not allow a foreign takeover of its three major local financial institutions.

## **Education Services**

Singapore's Private Education Act (the 2009 Act) includes new registration criteria for education service providers and degree courses that have been applied in a non-transparent manner. Singapore's Council for Private Education (CPE), a statutory board created under the 2009 Act to regulate the sector, has rejected the applications of at least two U.S.-based universities interested in providing university-level classes in Singapore, effectively barring their participation in the market. Although the CPE has provided a list of the criteria on which applications are judged, it has not explained the specific reasons for denying these registrations, how it weights the criteria or reaches decisions on whether to approve or reject applications, or what steps the education service providers could take to satisfy the new requirements for future applications to be approved. The United States will continue to work with Singapore in an effort to resolve these concerns.

## **OTHER BARRIERS**

### **Competition**

Singapore has an extensive network of government-linked corporations that are active in many sectors of the economy. Some sectors, notably telecommunications, media, and financial services, are subject to sector-specific regulatory bodies and competition regulations typically less rigorous than those being implemented under Singapore's general Competition Act. The United States will continue to monitor Singapore's implementation of its commitments on competition under the United States-Singapore Free Trade Agreement.



# SOUTH AFRICA

## TRADE SUMMARY

The U.S. goods trade deficit with South Africa was \$2.6 billion in 2010, up \$1.2 billion from 2009. U.S. goods exports in 2010 were \$5.6 billion, up 26.4 percent from the previous year. Corresponding U.S. imports from South Africa were \$8.2 billion, up 39.5 percent. South Africa is currently the 38th largest export market for U.S. goods.

U.S. exports of private commercial services (i.e., excluding military and government) to South Africa were \$2.2 billion in 2009 (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 2008 (latest data available), while sales of services in the United States by majority South Africa -owned firms were \$1.0 billion.

The stock of U.S. foreign direct investment (FDI) in South Africa was \$5.9 billion in 2009 (latest data available), up from \$4.9 billion in 2008. 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 (SADC), and the Southern African Customs Union (SACU). As a member of SACU, South Africa applies the SACU common external tariff (CET). In practice, South Africa effectively sets the level of most-favored nation (MFN) tariffs applied by all SACU countries. South Africa's overall average MFN 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, beverages, and spirits. According to the WTO, average tariff protection is highest for the manufacturing sector in South Africa.

The International Trade Administration Commission (ITAC) administers 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 (the rate that generally cannot be exceeded under WTO rules) and impede entry into South Africa's apparel market. The tariff situation in South Africa remained similarly constraining in 2010.

### Nontariff Measures

The Minister of Trade and Industry is authorized to prohibit specified classes of imports into South Africa by notice in the Government Gazette, unless the products are imported in accordance with a permit issued by ITAC. ITAC requires import permits on used goods if such goods are also manufactured domestically, resulting in *de facto* restrictions 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 2010, South Africa maintained antidumping duties on three products from the United States: poultry products, 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. As a result of this decision, ITAC's domestic legal authority to impose antidumping duties had expired prior to the initiation of the sunset review for that product. ITAC subsequently announced its intention to terminate the 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 in accordance with the court's interpretation of South African law. At the same time, ITAC indicated its intention to seek court permission to retain the antidumping duties on many products from various countries, including poultry products, acetaminophenol, and L-lysine-HCl from the United States. ITAC found that dumping and injury were likely to continue or recur even though those sunset reviews were initiated after the five-year lapse date. In April 2010, ITAC, along with the Minister of Finance and the Minister of Trade and Industry, jointly filed an action with South Africa's High Court seeking permission to conduct *de novo* the sunset reviews on these products such that ITAC would avoid having to revoke the antidumping measures. A decision from the High Court is expected in April 2011.

## **GOVERNMENT PROCUREMENT**

Government purchases are made through the 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 Broad-Based Black Economic Empowerment (BBBEE) strategy. See the section on Investment Barriers for more detail on BBBEE.

South Africa's Preferential Procurement Policy Framework Act of 2000 (the Framework Act) and associated implementing regulations created the legal framework and a formula for evaluating tenders for government contracts. The Department of Trade and Industry (DTI) is working on regulations to clarify the Framework Act and incorporate the objectives of the Broad-Based Black Economic Empowerment Act of 2003. These regulations would give preference to bidders who comply with BBBEE objectives, and would include BBBEE thresholds in tender evaluations. In procurements valued up to one million rand (about \$142,000), 80 percent of the tender evaluation would be based on the bid price and 20 percent on the supplier's commitment to BBBEE objectives. For tenders valued over one million rand, companies would earn 90 percent of their points from the bid price and 10 percent from their commitment to BBBEE objectives. The National Treasury is working with the DTI to align preferential procurement regulations with the BBBEE Code of Good Practice on Procurement in order to help standardize how firms are evaluated on their compliance with industry BBBEE 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 condition requires that the seller/supplier 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. There are also complaints of cases of government entities' failing to comply with procurement contracts.

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

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

In recent years, the South African government 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. While 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, and about slow and cumbersome court proceedings. Many are concerned about a South African Customs Administration interpretation of a 2004 court ruling as limiting the Customs Administration's authority to seize potentially IPR-infringing goods that are marked for transshipment through South Africa. This interpretation is still being debated within the South African government.

The number of arrests for trading in pirated or counterfeit goods has increased in recent 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. Stakeholders were encouraged by a November 2010 Pretoria Commercial Crime Court decision sentencing an optical disc pirate to imprisonment. 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 of IPR enforcement. The DTI is also working with universities and other local groups to incorporate IPR awareness into college curricula and training of local business groups.

Despite efforts to improve IPR enforcement, monetary losses from counterfeiting and piracy remain high. U.S. industry has expressed concern about software, optical disc, and internet piracy, the growing number of counterfeit production facilities, advertisements for "burn-to-order" services, and the unwillingness of South African internet service providers (ISPs) to shut down infringing sites. Counterfeit medicines are also a problem.

## **SERVICE BARRIERS**

### **Telecommunications**

Fixed-line telecommunication services in South Africa are dominated by Telkom, a former parastatal monopoly that is now partially privatized. Many businesses complain about high telecommunications prices, which are partly a result of Telkom's control of most of South Africa's wire line infrastructure. Telkom enjoyed a protected legal monopoly status prior to passage of the Electronic Communications Act of 2005, which allowed the creation of a second national operator for telecommunications services. While the second operator, Neotel, has yet to offer serious price competition in the consumer market, over the last two years Neotel and other wireless transmission services have begun to compete with Telkom for market share.

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

The Independent Communications Authority of South Africa (ICASA) announced the recipients of the Individual Electronic Communications Network Services (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 BBBEE equity ownership requirements by the end of the first quarter of 2009. As of December 2010, the process had not been completed.

In January 2009, the South African government approved the sale of existing government-controlled shares in Neotel to its parent corporation, India-based Tata Communications. This decision allowed Tata to gain a controlling share (56 percent) of Neotel. Neotel was the sole South African sponsor of the United States-led SEACOM undersea fiber-optic cable, which became operational in late July 2009 and 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-2011.

## **Broadcasting**

ICASA requires local content 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 followed a number of changes in the broadcasting and telecommunications sector, such as the migration from analog to digital television broadcasting. The SADOCA announced a goal for the completion of digital migration by November 2011, but later revised the date to 2012. The standard (DVB-T) that had been announced earlier is under review. Full migration should free up scarce spectra (approximately 80 megahertz to 100 megahertz) that could be used to promote new technology and e-government services.

## **INVESTMENT BARRIERS**

The only reported barrier to foreign investment in South Africa is BBBEE. 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 BBBEE 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 BBBEE 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. While completion of the Codes of Good Practice has cleared up much of the uncertainty that surrounded BBBEE, they are complex documents and much about their interpretation and implementation remains unclear. DTI has recently provided more clarity and the rate of approval has improved. Nonetheless, the process for getting an "equity-equivalent" mechanism approved remains complicated and requires a significant effort from the company. By the end of 2010, only six total "equity-equivalent" deals had been approved.

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. Some stakeholders expect 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. Draft legislation is circulating that would restrict the presence of foreign investment in the security industry.

In the Financial Services sector, a charter was reopened after labor unions complained that the charter permits 10 percent black ownership, while other sectors are required to have 25 percent. Banks argue that a lower equity threshold is appropriate due in part to banks' lack of physical capital as well as rapidly shifting capital market conditions, which can require frequent changes in the composition of equity shareholders as markets shift and investors need access to quick capital through sale of bank equity.

## **ELECTRONIC COMMERCE**

The Electronic Communications and Transactions Law governs electronic commerce in South Africa. The law was designed to facilitate electronic commerce, but it 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. This legislation, titled "Protection of Personal Information Bill", has undergone many changes since 2006, and will be promulgated in 2011. It will possibly come into effect by September 2011. Industry considers this version of the legislation superior to previous editions.

## **OTHER BARRIERS**

### **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, including 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 strain overall law 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. In August 2010, the government announced that the Special Investigating Unit (SIU) would investigate five ministries, two provincial departments and the South African Social Security Agency for tender and procurement irregularities. Also in August, the Minister of Human Settlements announced the arrest of 1,910 government officials who were illegally benefitting from housing subsidies worth Rand 44 million (\$6.35 million).

### **Labor**

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 employees from overseas and from other parts of the African continent.



# SRI LANKA

## TRADE SUMMARY

The U.S. goods trade deficit with Sri Lanka was \$1.6 billion in 2010, up \$206 million from 2009. U.S. goods exports in 2010 were \$178 million, down 22.4 percent from the previous year. Corresponding U.S. imports from Sri Lanka were \$1.7 billion, up 9.7 percent. Sri Lanka is currently the 123rd largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Sri Lanka was \$139 million in 2009 (latest data available), up from \$113 million in 2008.

## IMPORT POLICIES

Despite an economy that is attempting to open to foreign trade and investment, the pace of reform in Sri Lanka has been uneven. President Rajapaksa's broad economic strategy focuses on poverty alleviation and steering investment to disadvantaged areas, large-scale infrastructure projects, developing the small- and medium-sized enterprise sector, promotion of agriculture, and expanding the already large civil service. President Rajapaksa has also set an ambitious goal to double GDP per capita from \$2,000 in 2009 to \$4,000 by 2016, which will require very high GDP growth rates.

The Trade, Tariff, and Investment Policy Division of the Ministry of Finance and Planning is charged with the formulation and implementation of trade and investment policies. The Trade and Tariff cluster of the National Council of Economic Development (NCED) also examines trade and tariff issues and sends recommendations to the Ministry of Finance and Planning. Based on the Presidential Taxation Commission's recommendations, the government simplified the tax structure in 2010, including eliminating some but not all supplementary charges on imports.

### Import Charges

Sri Lanka's main trade policy instrument has been the import tariff. According to the WTO, Sri Lanka's average applied agricultural tariff in 2010 was 25.4 percent, whereas its bound rates, *i.e.*, the rate that generally under WTO rules cannot be exceeded, are significantly higher, averaging 50 percent. However, the compounded taxes for imported agriculture products are routinely between 80 and 100 percent of the cost, insurance, and freight (CIF) value. In 2010, Sri Lanka's average applied tariff for nonagricultural goods was 9.2 percent. However, less than 30 percent of Sri Lanka's nonagricultural tariffs are bound under WTO rules, meaning applied tariffs on those products can be increased to any level.

The import tariff structure was simplified in June 2010 by reducing the number of tariff bands from five to four. As a result, the current tariff bands are: 0 percent; 5 percent; 15 percent; and 30 percent. The highest duty band was increased from 28 percent to 30 percent in June 2010. Textiles, pharmaceuticals, and medical equipment, machinery, basic raw materials, software and selected consumer electronics, have a zero tariff. Semi-processed raw material tariffs are now 5 percent, while intermediate product tariffs remain at 15 percent. Most finished product tariffs have been raised to 30 percent, up from 28 percent. There continue to be a number of deviations from the new four-band tariff policy. Some items are subject to an *ad valorem* or a specific tariff, whichever is higher, and there is intermittent use of exemptions and waivers. Footwear, ceramic products, and agricultural products carry specific tariffs.

Recent changes to the tax structure have reduced but not eliminated a variety of taxes on a range of imported items that amount to between 60 percent and 100 percent of the CIF value of the product.

Specifically, in 2010 the government eliminated the 5 percent to 10 percent Regional Infrastructure Fee for automobiles, the 1.5 percent Social Responsibility Levy, and the 15 percent general import surcharge. The Nation Building Tax on imports was reduced from 3 percent to 2 but remains in effect. In general, the frequent changes (mostly upward) of these rates have added unpredictability to foreign exporters' and local importers' cost calculations. Affected products from the United States include fruits, processed/packaged food, and personal care products. The United States continues to examine if these combined tariffs, levies, and taxes conflict with Sri Lanka's WTO commitments.

Other developments with regard to charges on imports include:

- An Export Development Board (EDB) levy, ranging from 10 percent to 35 percent *ad valorem* on a range of imports identified as "nonessential." Most of the items are subject to specific duties as well; for example, shampoo (35 percent or Rs 350 (\$3.12) per kg), apparel (30 percent or Rs 75 (\$0.65) per unit), biscuits (35 percent or Rs 60 (\$0.52) per kg) and oranges (20 percent or Rs 15 (\$0.13) per kg). Whichever levy is higher – *ad valorem* or specific rate – is applied. Also, when calculating the EDB levy, an imputed profit margin of 10 percent is added onto the import price. In some cases, such as on biscuits, chocolates and soap, the tax is charged not on the import price but on 65 percent of the maximum retail price. In 2010, the EDB levy on a range of consumer electronics and motor vehicles was completely removed while the levy on items such as oranges, apples and grapes was reduced. The rates on shampoo and cosmetics were increased in 2010. Locally manufactured products are not subject to the EDB.
- A Ports and Airports Development Levy of 5 percent on imports. Locally manufactured products are not subject to the Ports and Airports Development Levy.
- The Value Added Tax (VAT) rate of 20 percent was reduced to 12 percent on November 23, 2010. Also, from June 2010, a range of consumer electronics goods were exempted from the VAT. When calculating the VAT, an imputed profit margin of 10 percent is added on to the import price. Locally manufactured products are also subject to VAT, but not the imputed profit margin.
- Excise fees are charged on some products such as aerated water, liquor, beer, motor vehicles, and cigarettes. In June 2010, the excise fee on motor vehicles was reduced, while that on some consumer electronics goods were removed. In November 2010, excise duties on some products were increased to compensate for the loss of income from the removal of certain other duties. When calculating the excise fee, an imputed profit margin of 15 percent is added on to the import price. The excise fee is applied on the price inclusive of other duties. Locally manufactured products are also subject to excise fees.
- As noted above, the Nation Building Tax (NBT) was reduced to 2 percent from 3 percent on January 1, 2011. The NBT is applied on the price inclusive of other duties. Local manufacturers also pay NBT.

Textiles and Apparel: Textiles have a zero tariff. There is an Export Development Board Levy (often referred to as a "cess") of 50 Rupees (approximately \$0.45) per kilogram on imported textiles not intended for use by the apparel export industry. All textile imports are subject to a Ports and Airports Tax of 5 percent and a VAT of 12 percent. Currently, apparel imports are subject to a 15 percent import duty, a 30 percent or Rs 75 (\$0.65) per unit Export Development Board Levy, a 12 percent VAT and a five percent Ports and Airports Levy.

## **Import Licensing**

Sri Lanka requires import licenses for over 400 items at the 6-digit level of the Harmonized Tariff System, mostly for health, environment, and national security reasons. Importers must pay an increased fee equal to 0.222 percent of the import price with a minimum fee of Rs 1,000 (approximately \$9) to receive an import license.

## **GOVERNMENT PROCUREMENT**

Sri Lanka is not a signatory to the WTO Agreement on Government Procurement and has indicated it has no plans to join despite its status as an observer to the WTO Committee on Government Procurement.

Government procurement of goods and services is primarily undertaken through a public tender process. Some tenders are open only to registered suppliers. Procurement is also undertaken outside the normal competitive tender process. Recent examples of such procurement include construction of a new bunkering facility in Hambantota and the purchase of port and railway machinery and equipment.

The government publicly subscribes to principles of international competitive bidding, but charges of corruption and unfair awards are common. In 2006, Sri Lanka published new guidelines and a new procurement manual to improve the public procurement process. However, in early 2008 the government disbanded the National Procurement Agency, which it had established in 2004, and shifted its functions to a unit in the Ministry of Finance. This move has raised concerns about the government's commitment to improve the transparency of procurements.

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

Weak IPR enforcement remains a problem in Sri Lanka. Piracy levels remain very high for sound recordings and software. According to an industry-commissioned study, as much as 89 percent of personal computers in Sri Lanka used pirated software in 2009 (down slightly from 90 percent in 2008) and retail revenue losses were estimated at around \$77 million (down from \$97 million) due to software piracy. Government use of unauthorized software continues to be a problem.

Redress through the courts for IPR infringement is often a frustrating and time-consuming process. While police can take action against counterfeiting and piracy without complaints by rights holders, they rarely do so. In the apparel sector, however, rights holders have had some successes in combating trademark counterfeiting through the courts.

The Sri Lankan Government's Director of Intellectual Property, along with international experts, continues conduct IPR legal and enforcement training for customs, judicial and police officials. The U.S. Embassy, the United States Patent and Trademarks Office, and the American Chamber of Commerce of Sri Lanka are also working with the government of Sri Lanka and the private sector to improve enforcement, provide enforcement training, and enhance public awareness. Sri Lankan Customs has created a computer based Customs Trade Mark recordation system, although it is yet to be launched.

During October 2010 TIFA talks, the Sri Lanka government provided U.S. Government representatives with information regarding a new Information and Communication Technology Agency (ICTA) policy requiring all government departments to procure genuine software. The government of Sri Lanka also noted that a new IP unit has been established within the Criminal Investigative Division of the Sri Lankan police. The United States will monitor the effectiveness of these new programs.

## **SERVICES BARRIERS**

### **Insurance**

Sri Lanka does not allow cross-border supply of insurance, with the exception of health and travel insurance. In order to provide all other insurance services to resident Sri Lankans, insurance companies must be incorporated in Sri Lanka. Branching is not permitted. The Sri Lankan government requires all insurance companies to reinsure 20 percent of their insurance business with a state-run insurance fund.

### **Broadcasting**

The government imposes taxes on foreign movies, programs, and commercials to be shown on television, ranging from Rs 25,000 (approximately \$220) for an imported English-language movie to Rs 90,000 (approximately \$790) per half hour of a foreign-language program dubbed in the local language Sinhala. Foreign television commercials are taxed at Rs 500,000 (roughly \$4,400) per year. Rates for non-English foreign programming are higher. Government approval is required for all foreign films and programs shown on television.

## **INVESTMENT BARRIERS**

While Sri Lanka welcomes foreign investment, there are restrictions in a wide range of sectors. For example, foreign investment is not permitted in certain types of money lending activities, in coastal fishing, and in retail trade for investments of less than \$2 million (\$150,000 in the case of international brands and franchises). In other sectors, foreign investment is subject to case-by-case screening and approval when foreign equity exceeds 40 percent. These include shipping and travel agencies, freight forwarding, mass communications, deep sea fishing, local timber industries, mining and primary processing of natural resources, and the cultivation and primary processing of certain agriculture commodities. Foreign equity restrictions also apply in the air transportation, coastal shipping, lotteries, and gem mining sectors, as well as in "sensitive" industries such as military hardware.

# SWITZERLAND

## TRADE SUMMARY

The U.S. goods trade surplus with Switzerland was \$1.6 billion in 2010, up \$111 million from 2009. U.S. goods exports in 2010 were \$20.7 billion, up 18.2 percent from the previous year. Corresponding U.S. imports from Switzerland were \$19.1 billion, up 19.2 percent. Switzerland is currently the 16th largest export market for U.S. goods.

U.S. exports of private commercial services (*i.e.*, excluding military and government) to Switzerland were \$17.5 billion in 2009 (latest data available), and U.S. imports were \$18.0 billion. Sales of services in Switzerland by majority U.S.-owned affiliates were \$57.8 billion in 2008 (latest data available), while sales of services in the United States by majority Switzerland-owned firms were \$53.5 billion.

The stock of U.S. foreign direct investment (FDI) in Switzerland was \$148.2 billion in 2009 (latest data available), up from \$132.1 billion in 2008. U.S. FDI in Switzerland is led by the nonbank holding companies, manufacturing, and wholesale trade sectors.

## IMPORT POLICIES

### Agricultural Products

Access for U.S. agricultural products is restricted by high tariffs on certain products, preferential tariff rates for other countries, and government regulation. Switzerland's tariff schedule is comprised only of specific (*non-ad valorem*) duties. According to the WTO, Switzerland's simple average *ad valorem* equivalent applied tariff is 36.9 percent for agricultural goods and 1.9 percent for non-agricultural goods. Imports of nearly all agricultural products, particularly those that compete with Swiss products, are subject to seasonal import duties and quotas. Agricultural products that are not also produced in Switzerland, such as tropical fruit and nuts, tend to have lower tariffs.

## GOVERNMENT PROCUREMENT

Switzerland is a signatory to the WTO Agreement on Government Procurement (GPA), which covers both cantonal and federal procurement. Cantonal and communal governments carry out most public projects, and the value of their procurement is two to three times that of the federal government. At the cantonal and local levels, a 1995 law provides for nondiscriminatory access to government procurement. However, since cantons are allowed to implement the GPA independent from federal intervention, disparities in procedures may be found among the cantons, which may hamper participation by foreign firms.

In contrast to cantonal and communal practice, federal authorities are not required to inform unsuccessful bidders of the selected tender or reasons for the award. Under the federal law on public procurement, tender procedures apply only where the value of the procurement exceeds SFr. 230,000 (\$240,856), SFr. 350,000 (\$366,520) for cantonal procurements, and SFr. 700,000 (\$733,040) if it involved a public or quasi-public actor in the field of water, energy or traffic. Furthermore, a tender procedure applies only to construction projects that exceed SFr. 8.7 million (\$9.1 million). The above stated values are valid until September 30, 2011.



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

Switzerland generally maintains high standards of IPR protection. However, U.S. industry has expressed some concerns regarding amendments that Switzerland made to its copyright law to implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty. For example, industry has asserted that exceptions for use of multimedia content are overly broad. The United States will continue to monitor the implementation and effect of this legislation.

Switzerland was an active participant in the Anti-Counterfeiting Trade Agreement (ACTA) negotiations, which were concluded in November 2010. The ACTA establishes an international framework that will assist Parties in their efforts to effectively combat the infringement of intellectual property rights, in particular the proliferation of counterfeiting and piracy, which undermines legitimate trade and the sustainable development of the world economy.

## **SERVICES BARRIERS**

### **Telecommunications**

The Swiss government amended the Telecommunications Act in 2007 following an investigation by the Competition Commission and the Federal Communications Commission against Swisscom, a 52 percent government-owned former state monopoly that still retains a 62 percent market share. The grounds for the amendments were Swisscom's failure to unbundle the local loop completely and to provide leased lines at cost-oriented prices to competitors. The legal amendment gives the regulator explicit authority to force Swisscom to unbundle its local loop, sets a minimum transmission rate of 600 kbit/s downstream and provides a maximum price limit, thereby addressing a flaw cited in earlier court rulings. However, according to the OECD 2009 Communication Outlook, only 8 percent of the network accommodates unbundling. The amendment also requires that wholesale broadband access be offered to Swisscom's competitors at cost-oriented prices for four years in order to provide competitors time to invest in their own competing facilities, after which all operators are expected to provide the broadband investment themselves. However, Swisscom's competitors still complain that the price charged by Swisscom to use its fiber network is too expensive. The amendment is limited to the copper network; fiber-optic cables are excluded from regulation.

### **Insurance**

The manager of the foreign-owned branch must be resident in Switzerland and the majority of the board of directors of the Swiss subsidiary must have citizenship in the EU or the European Free Trade Association. Public monopolies exist for fire and natural damage insurance in 19 cantons and for the insurance of workplace accidents in certain industries.

# TAIWAN

## TRADE SUMMARY

The U.S. goods trade deficit with Taiwan was \$9.9 billion in 2010, up \$3 million from 2009. U.S. goods exports in 2010 were \$26.0 billion, up 40.8 percent from the previous year. Corresponding U.S. imports from Taiwan were \$35.9 billion, up 26.6 percent. Taiwan is currently the 13th largest export market for U.S. goods.

U.S. exports of private commercial services (*i.e.*, excluding military and government) to Taiwan were \$6.5 billion in 2009 (latest data available), and U.S. imports were \$5.1 billion. Sales of services in Taiwan by majority U.S.-owned affiliates were \$10.7 billion in 2008 (latest data available), while sales of services in the United States by majority Taiwan-owned firms were \$2.2 billion.

The stock of U.S. foreign direct investment (FDI) in Taiwan was \$19.5 billion in 2009 (latest data available), up from \$18.1 billion in 2008. U.S. FDI in Taiwan is mostly in the finance/insurance, manufacturing, and wholesale trade sectors.

In June 2010, Taiwan and the People's Republic of China (PRC) signed the Economic Cooperation Framework Agreement (ECFA), a landmark trade agreement that Taiwan authorities anticipate will contribute to domestic economic growth and assist Taiwan's efforts to conclude trade agreements with other countries. The ECFA entered into force on January 1, 2011. WTO Members are required to notify any bilateral or regional trade agreement to the WTO upon entry into force of the agreement. As of December 31, 2010, the ECFA had not yet been notified.

## IMPORT POLICIES

### Tariffs

When Taiwan became a WTO Member in January 2002, the authorities implemented tariff-rate quotas (TRQs) on small passenger cars, three categories of fish and fish products, and a number of agricultural products. On January 1, 2007, in accordance with its WTO commitments, Taiwan made additional tariff cuts and increased TRQ amounts on these products. For example, the commodity tax on small passenger cars dropped from 35 percent to 30 percent (which is waived for electrical cars until 2014 in an effort to promote energy conservation). Beginning January 2011, Taiwan fully eliminated TRQs on small passenger cars. Taiwan maintains Special Safeguards (SSGs) for a number of agricultural products covered by TRQs. SSGs, which are generally permitted under Article 5 of the WTO Agreement on Agriculture, allow Taiwan to impose additional duties when import quantities exceed SSG trigger volumes or import prices fall below SSG trigger prices. Because Taiwan previously did not import many of these products, SSG trigger volumes are relatively low. Over the last few years, Taiwan has imposed SSG provisions on poultry imports and other products, including types of offal.

U.S. industry continues to request that Taiwan lower tariffs on many goods, including large motorcycles, wine, canned soups, cookies (sweet biscuits), snack foods, vegetable juices, potato and potato products, and various fruits and vegetables.

### Import Controls

Taiwan has eliminated more than 99 percent of its import controls, but 107 product categories still face import restrictions, up from 71 product categories in 2008. Of these 107 categories, 21 require import

permits from the Board of Foreign Trade, and 86 categories are prohibited. Most of the requirements reportedly are based on public health and national defense concerns.

The Economic Cooperation Framework Agreement includes early harvest lists of 267 goods permitted to enter Taiwan from the PRC with tariff reductions and exemptions. The early harvest lists will be phased in over three years starting on January 1, 2011, with the goal of eliminating tariffs on all of the 267 items at the end of the three-year period. Taiwan still retains import bans on more than 2,000 products from the PRC.

### **Agriculture and Fish Products**

Prior to joining the WTO, Taiwan banned or restricted imports of 42 agricultural and fish items. In January 2002, Taiwan eliminated restrictions on the importation of 18 of these categories and implemented tariff rate quotas (TRQs) on the remaining 24 items. In October 2002, market access for rice was changed from a minimum market access regime to a TRQ. On January 1, 2005, Taiwan eliminated TRQs on four products of interest to the United States, including chicken meat, poultry offal, and pork bellies and offal. In February 2005, Taiwan unilaterally eliminated sugar from its TRQ. At the end of 2007, Taiwan phased out TRQs for persimmon, mackerel, carangid, and sardines. Currently, 16 agricultural products are subject to TRQs.

#### *Beef*

Taiwan maintains unwarranted SPS measures that continue to serve as market access barriers to U.S. beef and beef product exports. Reopening Taiwan's beef market consistent with international science-based standards as well as in a commercially viable manner is an important priority. This issue is discussed in detail in USTR's annual Report on Sanitary and Phytosanitary Measures.

#### *Rice*

Upon accession to the WTO in 2002, Taiwan committed to lift the ban on rice importation and opened up an import quota of 144,720 metric tons on a brown rice basis under a "special treatment" regime. Starting in 2003, Taiwan shifted its rice importation from a special treatment regime to a complex TRQ system that includes a ceiling price mechanism. After the United States and other WTO members raised objections to Taiwan's method of quota allocation, Taiwan subsequently agreed that its public sector import quota would be allocated based on a country-specific quota (CSQ) regime, with the U.S. quota accounting for the largest share at 64,634 metric tons -- valued at approximately \$50 million (based on trade flow estimates) at current world prices.

The United States continues to engage Taiwan on issues relating to fulfilling its CSQ for importation of U.S. rice. Since 2007, U.S. exporters have raised concerns that Taiwan's ceiling price mechanism has disrupted Taiwan's tendering process for procurement of U.S. rice. The ceiling price is not public, but in recent years it is believed to have been set lower than the price levels bid by U.S. exporters, causing tenders to fail. In 2007 and 2008, public sector rice tenders for U.S. rice repeatedly failed. Throughout 2009 and 2010, the United States worked with Taiwan to seek improvements to the rice import system and to address the shortfalls in Taiwan's procurement of U.S. rice. As a result of these efforts, it appeared that Taiwan attempted to fill all country-specific tenders in 2009, but in 2010, Taiwan fell substantially short of meeting its rice purchase obligations and issues with the ceiling price mechanism continue.

## *Wood Products*

The issue of counterfeit U.S. industry-associated wood certification stamps noted in the 2010 National Trade Estimate has largely been resolved through an education campaign conducted by importers of U.S. wood products to familiarize local builders and architects with legitimate certification stamps. The U.S. wood industry also plans to establish an association office in Taiwan in 2011, which will allow for even closer monitoring of this issue. Revisions to Taiwan's building and fire codes in 2008 resolved outstanding issues for general construction lumber, improving market access for U.S. exports. With regard to heavy timber, however, the United States continues to engage with Taiwan authorities to encourage adoption of fire codes consistent with those in the United States.

## **Automobiles and Motorcycles**

Although the Ministry of Transportation and Communications (MOTC) opened most expressways to large motorcycles with engine displacement of 550cc or more in 2007, the MOTC subsequently asked the Directorate General of Highways (DGH) in 2009 to study further the feasibility of opening highways to those motorcycles. Following completion of the study, the MOTC concluded that opening highways to large motorcycles would not be appropriate. MOTC continues to restrict motorcycles with engine displacement of over 550 cc from Taiwan's highways.

## **Distilled Spirits**

Differential taxation for domestic and imported distilled spirits has been a contentious issue between Taiwan and a number of its important trading partners in the past, and it was the subject of careful negotiations during Taiwan's WTO accession process. Actions taken by Taiwan in 2010 have again raised concerns for the United States and other trading partners, including the European Union.

Specifically, on September 16, 2010, Taiwan implemented a significant tax reduction on domestic *mijiu* rice wine. This tax reduction resulted from the amendment of Taiwan's "Enforcement Rules of the Tobacco and Alcohol Administration Act" which created a new subcategory of "cooking rice wine" that covers *mijiumijiu* rice wine, a domestically-produced distilled spirit. Prior to this amendment, the enforcement rules contained a provision requiring that "cooking alcoholic products" contain a minimum salt content of more than 0.5 percent of total volume, ensuring that such products would be distinguished from other distilled spirits and not consumed as a beverage. The 2010 amendment removed the salt content requirement, requiring instead that the alcohol content of "cooking alcoholic products" be no greater than 20 percent and that such products be labeled "exclusively used for cooking." As a result of the amendment, *mijiu* rice wine is now taxed at NT\$9 per liter, the much lower rate applied to cooking alcoholic products, instead of at the much higher rate applicable to all other distilled spirits (NT\$2.5 per liter per degree (percentage) of alcohol content).

The United States and other trading partners continue to express their strong concerns to the Taiwan authorities that steps should be taken to ensure that the domestic *mijiu* rice wine will not compete with, or substitute for, like imported alcoholic beverages, and that imported alcoholic beverages would not be taxed at a higher rate than like domestically produced alcoholic beverages.

## **EXPORT SUBSIDIES**

Taiwan provides incentives to industrial firms in export processing zones and to firms in designated "emerging industries." Taiwan has notified the WTO of these programs.

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

Taiwan generally provides strong IPR protection and enforcement.

However, rights holders continue to express concern regarding: infringement of copyrighted material on the Internet; illegal textbook copying on and around university campuses; inadequate protection for the packaging, configuration, and outward appearance of products (trade dress); and the continued availability of counterfeit pharmaceuticals in Taiwan. The importation and transshipment of counterfeit products from China is also a problem, as well as the collusion of some Taiwan companies in supplying components to mainland factories producing “Shanzhai” counterfeits (*e.g.* mobile phones, netbooks, and other electronic devices). Taiwan also needs to provide an effective system to address patent issues expeditiously in connection with applications to market pharmaceutical products.

Piracy on the Internet remains a serious IP enforcement concern in Taiwan. In April 2009, the Legislative Yuan amended the Taiwan Copyright Law to require Internet service providers (ISP) to undertake specific and effective notice-and-takedown actions against online infringers to avoid liability for the infringing activities of users on their networks. Rights holders expect to reach agreement on a "code of conduct" with ISP operators for implementation of the new ISP law regulation.

In January 2010, the Legislative Yuan passed an amendment to the Copyright Collective Management Organization Act and an amendment to article 37 of the Copyright Law. Copyright collection groups complained that both amendments, which require a single portal and a joint tariff rate for fee collection, and exempt secondary public broadcasting users from criminal liability, weaken copyright owners' ability to collect remuneration for the use of their works.

### **Pharmaceuticals**

Taiwan formally established the Taiwan Food and Drug Administration (TFDA) on January 1, 2010 to replace the Bureau of Pharmaceutical Affairs (BOPA). The TFDA combines into one office agencies responsible for food and drug policy, license issuing, and product testing. The new configuration will potentially consolidate and speed up approval procedures. TFDA continues to work cooperatively with U.S. industry in revising registration procedures (*e.g.*, reducing the required number of Certificates of Pharmaceutical Products (CPPs) to one), and facilitating the entry of new products into Taiwan's market.

However, the U.S. pharmaceutical industry continues to express concern that measures related to pricing and reimbursement inadequately take into account the value of innovative products and adversely affect patients' ability to access new pharmaceutical products. For instance, in Taiwan, hospitals derive significant revenue from the difference between the prices they negotiate with drug companies and the higher amounts that the Bureau of National Health Insurance (BNHI) reimburses for the same drugs. To close the gap, BNHI uses the Price Volume Survey (PVS) to collect "market" price data from hospitals and drug makers for calculating new, lower drug reimbursements. The hospitals, in turn, re-negotiate contracts with drug companies after each PVS, driving prices down further while perpetuating the reimbursement gap at lower price levels. The process threatens to drive foreign pharmaceutical firms out of Taiwan's market as their profit margins dwindle through each successive PVS cycle. The pharmaceutical industry has indicated that it is encouraged by recently passed legislation that will implement a Drug Expenditure Target approach that could improve the transparency and predictability of pricing and reimbursement in the market. The United States encourages Taiwan to continue to consult with relevant stakeholders in implementing policies that will facilitate the private sector's development of innovative products and improve patients' access to such products.

## **Medical Devices**

The medical device industry has expressed concern regarding pricing policies that currently specify a single purchase price for all medical devices that treat the same indication. This policy does not take into account difference in quality and effectively subsidizes lower-cost devices while underpaying for high-tech, higher quality devices, discouraging the introduction of these devices into the Taiwan market.

Department of Health (DOH) officials continue to work with industry to improve the medical device registration process, particularly concerning identical products made at manufacturing sites with different quality-system documentation, or with small modifications, such as outer packaging changes.

## **SERVICES BARRIERS**

### **Banking Services**

Foreign banks may set up representative offices, branches, and subsidiaries in Taiwan. Foreign-invested banks in Taiwan are accorded national treatment. Foreign entities may acquire up to 100 percent equity in Taiwan banks, subject to certain requirements.

### **Securities Services**

Foreign securities firms may set up representative offices, branches, and subsidiaries, and Taiwan securities firms are not subject to any foreign ownership limit. In general, asset management business requires a securities investment trust enterprise (SITE) license and/or securities investment consultant enterprise (SICE) license. Both SITEs and SICEs are allowed to raise and sell offshore funds, or a fund established outside of Taiwan. Neither SITEs nor SICEs are subject to any foreign ownership limit.

### **Insurance Services**

Taiwan allows foreign insurance firms to set up representative offices, branches, and subsidiaries. Taiwan also allows foreign insurance firms to merge with or acquire local companies. Foreign insurance firms in Taiwan may engage in life, non-life, and re-insurance businesses.

### **Healthcare Services**

All healthcare services in Taiwan must be provided by non-profit organizations. The number of foreign persons permitted to serve on the board of directors of a healthcare service provider is limited to no more than one-third of the total members. In addition, one-third of the board members must have professional medical qualifications.

Taiwan does not license or recognize chiropractors as legitimate medical practitioners, and allows chiropractors to practice in Taiwan only if they do not advertise their services and make no claims about the results or efficacy of treatments.

Taiwan first started the national health insurance program in 1995 based on the National Health Insurance Act (NHIA). In order to improve the healthcare system for a better healthcare operation environment and service, the Legislative Yuan amended the NHIA in December 2010, to include several important concepts that are of interest to industry, including the drug expenditure target (DET), and the health technology assessment (HTA). The new NHIA would be implemented in 2012 following public hearings to discuss implementation rules regarding DET, HTA, and price adjustment mechanisms.

## **Pay Television Services**

The Cable Radio and Television Law restricts foreign investment in pay television services to a total equity share of 20 percent for direct investment, or 60 percent for direct plus indirect investment. In addition, continuing caps on monthly cable television fees are overly restrictive, hampering the Taiwan public's access to a broader range of programming. The fees may also reduce the cable industry's incentives to invest in expensive digitalization of Taiwan's largely analog cable system.

## **Telecommunications Services**

The National Communications Commission (NCC) is an independent agency modeled after the U.S. Federal Communications Commission which regulates Taiwan's telecommunications and broadcasting sectors, and supports the development of these industries. In 2008, the NCC began accepting and reviewing license applications when submitted, rather than on a quarterly basis. In addition to completing NT\$35 billion (\$1.1 billion) of new broadband network construction ongoing since 2003, the NCC in July 2007 issued six regional licenses to Worldwide Interoperability for Microwave Access (WiMax) operators. Three WiMax operators began services in 2009. A total of six are in operation as of 2010, a situation that will help break the dominance of the telecommunications network by Chunghwa Telecom (CHT), the legacy carrier still partially owned by the Ministry of Transportation and Communications and Taiwan's largest telecommunications firm with approximately half of the market.

Despite these advances, the agency has been criticized for demanding that service suppliers reduce fees, causing a decrease in infrastructure investment by firms. NCC has been ineffective in integrating telecommunications and broadcasting regulations, causing Taiwan's telecommunications industry to fall behind in an era of digital convergence. For example, current regulations prevent Taiwan's principal fixed-line phone company, CHT, from running multimedia-on-demand (MOD) programs, and restrict another primary mobile phone operator, Taiwan Mobile Co., from acquiring a cable television multi-system operator. In addition, existing fixed-line operators report that they still face difficulties in negotiating reasonable interconnection arrangements at technically feasible points in the network of the dominant carrier, CHT.

## **INVESTMENT BARRIERS**

Taiwan prohibits or restricts foreign investment in certain sectors, including agricultural production, chemical manufacturing, bus transportation, and public utilities. National treatment has recently been accorded in the postal services and pesticide production sectors. Since 2004, Taiwan has allowed private production of cigarettes without any foreign ownership limit, although prior official approval is required. Shipping companies registered in Taiwan are subject to a foreign ownership limit of 50 percent. Foreign ownership in Taiwan-registered merchant ships is limited to a 50 percent stake for ships engaged in international shipping, and to a 33 percent stake for those involved in domestic shipping, including shipping to the PRC.

The total direct and indirect foreign ownership limit on wireless and wire line telecommunications firms is 60 percent, including a direct foreign investment limit of 49 percent. Separate rules exist for CHT, the legacy carrier still partially owned by the Ministry of Transportation and Communications. CHT controls 97 percent of the fixed-line telecommunications market. For CHT, the cap on direct and indirect investment was raised to 55 percent in December 2007, including a direct investment limit of 49 percent. The total direct and indirect foreign ownership limit on cable television broadcasting services is 60 percent, which includes a 20 percent limit on foreign direct investment.

Foreign ownership in satellite television broadcasting services, power transmission and distribution, piped distribution of natural gas, high speed railways, airport ground handling firms, air cargo terminals, air catering companies, and air cargo forwarders is limited to 49 percent of the total shares issued. In July 2007, the foreign ownership limit on airline companies was raised from 33 percent to 49.99 percent, with each individual foreign investor subject to an ownership limit of 25 percent.

### **Portfolio Investment**

Foreign portfolio investors are required to register and they can do so via the Internet. Up to 30 percent of funds remitted for purposes of portfolio investment may be held in money market or other similar instruments. Funds for futures trading, however, must be remitted to Taiwan specifically for that purpose and are segregated from funds remitted for equity investment. In 2007, Taiwan set a cap of NT\$300 million (approximately US\$9.2 million) on the balance of a foreign investor's NT\$ omnibus account resulting from profits gained from futures trading in Taiwan. If the balance exceeds the limit, the foreign investor is required to convert the NT dollars into U.S. dollars, with the new balance below US\$10 million. Except for investors from the PRC, offshore foreign portfolio investors may trade in Taiwan's stock market regardless of their size.

Since April 2009, Taiwan has allowed PRC-based qualified domestic institutional investors to engage in portfolio investment and futures trading in Taiwan. China investors may invest in the following Taiwan securities: shares of listed companies, beneficial certificates, public sector bonds, financial bonds, corporate bonds issued by public companies, asset-backed securities, and call warrants. A PRC-based institutional investor that engages in futures trading can only do so using foreign currencies.

Foreign hedge funds have been permitted to trade in Taiwan's stock market since 2003, but they are subject to Taiwan authorities' close surveillance. Foreign individual investors are subject to an investment limit. Onshore foreign individuals and institutional investors are also subject to annual inward/outward limits of \$5 million and \$50 million, respectively.





# THAILAND

## TRADE SUMMARY

The U.S. goods trade deficit with Thailand was \$13.7 billion in 2010, up \$1.5 billion from 2009. U.S. goods exports in 2010 were \$9.0 billion, up 29.7 percent from the previous year. Corresponding U.S. imports from Thailand were \$22.7 billion, up 18.9 percent. Thailand is currently the 28th largest export market for U.S. goods.

U.S. exports of private commercial services (*i.e.*, excluding military and government) to Thailand were \$1.6 billion in 2009 (latest data available), and U.S. imports were \$1.5 billion. Sales of services in Thailand by majority U.S.-owned affiliates were \$4.6 billion in 2008 (latest data available), while sales of services in the United States by majority Thailand-owned firms were not available in 2009 (\$239 million in 2005, latest data available).

The stock of U.S. foreign direct investment (FDI) in Thailand was \$10.2 billion in 2009 (latest data available), up from \$9.3 billion in 2008. U.S. FDI in Thailand is led by the manufacturing and banking sectors.

## IMPORT POLICIES

Thailand's high tariffs remain an impediment to market access in many sectors. While Thailand's average applied MFN tariff rate was 10.4 percent in 2009, ad valorem tariffs are as high as 50-80 percent, and the ad valorem equivalent of some specific tariffs (charged mostly on agricultural products) are even higher. About one-third of Thailand's MFN tariff schedule involves a duty less than 5 percent, and almost 20 percent of tariff lines enter Thailand duty-free, including in key sectors like chemicals, electronics, industrial machinery, and paper. Thailand has bound all tariffs on agricultural products in the WTO, but only around 70 percent of its tariff lines on industrial products. The highest tariff rates apply to imports competing with locally produced goods, including automobiles and automotive parts, motorcycles, beef, pork, poultry, tea, wine and spirits, and textiles and clothing.

Thailand has bound its tariffs on agricultural products at an average of 40.6 percent, although its average applied MFN tariff on agricultural products is 22.6 percent. MFN duties on imported processed food products typically range from 30 percent to 50 percent, which have hindered U.S. exports of these products into Thailand. Tariffs on meats, fresh fruits (including citrus fruit and table grapes) and vegetables, fresh cheese, and pulses (*e.g.*, dry peas, lentils, and chickpeas) are similarly high. High tariffs are sometimes applied to products even when there is little domestic production. The type of potato used to produce frozen French fries, for example, is not produced in Thailand, yet imports of these potatoes face a 30 percent tariff. Tariffs on apples are 10 percent, while duties on pears and cherries range from 30 percent to 40 percent. U.S. fruit growers estimate they could export up to \$15 million more to Thailand each year if these tariffs were eliminated. In addition, the lowering of tariffs below MFN rates through free trade agreements with countries such as China, Australia, and New Zealand has reduced the competitiveness of many U.S. products including agricultural products in recent years and threatens to significantly erode U.S. market share as these agreements are phased in.

Nearly 30 percent of tariffs on industrial goods in Thailand are unbound in the WTO. For non-agricultural products with bindings, Thailand's average bound tariff is 25.5 percent. Thailand's MFN tariffs on industrial goods tend to be much lower than its bindings, averaging 8 percent in 2009. However, Thailand charges significant peak rates in some sectors; the MFN tariff on imported motor vehicles is 80 percent, 60 percent on motorcycles, and 30 percent on certain articles of plastic. Thailand's

tariff rates for textiles imports are also high, ranging from 20 to 30 percent for most fabrics, 30 percent for most clothing and other made-up textile products, and reaching 60 percent for some clothing products, according to information provided by Thailand to the WTO. Thailand also applies specific duties on more than a third of all textile tariff lines, which can result in even higher effective rates.

Excessive Thai tariffs on restaurant equipment – including ovens, fryers, ice cream machines, appliances, and cooking utensils, which are sometimes as high as 30 percent – hinder expansion of U.S. quick service restaurants in Thailand as well as U.S. exports.

Thailand applies a 10-percent tariff to all pharmaceuticals (excluding vaccines and therapies for HIV, malaria, and thalassemia). In addition to this tariff, all medicines are subject to a 7 percent value-added tax.

### **Nontariff Barriers (NTBs)**

*Quantitative Restrictions and Import Licensing:* Import licenses are required for at least 32 categories of items, including many raw materials, petroleum, industrial materials, textiles, pharmaceuticals, certain consumer products, and agricultural items. Imports of used motorcycle parts and gaming machines are prohibited. Import licenses for used automobiles and used motorcycles are granted only for imports intended for re-export or for individual, non-commercial use. Imports of certain minerals, arms and ammunition, and art objects require special permits from the relevant ministries.

Although Thailand has been relatively open to imports of feed ingredients, including corn, soybeans, and soybean meal, U.S. industry reports that the government has maintained excessively burdensome import requirements for feed products containing dairy ingredients. Nontransparent tariff-rate quotas on some products and price controls on others also impede market access. Thailand imposes domestic purchase requirements for several tariff-rate quota products, including nonfat dry milk, soybeans, soybean meal, and fresh potatoes. Delays in finalizing administrative tariff-rate quotas have led to market uncertainty and shipping disruptions.

Thailand imposes food safety inspection fees in the form of import permit fees on all shipments of uncooked meat. Currently, imports face fees of 5 baht per kilogram (approximately \$160 per ton) for red meat (beef, buffalo meat, goat meat, lamb, and pork) and for offal, and 10 baht per kilogram (\$320 per ton) for poultry meat. Fees for domestic meat inspections are much lower and are levied in the form of a slaughtering or slaughterhouse fee. The fees are \$5 per ton for domestic beef; \$21 per ton for poultry; \$16 per ton for pork; and zero for offal.

Thailand bans heavyweight motorcycles from highways, even though heavyweight motorcycles are designed for highway use, most countries accept their use, and many traffic studies demonstrate there is no underlying safety rationale for such bans.

*Taxation:* The complexity of Thailand's tax system also has raised concerns among foreign businesses. Excise taxes are high on some items, such as unleaded gasoline, beer, wine, and distilled spirits. For example, when import duties, excise taxes, and other surcharges are calculated, the cumulative duty and tax burden on most imported spirits is approximately 400 percent.

Excise taxes on automobiles in Thailand are based on various vehicle characteristics, such as engine size, weight, and wheelbase. In July 2004, Thailand revised its excise tax structure, but the tax calculation remains complex and heavily favors domestically manufactured vehicles. Excise taxes on passenger vehicles range from 30 percent to 50 percent, while pickup trucks are taxed at a rate of 3 percent. As a result, domestic pickup trucks account for more than 50 percent of total vehicle sales in Thailand.

*Customs Barriers:* The United States continues to have serious concerns about the lack of transparency of the Thai customs regime and the significant discretionary authority exercised by Customs Department officials. The Customs Department Director General retains the authority and discretion to arbitrarily increase the customs value of imports. The United States has raised concerns with the Royal Thai government regarding this authority and has urged Thailand to eliminate this practice. The U.S. Government and industry also have expressed concern about the inconsistent application of Thailand's transaction valuation methodology and repeated use of arbitrary values by the Customs Department.

The U.S. Government and exporters continue to urge the Customs Department to implement overdue reforms, including publishing proposals for changes in customs laws, regulations, and notifications, and allowing sufficient time for comments on these proposals. Of additional concern are the failure to publish customs rulings and the lengthy appeals process for these rulings, both of which create considerable uncertainty for importers.

U.S. companies also continue to report serious concerns about corruption and the inappropriate penalty reward system for customs officials. In August 2009, the Royal Thai government proposed a series of reforms to its customs laws and procedures. A first set of amendments that address some aspects of the penalty regime was approved by the Thai Cabinet in September 2010, but now must be reviewed and passed by Parliament. The U.S. Government will continue to discuss the details of these specific proposals with the Thai government in 2011.

## **GOVERNMENT PROCUREMENT**

A specific set of rules, commonly referred to as the Prime Minister's Procurement Regulations, governs public sector procurement for ministries and state-owned enterprises. While these regulations require that nondiscriminatory treatment be accorded to all potential bidders and open competition be applied in all procurements, state enterprises and ministries typically apply additional procurement policies and practices. Preferential treatment is provided to domestic suppliers, including subsidiaries of U.S. firms registered as Thai companies, through an automatic seven percent price advantage over foreign bidders in evaluations in the initial bid round.

Where corruption is suspected during the bidding process, government agencies and state enterprises reserve the right to accept or reject any or all bids at any time and may also modify the technical requirements. This allows considerable leeway to government agencies and state-owned enterprises in managing procurements, while denying bidders recourse to challenge procedures. There are frequent allegations that the Thai government makes changes to technical requirements during the course of procurements.

Despite an official commitment to transparency in government procurement, U.S. companies and the Thai media have reported allegations of irregularities. In addition, some U.S. companies have expressed concerns regarding a Thai government decision to no longer include arbitration clauses in concessions and government contracts. In addition, the Thai government is considering an amendment to the Arbitration Act that would exempt government contracts from arbitration procedures altogether.

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

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

Thailand was listed on the Priority Watch List in the 2010 Special 301 Report. The United States also conducted an out-of-cycle review in 2010 to review Thailand's IPR protection and enforcement prior to the full Special 301 annual review in 2011. Key concerns cited in the 2010 report included continued

widespread copyright piracy and trademark counterfeiting and a growing challenge in the areas of Internet, cable, and signal piracy. While the United States is encouraged by the Royal Thai government's senior level commitment to stronger IPR protection and enforcement through the creation of the National Task Force, its action plan to improve its IPR regime and the launch of the Creative Economy project, some concerns regarding IPR protection and enforcement remain and represent barriers to U.S. exports and investment. The United States welcomed Thailand's accession to the Patent Cooperation Treaty in 2009 and will continue to encourage Thailand to quickly enact proposed legislation to amend its copyright law to, among other things, implement the WIPO Internet Treaties, address landlord liability for infringement and illegal camcording, and enhance the authority of Thai Customs to take enforcement actions *ex officio*. Thailand also is considering possible amendments to its patent law.

## **SERVICES BARRIERS**

### **Telecommunications Services**

Thailand has made progress toward reforming its telecommunications regulatory regime, but significant obstacles to foreign investment remain. While foreign equity levels are capped at 20 percent under Thailand's WTO commitments, Thai law allows foreign equity up to 49 percent in basic telecommunications service firms and higher for an operator that does not own its telecommunications network but provides value-added services, such as internet service providers (ISPs), audio text providers, and resale service providers (prepaid calling cards). The licensing regime, however, has still limited access to narrowly-defined sub sectors.

The Thai Constitution of 2007 provides for a single independent regulator, provisionally named the National Broadcasting and Telecommunications Commission (NBTC), to allocate additional spectrum for radio and television frequencies and telecommunications. In 2010, Parliament approved the Frequency Allocation Act, which formally established the NBTC. The NBTC is not yet operational, however, and the regulations and procedures for allocating additional frequencies therefore remain unclear. This situation puts at risk any plans for expanding mobile services that can only be provided if operators are able to obtain additional spectrum, including for services using third generation (3G) technology. Other unresolved issues in the telecommunications sector include the phasing out of the concession contracts of the state-owned TOT and CAT Telecom; preferences accorded to TOT and CAT with respect to spectrum; the privatization of TOT and CAT; enforcing the interconnection obligations of these two operators; and Thailand's revision of its GATS schedule to reflect its 1998 commitments in the WTO, including with respect to improvements in foreign equity participation and regulatory oversight.

Although the National Telecommunications Commission has made progress in licensing new operators in some sub-sectors (*e.g.*, Internet access and private networks), it has yet to put in a framework for licensing competitors to the fixed services offered by CAT and TOT, covering domestic and international voice and data services.

### **Legal Services**

U.S. investors may own law firms in Thailand, but U.S. citizens and other foreign nationals (with the exception of "grandfathered" non-citizens) may not provide legal services. In certain circumstances, foreign attorneys may act in a consultative capacity.

### **Financial Services**

Significant restrictions remain on foreign participation in the financial services sector. The 2008 Financial Institutions Business Act, the consolidated financial act that replaced the 1962 Commercial

Bank Act and a 1979 Act on financial services, allows foreign equity ownership up to 49 percent. However, foreign ownership between 25 percent and 49 percent requires prior approval from the Bank of Thailand. The law also allows the Ministry of Finance to authorize foreign ownership greater than 49 percent if deemed necessary to support the stability of the overall financial system during an economic crisis. Permission for foreigners to have more than a 49- percent equity stake in Thai securities firms is granted on a case-by-case basis.

Foreign banks are generally limited to one branch and are not permitted to operate off-site automated teller machines (ATMs), which are considered branches. Subsidiaries established from 2004 to 2008 under the first Financial Sector Master Plan (FSMP) are entitled to open up to five bank branches, including a headquarters office. Under the second FSMP, which was approved by the Cabinet in 2009, foreign banks are allowed to open two additional branches from 2010 onward. The second FSMP also allows some foreign bank branches to have up to 20 branches and 20 ATMs, subject to Bank of Thailand approval. Foreign management personnel are limited to six professionals in full branches and subsidiaries of foreign banks, although exceptions are often granted. In August 2009, pursuant to Thailand's commitments under the ASEAN Framework Agreement on Services, the Bank of Thailand waived the foreign management personnel restriction if the employees are nationals from ASEAN member states.

### **Accounting Services**

Foreigners cannot be licensed as Certified Public Accountants unless they pass the required examination in the Thai language, are citizens of a country with a reciprocity agreement, and are legally resident in Thailand. Foreign accountants may serve as business consultants.

### **Transport Services**

The 2005 Multimodal Transport Act introduced uncertainty with respect to the treatment of foreign shipping companies. According to the law and its implementing regulations, foreign shipping companies performing multimodal services in Thailand are required to either incorporate in Thailand or appoint a Thai agent. The ministerial regulations implementing the law waive this requirement for foreign shipping companies transporting goods under bills of lading governed by international convention.

### **Postal and Express Delivery Services**

Thailand's Postal Act (1934) gives the government a monopoly on handling letters and postcards. Private express delivery companies must pay postal "fines" and penalties for delivery of documents in Thailand. These fines amount to an average of 37 baht per item (slightly more than \$1) for shipments that weigh less than two kilograms.

Thailand also imposes a 49-percent limit on foreign ownership in land transport (trucking), which discourages investment in the express delivery sector. Express delivery firms prefer to control items throughout the supply of the service, including both air and ground based operations, in order to speed the movement of goods.

### **Healthcare Services**

Thai government policy serves to restrict foreign investment in the healthcare services sector (*e.g.*, hospital, dental, and physician services). U.S. industry has identified the lack of transparency relating to foreign ownership and management of hospitals and treatment facilities as a significant barrier in this sector.

## **INVESTMENT BARRIERS**

The Foreign Business Act (FBA) lays out the overall framework governing foreign investment in Thailand. Under the FBA, a foreigner, defined as a person or company of non-Thai nationality or a company where foreign ownership accounts for 50 percent or more of total shares and/or registered shares, needs to obtain an alien business license from the relevant ministry before commencement of its business in a sector restricted by the FBA. Although the FBA prohibits majority foreign ownership of investment in most sectors, Thailand makes an exception for U.S. investors pursuant to the Treaty of Amity and Economic Relations (AER Treaty). Under the AER, Thailand may limit U.S. investment only in the following areas: “communications, transportation, fiduciary functions, banking involving depository functions, the exploitation of land or other natural resources, and domestic trade in indigenous agricultural products.” Thailand’s obligation to accord national treatment to U.S. investors in all other sectors does not extend to “the practice of professions, or callings reserved for Thai nationals”.

## **ELECTRONIC COMMERCE**

Thailand does not have a complete legal framework to support electronic commerce, but the Thai government is taking steps to create a more supportive environment. In July 2007, the Act on Computer-Related Crime was enacted to criminalize offenses against computer systems and data. Thailand also enacted an electronic transaction law, as well as several royal decrees establishing policies for electronic transactions and e-payment service providers. Several additional measures are pending approval, including security measures for electronic transactions, a draft law on personal data protection, and regulations for certification authority.

## **OTHER BARRIERS**

In the pharmaceutical sector, the Government Pharmaceutical Organization (GPO) is not subject to registration requirements faced by the private sector. The Council of State is currently reviewing a proposed law, however, that would eliminate GPO’s exemption from these requirements. GPO also is exempt from complying with the requirements of the safety monitoring period (SMP) when producing and marketing generic formulations of drugs marketed in foreign countries. Other manufacturers are subject to a mandatory two-to-four-year SMP for all new chemical entities registered and approved for marketing in Thailand. This and other Thai government requirements limiting government hospitals’ procurement and dispensing of drugs not on the national list of essential drugs significantly constrain the availability of many imported products.

The U.S. pharmaceutical industry has expressed serious concern regarding the uncertain climate for its business in Thailand. The United States will continue to encourage Thailand to engage in a meaningful and transparent manner with all relevant stakeholders as it considers ways to address Thailand’s public health challenges.

The Thai government retains authority to control prices or set *de facto* price ceilings for 38 goods and one service, including staple agricultural products (sugar, cooking oil, condensed milk, wheat flour, and others), liquefied petroleum gas, medicines, sound recordings, and student uniforms. Price control review mechanisms are nontransparent. In practice, the government also uses its control of major suppliers of products and services under state monopoly, such as the petroleum, aviation, and telecommunications sectors, to influence prices in the local market.

The 2007 Thai Constitution contains provisions to combat corruption, including enhancement of the status and powers of the National Counter Corruption Commission, which is independent from other branches of government. Persons holding high political office and members of their immediate families

are required to disclose their assets and liabilities before assuming and upon leaving office. Moreover, a law regulating the bidding process for government contracts defines actionable corruption offenses and increases penalties for violations. Despite these steps, corruption continues to be a serious concern. Anticorruption mechanisms continue to be employed unevenly, and the lack of transparency in many government administrative procedures facilitates corruption.





# TURKEY

## TRADE SUMMARY

The U.S. goods trade surplus with Turkey was \$6.3 billion in 2010, an increase of \$2.9 billion from 2009. U.S. goods exports in 2010 were \$10.5 billion, up 48.7 percent from the previous year. Corresponding U.S. imports from Turkey were \$4.2 billion, up 14.8 percent. Turkey is currently the 26th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Turkey was \$6.3 billion in 2009 (latest data available), up from \$5.7 billion in 2008. U.S. FDI in Turkey is led by the wholesale trade, and manufacturing sectors.

## IMPORT POLICIES

### Tariffs and Quantitative Restrictions

Turkey applies the EU's common external customs tariff to third-country nonagricultural imports (including from the United States) and does not impose duties on nonagricultural items from EU and European Free Trade Association (EFTA) countries.

Turkey continues to maintain high tariff rates on many food and agricultural product imports. Tariffs on fresh fruits range from 15.4 percent to 145.8 percent. Tariffs on processed fruit, fruit juice, and vegetables range between 19.5 percent and 130 percent. The Turkish government also levies high tariffs, excise taxes and other domestic charges on imported alcoholic beverages that increase wholesale prices by more than 200 percent.

U.S. exporters of rice, dried beans, pulses, sunflower seeds, and wheat, have reported concerns with valuation of their products by Turkish customs authorities.

### Import Licenses and Other Restrictions

Import licenses are required for products that need after-sales service (*e.g.*, photocopiers, advanced data processing equipment, and diesel generators), distilled spirits, and agricultural products. U.S. firms complain that lack of transparency in Turkey's import licensing system results in costly delays, demurrage charges, and other uncertainties that inhibit trade. U.S. producers have reported difficulties in obtaining import licenses during the domestic harvest season for products that compete with domestically produced food (such as pulses, nuts, dried fruits, cotton, grain, and oilseeds); however, this situation has reportedly improved in the past year. U.S. companies also frequently find Turkish documentation requirements affecting all food imports to be onerous, inconsistent, non-transparent, and not in accordance with standard international practices, resulting in shipments on numerous occasions being held up at port.

In November 2005, the United States brought a dispute against Turkey to the WTO arguing that, *inter alia*, Turkey's tariff-rate quota (TRQ) regime for rice, which contained an onerous domestic purchase requirement, as well as its refusal to issue import licenses for rice outside the TRQ, were inconsistent with Turkey's WTO obligations. In September 2007, a WTO dispute settlement panel agreed with the United States that Turkey's TRQ regime for rice was in breach of Turkey's market access obligations under the WTO Agreement on Agriculture and the national treatment provisions of the General Agreement on Tariffs and Trade 1994 (GATT 1994). The reasonable period of time for Turkey to comply with the

WTO's rulings and recommendations expired at the end of April 2008. Turkish authorities have taken no recent actions to impede rice imports, and rice exports in 2010 reached record levels.

The Turkish government has taken a number of steps to liberalize the spirits and tobacco markets – including completing the privatization of the state-owned alcoholic beverage company and the state-owned tobacco company, as well as some opening to private firms of the ability to import wine and alcoholic beverages. However, sales of imported products in these sectors have been inhibited by inordinately high tariffs (85 percent to 100 percent) and special tax treatment in some cases.

## **GOVERNMENT PROCUREMENT**

Turkey is not a signatory to the WTO Agreement on Government Procurement; however, it is an observer to the WTO Committee on Government Procurement.

Turkey's public tender law established an independent board to oversee public tenders. Foreign companies are allowed to participate in state tenders valued above an established threshold. However, the law provides a price preference of up to 15 percent for domestic bidders, which is not available if they form joint ventures with foreign bidders. Turkey has expanded the definition of a domestic bidder to include foreign-owned corporate entities established under Turkish law. Although Turkish law requires competitive bidding procedures, U.S. companies have complained that Turkey's procurement process can be lengthy and overly complicated. One of the problems identified by some companies is the requirement to use model contracts. Because various Turkish government procuring agencies do not allow for such model contracts to be modified, companies can find it difficult to formulate proposals when the model contracts contain non-germane financial requirements or technical specifications.

Turkey generally requires offsets with respect to military procurement. Since 2005, when the offset guidelines were modified to encourage foreign direct investment and technology transfers, U.S. companies have won few new commercial defense sales. Some U.S. companies have declined to submit bids in the face of such requirements.

## **EXPORT SUBSIDIES**

Turkey employs a number of incentives to promote exports, although programs have been scaled back in recent years to comply with EU directives and WTO commitments. Published export subsidies ranging from 5 percent to 20 percent of export values are granted to 16 agricultural or processed agricultural product categories in the form of tax credits and debt forgiveness programs, and are paid for by taxes on exports of primary products such as hazelnuts and leather. The Turkish Grain Board generally sells domestic wheat at world prices (which are well below domestic prices) to Turkish flour and pasta manufacturers in quantities based upon their exports of flour and pasta.

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

Turkey remained on the Watch List in the 2010 Special 301 Report. Turkey has not yet completed important legislative reforms needed to ensure effective enforcement of IPR. The Special 301 Report noted that piracy and counterfeiting are continuing, serious problems. Piracy of business software, and online music piracy have increased, and book and entertainment software piracy remain a concern. Over the course of 2010, Turkey conducted several operations that resulted in the seizure of large amounts of counterfeit goods. However, Turkey is also becoming a major exporter of, as well as a transshipment point for, counterfeit and pirated products. Delays in the judicial process further deficiencies in the overall IPR protection and enforcement regime. The Constitutional Court's dismissal of a significant number of trademark-related infringement convictions in 2008 – and the Turkish government's

subsequent inability to successfully prosecute the original offenders – continues to cause concern among rightsholders regarding Turkey’s commitment to effective trademark protection.

## **SERVICES BARRIERS**

### **Telecommunications Services**

The Telecommunications Authority (TK) is responsible for enforcing bans on Internet content that the courts have determined to be offensive. This has on many occasions led to TK blocking access for all consumers to various Internet-based service providers, such as the weblog hosting site [www.wordpress.com](http://www.wordpress.com), social networking sites like MySpace, and the video-sharing website YouTube.

### **Other Services Barriers**

There are some restrictions on establishment in the financial services, legal services, broadcasting, and petroleum sectors. Turkish citizenship is required to practice as an accountant or certified public accountant, or to represent clients in Turkish courts. Legislation awaiting final approval by Parliament would permit foreign doctors to work in Turkey.

## **INVESTMENT BARRIERS**

### **Energy Sector**

Turkish law calls for a liberalized energy market in which private firms are able to develop projects with a license obtained from the Energy Market Regulatory Authority, an independent regulatory body. The state electricity utility has been unbundled into power generation, transmission, distribution, and trading companies. As of December 2010, ten of the 21 regional distribution companies have been fully transferred to the private sector, eight have been tendered are in the process of being transferred, and three are in the tender process. The government plans to finalize privatization of all distribution regions and start privatization of the generation facilities in 2011.

Liberalization in the natural gas sector has also faced delays. The state pipeline company, BOTAS, remains dominant in gas importation, despite legislation requiring a phased transfer of 80 percent of its gas purchase contracts to the private sector by the end of 2009. Except for a small scale contract transfer tender in 2005, BOTAS has failed to reach its targets and still has an 86 percent share in the gas market. BOTAS plans to announce another tender in the first half of 2011 to transfer operational rights of some other contracts. The Turkish government has plans to introduce an amendment to the Natural Gas Market law, but the timetable remains unclear. According to this amendment, BOTAS would be broken up into three different companies charged with transportation, trading, and storage. Natural gas distribution in cities is dominated by the private sector, with the exception of Istanbul, where the local administration holds the distribution license but has plans to finalize privatization of the distribution system in 2011.

As the result of a 1997 court decision, the Turkish government blocked full repatriation of profits by foreign oil companies under Article 116 of the 1954 Petroleum Law, which had protected foreign investors from the impact of lira depreciation. Affected companies have challenged the 1997 decision, but the judgments in almost all such lawsuits have gone against the claimant companies. A new petroleum law that would provide greater investment incentives and protections has been submitted to the Parliament. The law is expected to come up for legislative consideration in 2011.

Turkey's decision to cancel 46 contracted power projects in 2001 led to a number of arbitration cases against the government, with the end result being that most companies were compensated. However, this action and the uncertainty it generated, combined with government-controlled prices despite rising fuel costs, delayed private investments in the power sector from 2001 to 2008, at a time when demand for electricity increased substantially. Turkey passed its long-awaited Nuclear Power Law in 2008, and conducted a tender in September 2008 to build a nuclear plant. Several international companies, including U.S. firms, expressed interest in the tender. However the government turned down the companies' request for a delay in the bidding deadline, and as a result only one Russian consortium submitted a bid. After a year-long evaluation period, the Turkish government finally cancelled the tender in November 2009, based on a court decision related to legal complications with the bid. The government moved forward with nuclear power projects in two sites in 2010: Akkuyu on the Mediterranean coast and Sinop on the Black Sea coast. In May 2010, the government signed an intergovernmental agreement for the construction and operation of the Akkuyu plant with the government of Russia. The government pursued a public-private partnership model with the government of the Republic of Korea for the Sinop site, but negotiations ended in November 2010 without an agreement.

### **Work Permits**

Many foreign (and reportedly many Turkish) employers perceive the difficulty in obtaining Turkish work permits for professional or highly skilled foreign workers as a pervasive problem. Companies complain that the application process is time-consuming and requires extensive documentation, the adjudication process is lengthy (often exceeding the time for which the permit is requested), and the chances of approval are low.

### **Real Estate**

Foreign ownership of real estate in Turkey has long been a contentious issue. In early 2008, the Constitutional Court issued two decisions that suspended portions of the Foreign Direct Investment Law and the Title Deed Law which had allowed foreign individuals and companies to purchase land. In response, the Turkish government passed new legislation to permit these purchases again, but imposed an upper limit on the amount of land that can be owned by foreign individuals: no foreign individual may own more than 2.5 acres and all foreign individuals together can own no more than ten percent of the land in any given development zone. As information on the amount of land currently held by foreigners in any development zone is not readily available, this may cause problems and legal challenges for individual investors seeking to purchase land in Turkey. There are no limits on the amount of land that can be owned by foreign companies with a legal presence in Turkey, so long as the land is being used in accordance with their business activities.

## **OTHER BARRIERS**

### **Corruption**

Turkey is a party to the OECD anti-bribery convention and passed implementing legislation that makes bribery of foreign officials illegal and no longer tax-deductible. Turkey is also a State Party to the United Nations Convention Against Corruption, which requires State Parties to criminalize domestic and foreign bribery and other corruption offenses as well. Despite this, many foreign firms doing business in Turkey perceive corruption to be a problem.

The judicial system is also perceived by many observers to be susceptible to external influences and to be somewhat biased against foreigners.

**Taxes**

Turkey assesses a special consumption tax between 27 and 50 percent on all motor vehicles based on engine size, which has a disproportionate adverse effect on automobiles imported from the United States.

**Pharmaceuticals**

The pharmaceutical industry reports that its sales have been severely affected by government price controls and an awkward, burdensome reimbursement system. In 2008, Turkey implemented changes in its reimbursement scheme that increased the cost borne by pharmaceutical manufacturers. In September 2009, faced with a growing health care budget deficit, the Turkish government decreed additional mandatory discounts totaling over \$2.3 billion. A large majority of the burden of these discounts fall on foreign manufacturers of pharmaceuticals. In December 2009, the government and pharmaceutical industry agreed on a compromise pricing deal that will require U.S. firms to provide extra discounts of approximately \$800 million per year.



# UNITED ARAB EMIRATES

## TRADE SUMMARY

The United Arab Emirates (UAE) is a federation of seven emirates (Abu Dhabi, Dubai, Sharjah, Ajman, Umm Al-Qaiwain, Fujairah, and Ras Al-Khaimah). The U.S. goods trade surplus with the United Arab Emirates was \$10.5 billion in 2010, a decrease of \$220 million from 2009. U.S. goods exports in 2010 were \$11.6 billion, down 4.7 percent from the previous year. Corresponding U.S. imports from the United Arab Emirates were \$1.1 billion, down 23.6 percent. The United Arab Emirates is currently the 21st largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in the United Arab Emirates was \$4.0 billion in 2009 (latest data available), up from \$3.4 billion in 2008. U.S. FDI in the United Arab Emirates is led by the wholesale trade sector.

## IMPORT POLICIES

### Tariffs

As a member of the Gulf Cooperation Council (GCC) customs union, the UAE applies the GCC common external tariff of five percent for most products, with a limited number of GCC-approved country-specific exceptions. Currently, the UAE's exceptions to the five percent tariff are a 50 percent tariff on alcohol, a 100 percent tariff on tobacco, and duty exemptions for 53 food and agricultural items. In February 2009, the UAE reinstated a five percent tariff on steel and cement, after a one year exemption that had been aimed at easing inflation in the construction sector.

### Import Licensing

Only firms with an appropriate trade license can engage in importation, and only UAE registered companies, which must have at least 51 percent ownership by a UAE national, can obtain such a license. This licensing provision does not apply to goods imported into free zones. Some goods for personal consumption do not require import licenses.

### Documentation Requirements

Since July 1998, the UAE has required that documentation for all imported products be authenticated by the UAE Embassy in the exporting country. There is an established fee schedule for this authentication. For U.S. exports, if validation is not obtained in the United States, customs authorities will apply the fee schedule when the goods arrive in the UAE.

## GOVERNMENT PROCUREMENT

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

The UAE grants a 10 percent price preference for local firms in government procurement. The UAE requires companies to register with the government before they can participate in government procurements, but to be eligible for registration, a company must have at least 51 percent UAE ownership. This requirement does not apply to major projects or defense contracts where there is no local company able to provide the goods or services required.



The UAE's offset program requires defense contractors which are awarded contracts valued at more than \$10 million to establish commercially viable joint ventures with local business partners that would be projected to yield profits equivalent to 60 percent of the contract value within a specified period (usually 7 years). To date, more than 40 such joint venture projects have been launched, including, *inter alia*, a hospital, an imaging and geological information facility, a leasing company, a cooling system manufacturing company, an aquiculture enterprise, a foreign language training center in Abu Dhabi, and a firefighting equipment production facility. Two of the largest offset ventures are an international gas pipeline project (Dolphin) and the Oasis International Leasing Company, a British Aerospace offsets venture. There are also reports, as well as anecdotal evidence, indicating that defense contractors can sometimes satisfy their offset obligations through an up-front, lump-sum payment directly to the UAE Offsets Group.

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

The UAE has made the protection of intellectual property a priority in recent years. According to 2010 industry estimates, the rate of software piracy in the UAE is the lowest in the Middle East, and the second lowest in the Middle East and Africa, after South Africa. While the UAE is recognized as the regional leader in fighting computer software piracy, other industry stakeholders believe the UAE could be doing more. For example, the recording industry has complained about the UAE's failure to establish a royalty collecting mechanism for the use of recorded music, which means that right holders are not being remunerated for certain uses of such works.

The GCC Customs Union, of which the UAE is one of six members, is preparing a draft common trademark law, as well as a draft common unfair competition law to protect companies from unfair commercial use of undisclosed information submitted for marketing approval of pharmaceutical products. The United States is engaged in a dialogue with GCC technical experts to help ensure that the trademark law and unfair competition law will facilitate Member States' implementation of international and bilateral obligations.

## **SERVICES BARRIERS**

### **Insurance**

Foreign insurance companies may operate only as branches in the UAE. An insurance company established in the UAE must be a public joint stock company. At least 75 percent of the capital in such companies must be owned by UAE nationals, while the remaining 25 percent may be owned by a foreigner. Since 2008, new insurance licenses have been issued only to UAE and GCC firms.

In the Emirate of Abu Dhabi, the offering of insurance coverage for construction projects and companies under the Abu Dhabi National Oil Company (ADNOC) is restricted to Abu Dhabi-based insurance companies.

### **Banking**

The UAE Central Bank does not grant new licenses to foreign banks. In 2008, the Central Bank allowed several foreign banks already operating in the UAE to set up new branches. According to Central Bank statistics, there were no new foreign bank branches in 2009 and 2010 but the number of electronic banking service units for foreign banks operating in the UAE reached 47 in 2010, up from 43 units in 2009. In 2010, local banks opened 27 new branches.

## **Agent and Distributor Rules**

It remains difficult, if not impossible, to sell products in UAE markets without a local agent. Only UAE nationals or companies wholly owned by UAE nationals can register with the Ministry of Economy as commercial agents.

The provisions relating to commercial agencies are collectively set out in Federal Law No. 18 of 1981 on the Organization of Commercial Agencies as amended by Federal Law No. 14 of 1988 (the Agency Law) and applies to all registered commercial agents. Federal Law No. 18 of 1993 (Commercial) and Federal Law No. 5 of 1985 (Civil Code) govern unregistered commercial agencies.

On March 22, 2010, the UAE issued Federal Law No. 2 of 2010 amending certain provisions of the Commercial Agency Law. The amendments prevent the termination, or non-renewal, of a commercial agency unless the principal has a material reason to justify the termination or non-renewal. Further, a principal may not re-register the commercial agency in the name of another agent even if the previous agency was for a fixed term unless: (i) it is amicably terminated by the principal and the agent; (ii) termination or non-renewal is for justifiable reasons that are satisfactory to the Commercial Agencies Committee; or (iii) a final judicial judgment is issued ordering the cancellation of the agency. The 2010 Amendments also reinstate the specialized Commercial Agencies Committee which had been revoked in 2006. The Commercial Agencies Committee has original jurisdiction over disputes involving registered commercial agents. Any commercial dispute should be referred first to the Commercial Agencies Committee.

## **Telecommunications**

UAE currently has two telecommunications companies which are largely government owned: Emirates Telecommunications Corporation (Etisalat), the former telecommunications monopoly, and Emirates Integrated Technology Company (which operates under the trade name Du). UAE has made commitments in the WTO to remove the duopoly by December 31, 2015, after which time it will consider issuing further licenses. One U.S. trade association representing Voice over Internet Protocol (VoIP) providers has complained that the UAE is limiting their ability to provide these services by licensing only two companies; other companies using this technology are subject to having their services blocked.

## **INVESTMENT BARRIERS**

Except for companies located in one of the UAE's free trade zones, at least 51 percent of a company established in the UAE must be owned by a UAE national. A company engaged in importing and distributing a product must be either a 100 percent UAE-owned agency/distributorship or a 51 percent UAE-owned limited liability company. While the UAE government is reportedly considering liberalizing specific sectors where there is a need for foreign expertise or where local investments are insufficient to sustain 100 percent local ownership, the government has yet to enact liberalizing measures to achieve this end.

Resolution of investment disputes continues to be a problem in the UAE. Foreign investors have expressed concern that pursuing international arbitration in such disputes may jeopardize their business activities in the UAE. Foreign investors also report a reluctance to take disputes to the domestic court system, due to a perceived lack of court impartiality.



# UKRAINE

## TRADE SUMMARY

The U.S. goods trade surplus with Ukraine was \$262 million in 2010, a decrease of \$130 million from 2009. U.S. goods exports in 2010 were up \$1.3 billion, up 51.6 percent from the previous year. Corresponding U.S. imports from Ukraine were \$1.1 billion, down 118.8 percent. Ukraine is currently the 68th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Ukraine was \$793 million in 2009 (latest data available), down from \$912 million in 2008.

## United States-Ukraine Trade and Investment Cooperation Agreement

The United States and Ukraine signed a Trade and Investment Cooperation Agreement (TICA) on April 1, 2008, establishing a forum for discussion of bilateral trade and investment relations. The TICA mandates a joint United States-Ukraine Council on Trade and Investment, which addresses a wide range of trade and investment issues including market access, intellectual property, tax policy, and specific business disputes. The Council seeks to increase commercial and investment opportunities by identifying and working to remove impediments to trade and investment flows between the United States and Ukraine. The Council met for the third time on October 13, 2010. At the third meeting, the two sides agreed to a wide-ranging action plan to improve the protection of intellectual property rights in Ukraine.

## IMPORT POLICIES

Ukraine continues to maintain licensing requirements and fees on certain imports. Ukraine imposes several duties and taxes on imported goods: customs/import tariffs, value added tax (VAT), and excise duties. Additionally, imports into Ukraine are subject to customs processing fees, a unified fee on vehicles crossing Ukraine's borders, and port fees.

## Customs/Import Tariffs

Imports from the United States are subject to Ukraine's MFN simple applied tariff rate which fell to an average of 4.6 percent, according to the WTO, down from the 4.95 percent in place after its accession to the World Trade Organization (WTO) in 2008. For agricultural goods, the average applied tariff rate is now 9.7 percent. For industrial goods the average applied rate is now 3.8 percent. Ukraine applies preferential tariff rates to imports from its 12 free trade agreement partners and certain Commonwealth of Independent States (CIS) countries. Most MFN customs tariffs are levied at *ad valorem* rates, and only 1.5 percent of tariff lines (down from 5.97 percent prior to WTO accession) are subject to specific or combined rates of duty. These specific and combined rates apply primarily to agricultural goods that are produced in Ukraine, such as grains, poultry products, sugar, and vegetables such as carrots and potatoes.

Although Ukraine's MFN tariff rates are relatively low, the Ukraine State Customs Service (SCS) continues to assign higher customs values to U.S. imports, including to food and agricultural products and pharmaceuticals, than is declared in the import documentation. There are concerns on how the SCS is determining and/or calculating these values. For some shipments, it is alleged that the result is a customs valuation 100 percent higher than what was declared in the import documentation. Since customs valuation decisions are not published, this lack of transparency is problematic. Importers who have sought to appeal the assigned customs valuation have been instructed by the SCS to have the government from the country of the product's origin provide verification. These practices have made importing U.S.

meat products, in particular, expensive and have impeded trade in these products. The U.S. Government has raised its concerns about these valuation practices, including at the 2010 Trade and Investment Council meeting.

### **Excise Duties**

Ukraine applies excise duties to a limited set of goods, such as alcoholic beverages, un-filtered cigarettes, motor vehicles, and petroleum products. Excise duties apply equally to imported and domestically manufactured goods. While excise duties are mainly specific (fixed amount per quantity of product), in the case of tobacco products both specific and *ad valorem* rates are applied. High excise duties hinder U.S. exports of wine and grape spirits and automobiles to Ukraine. Import tariffs on automobiles were significantly reduced to implement commitments Ukraine made in the context of its WTO accession; however, the government has introduced a registration fee that is considerably higher for used cars and therefore discourages imports of foreign used cars.

### **Import Licenses**

Import licenses are required for some goods. The list of goods covered by the licensing regime and the license terms are reviewed and amended annually by the Cabinet of Ministers. In 2010, the list included printers' ink, paper with watermarks, optical media production inputs such as polycarbonate, pharmaceuticals, paints and lacquers, dyes, hygiene products, cosmetic products, pedicure and manicure products, shaving aerosols and deodorants, lubricants, waxes, shoe polishes, insecticides, solvents, silicone, fire extinguishers and the chemicals that fill extinguishers, refrigerators and freezers, air-conditioners, humidifiers, and other selected industrial chemical products.

While these import licenses are granted automatically to applicants, some products require a separate licensing approval, which may or may not be automatic, from the relevant administrative agency before receiving the necessary import license from the Ministry of Economy. The Ukrainian State Committee for Veterinary Service established a procedure of import approvals that results in non-automatic licensing. The procedure is prescribed in the Law on Veterinary Medicine and covers all commodities subject to veterinary control. Approval is needed even for cases in which a bilateral veterinary certificate is issued by the country of origin. In June 2010, the Chief State Inspector of the Veterinary Service of Ukraine canceled the authority of regional veterinary offices to issue permits for imports. Since this decision, U.S. and other exporters have faced substantial delays and difficulties in obtaining permits to import meat products. In 2008, the Ministry of Environment significantly tightened procedures for obtaining its approval to import goods that are potentially ozone-depleting. The stricter procedures continue to delay shipments and significantly increased business costs for importers of a wide range of goods, including aerosols, refrigerators, mascara, lipstick, toothpaste, and coffee makers.

For some goods, product certification is a prerequisite for an import license. Importers can request that a foreign facility be certified as in compliance with Ukraine's technical regulations that apply to imports. The U.S. distilled spirits industry reports that this option usually involves a burdensome and costly inspection visit by Ukrainian government officials. If approved, the supplier receives a certificate of conformity valid for two years to three years and avoids the burden of certifying each shipment and mandatory laboratory testing upon arrival in Ukraine.

### **GOVERNMENT PROCUREMENT**

Ukraine is not yet a party to the WTO Agreement on Government Procurement (GPA), but became an observer to the WTO Committee on Government Procurement in February 2009. While Ukraine committed to initiate negotiations for GPA membership within two years of its WTO accession,

negotiations have not begun. Ukraine is reportedly preparing its initial offer to begin the process of GPA accession.

In July 2010, Ukraine passed a new government procurement law. The U.S. government, coordinating with the World Bank and other international donors, provided technical assistance during the drafting process and presented a strong message to the Government of Ukraine about the need to enact a law that met international standards. The U.S. government will continue to pay close attention to current attempts to amend the law to ensure that such attempts do not undermine its provisions.

The newly adopted law, which is now in force, requires that all government procurement of goods and services valued at more than UAH 100,000 (approximately \$12,500) and public works valued at more than UAH 300,000 (approximately \$38,000) must be procured through competitive tenders. Open international tenders are used where procurement is financed by an entity outside of Ukraine. The Anti-Monopoly Committee of Ukraine has the power to review disputes arising from public procurements, but that Committee has not yet been set up. Courts may also hear government procurement-related cases. Cases must be filed on tight timelines, often within 14 days of the alleged violation.

Ukraine's procurement rules generally do not restrict foreign enterprises from participating in government procurement, but, in practice, foreign companies claim that they are rarely able to compete on an equal footing with domestic companies. Foreign companies generally win only a tiny fraction of total procurements. Among the problems faced by foreign firms are: (1) the lack of public notice of tender rules and requirements; (2) non-transparent preferences in tender awards; (3) the imposition of conditions that were not part of the original tender requirements; and (4) ineffective grievance and dispute resolution mechanisms, which often allow a losing bidder to block the tender after the contract has been awarded. The use of mechanisms such as, "bids with limited participation" has been eliminated.

## **EXPORT BARRIERS**

Exports of some categories of products are subject to registration by the Ministry of Economic Development and Trade. Products that must receive a license prior to export from Ukraine include precious metals and stones, cast iron, ferronickel, ferrotitanium, ferroalloys, steel, copper, aluminum alloys, lead, some metallurgy equipment, unrefined oil and gas, scrap metal, printers' ink, optical polycarbonates for laser reading systems, optical disc manufacturing equipment, and paper with watermarks. The government has eliminated most export duties, with the notable exception of duties on natural gas, livestock, raw hides, some oil seeds, and scrap metal.

### **Export Restrictions on Grains and Sunflower Oil/Seeds**

Ukraine ranks among the top grain exporters in the world, but has periodically resorted to grain export restrictions. The supply of products deemed "socially important" (*e.g.*, vegetable oil, bread, and sugar) is controlled by the government.

Ukraine's major grain exporters, which include a number of U.S. companies, have experienced severe difficulty exporting grain since July 2010. Initially, Ukraine imposed non-transparent and burdensome testing requirements on grain shipments, essentially closing off exports. The Government of Ukraine then announced the introduction of grain export quotas in October 2010. U.S. companies have complained that these grain export quotas were allocated starting on November 12, 2010, in a non-transparent and arbitrary process that resulted in their exclusion, along with a number of other non-Ukrainian companies, from the quota allocation process. Grain export quotas are currently in force through March 31, 2011.

## **Live Cattle, Sheep, Hides, and Skins**

Export duties remain in place on live cattle, sheep, hides, and skins. However, trade of these products has been negligible. Ukraine continues a staged reduction of these duties. Export duties on live calves, cows, and sheep will fall to 10 percent in 2016. Export duties on raw hides will fall to 20 percent in 2018.

## **Scrap Metal**

Upon WTO accession, Ukraine lowered duties on ferrous scrap exports to 25 Euros/metric ton for ferrous metals and to 30 percent *ad valorem* (with minimum, specific rates for some products) for nonferrous metals. Laws passed in 2006 and 2007 as part of the accession process provide for staged duty reductions to 10 Euros/metric ton over a period of 6 years (2008 – 2014) for ferrous metals and reductions to 15 percent *ad valorem* over a period of 5 years (2008 – 2013) for nonferrous metals. According to Ukrainian law, the export duty in 2010 for ferrous metals is 16.4 Euros/ton and 24 percent *ad valorem* for nonferrous metals.

## **Sunflower Seed, Flaxseed, and Linseed**

Sunflower seed, flaxseed, and linseed have been subject to an export duty since June 2001. The export duty on sunflower seed was lowered from 17 percent to 14 percent in 2008. The duties are subject to a one percent decrease annually until duties reach 10 percent. The duty was 13 percent as of January 1, 2010.

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

Ukraine was listed on the Watch List in the 2010 Special 301 Report. Key concerns cited in the report included weak enforcement, widespread retail piracy, the transshipment of pirated and counterfeit goods, internet piracy, the continued government use of illegal software, and inefficiencies in the judicial system. The need to improve protection of intellectual property was a major theme of the bilateral 2010 Trade and Investment Council meeting, during which the two sides agreed to an IPR Action Plan. Matters addressed in the plan include, *inter alia*, public awareness, strengthened enforcement, and needed legislative improvements. Additionally, the Plan identifies measures to transition government ministries to legal software. The Government of Ukraine formally adopted the IPR plan in February 2011.

## **SERVICES BARRIERS**

### **Audiovisual Services**

A local content requirement exists for radio and television broadcasting, although it has not been stringently enforced in most cases. In November 2009, Ukrainian SCS Order #900 stated that duties for audiovisual products will be assessed on projected royalties rather than on the underlying carrier medium.

### **Financial Services**

The United States continues to monitor Ukraine's actions with regard to electronic payments services. A ruling by the Ukrainian Anti-Monopoly Committee modified the National Bank of Ukraine's June 19, 2008 rules that required any bank that wished to bid on cash management contracts for state employee salaries to join the National System of Mass Electronic Payment (NSMEP). NSMEP operates as a domestic electronic payments system in Ukraine, competing against foreign service suppliers. Under the modified ruling, banks are still required to become members of NSMEP, but there is no provision to force them to issue payment cards exclusively through that system. However, parliament is considering new

legislation that would require all banks to join NSMEP and use that service exclusively for electronic payment transactions. This would force banks wishing to bid on government cash management contracts to base their bids on NSMEP-branded cards, thus shutting out foreign-service suppliers. Parliament is also considering new legislation that would require all hryvnia-denominated electronic financial transactions to be resolved within Ukraine, at processing centers operated by the National Bank of Ukraine. This proposed change could increase costs and reduce the reliability of transactions, as well as restrict the ability of foreign firms to compete against local service providers.

## **INVESTMENT BARRIERS**

The Ukrainian Center for Foreign Investment Promotion (known as InvestUkraine) is charged with helping attract foreign investment to the country. The Government of Ukraine continues to have an advisory body composed of representatives from foreign and domestic companies to advise the President on efforts to improve the business and investment climate.

The United States has a bilateral investment treaty (BIT) with Ukraine, which took effect in 1996. The BIT guarantees U.S. investors non-discriminatory treatment, the right to make financial transfers freely and without delay, international legal standards for expropriation and compensation, and access to international arbitration. Despite the BIT, there are several longstanding, and several new, U.S. company investment disputes. In most cases, there has been little progress toward resolution despite advocacy by the United States.

An agreement signed in December 2009 ended a longstanding dispute that had prevented the U.S. Overseas Private Investment Corporation (OPIC) from operating in Ukraine. OPIC is now actively providing financing and political risk insurance to American companies operating in Ukraine.

## **Taxation**

Companies report that Ukraine's taxation system is a major obstacle for U.S. investors doing business in Ukraine. Ukraine maintains a corporate profit tax (25 percent, which is scheduled to drop to 16 percent by 2014), a personal income tax (flat rate of 15 percent, scheduled to rise to 17 percent by 2014), a Value Added Tax (20 percent), and a payroll tax (variable, between 33.2 percent and 49.6 percent) that funds pension and social insurance programs. An average Ukrainian business has to pay 99 separate taxes and its profits are taxed at an overall rate of 58.4 percent. Many analysts single out the payroll tax as being exceptionally high and the main reason why shadow wage payments remain common in Ukraine. Ukraine has adopted a new tax code. While many aspects of the new Code improve on the old taxation system, U.S. companies have raised concerns that the new Code will impact negatively those companies involved in direct selling due to changes in the criteria for those subject to the simplified tax system.

In recent years, delays in the payment of VAT refunds to exporters have also been a problem. While the Government of Ukraine finally refunded a large proportion of VAT refund arrears through a VAT bond scheme in August 2010 (some of these claims had been pending for over two years), the manner in which refunds were distributed was not transparent and the firms complained that they should have received cash rather than bonds. Additionally, some companies received reduced refunds or were refused refunds for arbitrary reasons. While the government stated its intention to introduce a comprehensive electronic system to ensure rapid, automated refunds by the start of 2011, little action has yet been taken in this direction and arrears continue to build. Ukraine's inability to refund VAT in a timely manner remains a problem, and delays in reimbursement have become an important cost factor for many foreign companies. Improvements to the system would have an important, positive impact on the investment climate.



## **Privatization**

The State Property Fund oversees the privatization process in Ukraine. Privatization rules generally apply to both foreign and domestic investors, and, in theory, a relatively level playing field exists. Observers claim, however, that a common abuse of privatization laws is that the terms of a privatization contest are arbitrarily adjusted to fit the characteristics of a pre-selected bidder. Few major new privatizations have been conducted since the privatization rush of 2004. In 2010, the State Property Fund attempted to revoke the privatization of the Krivoriizhstal factory (now named Arcelor Mittal Kryvyi Rih), claiming that Mittal Steel had failed to meet its contractual obligations. Ukraine's Commercial Court considered the case and ruled that the government had no basis to reclaim the facility.

No major privatizations took place in 2010, largely due to disagreements over the privatization process. The government announced in May 2010 that it would privatize Ukrtelekom (the State telecommunications company) before the end of the year, with a starting bid of UAH 10 billion. However, the majority of potential bidders dropped out after the bidding floor was set, leaving an Austrian firm as the sole bidder. An auditing firm, contracted to assess the fair market value of Ukrtelekom, announced on February 20, 2011 that the company should be valued at 10.575 billion hryvnias. The sale is scheduled to proceed with this valuation estimate serving as the purchase price. The State Property Fund has also identified the Kryvorizhskyy Ore Mining and Processing Plant, and Turboatom (a producer of turbines for power plants), as priorities for privatization, but neither has moved forward. Other attempts at privatization in recent years were often marked by controversy.

The government has also announced its intention to privatize all of the 112 coal mines still owned by the government in 2011. There are concerns that a few Ukrainian and Russian firms are trying to acquire these mines without going through a fair, transparent privatization process. Industry analysts dismissed the announcement, as similar proclamations have been made in previous years without results. They believe that the majority of the state-owned mines are no longer economically productive, and would need to be bundled with other assets to attract investor interest.

Ukraine maintains a moratorium on the sale of agricultural farmland. This provision blocks private investors from purchasing some of the 33 million hectares of arable land in Ukraine and constitutes a serious obstacle to the development of the agricultural sector. While there have been some efforts to adopt new legislation necessary to open the land market, the ban on the sale of agricultural land is set to continue until January 1, 2012, when it comes up for renewal.

## **Corporate Hijacking**

Ukraine continues to have problems with corporate hijacking activities. Some researchers claim that thousands of Ukrainian enterprises have suffered hijacking attempts in the last several years. These hijackers frequently purchase a small stake in a company, and then take advantage of deficient legislation, corrupt courts, and a weak regulatory system to gain control of the company to the detriment of rightful shareholders. This development harms investors, including U.S. companies and shareholders, and has damaged the image of Ukraine among foreign investors. The Ukrainian government has recognized the seriousness of this problem and has taken some steps to address it.

In September 2008, Parliament passed a new law "On Joint Stock Companies" to help stop corporate hijacking. Companies must fully comply with the law, which is considered to be an improvement in the corporate governance regime, by April 30, 2011.

# VENEZUELA

## TRADE SUMMARY

The U.S. goods trade deficit with Venezuela was \$22.1 billion in 2010, up \$3.4 billion from 2009. U.S. goods exports in 2010 were \$10.7 billion, up 14.4 percent from the previous year. Corresponding U.S. imports from Venezuela were \$32.8 billion, up 16.8 percent. Venezuela is currently the 25th largest export market for U.S. goods.

U.S. exports of private commercial services (*i.e.*, excluding military and government) to Venezuela were \$5.0 billion in 2009 (latest data available), and U.S. imports were \$788 million. Sales of services in Venezuela by majority U.S.-owned affiliates were \$4.1 billion in 2008 (latest data available), while sales of services in the United States by majority Venezuela-owned firms were \$1.9 billion.

The stock of U.S. foreign direct investment (FDI) in Venezuela was \$14.5 billion in 2009 (latest data available), up from \$13.5 billion in 2008. U.S. FDI in Venezuela is primarily concentrated in the nonbank holding companies and manufacturing sectors.

## IMPORT POLICIES

Venezuela officially withdrew from the Andean Community (AC) in April 2006. President Chavez stated publicly that the reason for the withdrawal was the entry of other AC member countries into free trade agreements or negotiations with the United States, which, according to the Venezuelan government, changed the essence of the pact.

Under AC rules, following a member's formal withdrawal, only tariff-related decisions and resolutions remain in force, expiring after a period of five years from the date of withdrawal. All of Venezuela's obligations under the AC tariff liberalization regime should remain in place until the end of April 2011. Over the years, AC norms, which cover a wide range of disciplines, have been incorporated into the Venezuelan legal framework. Although the Venezuelan government has yet to clarify officially the legal impact of leaving the AC, to date Venezuela has continued to follow AC norms. In November 2006, Venezuela's Supreme Court accepted a petition requesting an interpretation of the current validity of AC norms. As of January 2011, the court had not issued a ruling on the matter.

## Tariffs

In December 2005, Venezuela signed a framework agreement to join the Southern Cone Common Market (MERCOSUR). MERCOSUR membership is contingent upon approval by the legislatures of all MERCOSUR countries. The last hurdle to Venezuela's full membership in MERCOSUR is obtaining Paraguay's formal approval. In early 2010, Paraguayan President Lugo withdrew the petition for approval from the Paraguayan Congress; it was re-introduced on November 24, 2010, and has been withdrawn again. Under the terms of its accession, Venezuela will have four years from its date of accession to adopt the MERCOSUR Common External Tariff (CET) and to provide duty-free treatment to its four MERCOSUR partners on all goods, with sensitive products allowed a two year extension.

According to the WTO, Venezuela applied a simple average tariff of 15 percent on agricultural goods and 12.1 percent on non-agricultural goods.

## Nontariff Measures

Currency controls introduced in 2003 continue to pose a significant barrier to most trade with Venezuela, with the possible exception of agricultural goods and pharmaceutical products. These controls are overseen by the Foreign Exchange Commission, or *Comision de Administracion de Divisas* (CADIVI), and, in the case of the Transaction System for Foreign Currency Denominated Securities (SITME), newly established in June 2010, by the Central Bank of Venezuela (BCV).

The official exchange rate was fixed at 2.15 bolivars (Bs)/\$1 from March 2005 through January 10, 2010. On January 11, 2010, the government devalued the currency and set two exchange rates, one at 2.6 Bs/\$1 (which applied to certain priority imports such as food, medicines and healthcare equipment, science and technology products, capital goods, and public sector imports) and one at 4.3 Bs/\$1 (which applied to non-priority imports and most other categories of foreign exchange requests). On December 30, 2010, the government announced the devaluation of the currency as of January 1, 2011, eliminating the 2.6 Bs rate and creating a single official exchange rate of 4.3 Bs/\$1.

Importers who receive CADIVI pre-approval may import goods and then apply for CADIVI approval to purchase dollars at the relevant official rate to pay for the imports. CADIVI cannot be used for certain types of luxury goods. Authorizations for foreign currency through CADIVI are not expeditious, and can require the submission of significant numbers of supporting documents by the Venezuelan importer with the support or cooperation of the exporter.

When oil prices fell sharply in the latter half of 2008, the Venezuelan government significantly reduced overall CADIVI approvals from an average of \$187 million per working day in October 2008 to a daily average of \$118 million for 2009. In the period from January-September 2010, CADIVI approved a total of \$21.3 billion in foreign exchange disbursements, averaging \$120 million per working day. This included \$14.7 billion in approvals for imports (not including imports realized under the Latin American Integration Association (ALADI) Agreement). Import sectors receiving the greatest exchange flows were: food (20.8 percent), medicines and healthcare equipment (19.5 percent), automotive (12.1 percent), retail (12 percent), machinery and equipment (6.7 percent), and chemicals (6.6 percent).

The need to obtain CADIVI pre-approvals to import goods and for payments at the official exchange rate(s) has resulted in increased obstacles to trade due to its complexity, delays in receiving approvals and payments, and restrictions on imports and importers. Once the goods have arrived in Venezuela, cleared customs, and have been verified, CADIVI should approve payment within 30 days. However, importers have reported delays in receiving such approvals, as well as unpredictability and inconsistency in their granting. Many companies have moved to the SITME foreign exchange market to obtain foreign currency to pay for imports, somewhat alleviating the demand on the CADIVI system.

In May 2010, the Venezuelan government abolished the former “permuta” or parallel market foreign exchange system, which had been in place since currency controls were implemented in 2003. In June 2010, the BCV created SITME to replace the “permuta” market. Average SITME approvals since June 2010 have been approximately \$35 million per business day, while average disbursements in the old parallel market were estimated at \$80 million to \$100 million per business day during 2009. SITME operations have received an exchange rate that differs from the official rate and is approximately 5.30 Bs/\$1. Under SITME, transaction amounts for individual customers are limited to \$50,000/day, with a maximum total of \$350,000/month. Requests for SITME exchange transactions are made through Venezuelan banks. Importers that acquire foreign exchange through CADIVI are not allowed to access SITME for a period of 90 days. The elimination of the “permuta” market and restricted access to CADIVI and SITME has resulted in the growth of a black market for foreign exchange transactions.

Burdensome documentation requirements are another significant import barrier. Beginning January 1, 2008, all automobile importers require a license from the Ministry of People's Power for Light Industry and Commerce (MILCO) for authorization to receive foreign exchange for the importation of assembled vehicles. According to the resolution, approval of these licenses depends on "national need, the capacity of national production, plans to expand local production, model cost, historic sales, and the efficient use of fuel." When applying for this license, an automotive company has to include its "national production plan" and its "vehicle importation plan." The law also prohibits the importation of passenger cars with engines larger than three liters, thus discriminating against companies selling predominantly larger cars. Even when the Venezuelan government issues import licenses for assembled vehicles, delays and burdensome paperwork make it difficult to fill the year's import quotas. Venezuela prohibits the importation of used cars, buses, trucks, and used tires, as well as used clothing.

The government also imposed import quotas on vehicles in January 2008 in a bid to increase the number of automobiles assembled in Venezuela. In addition, carmakers are subject to limited allocations of dollars to import components they need to produce in Venezuela. The automotive regime adds a requirement to produce dual fuel (gasoline and natural gas) vehicles. The original law mandated that all new vehicles sold in Venezuela after December 1, 2008, be dual fuel. The rule was twice postponed and then changed. As of April 1, 2009, 30 percent of vehicles sold by each company are to be dual fuel, and each Venezuelan assembler must produce at least 2 dual fuel models. As of December 2010, however, the ability of the assemblers to meet this requirement remains unclear. In addition, the gradually rising requirement for local content in domestically assembled vehicles was changed to a flat 50 percent requirement, applicable beginning in 2013. A new requirement for engines to be assembled in Venezuela by 2010 was also added. Assemblers have stated that these two requirements are extremely problematic. Local industry is unable to produce sufficient components to meet a 50 percent local content requirement, and the variety of engines and the necessary large production runs will make local engine assembly prohibitively expensive.

In addition, Venezuela also protects some industries within its agricultural sector through the use of licenses and sanitary permits to restrict imports. The Venezuelan government applies fixed farm gate prices for producers of corn, rice, sorghum, sugar cane, milk, and beef. These prices, although reviewed periodically, still generally lag behind increases in input costs. Since 2007, selected basic commodities are granted agricultural subsidies based on acreage or volume.

Venezuela maintains the authority to impose tariff-rate quotas (TRQs) on up to 62 Harmonized System code headings at the 6-digit level. Currently, the government is applying TRQs to oilseeds, corn, wheat, milk and dairy, and sugar. The issuance of import licenses for such TRQs is neither transparent nor automatic and has negatively affected trade in basic agricultural commodities as well as processed products. Import licenses and sanitary permits are restricted for products for which the government is trying to increase domestic output, such as raw materials for processing. The Venezuelan government has denied import licenses for both in-quota and over-quota quantities, even though importers are often willing to pay the over-quota tariff for additional quantities of some products. Licenses for over-quota quantities are not automatically issued. Furthermore, the Venezuelan government has not published regulations establishing the TRQ mechanism for certain eligible products and has refused to activate the TRQ for others, such as pork.

Importers of many basic commodities, horticultural products, and agricultural inputs must request a "certificate of nonproduction" or a "certificate of insufficient production" before trade can take place. If the certificate is issued, the importer can request foreign exchange and obtain import licenses, import permits, and possibly tax exoneration from other government offices. Some goods may require a certificate from more than one ministry, increasing processing time. The number of ministries and agencies involved and the constant shifting of responsibilities among them has hampered the issuance of

import permits, licenses, and the registration of local and imported food products. On January 18, 2008, the government of Venezuela passed a resolution waiving the “certificate of nonproduction” requirement for 51 goods to mitigate food shortages.

The government has delayed the issuance of import licenses for yellow corn and for oilseeds and oilseed products until the entire domestic crop has been purchased at the set price when there is a surplus. When there is a deficit, imports are readily authorized. This has been the case for the last several years as demand has exceeded domestic supply. Since September 2007, the government of Venezuela has banned non-food use of corn and has controlled product movement through “mobilization guides,” which results in a *de facto* ban on the export of corn. Since a resolution was promulgated in February 2009, products such as coffee, sugar, and other basic food items, cannot be exported while domestic demand is not satisfied.

Since January 2003, the Venezuelan government has waived import duties for staple products. Initially, the import duty waiver was granted for a six month period. Since then, some products have been added or removed from the initial list, and there have been certain periods when this policy lapsed. On January 18, 2008, the government of Venezuela created a new list of tariff-exempt goods, which included products that had been on the previous list as well as new products. The list was last updated in October 2008, with customs duties for live cattle imports waived in order to allow more cattle into the country for processing.

The Venezuelan government is the main importer of basic foodstuffs and has created a large food distribution network to serve low and middle income classes. The *Corporacion Venezolana de Alimentos* (CVAL) and the *Corporación de Abastecimiento y Servicios Agrícolas* (CASA) are the leading state trading entities. At the same time, *Mercado de Alimentos, C.A.* (MERCAL) and *Productora y Distribuidora Venezolana de Alimentos* (PDVAL), a division of Venezuela’s state-owned oil company *Petroleos de Venezuela* (PDVSA), also import for their own food marketing chains, offering products at prices that are at or below government-fixed prices. Two supermarket chains, *Corporacion de Mercados Socialistas* (COMERSO) and *Abastos Bicentenarios* have been recently created to increase the government’s market presence, and to compete with the private sector. Venezuela’s food program is focused on providing a government-subsidized basic basket of products, including dry milk, precooked corn flour, black beans, rice, vegetable oils, sardines, pasta, sugar, bologna, margarine, deviled ham, eggs, mayonnaise, and sauces. Government entities have an advantage in purchasing abroad because they have guaranteed access to official dollars, import licenses and permits, and import products without custom duties.

As noted above, the Venezuelan government is the main importer of basic foodstuffs through entities such as COMERSO, which was created in April 2010 and now handles purchases for government-run supermarket chains. It appears that this expansion of the government role in trade is likely to grow. On December 1, 2010, the Venezuelan government created a new corporation called *Corporación de Importación, Exportación y Comercialización Mayorista de Bienes para el Pueblo* (Venecom) which, according to the announcement in Venezuela’s Official Gazette, will be charged with handling foreign trade in support of the development of small and medium sized industries. Venecom follows in the footsteps of *Suministros Venezolanos Industriales C.A.* (SUVINCA), which was established in 2006 and began operations in 2008, and is charged with supporting the government’s plan to develop 200 “socialist factories.” SUVINCA and Venecom will reportedly be involved in importing for these sectors.

## **GOVERNMENT PROCUREMENT**

Venezuela’s government procurement law covers purchases by government entities, national universities, and autonomous state and municipal institutions. It is not clear to what degree the public procurement

law applies to joint ventures in which a state entity has a controlling interest. The law requires a contracting agency to prepare a budget estimate for a procurement based on reference prices maintained by the Ministry of Light Industry and Trade (MILCO). The law forbids discrimination between domestic and foreign suppliers. However, the law also provides that the President can mandate temporary changes in the bidding process “under exceptional circumstances,” in accordance with “economic development plans” that promote national development or provide preferences to domestic goods and suppliers. These measures can include price preferences for domestic goods and suppliers, reservation of contracts for nationals, requirements for domestic content, technology transfer or the use of local labor and other incentives to purchase from companies domiciled in Venezuela. For example, government decree 1892 establishes a 5 percent preference for bids from companies whose products have over 20 percent local content, half of which must come from small to medium-sized domestic enterprises. The Venezuelan government is increasingly awarding contracts without competition. There are allegations that companies from certain countries are favored while those from other countries, including the United States, are discriminated against.

A presidential decree published in March 2008 raised additional concerns. The decree established a National Service of Contractors, with which firms must register in order to sell to the government. Bids will not be accepted without prior registration. Some observers assert that the registration requirement allows additional, arbitrary screening.

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

## **EXPORT SUBSIDIES**

Exporters of selected agricultural products – cocoa, some fruits, and certain seafood products – are eligible to receive a tax credit equal to 10 percent of the export’s value. The level of direct payments for export subsidies has generally been fairly small and limited to agricultural products. Venezuela notified its export subsidies to the WTO in the past, with the last notification occurring in June 2001, for the export year 1998. The total value of export subsidies at that time was \$5.5 million. The government has not published further information on export subsidies.

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

Venezuela was listed on the Priority Watch List in the 2010 Special 301 Report. Key concerns cited in the Report relate to the deteriorating environment for the protection and enforcement of IPR in Venezuela. Copyright piracy is increasing and the protection for certain trademarks remains unclear. Concerns remain regarding the revocation of existing patents on pharmaceuticals. Other concerns include the lack of effective protection against unfair commercial use of undisclosed test and other data generated to obtain marketing approval for pharmaceutical products. Although Venezuela's tax and customs authority had made some progress on raising awareness of IPR issues through public anti-piracy and “zero tax evasion” campaigns, those programs are no longer in place.

## **SERVICES BARRIERS**

Venezuela maintains restrictions on a number of service sectors, including professional services, audiovisual, and telecommunications services. In any enterprise with more than ten workers, foreign employees are restricted to 10 percent of the work force, and Venezuelan law limits foreign employee salaries to 20 percent of the payroll.

## **Professional Services**

Foreign equity participation in professional firms is restricted to a maximum of 19.9 percent. Only Venezuelan citizens may provide accounting and auditing services to government institutions and related institutions, such as banks and hospitals. In addition, only Venezuelan citizens may act as accountants for companies in which the government has at least a 25 percent ownership interest. A foreign lawyer cannot provide legal advice on foreign or international law without being fully licensed as a lawyer in Venezuela. Foreigners are required to establish a commercial presence for the provision of engineering services. Foreign consulting engineers must work through local firms or employ Venezuelan engineers.

The insurance law approved at the end of July 2010 established that, for all insurance companies, at least half of the members of the board must be of Venezuelan nationality. In addition, all members of the board must be living in, and have resident status in, Venezuela.

## **Audiovisual Services**

Venezuela limits foreign equity participation to less than 50 percent for enterprises engaged in Spanish language media, including television and radio broadcasting. At least half of the television programming must be dedicated to domestic programming. Additionally, half of both FM and AM radio broadcasting must be dedicated to Venezuelan-produced material. In the case of music, 50 percent of the Venezuelan produced material must be traditional Venezuelan songs. There is also an annual quota for the distribution and exhibition of Venezuelan films, as well as a requirement that a percentage of film copying be done in Venezuelan facilities.

## **INVESTMENT BARRIERS**

The government continues to control key sectors of the economy, including oil, petrochemicals, and much of the mining and aluminum industries. Venezuela began an ambitious program of privatization under the Caldera administration (1994-1999), but under President Chavez (since 2000) privatization has been halted and the government has re-nationalized key sectors of the economy. In 2007, the government nationalized certain electricity and telecommunications providers. In 2008, the government nationalized certain cement companies and an aluminum company, and first proposed the nationalization of a commercial bank. In 2009, the government nationalized a food production plant and 76 oilfield services companies. In 2010, the government nationalized a number of companies involved in the agricultural sector; gasoline stations along the Colombian border; a petrochemical plant in which equity was held by a U.S. company; drilling rigs belonging to a U.S. company; and a number of housing projects. Fuel distribution companies and Venezuela's largest privately-owned lubricant manufacturer have also been nationalized.

## **Petroleum Sector**

Foreign investment continues to be restricted in the petroleum sector. The exploration, production, refinement, transportation, storage, and foreign and domestic sale of hydrocarbons are reserved to the state. However, private companies may engage in hydrocarbons-related activities through mixed companies and equity joint ventures with the state-owned oil company, PDVSA. Sales to foreign investors of interests in subsidiaries and affiliates of PDVSA are permitted, contingent on approval by the government. Pursuant to a June 2009 law, only the state, and companies in which the state has at least a 50 percent ownership stake, may carry out primary and intermediate petrochemical activities.

Since 2004, the national government has made significant changes to royalty policies, tax policies, and contracts involving hydrocarbons-related activities. This has substantially increased uncertainty in the

hydrocarbons sector and created concern on the part of companies operating in Venezuela. President Chavez issued a decree in late February 2007 requiring that four joint venture projects relating to the development of Venezuela's extra heavy crude oil reserves convert themselves into PDVSA-controlled joint ventures in which the government holds at least a 60-percent equity stake. The decree established a deadline of April 30, 2007, for completing the transfer. Two U.S. companies operating in the sectors refused to transfer their stakes, and the Venezuelan government took control of their investments as a result. Both companies have filed international arbitration claims against the Venezuelan government. The United States is monitoring the process closely and has impressed upon the government of Venezuela that U.S. companies must receive fair treatment, including timely, adequate, and effective compensation where an expropriation has occurred.

Both Venezuela's 2001 Hydrocarbons Law and the 1999 Gaseous Hydrocarbons Law require that there be a competitive process for the identification of private partners for projects to be developed by PDVSA. However, the government may directly award contracts when the project is to be developed under special circumstances or is of "national interest." National oil companies from politically strategic partner countries seem to be the preferred partners for the development of many new projects. In February 2010, for example, the government awarded new heavy oil projects in the Junín region of the Orinoco Oil Belt to private companies and consortia from Russia, China, Vietnam, and Italy.

Although foreign investors have previously been allowed to own and operate gasoline service stations in Venezuela, gasoline prices in the domestic market are set by the government. The current government has not raised gasoline prices in several years, even though currency devaluations and a high inflation rate have eliminated service station profit margins. An Organic Law on the Restructuring of the Internal Liquid Fuels Market came into effect on September 18, 2008, mandating government control of domestic transportation and wholesale distribution of liquid fuels. All establishments that carry out retail activities for liquid fuels were to be re-branded as PDVSA. The law did not define the term "liquid fuels," creating uncertainty as to whether it applied to products other than gasoline or diesel fuel, such as motor oils and lubricants. It was also unclear whether the law applied to fuel pumps and storage tanks at service stations or to the entire entity (including any other services provided, such as convenience stores). Affected companies have not yet been compensated and negotiations are still ongoing, despite a 60-day deadline for negotiations established by the 2008 legislation.

In May 2009, the Venezuelan government promulgated a law reserving to the state those assets and services relating to the performance of primary activities identified in the 2001 Hydrocarbons Law. Specifically, the assets and services included: (1) those involved in the injection of water, steam, or gas into petroleum reservoirs; (2) those related to gas compression; and (3) a range of assets and services associated with the hydrocarbons industry on Lake Maracaibo in western Venezuela. Seventy-six companies, including several U.S.-owned firms, were nationalized pursuant to this law and none have received compensation to date.

### **Electricity and Mining**

In early 2005, President Chavez reorganized the ministries that govern the energy and mining sectors. One result of this restructuring was to increase control over these industries at the ministerial level and to strengthen the state-owned *Corporacion Venezolana de Guayana* (CVG), which controls steel and aluminum production, electricity generation, and mining.

In January 2007, President Chavez announced that the Venezuelan government would nationalize strategic areas including telecommunications and the electricity sector. As a result, privately-owned power producers, including a U.S. company, were required to sell their assets to the Venezuelan government. In August 2010, the National Assembly passed an Organic Law for the Reorganization of



the Electricity Sector, effectively ordering the fusion of all electricity utilities under one central holding entity that would have 75 percent government ownership and 25 percent PDVSA ownership.

A draft mining law is still pending in the National Assembly that seeks to repeal “inactive” concessions to foreign countries, and to structure the mining sector under a joint-venture model. In April 2008, the government revoked a U.S.-based company’s gold mining concession. The company has since filed for international arbitration against the Venezuelan government. In April 2010, President Chavez announced that he would order the Ministry of Basic Industry and Mines to cancel all mine concession agreements and expropriate gold and diamond mining activity taking place in Venezuela’s southern state of Bolivar. A decision to nationalize a gold concession in the state was announced by President Chavez in October 2010.

# VIETNAM

## TRADE SUMMARY

The U.S. goods trade deficit with Vietnam was \$11.2 billion in 2010, up \$2.0 billion from 2009. U.S. goods exports in 2010 were \$3.7 billion, up 19.8 percent from the previous year. Corresponding U.S. imports from Vietnam were \$14.9 billion, up 21.0 percent. Vietnam is currently the 45th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Vietnam was \$524 million in 2009 (latest data available), up from \$473 million in 2008.

The United States and Vietnam held numerous discussions throughout 2009 under the Trade and Investment Framework Agreement (TIFA). The TIFA provided a forum to help monitor and implement Vietnam's WTO commitments, address bilateral trade issues, and promote increased trade and investment. In June 2008, the two countries launched negotiations for a Bilateral Investment Treaty (BIT). Two rounds of BIT negotiations were held in 2009. An ICT (Information Communication Technology) Commercial Dialogue was held in 2009 and 2010.

In December 2009, the United States announced its intention to enter into negotiations on a regional Asia-Pacific trade agreement called the Trans-Pacific Partnership (TPP), with the objective of shaping a high-standard, broad-based regional agreement. This agreement will create a potential platform for economic integration across the Asia-Pacific region, a means to advance U.S. economic interests with the fastest-growing economies in the world, and a tool to expand U.S. exports, which are critical to U.S. economic recovery and the creation and retention of high-paying, high-quality jobs in the United States. The TPP negotiating partners currently include Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, and Vietnam.

Vietnam was declared a Next-Tier country under the President's National Export Initiative (NEI).

## IMPORT POLICIES

### Tariffs

Vietnam significantly reduced its tariff rates for many key U.S. exports in the context of its entry into the WTO in January 2007 and as part of the accession process agreed to bind all tariff lines. As a result, the vast majority of U.S. exports now face tariffs of 15 percent or less. High tariffs on selected products remain, however. U.S. industry has identified a range of products where it sees significant potential for export growth if Vietnam's tariffs could be reduced further. These products include fresh apples, cherries, pears and citrus, almonds, cooked and raw frozen poultry, fresh/chilled and frozen pork, cheese, frozen potato products, flatbread, tomato concentrate and tomato sauce, ice cream powder, cereals and preparations, sugars, and confectionaries. Several beverage products also face high tariffs, including distilled spirits, powdered teas, nutritional supplements (including protein drink mixes) and coffee. In addition, Vietnam imposes high tariffs on selected equipment for restaurant use and on large engine motorcycles. After making substantial tariff reductions on a wide range of products in 2007, Vietnam raised applied rates on some products during 2008 and 2009, including meat and poultry, automobiles, paper, steel and fertilizer.

## **Nontariff barriers (NTBs)**

Vietnam has made significant progress in eliminating nontariff barriers (NTBs) under the 2001 United States-Vietnam Bilateral Trade Agreement (BTA) and through Vietnam's accession to the WTO. As a result, Vietnam has eliminated many quantitative restrictions on imports and other nontariff measures, such as quotas, bans, permits, prior authorization requirements, licensing requirements, or other restrictions having the same effect, that would not be consistent with its WTO commitments.

*Import prohibitions:* Vietnam currently prohibits the commercial importation of a limited number of products, including cultural products deemed "depraved and reactionary," firecrackers, certain children's toys, second hand consumer goods, right hand drive motor vehicles, and used spare parts for vehicles.

*Quantitative restrictions and import licensing:* Salt, tobacco, eggs, and sugar are under a tariff-rate quota regime.

In 2008, Vietnam introduced Circular 17, an import licensing regime on a number of products, mostly consumer goods. On May 28, 2010, Vietnam's Ministry of Industry and Trade (MOIT) published Circular 24, which entered into force on July 12 and replaced Circular 17. Circular 24 extends the list of products for which licenses were required under Circular 17 to cover certain food and agricultural products as well as textile and apparel products. Circular 24 requires local importers to obtain an "automatic" import license (AIL) before shipments can be unloaded at a Vietnamese port. The license is not, however, automatic, as product cannot move until the importer has the license in hand, a process that is supposed to take seven days but in practice often takes longer. Many U.S. companies have reported that delays in receiving AILs have resulted in decreased shipments into Vietnam and significant losses. Importers must wait until they have an original Bill of Lading (BL) before applying for the AIL, which limits their ability to apply for AILs early to avoid delays (a BL cannot be obtained until cargo has been loaded). Vietnam has not notified Circular 24 to the WTO.

The U.S. Government has repeatedly raised this issue with the Government of Vietnam. In meetings with Vietnamese officials in Washington, Hanoi, and Geneva, the United States has emphasized that Vietnam is required to notify Circular 24 to the WTO. Further, U.S. officials have noted that this measure has significantly increased the administrative burden and costs for U.S. companies exporting to Vietnam. Working with other governments, the United States has sent letters to the Prime Minister and Vice Minister of Trade in Vietnam regarding Circular 24, and urged Vietnam to notify the full scope of its import licensing requirements at the October 29, 2010 meeting of the WTO Committee on Import Licensing. After the United States informed MOIT officials that, due to the BL requirement, importers of air freight shipments of perishable products would not receive AILs before their cargo expired, MOIT removed the BL requirement for air freight shipments. However, all other aspects of Circular 24 remain in force. The United States also requested additional information on Circular 24, including how products were selected for inclusion.

On April 16, 2010, MOIT issued a list of "dispensable and non-essential import items and consumer goods," which covered 1500 tariff lines. This notification is understood, in practice, to prevent importers from accessing foreign exchange through official channels, thereby restricting imports. The U.S. Government has repeatedly raised this issue with Vietnamese officials, requesting a transparent and clear explanation of the scope and intent of this list.

*Price Registration and Stabilization:* In late 2009, the Ministry of Finance published a draft regulation that would establish a price registration and stabilization regime for a broad range of goods and services potentially affecting U.S. exports. The United States, along with other governments and private sector interests, repeatedly raised concerns with the Vietnamese government.

Despite foreign government and private sector intervention, on August 12, 2010, MOF officially issued Circular 122 on price management and registration, which entered into force on October 1. Circular 122 states that MOF may apply price controls when prices increase or decrease without a “legitimate excuse,” and subjects an extensive list of goods to pricing registration, including cement, steel, liquefied petroleum gas, clean water for commercial use, chemical fertilizers, plant protection products, animal drugs and vaccines, salt, milk/nutritional powders for children under six years old, sugar, rice, animal feed, coal, paper, textbooks, and railway transport. U.S. companies covered under this circular are significantly concerned about the potential impact of the measures, which they report will cause increased administrative costs and, if price controls are applied, loss in profits. They are also concerned the circular is being implemented in a discriminatory manner. The U.S. Government, along with other foreign governments, has repeatedly discussed concerns about Circular 122 with the Prime Minister, Minister of Finance, and Vice Minister of Trade, and will continue to engage the Government of Vietnam about this issue.

*Customs:* Vietnam implemented the WTO Customs Valuation Agreement through the 2006 Customs Law and related implementing regulations, significantly improving customs valuation in Vietnam. However, U.S. exporters report that inefficient customs clearance remains a key concern. The United States will continue to work with Vietnam to monitor implementation of the WTO Customs Valuation Agreement and other customs issues as part of the ongoing TIFA dialogue.

*Trading rights:* Import rights are granted for all goods except for a limited number of products reserved for importation through state trading enterprises and those products subject to a phase in period under Vietnam’s WTO accession agreement. Vietnam has reserved the right of importation for state trading entities in the following product categories: cigars and cigarettes, crude oil, newspapers, journals and periodicals, and recorded media for sound or pictures (with certain exclusions).

*Taxes:* Vietnam applies a value added tax on goods and services in a number of categories listed in the Law on Value added Tax and related implementing regulations. Certain goods in Vietnam are also subject to an excise tax, levied in accordance with the Law on Excise Tax. This law was revised in late 2008. Effective January 1, 2010, excise taxes were harmonized to a single *ad valorem* rate for all beer, regardless of packaging, and for all distilled spirits over 20 percent alcohol by volume.

Pharmaceutical companies have raised concerns about possible discriminatory treatment against foreign firms across a range of product registration requirements for imported pharmaceuticals. The United States will continue to work closely with the Ministry of Health and other relevant agencies to seek improvements in the transparency of the pharmaceutical regulatory process.

The U.S. distilled spirits industry has identified Vietnam’s restrictions on advertising of distilled spirits in print, electronic, and broadcast media as a barrier to increased exports.

## **GOVERNMENT PROCUREMENT**

Vietnam’s 2006 Law on Procurement provides for greater transparency in procurement procedures; decentralization of procurement decision making to the ministries, agencies, and local authorities; appeal processes; and enforcement provisions. The U.S. software industry has expressed concern about the Vietnamese government’s promotion of the use of open source software by government agencies, including specific preferences for open source software in government procurement. It continues to urge the Vietnamese government to use a merit-based approach to software procurement decisions consistent with the APEC Technology Choice Pathfinder Agreement that Vietnam signed in 2006.

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

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

Vietnam was listed on the Watch List in the 2010 Special 301 report. While recognizing the strides Vietnam has made in IPR protection and enforcement over the past several years, the United States noted that enforcement efforts have not kept pace with rising levels of IP infringement and piracy in the country. Furthermore, administrative enforcement actions and penalties --- the most commonly used means of enforcing IPR in Vietnam --- have not served as a sufficient deterrent. The special 301 report also noted that IP violations committed over the Internet continue to increase. Over the past year, Vietnamese agencies took some initial steps to enforce IP protections on the Internet, including sending warning letters and meeting with service providers to provide warnings against providing infringing content. The United States will continue to work with Vietnamese authorities and to encourage more vigorous enforcement actions.

In 2009, Vietnam revised its IPR Law, as well as IPR related provisions in the Criminal Code, to provide criminal penalties for IPR infringement conducted on a commercial scale. Vietnam has stated it will clarify the IPR related provisions in the Criminal Code through an implementing decree. The United States continues to monitor implementation of these important provisions. In September 2010, Vietnam issued a new decree on administrative penalties for industrial property violations with the aim of further deterring violations.

## **SERVICES BARRIERS**

In the BTA and in Vietnam's WTO services schedule, Vietnam committed to a high level of liberalization in a broad array of service sectors, including financial services, telecommunications, express delivery, professional services, and distribution services. As part of these negotiations, Vietnam also retained some market access limitations and exceptions to national treatment.

### **Audiovisual Services**

Foreigners may invest in cinema construction and operation only through joint ventures with local Vietnamese partners, subject to government approval. Films are subject to censorship before public viewing, a process which is nontransparent and for which the right of appeal of a censor's decisions is not well established.

### **Broadcasting**

In late 2009, Vietnam's Ministry of Information and Communication circulated draft regulations covering pay television that included a proposal to establish a government controlled agency as the only authorized entity for the purchase and distribution of pay television programming. This proposal would have had the effect of requiring all foreign programming and all foreign channels to be sold into the Vietnam market through this "single buyer" government entity. However, the Ministry of Information and Communication subsequently reported that the draft was revised to remove the "single buyer" provision and was submitted to the Deputy Prime Minister for approval, where it is still pending. The United States and industry representatives have registered serious concerns over this proposal. The United States will continue to monitor the development of these regulations.

## **Express Delivery Services**

Foreign participation in joint ventures with express delivery service providers currently is limited to 51 percent of a firm's equity. By January 2012, 100 percent foreign ownership will be permitted in this sector.

## **Telecommunications**

Vietnam permits foreign participation in the telecommunications sector, with varying equity limitations depending on the sub-sector (there are five basic and eight value added sub-sectors). For instance, foreign ownership in private networks is permitted up to 70 percent, while foreign ownership in facility-based basic services (*e.g.*, public voice service where the supplier owns its transmission facilities) is generally capped at 49 percent. As of January 2010, Vietnam allows foreign equity of up to 65 percent for non-facilities-based public telecommunications services (*i.e.*, services provided by a supplier that does not own its own transmission capacity but contracts for such capacity, including submarine cable capacity, from a facilities-based supplier).

Opportunities for foreign firms to form joint ventures in the facilities-based sector are further restricted by a requirement that all facilities-based operators be majority state owned, limiting the pool of such partners and reinforcing governmental control over market entry. The Law on Telecommunications was issued in September 2009. In 2010, the Ministry of Information and Communication is drafting an implementing decree which proposes limiting a single foreign investor's ownership in a telecommunications enterprise to 30 percent of the charter capital, which is less than the 49 percent listed in the WTO member's Service Schedule. Even if this provision can be interpreted as allowing up to a total of 49 percent foreign ownership, subject to 30 percent limit on any one foreign investor, a number of experts have expressed concern that such a provision would violate international regulations on market access limitations and create potential difficulties foreign-invested enterprises to operate in the sector. The United States will continue to engage Vietnam as it drafts implementing regulations for its new telecommunications law in an effort to address these restrictions.

In 2010, users widely reported incidents of having no access to certain websites, including foreign-based social networking sites, with the apparent involvement of telecommunications operators. Although the Government of Vietnam has officially denied it is blocking certain websites, the government also has not denied efforts to ensure that Internet usage does not promote "antisocial" behavior. The United States has raised serious concerns about these Internet restrictions with the Vietnamese government and will continue monitor this issue closely.

## **Distribution Services**

Foreign participation in this sector, which includes commission agents' services, wholesale services, retail services, franchising and direct sales activities, is allowed without equity limitations. However, foreign-invested distributors are restricted from trading in a limited number of goods that are excluded from Vietnam's distribution sector commitments either during a phase out period or for an indefinite time period, as set out in Vietnam's WTO Schedule of Specific Commitments. The United States continues to urge Vietnam to further reduce or eliminate these product-specific restrictions on foreign-invested distributors, including in the distribution of videos (tapes, VCDs, DVDs) and pharmaceuticals. In addition, the United States will continue to seek greater clarity and transparency in distribution licensing to address issues with licensing procedures.

## **Banking and Securities Services**

Foreign equity in joint venture banks is limited to 49 percent. In 2012, 100 percent foreign ownership of securities firms will be permitted.

In 2010, Vietnam made progress in strengthening the country's banking sector by officially promulgating the Law on Credit Institutions and Circular 13 (and subsequent amendment Circular 19) on prudential ratios for credit institutions. While these new regulations are aimed at improving the capital position of the banking industry, they have also introduced new requirements and restrictions, such as those for calculation of capital adequacy ratios, which can cause compliance-related difficulties. Foreign banks have also raised concerns about provisions in the Law on Credit Institutions which limit the lending of foreign bank branches in Vietnam based on their local charter capital, rather than on the global capital of the parent bank.

## **INVESTMENT BARRIERS**

Vietnam's Investment Law sets criteria designating certain sectors in which foreign investment is prohibited and others in which foreign investment is subject to conditions ("conditional sectors"). Vietnam also has specific laws that apply to investment in conditional sectors such as banking, securities, insurance, mining, telecommunications, real estate, ports and aviation. Investments in conditional sectors, and other projects deemed sensitive, are subject to extensive and additional review, sometimes requiring the Prime Minister's approval, which can often delay the approval of investment licenses.

All land in Vietnam is owned and managed by the state and, as such, neither foreigners nor Vietnamese nationals can own land. The 2006 Investment Law permits foreign invested enterprises to rent land for a period of 50 years and up to 70 years in special cases. Investors can obtain land use rights and mortgage both the structures erected on that land and the value of land use rights.

## **ELECTRONIC COMMERCE**

Electronic commerce remains underdeveloped in Vietnam. Development has been hampered by the low number of Internet subscribers, concerns about data protection and data privacy, limited bandwidth and other problems with the Internet infrastructure, limitations in the financial services sector (including few credit cards users), and regulatory barriers. The 2006 Law on Electronic Transactions gave legal standing to electronic contracts and electronic signatures and allocated the responsibilities of parties with respect to the transmission and receipt of electronic data.

## **OTHER BARRIERS**

Both foreign and domestic firms have identified corruption in Vietnam in all phases of business operations as an obstacle to their business activities. The lack of transparency, accountability, and media freedom, as well as widespread official corruption and inefficient bureaucracy, remain serious problems.

Competition among government agencies for control over business and investments has created confusing and overlapping jurisdictions and overly bureaucratic procedures which in turn create opportunities for corruption. Low pay for government officials and inadequate accountability systems contribute to these problems. With the assistance of the United States and other donors, Vietnam is in the process of implementing a public administration reform program and continuing to enhance transparency. The United States will continue to work with Vietnam to support administrative reform efforts and promote greater transparency.