

## The New Regulatory Environment for Local Business

During the accession process, and in the first few years of WTO membership, the emphasis, at least for a country at Cambodia's stage of development, is on providing a satisfactory regulatory environment for trade and investment. In order to reach an agreement acceptable to other WTO members, Cambodia had to enact many laws and regulations that met WTO obligations. The government also developed a specific legislative program, through 2007, to complete the process.

The delay in forming a government in Cambodia following the 2003 elections also delayed the legislative program. Nevertheless, these measures include big changes to the framework within which local firms conduct business. Laws and regulations are of value only if they are enforceable, and enforceable through administrative and judicial systems that are credible, open, and fair. This is one of the key tests for Cambodia as a WTO member. Other members whose firms wish to trade or invest in this country will watch closely. Clearly, it is also for the private sector within Cambodia to be vigilant on its own behalf if it wants to see real benefits from WTO accession.

The WTO will influence Cambodia's laws and regulations in four areas: the general business environment, trade in goods, trade in services, and the protection of IP. For the most part, the regulation of trade in services affects investment conditions, which are examined in the next chapter.

### GENERAL BUSINESS REGULATION

Among the key pieces of general business legislation that were promised in the Agenda for Enacting Laws for WTO Conformity in Cambodia are:

- Commercial Arbitration Law
- Insolvency Law
- Commercial Contracts Law
- Commercial Leasing Law

- Commercial Agency Law
- Law Establishing the Commercial Court
- Civil Procedure Code
- Civil Code
- Criminal Procedures Code
- Criminal Code
- Competition Law
- Securities and Exchange Laws

This is a demanding agenda for the government and the National Assembly. For businesses, both domestic and foreign-owned, the key will be in the enforceability of new measures. For that, the establishment of an efficient and respected commercial court will be important.

Another requirement for growing businesses, and especially in the context of financing, is the use of modern accountancy standards. The standards themselves are not set out by the WTO. However, the organization adopted disciplines in 1998 that require accounting regulation to be transparent. The disciplines also cover procedures and requirements affecting the licensing of accountants and their qualifications.

### REGULATING TRADE IN GOODS

There are many provisions in the WTO affecting cross-border trade in merchandise goods. Some are important for Cambodian exporters and are discussed in Chapter 7; others will interest companies that need to import goods. Three provisions will have an impact on import practices at the border: customs valuation, import licensing, and pre-shipment inspection (PSI).

A serious concern of Cambodian importers has been the varying valuations placed on imported goods by the customs service in order to levy duties and VAT. Businesspeople complain that valuations change

on the same goods, and there is little logic in the valuations made on large and small shipments. Above all, the current official customs regime uses minimum, and other artificial values, rather than invoice values. WTO members also raised these problems during meetings of the working party on WTO accession.

Cambodia is committed to implementing the WTO Customs Valuation Agreement (See Box 5). Because implementation can be a complex and

dian importers will have a transparent, consistent, and fair system to determine the basis for duties.

Associated with the process of customs valuation is the practice of pre-shipment inspection (PSI). PSI is normally conducted in the exporting country, however many countries that lack a qualified and trusted customs service hire PSI firms to conduct a broad range of customs services at the port of entry, such as checking the quantity, quality,

### ***Box 5: The WTO Customs Valuation Agreement***

The WTO regulates the valuation to determine import duties made by the customs service. Essentially, the valuation should be the transaction value of the imported goods, in other words, the price paid by the importer, listed on the invoice. Customs are entitled to add certain costs or charges to the invoice price if they are not already included. These are detailed in the Agreement and include: commissions and brokerage, packing and containers, and royalties and license fees. Transport, insurance, and related charges up to the port of entry can also be added.

The WTO Agreement includes a short list of situations where customs can reject the declared transaction value. When it does, five other standards for determining the dutiable value are available; notably the transaction value determined for a previous shipment of identical goods. Where there is a delay in determining a customs value, the importer should have the right to withdraw the goods from customs on payment of a guarantee or deposit.

Importers must have the right to a written explanation of the manner in which the customs service has made its valuation calculations. They must also have the right to appeal a customs valuation, without fear of a penalty, to the customs administration or to an independent body. Confidential information provided to the customs administration must not be disclosed.

burdensome process, Cambodia and the WTO have agreed on a five-year transition period. The process will be progressive, but by 1 January 2009, the Agreement's provisions should be fully operational in Cambodia. Once the implementing laws and regulations are effective, overseas suppliers and Cambo-

and price of goods. These firms also verify tariff classifications<sup>2</sup> to be applied and the duties payable. At the time of writing, bids for a new PSI contract for Cambodia were under consideration; Société Générale de Surveillance (SGS) from Switzerland is the incumbent.

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<sup>2</sup> A tariff classification is a number that identifies almost all goods in order to assign customs duties. Broad product groups are given a relatively short and simple number. For instance, garments are normally covered by the classifications, or chapters, 61 and 62. The classification number is longer when a product is more precisely defined. For example, women's and girls' suits, dresses, and skirts are covered by a classification 61.04, and women's cotton dresses are 61.04.42.00. In some industrial countries, which import many products, as many as ten figures can be used for a classification.

There are several classification systems. Most WTO member countries, including Cambodia, use the "Harmonized System" of classification, which is administered by the World Customs Organization in Brussels.

The use of PSI services by developing countries has been justified for several reasons. In addition to ensuring that the goods ordered are the goods shipped, in both quantity and quality, PSI can stop the over-invoicing and under invoicing of imports. Over-invoicing facilitates the illegal movement of money overseas (capital flight), since the payment made greatly exceeds the true value of the goods. Under-invoicing results in lost revenues from customs duties and other taxes due to lower customs valuations. In the case of Cambodia, PSI probably helps speed up customs clearance at the ports, and serves to reduce corruption by pre-determining the duties payable.

Large exporting firms in developed countries have often complained that the PSI inspections in exporting countries lead to unwarranted and unexplained downward adjustment of invoices, and to delays because of the physical inspection of shipments.

The WTO Agreement on PSI (see Box 6 below) sets out detailed rules for the use of PSI services. In particular, it allows for dispute settlement when exporters or importers encounter problems. During the accession process, several WTO

members criticized the operations of SGS on behalf of Cambodia. Concern over the charges imposed on exporters for PSI inspections (0.8% of the shipment value), and the 7% penalty imposed on non-inspected goods, was expressed. Cambodia took steps to resolve the problems, and assured other WTO members that the use of PSI would be temporary, and would be terminated once the capacity of the Customs Department was increased.

#### **IMPORT LICENSING DISCIPLINES**

Another area of uncertainty for business in Cambodia has been the operation of the import licensing system. Import licensing can involve administrative burdens, delays and informal payments to officials. In practice, an import licensing system can amount to a quota restriction. As such, all import-licensing schemes are a burden on investment companies, farmers and wholesale-retail businesses needing foreign-made inputs and supplies.

Licensing is permitted under the WTO (see Box 7), but in carefully specified circumstances and under tightly drawn conditions. These conditions will need to be observed by Cambodia as a WTO member.

#### ***Box 6: The WTO Agreement on Pre-shipment Inspection***

The agreement's provisions include the following:

- Pre-shipment inspection (PSI) can only be used on a temporary basis.
- There must be no discriminatory treatment among different exporters.
- Inspections are normally to take place in the exporting country.
- The laws and regulations governing PSI companies, as well as their procedures and inspection criteria, must be transparent.
- Confidential information must be protected.
- Delays to shipments must be avoided.
- Detailed conditions for shipment price verifications by PSI companies.
- Dispute settlement machinery at three levels:
  - PSI companies must designate officials to whom exporters can address grievances.
  - If there is no agreement on a complaint within two working days, exporters have recourse to an "Independent Review Entity" operated jointly by the International Chamber of Commerce and the WTO.
  - In extreme situations, governments can take complaints to the WTO's dispute settlement procedure.

**Box 7: Import Licensing Rules in the WTO**

The WTO Agreement on Import Licensing Procedures includes the following provisions:

- Information on the licensing procedures must be published and include:
  - The eligibility of firms, persons or institutions to make applications;
  - The administrative body responsible for issuing licenses; and,
  - The products subject to licensing.
- Paperwork should be easy and penalties cannot be imposed or licenses refused where errors are made without ill-intent.
- Where licensing is “automatic” - i.e. no discretion is exercised by the authority - the license should be granted within 10 working days.
- For “non-automatic” licensing, the license should be issued within 30 days, if on a “first-come first-served” basis; or 60 days if all applications are considered simultaneously.
- The period of a license must be “reasonable”, for instance, to facilitate long-distance shipments.
- These, and all provisions of the Agreement, were to be implemented at the time of Cambodia’s accession.

Cambodia has assured the WTO that its use of import licensing is limited. Five classes of products have been declared to the WTO as subject to licenses:

- Pharmaceuticals and medical material;
- Agricultural inputs (principally pesticides and fertilizers);
- Weapons, explosives, and ammunition;
- Vehicles, aircraft and parts, ships and boats, and other machinery for military purposes; and,
- Gold, silver, precious stones and articles made from them.

According to the Government of Cambodia, none of these licensing requirements, with the exception of those for pesticides and fertilizers, are intended to impose quantitative limits on imports. They exist, rather, for health, safety, consumer interest, national security, and environmental protection purposes.

In the case of chemical pesticides and fertilizers, the Ministry of Agriculture, Forestry, and Fisheries (MAFF) sets import limits based on an annual assessment of farmers’ needs, as well as the need for environmental protection, and health and safety considerations. Licenses are issued on a first-come, first-served basis. When necessary, MAFF can authorize imports over the annual limit.

As for import licensing on pharmaceuticals, the Cambodian government informed the WTO that the system was a response to Cambodia’s problems with counterfeit medicines and drug trafficking.

Import licenses can only be secured by enterprises registered by the Ministry of Commerce (MoC) (also see Appendix 3, The Role of Camcontrol). MAFF issues licenses for agricultural inputs, while the Ministry of Health issues those for pharmaceuticals and medical materials, product-by-product.

Most concern from WTO members during the accession negotiations was directed at the licensing of pharmaceuticals and agricultural inputs. Responding to complaints that the system constrained imports for no credible reason, the Cambodian government undertook to eliminate quantitative restrictions on imported agricultural inputs by 1 June 2005. A WTO-consistent method of registering and reviewing imported agricultural chemicals will be implemented.

**REGULATION OF INTELLECTUAL PROPERTY PROTECTION**

Since the WTO was established and its Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) came into effect, there has been pressure for all newly acceding countries to apply and

enforce patents, copyright, and other intellectual property rights (IPR). Even as an LDC, Cambodia was faced with such pressure, despite the institutional, administrative, and policing burdens of meeting many of the obligations.

For the most part, the interest in securing TRIPS commitments (see Box 8) comes from major industrial sectors, in developed countries, that expect to export their own branded goods or to produce them locally. They react strongly to counterfeiting and copying (for example, of films, videos, CDs, watches, and software), the denial of patent protection (for example, of pharmaceuticals and agricultural chemicals), and the abuse of trademarks and trade names (for example, of beverages). In short, owners want their ideas protected, and, therefore, to retain the right to exploit them commercially.

At the same time, respect for IPR and the

capacity to enforce them can be a significant attraction for potential investors. Cambodia has long accepted that IP protection could aid development and encourage the transfer of technology. The country is a member of a number of key international agreements, and has been progressively introducing legislation to enact IP treaties. Further, it is engaged in the cooperative program on IP protection within ASEAN.

Much remains to be done in terms of implementing practical IP regulations. International investors will want to see not only the adoption of international IP protection standards, but also the presence of administrative and judicial machinery to allow for administrative, civil, and criminal procedures. As part of the WTO accession terms, Cambodia committed itself to an “Action Plan” for full implementation of TRIPS that was to be concluded by 1 January 2007.

***Box 8: The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights***

Normally referred to as the “TRIPS” Agreement, the WTO rules require members to meet minimum international standards for the protection of:

- Patents;
- Copyrights;
- Trademarks;
- Industrial designs;
- Layout designs of integrated circuits;
- Undisclosed business information; and,
- Geographical indications.

The TRIPS Agreement seeks a balance between the rights of intellectual property owners, the users of intellectual property, and the wider public interest. The rules on patent protection, for example, allow for circumstances in which governments can provide “compulsory licenses”, allowing the exploitation of a patented invention without the permission of the owner of the patent. The WTO has recently clarified the situations in which such licenses can be issued in order to allow production, and ensure supply, of vital pharmaceutical products subject to patent protection.

Apart from setting standards of protection, TRIPS also sets out strong requirements for the enforcement of IP rights by their owners. This includes provision for civil, administrative, and criminal procedures and penalties. It also allows for the seizure of counterfeit or pirated goods at the border.