KENYA

TRADE SUMMARY

The U.S. goods trade surplus with Kenya was $83 million in 2011, up $19 million from 2010. U.S. goods exports in 2011 were $464 million, up 23.7 percent from the previous year. Corresponding U.S. imports from Kenya were $382 million, up 22.6 percent. Kenya is currently the 98th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Kenya was $263 million in 2010 (latest data available), up from $257 million in 2009.

IMPORT POLICIES

Tariffs

According to the WTO, Kenya's average applied tariff rate for all products was 12.5 percent in 2011. Kenya's average applied rate for agricultural goods was 19.7 percent and 11.4 percent for industrial goods. Kenya has bound rates (*i.e.*, the rates that under WTO rules generally cannot be exceeded) on less than 15 percent of its tariff lines, and these bound rates are generally high.

Kenya is a member of the WTO, the Common Market for Eastern and Southern Africa (COMESA), and the East African Community (EAC) and applies the EAC Customs Union's Common External Tariff (CET) on most tariff lines.

Within the context of EAC and COMESA Memberships, the government of Kenya has undertaken substantial trade liberalization, including some the reductions of most favored nation tariffs, removal of quantitative restrictions, improvement of the business environment, and trade facilitation.

However, the high CET *ad valorem* import tariffs and value-added taxes (VAT) inhibit non-EAC/COMESA trade, especially in "sensitive" agricultural sector commodities. The Kenyan government sometimes reduces and/or abates these tariffs in cases of domestic shortages. Even so, the government oftentimes restricts imports to millers. Currently, Kenya's government applies a reduction in the wheat duty from 35 percent to 10 percent through June 2012 (accessible only to Kenyan millers at specified tonnages) and a reduction in the rice *ad valorem* tariff from 75 percent to 35 percent through June 2012.

"Sensitive" products/commodities, comprising 58 tariff lines, have applied *ad valorem* rates above 25 percent. This includes, except when abated or reduced through EAC-approved requests, minimum rates of 25 percent for milk and milk products, 50 percent for corn and popcorn, 75 percent for rice, and 35 percent for wheat and wheat flour. The Kenyan government also requires import permits/licenses for many of these "sensitive" products. For some products/commodities, the tariffs, at times, may vary across the five EAC member states.

For "non-sensitive" tariff lines, the CET calls for zero duty for raw materials and inputs; 10 percent for processed or manufactured inputs; and 25 percent for finished products.

Nontariff Measures

The Finance Ministry's Business Regulatory Reform Unit plays an important role in reducing regulatory risks and removing nontariff measures, including those that affect U.S. imports. Kenya justifies its existing import controls as necessary to address health, environmental, and security concerns. All importers pay an import declaration fee set at 2.25 percent of the customs value of imports, and are required to furnish the following documents: Pre-export Verification of Conformity; a Certificate of Conformity; Import Standardization Mark; valid *pro forma* invoices from the exporting firm; and specific labels for products containing agriculture biotechnology.

Kenyan law stipulates that all licensed importers of petroleum products participate in a crude processing program. Under this system, the Kenya Petroleum Refinery Ltd, a parastatal entity, receives 1.6 million tons of crude oil for refining each year, the majority of which is imported from the United Arab Emirates. 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 comes outside of tendering requirements.

Customs Procedures

Numerous bureaucratic procedures at the Port of Mombasa increase the cost of imported goods significantly. Multiple agencies, including customs, police, ports authority, and standards inspection agencies, subject importers to excessive and inefficient inspection and clearance procedures. These procedures can create opportunities for graft and unnecessary delays. For every 24 hour delay, trucking companies lose an estimated $400, and shippers lose roughly $25,000.

The Kenya Revenue Authority's (KRA) online customs clearance system was implemented in 2005 and has contributed to improvements in overall efficiency and transparency. However, according to the World Bank's Doing Business 2011 report, it still takes an average of 24 days and costs $2,190 to complete import procedures for a standardized container of cargo. It takes 26 days and costs $2,055 to complete export procedures for a similar container.

In April 2011, the KRA introduced new rules that require cargo owners to file additional documents to clear goods at the port. The change requires importers to provide the KRA with cargo manifests and a bay plan from the port of origin to ensure full and accurate collection of required duties. Previously, shippers presented the KRA with cargo manifests only, while the bay plan was provided to port authorities. KRA officials said the change was meant to prevent customs revenue leakages and the importation of illicit goods, including narcotics and weapons. Shippers complain that the new rules add to inefficiency at the port and raise overall costs.

EXPORT SUBSIDIES AND OTHER EXPORT PROMOTION PROGRAMS

Kenya's "Manufacturing Under Bond" (MUB) program is meant to encourage manufacturing for export by exempting participating enterprises from import duties and 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. If goods produced under the MUB system are not exported, the goods are subject to a surcharge of 2.5 percent, and imported inputs used in their production are subject to all applicable tariffs and import charges. The program is open to both local and foreign investors.

Firms operating in Export Processing Zones (EPZ) are provided a 10 year corporate tax holiday and 25 percent tax rate thereafter (the statutory corporate tax rate is 30 percent, but the overall tax rate is 49.6

percent); a 10 year withholding tax holiday on dividend remittance; duty and VAT exemption on all inputs except motor vehicles; 100 percent investment deduction on capital expenditures for 20 years; stamp duty exemption; exemption from various other laws; exemption from pre-shipment inspection; availability of on-site customs inspection; and work permits for senior expatriate staff. Kenya's EPZ law allows manufacturers and service providers to sell up to 20 percent of their output in the domestic market. Manufacturers are liable for all taxes on products sold domestically, however, plus a 2.5 percent surcharge.

The government of Kenya aims to revive EPZs that have suffered declines in competitiveness due to the rising cost of doing business. The strategy includes converting some existing EPZs into Special Economic Zones. A Special Economic Zones Bill, which would authorize this action, is awaiting enactment in Parliament. Products manufactured in EPZs account for over 10 percent of Kenya's total exports, and EPZs employ approximately 40,000 people.

GOVERNMENT PROCUREMENT

U.S. firms have experienced 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 typically partnered with well-connected Kenyan firms. Reportedly, corruption often influences the outcome of public tenders.

In 2007, Kenya established a Public Procurement Oversight Authority (PPOA) to ensure compliance with rules and regulations surrounding government procurement. The PPOA's nine members are selected by the Minister of Finance, subject to Parliamentary approval. The total value of public procurement within Kenya's central government is estimated at 10 percent of GDP.

The government designed the Public Procurement and Disposal Act (the "Act") to make procurement more transparent and accountable, and established penalties for violations of its provisions. The Act permits procurement agencies to establish a list of pre-qualified firms annually. It also reserves exclusive preferences for Kenyan citizens where the funding is 100 percent from the government or a state-related entity, and where the amounts are below Ksh50 million (approximately $540,000) for goods or services and Ksh200 million (approximately $2.1 million) for public works. It also sets a 15 percent margin of preference for goods manufactured, mined, extracted, or grown in Kenya. For citizen contractors who are bidding for contracts paid for out of two earmark funds known as the "Constituency Development Fund" and the "Local Authority Transfer Fund," there is a preference of 6 percent in cases where locals have below 20 percent of shareholdings, 8 percent in cases where locals have shareholdings between 20 percent to 50 percent, and 10 percent where locals have shareholding of 51 percent or greater.

Additionally, the Act allows for restricted tendering under certain conditions such as when the complex or specialized nature of the goods or services requires the pre-qualification of contractors. The Act may impose restrictions if the time and costs required to examine and evaluate a large number of tenders would be disproportionate to the value of the tender.

With the support of the World Bank and in collaboration with the Kenya Information and Communication Technology Board, the PPOA is developing a web-based Market Price Index and an Electronic Procurement system. Additional measures underway at the PPOA include implementation of an internal procurement performance monitoring tool, improvements to the process for reviewing tendering complaints, and development of general and sector-specific procurement manuals.

Parliament enacted the Supplies Management and Practitioners Act in 2007. This law required that a procurement professional be responsible for all procurement within any public entity. However, implementation of the Supplies Management and Practitioners Act has been inconsistent.

Kenya is neither a party nor observer to the WTO Agreement on Government Procurement.

INTELLECTUAL PROPERTY RIGHTS PROTECTION

Kenya's lax enforcement of intellectual property rights (IPR) continues to be a serious challenge for U.S. firms. Pirated and counterfeit products in Kenya, mostly imported from Asia, present a major impediment to U.S. business interests in the country. Imported pharmaceutical drugs, shoes, textile products, office supplies, tubes and tires, 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 2008, piracy and counterfeiting of business software, music, consumer goods, and pharmaceuticals in Kenya cost firms about $715 million in lost sales annually. Consequently, KAM estimated that the government of Kenya loses over $270 million in potential tax revenues per annum.

The Pharmaceutical Society of Kenya contends that over 50 percent of anti-malaria drugs sold in Kenya are counterfeit. A survey conducted 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 sub-standard goods also end up in the Kenyan marketplace without paying the necessary taxes. Counterfeiting of batteries have been particularly problematic.

Transit shipments destined for neighboring countries are also a significant source of counterfeit goods. Intellectual property authorities are limited in their ability to seize transit goods, and authorities suspect that some of these goods find their way back into Kenya.

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.

Parliament passed the Anti-Counterfeit Act in 2008. Long sought by the business community, the law provided 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 ACA became operational in June 2010; however, it is poorly funded, receiving only half of its budget request for 2010. Implementing regulations meant to clarify and expand on the provisions of the Anti-Counterfeit Act have yet to be adopted.

Kenyan artists have formed organizations to raise IPR awareness and to lobby the government for better enforcement. Two of the most active groups are the Music Copyright Society of Kenya and Kopiken. In 2008, the Music Copyright Society claimed that 90 percent of its potential earnings are lost to piracy, and urged the KRA to require authentication stickers on musicians' releases. IPR enforcement against pirated Kenyan and foreign works remains weak.

KAM continues its strenuous efforts to increase government focus on the counterfeit and piracy issues that impact virtually every legitimate manufacturer in Kenya. Working with U.S. rights holders, local authorities have seized thousands of counterfeit products in recent years.

INVESTMENT BARRIERS

A law passed in 2007 reduced the limit on foreign ownership (personal or corporate) of firms listed on the Nairobi Stock Exchange from 75 percent to 60 percent. A grandfather clause allows foreign investors with shares in excess of these limits to maintain or reduce their existing shareholdings. The Capital Market Authority allows foreign investors to increase their investment with prior written approval if the shares reserved for local investors are not fully subscribed.

Foreign ownership of telecommunications firms is limited to a maximum of 70 percent.

Foreign brokerages and fund management firms must operate via locally registered companies, with Kenyan ownership of at least 30 percent and 51 percent, respectively. Additionally, foreign ownership of insurance companies is restricted to 66.7 percent. Foreign ownership of companies engaged in fishing activities is restricted to 49 percent of voting shares, as stipulated by the Fisheries Act of 1991.

The constitution prohibits foreigners from holding a freehold land title anywhere in the country, but does allow leasehold titles of up to 99 years. The cumbersome and opaque process required to purchase land in Kenya raises concerns about security of title, particularly given past abuses relating to the distribution and redistribution of public land.

Kenya has been slow to open public infrastructure to competition because the government considers state-owned companies that control infrastructure as "strategic" enterprises. The reform and partial privatization of the telecommunications, power, and rail sectors are proceeding but have fallen behind schedule. A Public-Private Partnership (PPP) law is being considered by Parliament. Meanwhile, the Finance Ministry is developing rules and regulations for PPPs and is in the process of setting up a Secretariat to help review and oversee proposed partnerships.

The use of fees and security bonds operates to discourage the employment of foreign labor. New foreign investors with expatriate staff are required to submit plans for the gradual phasing out of non-Kenyan employees.

In recent years Kenya has made progress in eliminating or reducing business license requirements. The Business Regulation Act of 2007 established a Business Regulatory Reform Unit within the Ministry of Finance to continue the deregulation process. In 2009, Kenya launched a national electronic registry to ease business license processing and help improve transparency.

OTHER BARRIERS

The 2010-2011 Global Competitiveness Index published by the World Economic Forum cited corruption, access to financing, and inadequate infrastructure as the three most problematic factors for doing business in Kenya. Bureaucratic complexity and a high overall cost of doing business also contribute to Kenya's poor business environment. For example, it costs businesses in Kenya over 47 percent of the cost of a claim to enforce a contract; 22 percent of the estate to close a business; and 4.2 percent of a property's value to have it registered. Registering a business in Kenya is an 11 step process that takes an average of 33 days and costs the equivalent of roughly 38.3 percent of average per capita income. In addition to these burdens, Kenya's overall corporate tax rate is nearly 50 percent.

Corruption

Corruption remains a substantial trade barrier in Kenya. U.S. firms find it difficult to succeed against competitors who are willing to ignore or engage in corruption. A number of U.S. firms have exited Kenya at least in part due to corruption issues. The 2008 Business Climate Index published by the East African Business Council revealed a deteriorating business environment in the region, with over $10 million paid in bribes to police and customs officials every year.

According to the 2011 East Africa Bribery Index published by Transparency International-Kenya, 84 percent of respondents rated Kenya as being corrupt or extremely corrupt, while only 13 percent regarded Kenya as slightly corrupt. The report also indicated that Kenyans still consider the police force to be the most corrupt government institution. According to the International Finance Corporation's most recent Assessment of the Investment Climate in Kenya, 75 percent of firms surveyed said they have made informal payments to "get things done."

Judiciary

The Kenyan judicial system is working to improve its efficiency and timeliness. A backlog of cases, including those that are investment-related, burdens the system. Corruption, both perceived and real, reduces the system's credibility. Companies cite these deficiencies as obstacles to investment, especially since these issues make some financial institutions reluctant to supply loans, or charge higher interest rates when they do agree to provide financing. The case backlog is a result of understaffing, but the government has embarked on a major judiciary recruitment drive. Following the promulgation of the new constitution in August 2010, the government of Kenya appointed a new Chief Justice and Deputy Chief Justice, both of whom pledged to reform the judicial sector and restore public confidence. Since 2010, the number of judges on Kenya's Commercial Court has increased from three to eight judges, which has improved access to justice and reduced the commercial case backlog. The Commercial Court took several important actions to ease congestion, including (1) requiring advocates to submit electronic copies of pleading and submissions; (2) limiting direct examination of witnesses in court; and (3) creating a committee of advocates and judges to address administrative issues.