KENYA

TRADE SUMMARY

The U.S. goods trade surplus with Kenya was $172 million in 2006, a decrease of $112 million from $284 million in 2005. U.S. goods exports in 2006 were $526 million, down 16.8 percent from the previous year. Corresponding U.S. imports from Kenya were $354 million, up 1.6 percent. Kenya is currently the 82nd largest export market for U.S. goods.

The stock of U.S. foreign direct investment in Kenya in 2005 was $89 million (latest data available), up from $86 million.

IMPORT POLICIES

Tariffs

Kenya is a Member of the World Trade Organization (WTO), the Free Trade Area of the Common Market for Eastern and Southern Africa (COMESA), and the East African Community (EAC). High import duties and Kenya's value-added tax (VAT) pose trade barriers, especially in the agricultural sector. Kenya's import regulations on agricultural products are sometimes altered to reflect fluctuations in domestic supply and demand as well as political factors. The government continues to carefully control imports of seed corn by subjecting hybrid varieties to a certification process that effectively restricts trade.

With the establishment on January 1, 2005 of the EAC Customs Union (between Kenya, Uganda, and Tanzania), the government established three tariff bands: zero duty for raw materials and inputs; 10 percent for processed or manufactured inputs; and 25 percent for finished products. According to the WTO, the move from national tariffs to a common external tariff under the EAC reduced average tariff protection in Kenya. A selected list of sensitive items, comprising 58 tariff lines, was assigned rates above 25 percent, including milk and milk products, corn, rice, wheat and wheat flour. (Wheat flour is imported duty-free from member states of COMESA and the EAC.) Tree nuts, including almonds, are not classified under the sensitive products list but experienced an increase in duty. The tariff on unshelled almonds increased from zero percent to 10 percent, and shelled almonds and other nuts increased from 15 percent to 25 percent. The duty on used clothing, a major U.S. export to the EAC region, was increased to 45 percent or $0.30 per kilogram, whichever is higher. While the U.S. Government welcomed the simplification of the tariff system that came about as a result of the EAC Customs Union, it has raised concerns with Kenya and other EAC members about exceptional tariff increases on used clothing, as well as higher tariffs on almonds and some other U.S. exports to the region.

In 2004, the government introduced an export tax on hides, skins, and scrap metal to encourage local processing rather than the export of these items. Refrigerated trucks and hotel equipment received duty exemptions.

In June 2006 the government eliminated import duties on solar equipment and accessories, bicycle kits, kaolin and kaolinic clays, coke fuel, filter paper, wire of stainless steel and nickel bars, and circular interwoven discs and netting glass fiber. Additionally, import duties were reduced from 25 percent to 10 percent for unassembled kits for motorcycles and unprinted aluminum foil, while duties were increased from 10 percent to 25 percent for floor coverings and mats and from 35 percent to 50 percent on matches.

The government sometimes appears to use the VAT to support policy priorities, both to protect "strategic" sectors such as transportation and agriculture and to address short-term needs. For example, in June 2006, Kenya eliminated the VAT on pharmaceuticals; wheat flour; computer equipment, parts and accessories; liquid petroleum and coal; sanitary pads, baby diapers, napkins, and feeding bottles; supply and treatment of natural water; tractor tires, agricultural tractors, and semi-trailers; and transportation of unprocessed agricultural produce and raw materials such as cut flowers, unroasted coffee, green tea, raw sugar cane, cereals, un-ginned cotton, raw or smoked tobacco and raw pyrethrum.

Non-Tariff Measures

Kenya has removed most non-tariff measures. Those import controls still in existence are based on health, environmental, and security concerns. All Kenyan imports are required to have the following documents: import declaration forms (IDF), a clean report of findings from the Pre-shipment Verification of Conformity agent for regulated products (see Standards section), and valid *pro forma* invoices from the exporting firm.

Kenyan law limits the importation of refined petroleum products by stipulating that any consignment of oil that a company imports for the domestic market be 70 percent crude, thus requiring that it be refined by the Kenya Petroleum Refineries. A senior private sector manager estimates the cost of petroleum products refined in Kenya is about $0.14/gallon higher than imported products, costing Kenyan consumers almost $70 million per year. Oil imports en route to other countries are not affected by this requirement.

Customs Procedures

Kenya is a party to the WTO Customs Valuation Agreement and uses the transaction value for valuation of goods imported from other WTO signatories. Concerns have been raised, however, that this system is not applied consistently. Kenya's customs procedures are detailed and rigidly implemented, often leading to delays in clearance of both imports and exports. In September 2005, the Kenya Revenue Authority (KRA) introduced a new electronic clearing system at the Port of Mombasa, Kenya's major port of entry for imports. Initially, poor implementation, capacity constraints, and information sharing problems created significant delays for some importers. The two private sector firms that administer Kenya's Pre-shipment Verification of Conformity regime (Intertek Testing International and Societe Generale de Surveillance) have been charged with ensuring that up-to-date customs valuation and risk assessment methods are applied.

STANDARDS, TESTING, LABELING AND CERTIFICATION

On September 29, 2005, the government introduced a new Pre-shipment Verification of Conformity (PVC) program. Under the new system, all goods entering the country require a Certificate of Conformity from the country of origin, demonstrating conformity to Kenyan standards. For consignments shipped without inspections, importers may apply for a destination inspection subject to acceptance by the Kenya Bureau of Standards' (KEBS). KEBS is a regulatory body under the Ministry of Trade and Industry. For destination inspection, Kenya requires the importer to pay a 15 percent penalty charge and post a 15 percent bond on the CIF (cost, insurance, freight) value in addition to paying the costs of the test.

Commercial and research applications of agricultural biotechnology in Kenya are currently regulated through guidelines that are neither formal regulations nor enacted law. The guidelines, initially published in 1998 and reviewed yearly, describe a committee-based approach for review and approval of agricultural biotechnology imports, including specific review of end uses (e.g., planting seeds for trials). Substantial quantities of agricultural biotechnology products have been imported into Kenya for food aid purposes since the establishment of the National Biosafety Committee, and significant volumes of food products derived from agricultural biotechnology crops are available commercially. Kenya also imports maize from South Africa, where biotechnology varieties are commercially available.

On September 28, 2006, the Cabinet approved a "National Biotechnology Development Policy 2006" document, which signaled the government's positive attitude toward the use of biotechnology. A draft Biosafety Bill has also been presented to the Cabinet and signed by the Minister of Science and Technology. Although there is momentum in favor of the bill, its actual enactment remains uncertain. As of mid-March 2007, it had yet to be brought before Parliament for debate. Kenya is a party to the Cartagena Protocol on Biosafety.

The Kenya Plant Health Inspectorate Service (KEPHIS), a regulatory agency for quality control, subjects certain imported agricultural goods to further inspection. The Inspectorate also regulates the import and export of plant materials and trade in biotechnology items that require special handling to ensure they are not accidentally released into the environment. KEPHIS evaluates commercial hybrid grain seeds for a period of three years before the seeds can be released to market. According to industry representatives, the certification process can be tedious and restrictive, and the three-year period needed for the government to approve or reject a variety is burdensome. The Ministry of Agriculture restricts cereal seed imports by setting quantitative ceilings. However, once a variety is certified, the quantitative restrictions are lifted.

Any plant consignment arriving in Kenya should have a copy of the plant import permit provided by KEPHIS and an additional health certificate (a phytosanitary certificate), international model, or its equivalent. U.S.-origin genetically modified products must indicate genetic modification status as an additional declaration, with the details stated on the phytosanitary certificate, or they must have a certificate of analysis from a credible laboratory.

GOVERNMENT PROCUREMENT

Kenya is not a signatory to the WTO Agreement on Government Procurement. However, in 2005, Kenya enacted the Public Procurement and Disposal Act, which provides for a Public Procurement Oversight Authority. The Authority entered into force on January 1, 2006, but certain elements of its implementation remain uncertain. Its nine-member Oversight Advisory Board is appointed by the Minister of Finance.

The Public Procurement and Disposal Act is designed to make procurement more transparent and accountable, requiring procurement agencies to carry out an annual update of pre-qualified firms, especially when dealing with restricted tenders, such as security-related tenders. The act establishes penalties for violations of the law, with penalties for individuals up to Ksh4 million (approximately $53,000) in fines, or imprisonment for three years, or both; and for corporations, fines of up to Ksh10 million (approximately $133,300). The Act gives exclusive preferences to Kenyan citizens where the funding is 100 percent from the government of Kenya or a Kenyan body and the amounts are below a yet-to-be determined threshold. The law allows for restricted tendering under certain conditions, such as when the complex or specialized nature of the goods or services limits the competition to pre-qualified contractors. Restrictions can also be imposed if the time and costs required to examine and evaluate a large number of tenders would be disproportionate to the value of the tender. It is uncertain whether the new law will enhance the transparency of national security-related procurements, which have been the subject of a number of high-profile corruption cases in recent years.

The government has taken steps to increase transparency in its public procurement process by removing from its tender documentation a clause that read: "The government reserves the right to accept or reject any bid and is not obliged to give any reasons for its decisions." The Central Tender Board now publishes its decisions and, if a bidder asks, provides the reasons for rejecting certain bids.

In May 2006, the Supplies Management and Practitioners Bill of 2006 was tabled in Parliament for debate. The bill, yet to be passed, aims to complement the Public Procurement and Disposal Act of 2005 by specifying that only a procurement professional may be entrusted with the responsibility of procurement in any public entity.

The World Bank, International Monetary Fund, European Union, and other donors have conditioned some of their official assistance programs, including direct budget support, on reform of public procurement. The donor community hopes the revised public procurement laws will improve Kenya's public procurement system, which has been frequently marred by flawed contracts, awards to noncompetitive firms, and awards to firms in which government officials have a significant interest. Kenya's conflict-of-interest regulations are often compromised and rarely enforced.

EXPORT SUBSIDIES

Kenya maintains a Manufacturing Under Bond (MUB) program that is designed to encourage manufacturing for export. MUB goods are expected to be exported. If not, they are subject to a surcharge of 2.5 percent and are subject to all other duties. The program is open to both local and foreign investors. Enterprises operating under the program are exempted from duty and VAT on imported raw materials and other imported inputs and have a 100 percent investment allowance on plant, machinery, equipment, and buildings. The Kenyan Export Processing Zones (EPZs) offer a variety of fiscal and in-kind incentives such as tax holidays, less red tape, administrative shortcuts, and superior infrastructure not found anywhere else in the country. Firms operating in EPZs are exempted from all withholding taxes on dividends and other payments to non-residents during the first 10 years. They are also exempted from import duties on machinery, raw materials, and intermediate inputs. There are no restrictions on management or technical arrangements, and EPZ companies have access to expedited licensing procedures. Kenya's EPZs have become the center of Kenya's successful garment and apparel sector.

EPZ firms are allowed 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. There is no general system of preferential financing, although sectoral government development agencies in areas such as tourism and tea are supposed to provide funds at below-market rates to promote investment and exports.

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INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION

Kenya is a member of most major international and regional intellectual property conventions including the World Intellectual Property Organization (WIPO), the African Regional Industrial Property Organization, the Paris Convention for the Protection of Industrial Property, and the Berne Convention on the Protection of Literary and Artistic Works. The Kenya Industrial Property Act (as amended) is the implementing legislation for Kenya's obligations under the WTO Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement. U.S. industry has called on the Kenyan government to take a more active role in enforcing intellectual property protection and combating the spread of counterfeit and pirated goods. Pirated and counterfeit products in Kenya, mostly from South Asia and East Asia, present a major impediment to U.S. business interests in the country. Industry estimates that copyright piracy of business software, records, and music in Kenya cost U.S. firms $25 million in lost sales in 2005.

Patents and Trademarks

Patent protections are enshrined in Kenya's Trademarks Act, which established the Kenya Industrial Property Institute (KIPI). KIPI considers applications for and grants industrial property rights and privileges that are valid for 10 years on a renewable basis. The Amendments to the Act -- designed to bring Kenya into conformity with the Madrid Agreement and Protocol as well as the TRIPS Agreement -- were passed and came into force in 2004. The act provides protection for registered trade and service marks and entitles foreign investors to national treatment and priority right recognition for their patents' and trademarks' filing dates.

Copyrights

Computer programs, sound recordings, broadcasts, and literary, musical, artistic, and audiovisual works are protected under the Copyright Act. The Kenya Copyright Board (KCB) is charged with coordinating all licensing and treaty activity and has the authority to inspect, seize, and detain suspect articles and to prosecute offenses. In June 2006, the Attorney General appointed the first KCB executive director. The KCB established an IPR enforcement unit in October 2006. The KCB has minimal staff and has not, to date, effectively carried out its mandate. Infringement of copyright, especially on music and films, is pervasive, and enforcement remains sporadic at best.

Kenyan artists have formed organizations to raise awareness of intellectual property rights and to lobby the government for better enforcement, but merchants are still free to peddle pirated versions of Kenyan and international works without fear of arrest or prosecution. Pirated materials and counterfeit goods produced in other countries are readily available in all major towns. These materials include pre-recorded audiocassette tapes, DVDs, CDs, and consumer products. General understanding of the importance of intellectual property is limited. In October 2005, however, the High Court ruled in favor of the plaintiff in a copyright infringement case (Alternative Media Limited vs. Safaricom Limited). In November 2006, the American Chamber of Commerce of Kenya, in conjunction with the Ministry of Trade and Industry and the Kenya Association of Manufacturers, held a pioneering regional IPR conference in Nairobi.

Enforcement

In July 2006, the Ministry of Trade and Industry reported that Kenyan manufacturers incur a net loss of Ksh30 billion (over $400 million) due to counterfeit products, while the government loses Ksh6 billion (approximately $80 million) in potential tax revenue annually due to counterfeit products. Imported drugs, shoes, textile products, office supplies, tubes and tires, batteries, shoe polish, soaps, and detergents are the most commonly counterfeited items. Historically, penalties and enforcement for copyright infringement have been low. The Attorney General has yet to introduce before Parliament a proposed Counterfeit Goods Bill that would strengthen the ability of law enforcement agencies to investigate and prosecute manufacturers and distributors of counterfeit and pirated goods. In December 2006, the Minister of Trade and Industry presided over the destruction of 3.2 million counterfeit Bic pens that the Kenya Revenue Authority had confiscated.

SERVICES BARRIERS

In general, individuals and companies supplying services, whether local or foreign, are accorded the same treatment.

Telecommunications

Kenyan telecommunications are dominated by three state bodies: Telkom Kenya, the monopoly fixed-line services provider; the Communications Commission of Kenya (CCK), the regulatory body; and the Postal Corporation of Kenya. Kenya has witnessed significant growth in the information, communication, and technology sector in terms of telephones lines, Internet Service Providers (ISPs), and the number of Internet users and broadcasting stations.

The government has liberalized the mobile telephone market. In January 2005, the government ended Telkom Kenya's monopoly on Very Small Aperture Terminals (VSATs) and Internet bandwidth, and subsequently licensed a number of competing firms. In August 2005, CCK issued guidelines on the provision of Voice-Over-Internet Protocol (VoIP) and to date there are a number of licensed VoIP providers operating in the country.

In February 2006, the CCK de-registered 30 Internet Service Providers (ISPs). By June 2006, there were 53 registered ISPs in operation, 19 public data network operators, and six commercial VSAT hub operators. There were also two licensed call centers, but only one was in operation. Foreign ownership of an ISP is restricted to 40 percent.

Since 2004, Kenya's updated regulatory framework includes:

-- Permitting mobile operators (GSM) to construct and operate their own international gateways;

-- Issuing additional licenses to provide Internet backbone and gateway, broadcast signal distribution, and commercial VSAT services on a first-come, first-served basis;

-- Allowing public data network operators (PDNOs) to establish international gateways for data communication services; and

-- Allowing Internet backbone and gateway operators, broadcast signal distributors, commercial VSAT operators, and public data network operators to carry any form of multimedia traffic.

In a new National Information and Communication Technology Policy released in late 2005, the government proposed major changes in the sector, including a further restructuring of Telkom Kenya. The telecommunications parastatal's privatization is now scheduled for April 2007.

In September 2006, the government announced the results of a pre-qualification exercise for a second national operator (SNO) for fixed-line telephone services in which seven firms/consortia were selected. In late October 2006, the press announced that CCK had offered the SNO license to operate both fixed and mobile telephone services to a Dubai-based company. However, the deal fell apart and the second-highest bidder, an Indian company, was offered the license and, reportedly, has accepted.

In September 2006, a Kenyan court ruling ended an ownership dispute that had prevented Econet Wireless from exercising its rights to roll out a new mobile network under a license it had won in 2004. As of the end of 2006, however, the CCK still had not provided the company with the network codes necessary to begin its roll-out, and the company publicly accused government officials of corruption in the matter.

To date, the deficiency of competition has contributed to increased costs of doing business. Consumers complain that Telkom Kenya's land lines are often down and that cell phone service is too expensive. Like the fixed-line market, cellular service provides consumers with few options. Currently only two mobile phone firms, Safaricom (a joint venture of Telkom Kenya and Vodafone) and Celtel (a joint venture of Vivendi and Sameer Investments), are licensed to provide mobile telecommunications. As of June 2006, Safaricom and Celtel had over 6.5 million subscribers, up from 4.6 million from June 2005. Safaricom commands over 66 percent of the market share. The government intends to sell 34 percent of the Safaricom shares it holds through Telkom Kenya through an initial public offer (IPO) on the Nairobi Stock Exchange while selling 26 percent to a strategic investor. In the current arrangement, 9 percent of the Safaricom shareholding will be sold to finance the sale of Telkom Kenya. Under the existing shareholders' agreement signed in 1999, the government cannot sell its shares of Vodafone, which has pre-emptive rights over the shares.

INVESTMENT BARRIERS

Kenya revised its investment promotion laws in late 2005. Foreign investors who seek to benefit from incentive programs under the Investment Promotion Act of 2004, as amended, must obtain a certificate from the newly established Kenya Investment Authority and confirm that the amount to be invested is equivalent to at least $100,000. Domestic investors are required to invest a minimum of Ksh5 million (approximately $70,000) to qualify. The Investment Promotion Act, as amended, reduces the number of required licenses from 71 to 18. The holder of an investment certificate immediately qualifies for all the required licenses listed in the Second Schedule of the Act. For a maximum period of 12 months after the issuance of an investment certificate, the licenses are deemed to have been issued, subject to the submission of appropriate forms and fees. According to the Ministry of Trade and Industry, with the establishment of the Kenya Investment Authority, the registration of foreign firms now involves a simple five-step process.

A Foreign Investment Advisory Service (FIAS) report found that many regulatory systems are outdated, do not serve an identifiable purpose, and are exploited by low-level officials to extract bribes. The report also found that the current business registration system in Kenya is archaic, inefficient and unreliable. Starting a business takes on average over 54 days, lower than the regional average of 61.8 days but significantly higher than EAC neighbors Uganda and Tanzania (30 days). A private sector initiative found that the government maintained 1,300 license and fee requirements that have a direct or indirect impact on trade and investment. However, in June 2006, the government abolished 37 licenses and appointed a commission to eliminate or simplify an additional 700 licenses that directly affect trade and investment in the country. Reviews of the legal sector found that the court system is in disarray, with a huge and growing backlog of cases. Corruption and inefficiency further reduce the credibility of the legal and judicial systems in Kenya. These deficiencies continue to be an obstacle to investment, especially since they make financial institutions reluctant to make loans and increase the risk premium.

The Kenyan government allows up to 75 percent foreign ownership (personal or corporate) of firms listed on the Nairobi Stock Exchange (NSE). If foreign ownership in a company is 75 percent at the time of listing on the NSE, the foreign owner is allowed to maintain (or reduce) but not to increase its share. Foreign investors may be allowed to increase their investment with prior written approval from the Capital Market Authority if the shares reserved for local investors are not fully subscribed. Foreign brokerage companies and fund management firms must be locally registered companies, with Kenyan ownership of at least 30 percent and 51 percent, respectively. Foreign ownership of equity in insurance, telecommunications, and companies listed on the Nairobi Stock Exchange is restricted to 66.7 percent, 70 percent, and 75 percent respectively. Foreign equity in companies engaged in fishing activities is restricted to 49 percent of the voting shares as stipulated by the Fisheries Act of 1991.

Foreigners are not permitted to hold a freehold land title anywhere in the country, but can be granted leasehold titles -- normally 99 years for land in towns and coastal beachfronts, and 999 years elsewhere. Investors in Kenya are required to comply with environmental standards that are enforced through the licensing regime. The cumbersome and opaque process required to purchase land, and concerns about security of title because of past abuses relating to distribution of public land, constitute serious impediments to new investment. An investment guide to Kenya, published by the United Nations and International Chamber of Commerce in June 2005, asserts that individuals and companies involved in business disputes routinely turn to the courts for redress of grievances. Although arbitration and alternative dispute resolution are becoming increasingly popular, most disputes are still resolved through litigation in the courts. Lack of confidence in the speedy and fair resolution of disputes, and requests from officials for illicit payments, continue to dampen the country's ability to attract more foreign investment.

Kenya has been slow to open public infrastructure to competition because the state-owned companies that control infrastructure are considered "strategic" enterprises. The reform and partial privatization of the telecommunications, power, and rail sectors has fallen behind schedule, but is proceeding. The Kenyan Parliament passed a Privatization Law in 2005 that outlines how the government will divest its shares in the state corporations. In May 2006, the government-owned Kenya Electricity Company sold 30 percent of its shares. The Mumias Sugar Company and Kenya Commercial Bank, among other entities previously considered "strategic parastatals," are lined up for privatization in the coming year. In November 2006, the Kenyan and Ugandan governments entered into a 25-year concession agreement with "Rift Valley Railways," a consortium led by a South African firm to run the Kenya-Uganda railroad. The Kenya Port Authority plans to privatize some of its functions in the Port of Mombasa.

Kenya applies fees and security bonds in an attempt 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. Some investors continue to complain that it is difficult to obtain work permits for expatriate staff.

OTHER BARRIERS

Customs Clearance

Recent changes by the Kenya Revenue Authority for electronic customs clearances have created some confusion and delays at Kenya's ports of entry. Until the program is improved, revised, or eliminated in favor of port of entry inspections, it will pose an added expense and administrative burden on exporters to Kenya. Also, allegations of corruption and on-going delays in cargo handling at the Port of Mombasa, the region's major trade hub, continue to add unnecessary costs for exporters. In response to demands from Kenyan exporters and the Kenya Association of Manufacturers (KAM), in October 2006 the government vowed to begin 24-hour, round-the-clock customs services at the port, but is still working out the operational and budget details.

Corruption

Corruption remains a major deterrent to greater investment, both foreign and domestic, and government officials bemoaned the lack of foreign direct investment in 2005-2006. Transparency International's 2005 Corruption Perceptions Index places Kenya 145th among 159 countries surveyed. According to the International Finance Corporation's Investment Climate Assessment for Kenya, corruption was rated as a severe or major obstacle by three-quarters of firms surveyed, with two-thirds of respondents stating they were expected to pay bribes for government contracts. In late 2005 and early 2006 there were public disclosures of high-level, grand-scale graft in both the previous and current administrations. Calls for greater accountability on the part of the media, civil society, and donors led to the unprecedented resignation of three cabinet ministers in early 2006, generating hopes that such activities may at last be on the wane. The Kenya Anti-Corruption Commission launched several investigations in 2006 against senior government officials. However, none of these cases has been successfully prosecuted, in large part due to bottlenecks in the Attorney General's Office and loopholes in the judiciary.