# KENYA

## TRADE SUMMARY

The U.S. goods trade surplus with Kenya was $131 million in 2008, a decrease of $122 million from $252 million in 2007. U.S. goods exports in 2008 were $474 million, down 17.9 percent from the previous year. Corresponding U.S. imports from Kenya were $344 million, up 5.6 percent. Kenya is currently the 96th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Kenya was $193 million in 2007 (latest data available), up from $166 million in 2006.

## 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), the East African Community (EAC), and the EAC Customs Union. 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. Kenya has bound only 14.6 percent of its tariff lines under WTO rules.

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. A selected list of sensitive items, comprising 58 tariff lines, has rates above 25 percent, including milk and milk products, corn, popcorn, rice, sugar, wheat, and wheat flour. For a few products, the tariff varies in different EAC countries. In response to public demands that the government reduce the price of bread following two months of ethnically-charged political violence in January-February 2008, which resulted in a shortfall of 300,000 metric tons of corn, the newly formed coalition government reduced the duty on imported wheat from 35 percent to 10 percent and to 0 percent on 297,000 metric tons of imported corn in mid-June 2008. Corn imported from outside COMESA is normally assessed a 50 percent import duty. The government also waived the 60 percent import duty on 52,149 tons of imported wheat flour, and the Minister of Agriculture set the value added tax on bread, wheat flour, milk, rice, yeast, and corn flour to 0 percent. In October 2008, the government placed a ban on the export of maize to prevent a further shortfall in supply of cornmeal.

While the U.S. Government welcomed the simplification of the tariff system that resulted from the establishment of the EAC Customs Union in 2005, it has raised concerns with Kenya and other EAC members about tariff increases introduced on several U.S. exports, including used clothing, almonds and wheat flour. 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. The tariff on unshelled almonds increased from 0 percent to 10 percent, while the tariff on shelled almonds and other nuts increased from 15 percent to 25 percent. Finally, the regular import tariff for wheat flour was increased from 35 percent to 60 percent, notwithstanding the limited waivers of the duty adopted in mid-2008.

**Nontariff Measures**

In August 2008, the Ministry of Industrialization and the Kenya Bureau of Standards (KEBS) attempted to arbitrarily require importers to attach an import standardization mark (ISM), costing $300 per product, on a wide band of imported goods by October 1, 2008. The government also sought to impose a standardization mark for locally manufactured and assembled products as well. Kenyan officials argued that the ISM is an import requirement established by the EAC, which should have been adopted by July 1, 2007. After representations by the United States and business association representatives, the government agreed in late August 2008 to limit the products requiring the KEBS ISM to food products, electronics, and medicines and to extend the compliance deadline to March 1, 2009.

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: a clean report of findings from the Pre-shipment Verification of Conformity (PVoC) 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 no less than 70 percent crude, thus requiring that it be refined by the monopoly Kenya Petroleum Refineries.

In late October 2008, the Energy Minister announced plans to institute fuel price controls as provided under the Energy Act. He told Parliament that the government would mandate a 7 percent profit margin on the cost of refining one liter of crude oil. He and other government officials charged that gasoline producers had colluded to keep the price of petrol artificially high following a dramatic drop in the price of a barrel of crude oil.

The government continues to carefully control imports of seed corn by subjecting hybrid varieties to a certification process that effectively restricts trade.

**Customs Procedures**

Kenya’s customs procedures, including its PVoC program, are detailed and rigidly implemented, often leading to delays in clearance of both imports and exports.

Allegations of corruption and ongoing delays in cargo handling at the Port of Mombasa, the region’s major trade hub, continue to add unnecessary costs for exporters. In October 2006, the government pledged to begin seven-days-a-week, round-the-clock customs service at the Mombasa port, in response to demands from Kenyan exporters; 24 hours a day/7 days a week service finally began in August 2008. The government also ordered that Kenya’s border entry points and Kenya Revenue Authority (KRA) customs stations with Uganda and Tanzania operate around the clock. President Mwai Kibaki instructed that the KRA, Kenya Bureau of Standards, and Kenya Ports Authority harmonize their regulations and adopt a common accreditation system to expedite cargo inspection and clearance.

**EXPORT SUBSIDIES**

Kenya maintains a Manufacturing Under Bond (MUB) program that is designed to encourage manufacturing for export by exempting enterprises operating under the program from import duties and VAT on imported raw materials and other imported inputs and providing a 100 percent investment allowance on plant, machinery, equipment, and buildings. It is expected that goods produced under the

MUB system will be exported. If not, they are subject to a surcharge of 2.5 percent and imported inputs used in their production are subject to all other duties. The program is open to both local and foreign investors.

Firms operating in Kenya's Export Processing Zones, which offer a variety of fiscal, tax, and in-kind incentives, 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.

## STANDARDS, TESTING, LABELING, AND CERTIFICATION

Under the PVoC system, all goods entering the country require a Certificate of Conformity from the country of origin, demonstrating conformity with Kenyan standards. For consignments shipped without inspections, importers may apply for a destination inspection subject to acceptance by the Kenya Bureau of Standards (KEBS), a regulatory body under the Ministry of Trade and Industry. In such cases, KEBS, which has oversight of the PVoC program (which is administered by two private sector firms), requires importers to pay a 15 percent penalty charge and post a 15 percent bond on the cost, insurance, and freight value in addition to paying the costs of the test itself. Areas within the PVoC program that the private sector has identified as troublesome include the product list coverage, procedures and documentation, the cost of PVoC services, and the limited capacities of the accredited laboratories.

In November 2007, in response to representations by U.S. officials, KEBS agreed to waive the Certificate of Conformity requirement and associated fee for bulk agricultural commodities inspected and certified by U.S. Government inspection agencies, thereby significantly reducing the cost of exporting such commodities to Kenya.

In September 2008, during the first All Africa Congress on Biotechnology, held in Nairobi, senior government officials unveiled their "National Biotechnology Awareness Strategy 2008-2012" and vowed Kenya would adopt biotechnology as a means to improve food security. Two months later, Kenya's Parliament voted overwhelmingly to establish, via the Biosafety Bill, the framework within which the government may now devise regulations that will permit agriculture biotechnology use by Kenyan farmers, trade, and consumers.

In February 2009, President Kibaki signed the Biosafety Bill, which provides the legal framework to govern activities related to agricultural biotechnology and establish a regulatory body, the National Bio-Safety Authority, to regulate and oversee all activities pertaining to biotechnology. Prior to the enactment of this bill, commercial and research applications of agricultural biotechnology in Kenya were regulated through guidelines that were neither formal regulations nor enacted law. Initially published in 1998 and reviewed yearly, the guidelines described a committee-based approach for review and approval of agricultural biotechnology imports, including a specific review of end uses, *e.g.*, planting seeds for trials. With the passage of the Bill into law, Kenyan scientists can begin planting biotech seeds for multiplication; farmers can begin using the seeds to increase production and productivity; and Kenya can begin importing biotech food products (*e.g.* maize) to address its food security.

All plant consignments arriving in Kenya must have a copy of the plant import permit provided by the Kenya Plant Health Inspectorate Service and an additional phytosanitary (plant health) certificate, either the international model or its equivalent. In addition, all food and plant imports containing biotechnology components must either be accompanied by a declaration noting this fact, with the details stated on the phytosanitary certificate, or by a certificate of analysis from a credible laboratory.

In September 2007, the government established a National Codex Council to spearhead the development of food and safety standards through research and the adoption of established international standards under the Codex Alimentarius Commission.

## GOVERNMENT PROCUREMENT

In 2005, Kenya enacted the Public Procurement and Disposal Act, which provides for a Public Procurement Oversight Authority. The Authority was established on January 1, 2006. Its nine member Oversight Advisory Board is appointed by the Minister of Finance and approved by Parliament.

The Public Procurement and Disposal Act is designed to make procurement more transparent and accountable. It is a response to a number of national security-related procurements, which turned into high-profile corruption cases. The Act provides that procurement agencies may annually update prequalified firms. The Act establishes penalties for violations of its provisions. It allows for exclusive preferences to Kenyan citizens 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 for goods or services and 200 million Kenyan shillings for public works. The procurement law also sets margins of preference that are applied in the evaluation of bids: 15 percent for goods manufactured, mined, extracted, or grown in Kenya; 6 percent in cases where locals have below 20 percent of shareholdings; and 8 percent in cases where locals have shareholdings between 20 to 50 percent. The Law allows for restricted tendering under certain conditions, such as where the complexity or specialized nature of the goods or services requires the pre-qualification of suppliers. 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.

The Supplies Management and Practitioners Bill of 2006 became law in October 2007. It addresses loopholes left by the Public Procurement and Disposal Act by specifying that only a procurement professional may be entrusted with the responsibility in any public entity.

In March 2007, the U.S. Millennium Challenge Corporation signed a two-year, $12.7 million Threshold Program with Kenya focused on fighting corruption through the implementation of procurement reforms with an emphasis on health sector procurement and supply chain management.

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

## INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION

Kenya is a party to most major international and regional intellectual property conventions. However, government enforcement of IPR continues to be a serious challenge. Pirated and counterfeit products in Kenya, mostly imported from South Asia and East Asia, present a major impediment to U.S. business interests in the country. Imported 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 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 incurs loses over $270 million in potential taxes each year. A July 2006 report by Kenya's Ministry of Trade and Industry also suggests significant annual losses to Kenyan manufacturers and to the government due to counterfeit products.

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. The KCB established an IPR enforcement unit in October 2006. The KCB has minimal staff and is impeded in its ability to carry out its mandate.

Kenyan media reports estimate that 8 of 10 computers in Kenya use pirated operating software. The government has made some advances in combating this problem. In November 2007, the KCB, working jointly with Microsoft, conducted raids on several cyber cafes in Nairobi that were found to be using counterfeit Microsoft operating software. In September 2008, Nairobi police and agents with Kenya's Bureau of Weights and Measures raided two warehouses suspected of holding counterfeit Hewlett-Packard (HP) products, confiscated more than 3,000 counterfeit HP products, and arrested the warehouse owner.

Kenyan artists have formed organizations to raise the awareness of intellectual property rights and to lobby the government for better enforcement, but merchants still freely 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 prerecorded audiocassette tapes, digital video discs, compact discs, and consumer products.

Historically, penalties and enforcement for copyright infringement have been low. According to the KCB, as of October 2007, there were about 20 pending piracy cases in the Kenyan courts, with bails ranging from \$750 to \$4,500. To date, the KCB has conducted anti-counterfeit related training for 150 police officers, 40 magistrates, and 30 prosecutors.

In October 2007, one of the largest manufacturing firms in the region stated that it is losing more than \$5 million annually in potential sales due to counterfeit products. In 2007, another company threatened to cease commercial operations in Kenya if the government did not respond more forcefully in combating the importation of counterfeit shoe polishes. KEBS authorities cooperated with Procter and Gamble and GlaxoSmithKline in discovering and confiscating fake consignments in mid-September 2008. In addition, the Anti-Counterfeit Bill of 2008, designed to raise penalties significantly, was signed by the President on December 24, 2008. Long sought by the business community, the bill was designed to strengthen the ability of law enforcement agencies to investigate and prosecute manufacturers and distributors of counterfeit and pirated goods.

## SERVICES BARRIERS

### Telecommunications

In late December 2007, the government sold a 51 percent stake in landline parastatal Telkom Kenya to France Telecom for \$390 million. The government retained a 49 percent share. Since its privatization, the company has been restructured and re-branded as "Telkom Orange." In 2008 Telkom Orange began a \$73 million infrastructure campaign to deliver Global System for Mobile (GSM) and Broadband internet services countrywide. With the entry of Telkom Orange and the November 2008 network rollout of Econet Wireless Kenya, Kenya now has four GSM players including recently publicly-listed Safaricom, Kenya's first mobile operator with a market share of over 70 percent, and Zain (formerly Celtel Kenya, a joint venture of Celtel International and Sameer Investments).

Following the Telkom Kenya privatization, its 60 percent stake in Safaricom (originally a joint venture of Telkom Kenya and Vodafone) was transferred to the Ministry of Finance, the custodian of public shares in corporations, thus "unbundling" the two corporate entities. The government then sold 25 percent of

Safaricom through an initial public offer on the Nairobi Stock Exchange in March 2008, effectively privatizing the company. However, foreign ownership of telecommunications firms remains controlled and Kenyan nationals must own at least 20 percent equity.

In mid-August 2008, the Ministry of Information and Communication unveiled a unified licensing regime by amending existing information and communication technology policy. Under the "Unified Licensing Framework" (ULF), operators and service providers will now be licensed under a market structure consisting of a Network Facilities Provider (NFP), an Applications Service Provider (ASP), and a Content Services Provider (CSP). NFPs can own and operate any form of communications infrastructure whether based on satellite, terrestrial, mobile, or fixed. ASPs will provide all forms of services using network services of a facilities provider. CSPs shall on the other hand provide content services material, other information services, and data processing services.

With the implementation of a new licensing regime, current licensees can choose to operate on existing licenses or transition to the ULF without diminishing their rights under their existing licenses. With this new licensing framework, the national telecommunications regulator, the Communications Commission of Kenya (CCK), reconsidered its previous plan of re-bidding the license for a Second National Operator in 2008. With the ongoing aggressive marketing and price wars taking place in the GSM industry, it remains to be seen whether interest from existing players or new entrants in developing fixed line telephony will become viable in the future.

**INVESTMENT BARRIERS**

Although Kenya's judicial system has strived to improve its efficiency and timeliness, it is still burdened by a huge and growing backlog of cases, including some that are investment-related. Perceived corruption and inefficiency further reduce the credibility of the judicial system in Kenya. Companies cite these deficiencies as an obstacle to investment, especially since these problems make financial institutions reluctant to make loans and increase the risk premium.

A law passed in 2007 reduced the limit on foreign ownership (personal or corporate) of firms listed on the Nairobi Stock Exchange (NSE) from 75 percent to 60 percent. As a result of the new law, several leading Kenyan firms are now closed to any new foreign investor participation. If foreign ownership in a company is 60 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 are 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 and telecommunications companies is restricted to 66.7 percent and 70 percent, respectively. Foreign equity in companies engaged in fishing activities is restricted to 49 percent of the voting shares.

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. The cumbersome and opaque process required to purchase land and concerns about security of title because of past abuses relating to the distribution of public land constitute serious impediments to new 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 have fallen behind schedule but are proceeding. In early

December 2008, the government announced it would privatize 16 parastatals, including the National Bank of Kenya, the Kenya Electricity Generating Company, the Kenya Pipeline Company, the Kenya Ports Authority, and several sugar, cement, dairy, wine, and meat processing firms.

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 and expensive to obtain work permits for expatriate staff. On a positive note, in FY07/08, the government eliminated 315 licenses and simplified another 379 out of the 1325 cited by the World Bank as impediments to growth. In its FY08/09 budget address, the government vowed to reduce further the number of licenses issued by key regulatory agencies from 390 to 46. In 2008, Kenya's Treasury established an electronic registry for monitoring all licensing procedures to ensure transparency and efficiency.

## OTHER BARRIERS

### Corruption

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.

The Kenya Anti-Corruption Commission launched several investigations in 2006 and 2007 against senior government officials, including two government ministers. 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. Former Finance Minister Amos Kimunya resigned in early July 2008 in connection with the non-tendered sale of a government-owned property, the Grand Regency Hotel, to a Libyan group. Parliament subsequently held open hearings on the sale and cleared Kimunya of any wrongdoing.