KENYA

TRADE SUMMARY

The U.S. goods trade surplus with Kenya was $374 million in 2009, an increase of $275 million from 2008. U.S. goods exports in 2009 were $654 million, up 47.9 percent from the previous year. Corresponding U.S. imports from Kenya were $281 million, down 18.3 percent. Kenya is currently the 83rd largest export market for U.S. goods.

The stock of U.S. foreign direct investment in Kenya was $183 million in 2008 (latest data available), down from $193 million in 2007.

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). High import tariffs and Kenya's value added tax (VAT) impede trade, 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. According to the WTO, Kenya's average applied tariff rate was 12.6 percent in 2008.

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, wheat, and wheat flour. For a few products, the tariff varies in different EAC countries.

Due to continuing concerns about food security, the Kenyan government is permitting duty-free importation of white maize through June 2010. Corn imported from outside COMESA is normally assessed a 50 percent *ad valorem* tariff, a rate which is not bound in the WTO. The Minister of Agriculture also set the value added tax on bread, wheat flour, milk, rice, and corn flour at zero. In an effort to ensure sufficient cornmeal, in mid-October 2008, the government placed a ban on the export of maize to prevent a further shortfall in supply. The export ban on maize is scheduled to end in June 2010.

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. In addition, in June 2009, the Kenyan government raised the duty on imported wheat from 10 percent to 25 percent *ad valorem*. However, the import tariff on secondhand clothing was reduced 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, International Standard Mark, and valid *pro forma* invoices from the exporting firm.

Kenyan law stipulates that all licensed importers of petroleum products participate in a crude processing scheme. As a result, the Kenya Petroleum Refinery Ltd, a parastatal entity, is assured of receiving 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, 35 percent is purchased using a tendering system, and 15 percent is purchased outside of tendering requirements.

Customs Procedures

Numerous bureaucratic procedures at the Port of Mombasa significantly increase the cost of imported goods. Importers are subjected to excessive inspection and clearance procedures by multiple agencies including customs, police, ports, and standards inspection agencies. These inspection and clearance procedures also create additional opportunities for graft. Each day's delay for a truck costs its owner approximately $400 and for a ship costs its owner about $25,000.

EXPORT SUBSIDIES AND OTHER EXPORT PROMOTION PROGRAMS

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 plant, machinery, equipment, raw materials, and other imported inputs. The program also provides a 100 percent investment allowance on plant, machinery, equipment, and buildings. Goods produced under the MUB system are expected to 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 tariffs and other 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 remittance; 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. Manufacturers and service providers 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.

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 and establishes penalties for violations of its provisions. It is a response to a number of recent national security-related procurements that turned into high profile corruption cases. The Act provides that procurement agencies may carry out an annual update of pre-qualified firms. 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 amounts are 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 margins of preference: 15 percent in evaluation of bids 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 percent to 50 percent.

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. 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 a loophole left by the Public Procurement and Disposal Act by specifying that only a procurement professional may be entrusted with the responsibility of procurement in any public entity.

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 partnered with well-connected Kenyan firms.

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

INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION

Kenyan government 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. 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 the government loses over $270 million in potential taxes.

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 sub-standard 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 (KRA) 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. However, allegedly due to political infighting, the ACA has not been established. KAM continues its strenuous efforts to increase government focus on the counterfeit and piracy issues which impact virtually every legitimate manufacturer in Kenya. In response, local authorities working with U.S. rights holders have seized more the 9,000 counterfeits in Kenya since November 2008.

INVESTMENT BARRIERS

Although Kenya's judicial system is working to improve its efficiency and timeliness, the system is still burdened by a backlog of cases, including those that are investment-related. Perceived corruption further reduces 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 provide loans and charge higher interest rates when they do.

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. A grandfather clause allows firms that exceed the new limits 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 80 percent, respectively. However, telecommunications companies are given a three year grace period to find local investors to achieve the local ownership requirements and the local ownership policy may be scrapped entirely. 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 or cities and coastal beachfronts and 999 years elsewhere. The cumbersome and opaque process required to purchase land raises concerns about security of title due to past abuses relating to the distribution and redistribution of public land.

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. A new Public-Private Partnership law failed to pass Parliament in 2008. However, the Treasury ministry has developed some rules and regulations and is in the process of developing a Secretariat to help review and regulate the partnerships.

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. The Licensing Act of 2007 has so far eliminated and/or simplified 694 business license requirements. In 2008, the government also reduced the number of licenses to set up a business from 300 to 16 and is reviewing another 337 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

Corruption remains a substantial trade barrier in Kenya. U.S. firms faced with corrupt practices in foreign countries cannot effectively compete with other firms who are willing to turn a blind eye to corruption. A number of U.S. firms have exited Kenya at least in part due to corruption issues. The 2008 Business Climate Index of 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 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.