KENYA

TRADE SUMMARY

The U.S. goods trade surplus with Kenya was $284 million in 2005, an increase of $243 million from $42 million in 2004. U.S. goods exports in 2005 were $632 million, up 60.5 percent from the previous year. Corresponding U.S. imports from Kenya were $348 million, down 1.2 percent. Kenya is currently the 72nd largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Kenya in 2004 was $93 million, up from $91 million.

IMPORT POLICIES

Tariffs

Kenya is a member of the 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 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. 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. A selected list of sensitive items was assigned rates above 25 percent, including milk and milk products, wheat, corn, rice, and wheat flour. (Wheat flour is imported duty free from member states of COMESA and the EAC.) Tree nuts are not classified under the sensitive products list but witnessed an increase in duty. Unshelled almonds increased from 0 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. 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. Other measures introduced in 2005 include the removal of import duties on pharmaceuticals, diapers and sanitary pads, liquid petroleum, coal, media containing computer software, safety belts, speed governors, and splints for manufacture of matches, and the exemption of duty for refrigerated trucks and hotel equipment.

The Kenyan government sometimes manipulates the application of 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 2004, Kenya eliminated the VAT and duty on a limited quantity of imported maize to address severe food shortages.

Non-Tariff Measures

Kenya has removed most non-tariff measures; however, some barriers still remain. Kenya still maintains import controls based on health, environmental, and security concerns. Until

September 28, 2005 all imports with a free on board value of more than $5,000 were subject to pre-shipment inspection for quality, quantity, and price, and required a Clean Report of Findings by a government-appointed inspection agency. On September 29, 2005, the government introduced a new Pre-shipment Verification of Conformity (PVC) program. Under the new system, goods are only allowed into the country if they have 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 Kenya Bureau of Standards (KEBS) acceptance. For destination inspection, a penalty of 15 percent and a 15 percent bond of the CIF (cost, insurance, freight) value plus the costs of the test will be charged to the importer. KEBS has appointed two private firms to implement the PVC program on its behalf.

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, Kenya Revenue Authority introduced a new electronic clearing system at the Port of Mombasa, Kenya's major port of entry for imports. Poor implementation, capacity, and information-sharing have created significant delays for some importers. The two private sector firms that administer Kenya's Pre-shipment Verification of Conformity regime have been charged with ensuring that up-to-date customs valuation and risk assessment methods are applied.

STANDARDS, TESTING, LABELING AND CERTIFICATION

Commercial and research applications of agricultural biotechnology in Kenya are currently regulated through guidelines that are neither formal regulations nor enacted law. The guidelines, published in 1998, 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 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. Kenya is a party to the Cartagena Protocol on Biosafety.

Certain Kenyan standards do not conform to international standards, and this has adversely affected foreign investment in the country. The Kenya Plant Health Inspectorate Service (KEPHIS) subjects certain imported agricultural goods to further inspection. The Inspectorate also regulates the import and export of plant materials and trade in biosafety control organisms (organisms 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. The Ministry of Agriculture restricts cereal seed imports by setting quantitative ceilings. However, once a variety is certified, the quantitative restrictions are lifted. Industry has found this certification process to be tedious and restrictive.

U.S. agricultural plant products require special permits and certificates before they can be imported. KEPHIS requires submission of a Plant Import Permit. Genetic modification status must be declared, and details stated on the phytosanitary certificate, or a certificate of analysis from a credible laboratory obtained.

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's nine-member Oversight Advisory Board is appointed by the Minister of Finance. This new authority entered into force on January 1, 2006, but certain elements of its implementation are uncertain. The legislation 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 military tenders. The new law establishes penalties for violations of the law, with penalties for individuals up to Ksh4 million (about $52,000) in fines, or imprisonment for three years, or both; and for corporations, fines of up to Ksh10 million (about $130,300).

The new law 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. There remains some uncertainty about how much transparency the new law will apply to tenders for national security-related projects, which have been the subject of a number of high-profile corruption cases in recent years.

Other reforms in public procurement have also been put in place in recent years. For example, the government increased transparency in bidding by removing from its tenders a clause that reads, "[T]he 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 reasons for rejecting certain bids.

The World Bank, IMF, 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 is hopeful that the revised public procurement laws will improve Kenya's public procurement performance, 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 meager conflict-of-interest regulations are rarely enforced.

EXPORT PROMOTION

Kenya's Manufacturing Under Bond (MUB) program is designed to encourage manufacturing for export. 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 100 percent investment allowance on plant, machinery, equipment, and building. Firms operating in Export Processing Zones (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.

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. Kenya's EPZs have become the center of Kenya's successful garment and apparel sector, with most of the production being exported to the United States under AGOA preferences.

INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION

Kenya is a member of most major international and regional intellectual property conventions – 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. The U.S.-based International Intellectual Property Alliance 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 East Asia, present a major impediment to U.S. business interests in the country

Amendments to Kenya's Trademark 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.

Computer programs sound recordings, broadcasts, and literary, musical, artistic, and audiovisual works are protected under the Copyright Act. The Kenya Copyright Board is supposed to coordinate all licensing and treaty activity and has the authority to inspect, seize, and detain suspect articles and to prosecute offenses; however, the KCB has minimal staff and has not, to date, performed this role effectively. The Kenya Copyright Board coordinates all licensing and treaty activity and has the authority to inspect, seize, and detain suspect articles and to prosecute offenses. 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) for the first time in Kenyan history.

In June 2004, the Kenya Revenue Authority, through a newly created Counterfeit Department, said that illegal trade costs the Kenyan economy an estimated Ksh 20 billion (about $256 million) in unpaid taxes. 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.

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. 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 July 2004, the government suspended an award for a second national operator (SNO) for fixed-line telephone services. Subsequent court challenges have been resolved and the CCK is believed to be moving to re-bid that tender despite widespread skepticism that there is a commercial basis for a second license in light of subsequent changes in the market. In a new National Information and Communication Technology Policy released in late 2005, the government proposed major changes in the sector, including further restructuring of Telkom Kenya prior to its long-delayed privatization.

Two 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 cellular telecommunications. These two companies have over five million subscribers as of December 2005. By comparison, Telkom Kenya provides only about 280,000 landlines. A 2003 award for a third mobile operator, Econet Wireless, remains mired in court challenges brought by the government.

As of June 2005, there were 72 registered Internet service providers (ISPs), but only 16 were actively providing commercial service; there were 14 public data network operators and 6 commercial VSAT hub operators. Foreign ownership of an ISP is restricted to 40 percent.

Since 2004, Kenya's updated regulatory framework includes:

- Permitting cellular 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. However, regulations liberalizing Voice Over Internet Protocol remain in development.

INVESTMENT BARRIERS

Kenya revised its investment promotion laws in late 2005. Investors who seek to benefit from incentive programs under the new law 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.

The investment climate in Kenya, however, remains problematic. A recent World Bank study indicated that the share of investors who perceive the investment climate to be deteriorating outnumbers the share of those who perceive it to be improving. In order to attract meaningful foreign investment, Kenya needs to address persistent concerns about corruption, security, and degraded road, rail, and telecommunications infrastructure. Kenya also must address relatively high energy and labor costs and an overabundance of national and local government regulations. A Foreign Investment Advisory Service (FIAS) report found that many regulatory systems are outdated and 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, compared to five in the United States. Licensing procedures were similarly found to be overly complex and, more importantly, to contain significant redundancies. Reviews of the legal sector found that the court system is in disarray, with a huge and growing backlog of cases.

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 (CMA) 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.

Foreigners are not permitted to have 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 distribution of public land, constitute serious impediments to new investment. 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. As a result, the reform and partial privatization of telecommunications, power, and rail sectors has fallen behind schedule. The Kenyan parliament passed a Privatization Bill in 2005 that outlines how the government will divest its shares in the state corporations.

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 have complained that it is difficult to obtain work permits for expatriate staff.

OTHER BARRIERS

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 PVC 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.

Corruption remains a major deterrent to greater investment, both foreign and domestic, though foreign direct investment rose in 2004. 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 (KACC) launched several investigations over the past year against senior government officials. None of these cases has been successfully prosecuted, however, in large part due to bottlenecks in the Attorney General's Office and loopholes in the judiciary.