KENYA

TRADE SUMMARY

The U.S. goods trade surplus with Kenya was $259 million in 2007, an increase of $87 million from 2006. U.S. goods exports in 2007 were $584 million, up 11.1 percent from the previous year. Corresponding U.S. imports from Kenya were $325 million, down 8.0 percent. Kenya is currently the 87th largest export market for U.S. goods.

The stock of U.S. foreign direct investment in Kenya was $68 million in 2006 (latest data available), down from $145 million in 2005.

IMPORT POLICIES

Tariffs

Kenya is a member of the WTO, the Free Trade Area of the Common Market for Eastern and Southern Africa, 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, wheat, and wheat flour. For a few products, the tariff varies in different EAC countries. For example, the wheat tariff is 35 percent in Kenya but 0 in Uganda.

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.

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: 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.

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.

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. Other 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.

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 a specific review of end uses, *e.g.*, planting seeds for trials.

In early 2007, the Cabinet approved a Biotechnology Policy outlining the safety procedures for biotechnology in the context of research and development, technology transfer, and commercialization of products. In October 2007, a Biosafety bill, which would have provided the legal and scientific infrastructure to regulate agricultural biotechnology, proceeded through several parliamentary approval stages up to the second reading but was not enacted into law before Parliament was dissolved in October 2007.

Any plant consignment arriving in Kenya must have a copy of the plant import permit provided by the Kenya Plant Health Inspectorate Service and an additional health (phytosanitary) certificate, international model, or its equivalent. U.S.-origin food or plant imports containing genetically modified components 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.

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.

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 prequalified firms. The Act establishes penalties for violations of the Law. It gives 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 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 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. It is expected that 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 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 of procurement in any public entity.

The World Bank, the International Monetary Fund, the European Union, and other donors have conditioned some of their official assistance programs on reform of public procurement. In March 2007, the U.S. Millennium Challenge Corporation signed a 2 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.

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.

INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION

Kenya is a member of 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. Industry estimates that piracy and counterfeiting of business software, music, consumer goods, and pharmaceuticals in Kenya cost firms over $300 million in lost sales annually.

Kenya is among the world's top software piracy markets, according to a Business Software Alliance investigation.

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 has not, to date, effectively carried out its mandate. The KCB is working jointly with Microsoft and, in late 2007, conducted raids on several cyber cafes in Nairobi that were found to be using counterfeit Microsoft operating software. A Kenyan media report estimated that 8 of 10 computers in Kenya use pirated operating software.

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.

In November 2006, the American Chamber of Commerce of Kenya (ACCK), in conjunction with the Ministry of Trade and Industry and the Kenya Association of Manufacturers (KAM), held a pioneering regional IPR conference in Nairobi. The ACCK joined with Tanzanian business associations and the government of Tanzania to hold a second regional IPR conference in Dar es Salaam in October 2007. In mid-2007, KAM established an IPR Secretariat, empowered to work with the KCB, the Kenya Bureau of Standards, the Kenya Revenue Authority, and other government agencies in exposing IPR violations.

In July 2006, the Ministry of Trade and Industry reported that Kenyan manufacturers incur an annual net loss of over Ksh 30 billion (over $400 million) due to counterfeit products, while the government loses Ksh 6 billion (approximately $80 million) in potential tax revenue 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. 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 anticounterfeit related training for 150 police officers and plans to extend the same training to 40 magistrates and 30 prosecutors by April 2008.

The Anticounterfeit Bill of 2007, designed to raise penalties significantly, was introduced in Parliament in June 2007 but was not enacted before Parliament was dissolved in October 2007. The bill seeks to strengthen the ability of law enforcement agencies to investigate and prosecute manufacturers and distributors of counterfeit and pirated goods. 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 fakes. 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.

SERVICES BARRIERS

Telecommunications

Privatization of Telkom Kenya, the monopoly fixed line services provider, was initially scheduled for April 2007, but was delayed until the end of the year following ongoing restructuring involving staff retrenchments. In November 2007, France Telcom, as part of a consortium with Dubai-based Alcazar Capital, outbid seven other competitors by offering $390 million for a 51 percent stake in Telkom Kenya. France Telcom acquired a unified telecommunications license which will allow Telkom Kenya to provide both fixed and wireless services.

The Communications Commission of Kenya (CCK), the national telecommunications regulatory body, is also in the process of considering bids for a second national operator (SNO) license to operate fixed telephone services. In late October 2006, CCK had initially offered a Dubai based company, VTEL Holdings, this SNO license, as well as a license for mobile service. However, the deal fell apart and the second highest bidder, Indian company Reliance, was offered the license. When the company's local partner was unable to pay its share of the requisite license fees, CCK cancelled the tender. It plans to rebid the tender in 2008.

In September 2007, the Kenyan government reached an agreement with a third mobile licensee, Econet Wireless, thus effectively ending an ownership dispute that had prevented Econet Wireless from exercising its rights to begin operations of a new mobile network under a license it had won in 2004. Econet has since paid the full license fee of $27 million and is expected to begin operations in March 2008.

Although the government has granted Econet frequencies to operate its GSM service, the existing two mobile phone firms, Safaricom (a joint venture of Telkom Kenya and Vodafone) and Celtel Kenya (a joint venture of Celtel International and Sameer Investments), currently command 75 percent and 25 percent of the market share, respectively. Following the privatization of Telkom Kenya in late December 2007, its 60 percent ownership of Safaricom was transferred to the Ministry of Finance, the custodian of public shares in corporations, thus "unbundling" the two corporate entities. The government plans to sell 25 percent of Safaricom through an initial public offer on the Nairobi Stock Exchange in early 2008.

Even as telecommunications reforms and infrastructure projects proceed, various telecommunications operators have voiced concerns about the independence of the CCK, suggesting that the government's ownership of Telkom Kenya has caused it to afford more favorable treatment to Telkom Kenya than to private operators. For example, critics charge that the CCK has not ensured that a level playing field exists in the market since the initiation of Telkom Kenya's Code Division Multiple Access "fixed wireless" service in mid-2006 on a trial basis. Telkom Kenya's fixed wireless service is now competing head-to-head with two existing mobile providers, which contend Telkom Kenya does not have a license to provide wireless telephony.

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 – including Barclays Bank, Unilever Tea Kenya, and Total Kenya – 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 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. 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.

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.

OTHER BARRIERS

Customs Clearance

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 24 hour, round-the-clock customs service at the Mombasa port, in response to demands from Kenyan exporters; however, as of end-year 2007 this pledge had not been fulfilled.

Corruption

Transparency International’s (TI’s) 2007 Corruption Perceptions Index places Kenya 150th among 180 countries surveyed. Compared to its 2006 TI rating, Kenya fell five positions and its composite score dipped slightly. 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. On a more positive note, Kenya ranked 15th out of the 48 sub-Saharan African countries on The Ibrahim Foundation’s Index of African Governance, prepared by Harvard’s Kennedy School of Government.

The Kenya Anti-Corruption Commission launched several investigations in 2006 and 2007 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.