KENYA

TRADE SUMMARY

The U.S. trade surplus with Kenya was $83 million in 2002, a decrease of $367 million from $449 million in 2001. U.S. goods exports in 2002 were $271 million, down 53.0 percent from the previous year. Corresponding U.S. imports from Kenya were $189 million, up 47.1 percent. Kenya is currently the 80th largest export market for U.S. goods. The stock of U.S. foreign direct investment (FDI) in Kenya in 2001 was $92 million, down from $137 million in 2000.

OVERVIEW

In 2002, Kenya's Gross Domestic Product (GDP) growth rate is expected to be marginally higher at 1.8 percent than 2001's 1.2 percent. Even with this improvement, per capita GDP has fallen over the past several years. Kenya continues to experience reduced foreign investment as a result of corruption, poor infrastructure, high power costs and other factors. Investment outflows have continued. Despite some hope that Kenya would reestablish good relations with the international financial institutions (IFIs) in mid-2000, the Government of Kenya was unable to satisfy them on key issues, and relations remain frozen.

The December 2000 supreme court decision disbanding the Kenya Anti-Corruption Authority (KACA), together with parliamentary inaction on economic governance issues, continue to hinder reform efforts. In mid-2001, to replace the KACA, the Kenya government formed an anti-corruption unit under the police department to handle corruption cases. In May 2002, the Kenya government set up special courts to deal with corruption cases. Their effectiveness remains to be tested. The international community is encouraged by the Kenya government's public commitment to strengthen governmental institutions and to combat corruption. In January 2003, President Kibaki appointed the former Executive Director of Transparency International in Kenya as the new Permanent Secretary of Governance and Ethics. IFIs have expressed initial willingness to work more closely with the Kibaki administration.

Despite the downturn in investment, Kenya has continued to play an important role in the region. Kenya is a member of the reestablished East African Community (EAC) and remains an active member of the Intergovernmental Authority on Development (IGAD), the Common Market for Eastern and Southern Africa (COMESA), and the World Trade Organization (WTO). Although initially slow to honor its WTO commitments, Kenya has now implemented the WTO Customs Valuation Agreement and the Financial Services Agreement, and has, after several delays, begun to implement legislation designed to bring the country into compliance with WTO intellectual property obligations.

Kenya is working hard to take full advantage of the opportunities offered by the African Growth and Opportunity Act (AGOA). Partially as a result of AGOA eligibility, trade volume has expanded by 14.5 percent and 40 new firms have invested in export processing zones (EPZs). According to Ministry of Trade and Industry estimates, AGOA will directly and indirectly generate between 150,000 and 200,000 new jobs.

IMPORT POLICIES

The Kenya government continues to liberalize trade, primarily through reductions in tariffs, and to restructure many of its important sectors. Kenya continues, however, to rely on tariffs as the primary instrument of trade policy. All imports with an f.o.b. value of over $5,000 are subject to preshipment inspection (PSI) for quality, quantity and price by private companies who have contracted with the Kenya government to provide this service. The import declaration fee of 2.75 percent includes the fee for the PSI. Failure to obtain the PSI results in a penalty duty of 15 percent for non-vehicle imports and 25 percent for vehicle imports.

The Kenyan government usually announces tariff rate changes in its annual budget speech. In June 2002, it reduced duties for inputs and raw materials to zero and also reduced to zero the duty on capital goods. Import duties on fabrics are 35 percent. The tariff on fiber used in textiles is zero percent while the duty on yarn is 20 percent. Duties on timber and cottonseeds have been eliminated as has the duty on inputs used in the manufacture of animal feeds. The government continues to impose a 35 percent duty on imported foodstuffs that compete directly with goods produced in Kenya. These include meat and meat products, dairy products, and poultry and poultry products. The government continues to carefully control imports of seed corn by subjecting hybrid varieties to a certification process that effectively restricts trade. Until a seed variety is fully registered (a process that can take three to four years), the Ministry of Agriculture and Rural Development restricts cereal seed imports by setting quantitative ceilings. However, once a variety is certified, the quantitative restrictions are lifted. Firms operating in EPZs are able to purchase fuel duty free.

STANDARDS, TESTING, LABELING AND CERTIFICATION

The Kenya Bureau of Standards (KBS), a regulatory body under the Ministry of Trade and Industry, inspects imports to insure conformity with international standards. The body also conducts product testing certification for individual product categories. Goods that do not meet KBS standards are withdrawn from the market and the importer is prosecuted. KBS has regular meetings with local manufacturers to address problems arising from the importation of illegal, counterfeit, and substandard goods.

Certain imported agricultural goods are subject to further inspection by the Kenya Plant Health Inspectorate Service (KEPHIS). KEPHIS regulates the importation and exportation of plant materials and trade in biosafety control organisms (organisms that require special handling to ensure they are not accidentally released into the environment) in accordance with the International Plant Protection Convention (IPPC). KEPHIS also evaluates commercial hybrid grain seeds for a period of three years before the seeds can be released in the market. This certification process is tedious and restrictive, and the three-year period needed for the Kenya Government to approve or reject a variety can be burdensome.

GOVERNMENT PROCUREMENT

In March 2001, the Kenya government established a Public Procurement Directorate in the Ministry of Finance. This directorate has responsibility for procurement policy formulation, and for implementation and oversight of public procurement in Kenya. For purchases under ksh.500,000 ($6,250), the purchasing entity (ministry or public corporation) directs the procurement. Procurements above ksh.500,000 must be overseen by the relevant ministerial or district tender committee. Kenyan government reform measures over the last three years have resulted in wider publicity of government tenders, the establishment of an appeals committee, and private sector appointments to the Central Tender Board (CTB), the main decision-making agency for large-scale government purchases.

The Kenyan government has increased transparency in bidding by removing from its tenders the clause that reads, "the Government reserves the right to accept or reject any bid and is not obliged to give any reasons for its decisions." CTB now publishes its decisions and, if the bidder asks, provides reasons for rejecting certain bids. However, tenders are still frequently awarded to noncompetitive firms in which government officials have a significant interest, and conflict of interest regulations are rarely enforced. Kenya is not a signatory to the WTO Agreement on Government Procurement.

EXPORT SUBSIDIES

Firms in EPZs are allowed to purchase imported inputs tax-free. The firms are allowed to sell up to 20 percent of their output on the domestic market. However, Ministry of Trade and Industry officials state that these products are usually of second quality. In order to discourage the practice, EPZ firms are liable for all taxes plus a 2.5 percent penalty on second quality goods sold locally. There is no general system of preferential financing, although government development agencies in sectors such as tourism and tea provide funds at below-market rates to promote investment and exports by Kenyans.

INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION

Kenya is a member of, or signatory to, most major international and regional intellectual property conventions, including the World Intellectual Property Organization (WIPO), the African Regional Industrial Property Organization, the Paris Convention on the Protection of Industrial Property, and the Berne Convention on the Protection of Literary and Artistic Works. Although a unified system for the registration of trademarks and patents for anglophone Africa was signed in 1976, the effort has remained dormant due to the lack of cooperative procedures among the signatory states. A future prospect for patent, trademark and copyright protection is the African Intellectual Property Organization although its enforcement and cooperation procedures are as yet untested.

To comply with its WTO obligations, the Kenyan parliament passed an amended version of the WTO Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPS) in August 2001 as part of the Kenya Industrial Property Act (KIPA). The KIPA bill became law in May 2002 but has not been implemented yet. In July 2002, a separate trademarks bill was introduced. This bill, as amended and passed, is in conformity with the Madrid Agreement and Protocol as well as TRIPS. The Kenyan government has drafted and circulated to stakeholders (including WIPO) for comment a draft law on the protection of layout designs of integrated circuits. Kenya is a significant market for, and source of, counterfeit goods. The Kenya Association of Manufacturers (KAM) has called on the Kenya government to raise the fines for counterfeiting. The Kenya Revenue Authority (KRA) has sporadically raided counterfeit production facilities and seized incoming goods. However, its impact in reducing counterfeit production and trade has been minimal.

Patents, trademarks and trade secrets are the responsibility of the Kenya Industrial Property Office (KIPO) under the Ministry of Trade and Industry. Copyright protection is the responsibility of the Attorney General's Office. A new copyright bill, which supersedes the previous copyright act, was passed into law in November 2001 but has not been implemented yet . Computer programs, literary, musical, artistic and audiovisual works, sound recordings, and broadcasts are protected under the bill. The bill created the Kenya Copyright Board, which has the authority to inspect, seize and detain suspect articles and to prosecute offenses. New criminal penalties include fines up to ksh.800,000 ($10,192) and a maximum of ten years in jail, or both, up from previous levels of ksh.200,000 (about $2,548) and five years. Historically, however, penalties for copyright infringement have been low and enforcement and the understanding of the importance of intellectual property are poor. Several private sector groups exist, but in 2002 they had little impact on Kenyan government policies and the counterfeit markets. There is widespread sale of pirated music and videotapes produced in neighboring countries on the Kenyan market.

SERVICES BARRIERS

In general, service providers are accorded the same treatment, whether local or foreign. However, foreign firms in the construction, engineering, and architecture trades may face discrimination on tenders for public projects; an exchange authorization is required from the Ministry of Finance, and there is a high level of government discretion. In addition, new foreign investors with expatriate staff are required to submit plans for the gradual elimination of non-Kenyan employees. The Kenyan bar admits foreign lawyers for a maximum duration of 12 years. Medical personnel (doctors) must serve a one-year "induction" in public hospitals and sit for exams before they are considered for registration in the country.

The only privatizations of note since 1995 are the sale of state-owned tourist facilities, the flotation of shares of state-owned financial institutions on the Nairobi stock exchange, and the divesting of government shares in Mumias Sugar Company. The Kenya government is reviewing the bids from six companies for the Kenya Reinsurance Corporation.

The Kenyan government continues to liberalize the telecommunications sector. After dissolving the Kenya Post and Telecommunications corporation (KPTC) when the Kenya Communications Act of 1998 became effective in July 1999, three separate entities were formed: Telkom Kenya, the telecommunications company; the Communications Commission of Kenya (CCK), the regulatory body; and the Postal Corporation of Kenya; the postal service. Telkom Kenya is permitted to maintain its monopoly in segments of the telecommunications market for five years (1999-2004). The CCK licensed two firms, Safaricom (a joint venture of Telkom and Vodafone) and Kencell (a joint venture of Vivendi and Sameer investments), to provide mobile cellular telecommunications. As of October 2002, these two companies had over 840,000 subscribers combined, almost three times the 320,000 land lines provided by Telkom. In August 2001, the Kenyan government announced that three Kenyan firms had succeeded in acquiring the rights to operate eight regional licenses in competition with Telkom Kenya. Telair Communications acquired five of the eight licenses for a reported \$23 million. Safitel acquired two regional licenses for \$9 million and Bell Western acquired the remaining regional license for \$25,000. However, these regional entities have yet to begin operations. Also, after more than one year of negotiations to sell a 49 percent Kenyan government stake in Telkom Kenya, the government cancelled the sale in late 2001. Failure by the Kenyan government to privatize Telkom Kenya has cast doubts on the willingness of the government to privatize other parastatals such as the Kenya Ports Authority and Kenya Railways Corporation. In addition, since February 2001, no actions have been taken towards the sale of the 35 percent government stake in the Kenya Commercial Bank (KCB).

INVESTMENT BARRIERS

Macroeconomic stability and gradual economic reform have laid the groundwork for increased private investment. Measures have been taken to increase the role of the private sector and establish greater accountability and transparency with respect to financial infractions. A managed floating exchange rate regime has been adopted and companies may now retain foreign exchange earnings and repatriate capital and profits without certification. Although the government has identified more than 200 parastatals for privatization and another 33 for restructuring, this effort is stalled. In addition, corruption, poor infrastructure and high power tariffs are disincentives to investment, domestic and foreign.

The Kenya government places a number of restrictions on foreign ownership for publicly traded companies – particularly in the areas of financial services and telecommunications. In June 2002, the rules were amended to allow up to 75 percent foreign ownership of firms listed on the Nairobi Stock Exchange (NSE). The rule does not differentiate between corporations and individuals. With special permission, foreign ownership may exceed 75 percent if shares reserved for local owners are not subscribed. Foreign brokerage companies and fund management firms must be locally registered companies, in which case brokerage firms must be 51 percent Kenyan-owned and fund management at least 30 percent Kenyan-owned.

Internet service providers (ISPs) operate in the main towns, but have to rely on Telkom Kenya for bulk Internet services. For telecommunications companies, foreign ownership of an ISP is restricted to 40 percent. Although there are about 90 licensed ISPs, the Communications Commission of Kenya (CCK) restricts the number of ISPs and prohibits them and other carriers from establishing switches, international gateways, or direct satellite links. This has forced continued dependency on Telkom Kenya and inhibited competition and improvements in customer service. The CCK specifically prohibits ISPs from providing the following services: voice telephony, uploading of telecommunications traffic by satellite, and the use of wireless communications. In fact, ISPs must agree, in writing, not to provide Internet protocol telephony through their networks (paging services are exempted from this requirement). ISPs must also provide the CCK with information on what they charge for all services, as well as the names and addresses of their clients. CCK must also type-approve equipment that ISPs provide to clients. These regulatory practices make investing in this area considerably less attractive than it might otherwise be. The CCK regulates telecommunications and radio communications in the country as well as postal services.

The Kenyan legal system protects and facilitates acquisition and disposition of all property rights – including for land, buildings and mortgages. However, the process of securing the title deed is cumbersome and not transparent. This is one of the most serious impediments to new investment. Foreigners are not allowed to have a freehold title anywhere in the country. Leases along the coast and in towns and cities are normally for 99 years and, elsewhere, for 999 years. The courts are a factor as well because they have generally been unwilling to permit mortgage holders to sell off land to collect unpaid mortgage debt.

Technology transfer requirements and foreign exchange controls have been abolished. Local partners are encouraged but not required. Kenyan partners are no longer required for small-scale commercial enterprises.

ELECTRONIC COMMERCE

Kenya has not yet formulated a policy on electronic commerce, and its infrastructure has not developed to support electronic commerce.

OTHER BARRIERS

Textiles and Apparel

As mentioned under the imports category, in June 2001 the Kenya government imposed a 35 percent duty on imported fabrics (up from 25 percent to 30 percent) in order to protect the local textile industry. Fiber used in textile factories is not subject to a duty while the duty on yarn is 20 percent. The greatest obstacles to the sale of new U.S. apparel on the Kenyan market are its high price relative to secondhand goods. A strong, thriving market for secondhand U.S. clothing exists in Kenya.

Infrastructure

The Kenya government has been hesitant to open public infrastructure projects to competition because the state-owned companies that control infrastructure are considered "strategic" enterprises.

In the late 1990s, the Kenya government split Kenya Power and Lighting Company (KPLC) into three entities: a power generator (Kengen), a distributor (KPLC), and a regulator – the Electricity Regulatory Board (ERB) – to regulate retail tariffs and approve power purchase contracts between KPLC and producers. The government also licensed two independent power producers to sell electricity to the grid. Although Kengen appears to be a model of technical expertise and energy generation, non-payment of bills and accounts by the Kenya government and KPLC have adversely affected the operations of all entities, particularly KPLC. In late 2001, the ERB commissioned a study to review electricity tariff policy. The draft report presented in January 2002 recommended an upward adjustment to electricity tariffs to make the struggling KPLC profitable. These recommendations have not been implemented.

The Kenya Railways Corporation has contracted the maintenance of some of its locomotives to General Electric. The corporation has restructured its operations and recruited senior management from the private sector in the hope of turning the loss-making company into a profitable entity. However, the company is yet to be privatized as intended. The World Bank is assisting the Kenya government with a feasibility study that will eventually integrate the private sector in the rehabilitation and maintenance of the country's road networks.

Customs Procedures

Under the WTO Customs Valuation Agreement, implemented in early 2000, Kenya must use the transaction value in valuing goods imported from other WTO signatories. Kenya continues to maintain its preshipment inspection (PSI) regime. Cotecna Inspection, S.A. and Intertek Testing Services International provide PSI services under a two-year contract, which is expected to end in February 2003. The companies' mandates include ensuring that up-to-date customs valuation and risk assessment methods are applied.