KENYA

TRADE SUMMARY

The U.S. goods trade surplus with Kenya was $191 million in 2012, up $110 million from 2011. U.S. goods exports in 2012 were $581 million, up 25.5 percent from the previous year. Corresponding U.S. imports from Kenya were $390 million, up 2.1 percent. Kenya is currently the 92nd largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Kenya was $292 million in 2011 (latest data available), up from $251 million in 2010.

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). As a result, the country has undertaken substantial trade liberalization initiatives, including reduction of its most favored nation (MFN) tariffs, removal of quantitative restrictions, improvement of the business environment, and trade facilitation.

High *ad valorem* import tariffs and a value-added tax (VAT) inhibit trade, especially in the agricultural sector. The government of Kenya (GOK) sometimes waves these tariffs when domestic agricultural prices exceed acceptable levels, and in doing so oftentimes imposes restrictions to limit the number and types of imports. According to the WTO, Kenya's average applied tariff rate for all products was 12.5 percent in 2011.

Kenya applies the EAC Customs Union's Common External Tariff (CET), 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. "Sensitive" products and commodities, comprising 58 tariff lines, have applied *ad valorem* rates above 25 percent. This includes a 60 percent rate for most milk products, 50 percent for corn and corn flour, 75 percent for rice, 35 percent for wheat, and 60 percent for wheat flour. For some products and commodities, the tariffs vary across the five EAC member states.

During the June 2012 AGOA Forum, U.S. Trade Representative Ron Kirk, the Secretary General of the East African Community (EAC), and the Trade Ministers from each of the five EAC Partner States jointly announced their intention to move forward on a new U.S.-EAC Trade and Investment Partnership which will include a regional investment treaty, a trade facilitation agreement, continued trade capacity building assistance, and a commercial dialogue. These and other activities will help to promote EAC regional integration and economic growth, and expand and diversify U.S.-EAC trade and investment. They could also serve as building blocks towards a more comprehensive trade agreement over the long term.

Nontariff Measures

Kenya justifies its existing import controls as necessary to address health, environmental, and security concerns. All importers pay an import declaration fee set at 2.25 percent of the customs value of imports and are required to furnish several documents. Importers must provide a Certificate of Conformity (CoC) after export certification by pre-shipment inspection companies (SGS or Intertek International) contracted by the GOK. After a CoC is issued, the Kenya Bureau of Standards issues the Import Standardization

Mark, a stick-on label to be affixed to each imported item. Other import documents include valid *pro forma* invoices, Bill of Lading or Airway Bill, and a Packing List from the exporting firm.

Customs Procedures

Numerous bureaucratic procedures at the Port of Mombasa increase the cost of imported goods significantly. Multiple agencies (i.e. customs, police, ports authority, and standards inspection agencies) subject importers to excessive and inefficient inspection and clearance procedures. These procedures can create opportunities for graft and unnecessary delays. For every 24-hour delay, trucking companies lose an estimated $400, and shippers lose roughly $25,000.

The Kenya Revenue Authority's (KRA) online customs clearance system was implemented in 2005 and has contributed to improvements in overall efficiency and transparency. However, according to the World Bank's *Doing Business 2013* report, it still takes an average of 26 days and costs $2,350 to import a standardized container of cargo into Kenya.

In April 2011, the KRA introduced new rules that require cargo owners to file additional documents to clear goods at the port. The change requires importers to provide the KRA with cargo manifests and a bay plan from the port of origin to ensure full and accurate collection of required duties. Previously, shippers presented the KRA with cargo manifests only, while the bay plan was provided to port authorities. KRA officials said the change was meant to prevent customs revenue leakages and the importation of illicit goods, including narcotics and weapons. Shippers have complained that the new rules add to inefficiency at the port and raise overall costs.

GOVERNMENT PROCUREMENT

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 typically partnered with well-connected Kenyan firms. Reportedly, corruption often influences the outcome of public tenders.

With assistance from the World Bank and the U.S. Treasury Department, the GOK is attempting to upgrade the legal framework and operating environment for public-private partnerships. Parliament is expected to consider a new Public-Private Partnership Bill, though the timing is unclear.

In 2007, the GOK established a Public Procurement Oversight Authority (PPOA) to ensure compliance with rules and regulations surrounding government procurement. The PPOA's nine members are selected by the Minister of Finance, subject to Parliamentary approval. The total value of public procurement within Kenya's central government is estimated at 10 percent of GDP.

The GOK designed the Public Procurement and Disposal Act to make procurement more transparent and accountable, and establish penalties for violations of its provisions. The Act permits procurement agencies to establish a list of pre-qualified firms annually. It also allows for exclusive preferences for Kenyan citizens if the funding is 100 percent from the GOK or a state-related entity, and if the amounts are below Ksh 50 million (approximately $540,000) for goods or services and Ksh 200 million (approximately $2.1 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; 10 percent in cases where locals have over 51 percent of shareholdings; 8 percent in cases where locals have shareholdings below 51 percent but above 30 percent; and 6 percent in cases where locals have below 20 percent of shareholdings.

Additionally, 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. The Act may impose restrictions if the time and costs required to examine and evaluate a large number of tenders would be disproportionate to the value of the tender.

With the support of the World Bank and in collaboration with the Kenya Information and Communications Technology Board, the PPOA is developing a web-based Market Price Index and an e-Procurement system. Additional measures underway at the PPOA include implementation of an internal procurement performance monitoring tool, improvements to the process for reviewing tendering complaints, and development of general and sector-specific procurement manuals.

Parliament enacted the Supplies Management and Practitioners Act in 2007. This law addresses a loophole left by the Public Procurement and Disposal Act by entrusting only a procurement professional with the responsibility of procurement within any public entity. However, implementation of the Act has been inconsistent.

Kenya is neither a party nor observer to the WTO Agreement on Government Procurement.

INTELLECTUAL PROPERTY RIGHTS PROTECTION

The GOK's lax enforcement of intellectual property rights (IPR) continues to be a serious challenge for U.S. firms. Pirated and counterfeit products in Kenya, mostly imported from Asia, present a major impediment to U.S. business interests in the country. Imported pharmaceutical drugs, shoes, textiles, 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 April 2012, the Kenyan economy is losing at least $433 million annually due to counterfeiting. The study estimated that the GOK is losing approximately $72 million in potential tax revenue, and that some Kenyan companies could be losing as much as 65 percent to 70 percent of their regional market share due to counterfeiting.

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 responsible parties paying the necessary taxes. Counterfeit batteries have been particularly problematic.

Transit shipments destined for neighboring countries are also a significant source of counterfeit goods. Intellectual property authorities are limited in their ability to seize transit goods and authorities suspect that some of these goods are actually consumed in Kenya.

The Kenya Copyright Board (KCB) has the authority to inspect, seize, and detain suspect articles and to prosecute offenses. The KCB continues to work jointly with U.S. rights holders in conducting raids, but remains severely understaffed.

Parliament passed the Anti-Counterfeit Act in 2008. Long sought by the business community, the law provided for the creation of an Anti-Counterfeit Agency (ACA), and strengthened the ability of Kenyan law enforcement agencies to investigate and prosecute manufacturers and distributors of counterfeit and pirated goods. The ACA became operational in June 2010; however, it is poorly funded and under--resourced.

Kenyan artists have formed organizations to raise IPR awareness and to lobby the government for better enforcement. IPR enforcement against pirated Kenyan and foreign works, however, remains weak.

The Kenyan Association of Manufacturers continues its intensive efforts to increase government focus on the counterfeit and piracy issues that impact virtually every legitimate manufacturer in Kenya. Working with U.S. rights holders, local authorities have seized thousands of counterfeit products in recent years.

SERVICES BARRIERS

Political interference with the actions of the telecommunications regulator, the Communications Commission of Kenya (CCK), in particular President Mwai Kibaki's actions to override the CCK's decisions to lower the mobile termination rate, has raised concerns about the CKK's independence and effectiveness. The Kenyan legislature has under consideration the "Independent Communications Commission of Kenya" bill, which would create a new regulatory body with seven commissioners and would prohibit the commissioners from participating in matters where the commissioners or their family members have an interest.

The government still holds a significant level of ownership in the sector. Although a private sector company has a 60 percent equity stake in Telkom Kenya, the government retains 40 percent ownership. Telkom Kenya was wholly state-owned until December 2007.

INVESTMENT BARRIERS

The Kenyan judicial system has made significant steps towards increasing efficiency and limiting corruption. Nevertheless, a backlog of cases, including those that are investment-related, burdens the system. Despite efforts to increase public confidence in the judiciary, corruption—both perceived and real—reduces the system's credibility. Companies cite these deficiencies as obstacles to investment because they discourage lending and results in higher interest rates when financing is provided. Following the promulgation of the new constitution in August 2010, the GOK appointed a new Chief Justice who pledged to reform the judicial sector and restore public confidence, and a series of actions has been taken to ease judicial congestion.

Foreign ownership of firms listed on the Nairobi Securities Exchange (NSE) is limited to 75 percent. The Capital Markets Authority allows foreign investors to increase their investment with prior written approval if the shares reserved for local investors are not fully subscribed. Kenya imposes foreign ownership limitations in the telecommunications and insurance sectors of 70 percent and 66.7 percent, respectively.

The new constitution prohibits foreigners from holding a freehold land title anywhere in the country, permitting only leasehold titles of up to 99 years. The cumbersome and opaque process required to purchase land raises concerns about security of title, particularly given past abuses relating to the distribution and redistribution of public land.

Kenya has been slow to open public infrastructure to competition because the government considers state-owned companies that control infrastructure as "strategic" enterprises. As a result, reform and partial privatization of the telecommunications, power, and rail sectors have fallen behind schedule. A new Public-Private Partnership (PPP) law failed to pass in 2008, but the Kenyan Parliament is expected to again consider a similar bill. Meanwhile, the Finance Ministry is developing rules and regulations for PPPs and has organized a Secretariat to help review and oversee proposed partnerships.

The effect of certain fees and security bonds is 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.

OTHER BARRIERS

Corruption remains a substantial trade barrier in Kenya. U.S. firms find it difficult to succeed against competitors who are willing to ignore or engage in corruption, and a number of U.S. firms have exited Kenya at least in part due to corruption issues. The government has not implemented anticorruption laws effectively, and officials have often engaged in corrupt practices with impunity. While judicial reforms are moving forward, bribes, extortion, and political considerations continue to influence the outcomes in large numbers of civil cases. The *2011 Business Climate Index* published by 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 *2012 East Africa Bribery Index* published by Transparency International-Kenya, close to 84 percent of respondents rated Kenya as being corrupt or extremely corrupt. In the International Finance Corporation's most recent *Assessment of the Investment Climate in Kenya*, 75 percent of firms surveyed said they have made informal payments to "get things done." The report estimated that corruption costs Kenyan firms roughly 4 percent of annual sales.

The 2011-2012 report issued by the World Economic Forum cited corruption, access to financing, and inadequate infrastructure as the three most problematic factors for doing business in Kenya. The World Bank's *Doing Business 2013* report cited bureaucratic complexity and a high overall cost of doing business in Kenya.