KENYA

TRADE SUMMARY

U.S. goods exports in 2013 were $651 million, up 14.5 percent from the previous year. Corresponding U.S. imports from Kenya were $451 million, up 15.7 percent. The U.S. goods trade surplus with Kenya was $201 million in 2013, up $21 million from 2012. Kenya is currently the 95th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Kenya was $259 million in 2012 (latest data available), down from $390 million in 2011.

IMPORT POLICIES

Tariffs

Kenya maintains high *ad valorem* import tariffs, a value-added tax (VAT), and a 1.5 percent Railway Development Levy imposed on incoming shipments. The government of Kenya sometimes waives these tariffs when domestic agricultural prices exceed acceptable levels. According to the WTO, Kenya's average applied tariff rate for all products was 12.9 percent in 2012.

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.

In July 2013, the Kenya Revenue Authority (KRA) Customs Department imposed a 1.5 percent Railway Development Levy (RDL) on all imports. The government plans to use revenues from the RDL to construct a standard gauge railway line between the Port of Mombasa and Nairobi.

Nontariff Measures

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 obtain a Certificate of Conformity (CoC) after export certification by pre-shipment inspection companies (SGS or Intertek International) that have contracts with the government. After a CoC is issued, the importer provides it to the Kenya Bureau of Standards, which issues the Import Standardization Mark, a stick-on label to be affixed to each imported item. Other required import documents include valid *pro forma* invoices, a Bill of Lading or Airway Bill, and a Packing List from the exporting firm. Kenya justifies its import controls as necessary to address health, environmental, and security concerns.

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, creating opportunities for graft and unnecessary delays. To tackle the problem, Kenya has implemented a number of changes including having all agency inspections done simultaneously twice per day.

The KRA's online customs clearance system was implemented in 2005 and has contributed to improvements in overall efficiency and transparency. Due to recent procedural changes, the Kenya Port Authority reported a 13.2 percent improvement in container offtake at the Port of Mombasa.

In April 2011, the KRA introduced new rules that require additional documents be filed to clear goods at the port. The change requires cargo manifests and a bay plan from the port of origin to ensure full and accurate collection of required duties be provided to KRA. Previously, KRA received only the cargo manifests, 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. Affected parties have complained that the new rules add to inefficiency at the port and raise overall costs.

In November 2013, Kenya implemented an automated, integrated clearance single window portal, the Kenya National Electronic Single Window System (dubbed Kenya TradeNet), which aims to streamline the process of air, land, and sea cargo arrival and departure. Kenya simultaneously launched the National Gateway Payment System, an integrated, electronic platform that enables importers and exporters to apply for permits online and pay for them electronically through a payment gateway.

GOVERNMENT PROCUREMENT

U.S. firms have had 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.

In 2007, the government 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 finance minister, subject to Cabinet approval. The government has also outlined county government procurement regulations. The total value of public procurement within Kenya's central government is estimated at 10 percent of GDP. With the support of the World Bank and in collaboration with the Kenya Information and Communications Technology Board, the PPOA launched a web-based Market Price Index and is developing 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.

The government designed its 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 government or a state-related entity, and if the amounts are below KES 50 million (approximately $575,000) for goods or services and KES 200 million (approximately $2.3 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.

In addition, 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.

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.

The Public Procurement (Preference & Reservations) Amendment Regulations of 2013 calls for at least 30 percent of government procurement contracts to go to women, youth, and persons with disabilities.

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

INTELLECTUAL PROPERTY RIGHTS PROTECTION

The government of Kenya'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 as well as potential health and safety concerns for consumers. The most commonly counterfeited items include imported pharmaceutical drugs, shoes, textiles, office supplies, tubes and tires, batteries, shoe polish, soaps, and detergents. According to a survey released by the Kenya Association of Manufacturers in April 2012, the Kenyan economy is losing at least $433 million annually due to counterfeiting.

There appear to be a number of sources for counterfeit goods. For example, Kenya's Export Processing Zones (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. In addition, trans-shipments destined for neighboring countries are also a significant source of counterfeit goods as authorities suspect that some of these goods are actually consumed in Kenya.

Kenyan authorities are taking steps to improve enforcement but face resource constraints. For example, the Kenya Copyright Board continues to work jointly with U.S. rights holders in conducting raids, but remains severely understaffed. Also, the Anti-Counterfeit Act in 2008 provided for the creation of an Anti-Counterfeit Agency (ACA) and strengthened the ability of Kenya's law enforcement agencies to investigate and prosecute manufacturers and distributors of counterfeit and pirated goods, but the ACA remains poorly funded and under-resourced.

SERVICES BARRIERS

The only significant sectors in which investment (both foreign and domestic) is constrained are those where state corporations still enjoy a statutory monopoly. These monopolies are restricted almost entirely to infrastructure (*e.g.*, power, telecommunications, and ports), although there has been a partial liberalization of these sectors as well. Public ownership and control remains strongest in the power sector (including generation, transmission, and distribution).

The government divested the bulk of its ownership in the telecommunications sector (Telkom Kenya and Safaricom) from 2002 to 2007, allowing for greater competition in the sector. Telkom Kenya still operates and maintains the infrastructure over which Kenya's various internet service providers operate and remains the sole provider of landline phone services in Kenya. Mobile communications, however, are now almost entirely under private ownership.

INVESTMENT BARRIERS

The Kenyan judicial system has made progress in 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 result in higher interest rates when financing is provided.

An industrial court exists in Kenya, but it is plagued by long delays in rendering judgments. As such, foreign and local investors are subjected to lengthy and costly legal procedures.

Foreign ownership of firms listed on the Nairobi Securities Exchange 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 80 percent and 66.7 percent, respectively. The government allows telecommunications companies a three-year grace period to find local investors to achieve the local ownership requirements.

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. The Presidential Task Force on Parastatals Reforms recommends that the sectors be rationalized to remove redundancies by trimming the current number of state-owned companies from 262 to 187. 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. 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. Transparency International's Global Corruption Barometer for 2013 found Kenya's police, judicial system, registry and permit service, and land service to be the country's most corrupt institutions. The report found widespread corruption at all levels of the legal system. Official level corruption often comes in the form of land grabbing, conflict of interest and bid rigging in government procurement, and embezzlement.