KENYA

TRADE SUMMARY

U.S. goods exports in 2014 were $1.6 billion, up 151.7 percent from the previous year. Kenya is currently the 69th largest export market for U.S. goods. Corresponding U.S. imports from Kenya were $566 million, up 25.1 percent. The U.S. goods trade surplus with Kenya was $1.0 billion in 2014, an increase of $851 million from 2013.

The stock of U.S. foreign direct investment (FDI) in Kenya was $255 million in 2013 (latest data available), down from $285 million in 2012.

TECHNICAL BARRIERS TO TRADE / SANITARY AND PHYTOSANITARY BARRIERS

Technical Barriers to Trade

Licensing Regulations on Alcoholic Beverages

Proposed "Alcoholic Drinks Control (Licensing) Regulations" are under on-going domestic litigation. Labeling requirements under the proposed regulations could prove onerous to U.S. exporters should they go into effect.

Sanitary and Phytosanitary Barriers

Agricultural Biotechnology

Pursuant to a Kenyan Cabinet and Presidential decree, on November 21, 2012, the Kenyan Ministry of Public Health ordered public health officials to remove from the market all foods, feed, and seeds derived from agricultural biotech and to enact a ban on agricultural biotech food and feed imports.

This ban contravenes Kenya's National Biosafety Law, was implemented with little warning or stakeholder consultation, and was not notified to the WTO. Since the ban, key stakeholders in Kenya—scientists, universities, some non-governmental organizations, and policy makers including influential governors and legislators—have launched educational and outreach programs to encourage the government to rescind the decision. Both food aid and commercial U.S. agricultural exports derived from agricultural biotech products have been kept out of the Kenyan market because of the ban. The ban does not affect fully processed products such as edible oils; however, it does impact U.S. exports of semi-processed foods, such as soy for feed and high-value soy products. As the demand for feed inputs rises, the ban is hampering potential U.S. exports of feed ingredients, including soy, feed corn, and distiller dried grains.

Meat and Meat Products

Kenya maintains complex, non-transparent, and costly requirements for importation of all meat, dairy, and poultry products. These requirements include a shipment-by-shipment import permit requirement. Imported products must arrive with a standardized sanitary certification and a Letter of No Objection to Import Permit (no-objection letter) from the Department of Veterinary Services (DVS) under the Ministry of Agriculture, Livestock, and Fisheries. Before DVS issues the no-objection letter, an importer must explain the reason for importation, through a Letter of Application to Import, specifically addressing the market need the import would meet. DVS issues the no-objection letter for meat, dairy, and poultry products at its discretion. Although the Government of Kenya purports to prohibit imports only on

sanitary grounds, in practice, the exercise of discretion by DVS is largely focused on protecting the domestic industry, not on scientifically-based animal or human health concerns. A common reason for DVS denial is that the proposed imports are locally available.

On poultry specifically, Kenya states that it allows imports of live chicks for domestic production and breeding eggs, under specific conditions. As with other meat products, the importation of poultry and poultry products, such as frozen chicken (whole bird and/or parts), eggs in shell for human consumption, and liquid or powder-form eggs, requires a permit and no-objection letter from the DVS. Prior to issuing such a letter, the DVS may conduct a risk assessment based on the country of origin and can still deny permits based on "local market needs" (meaning DVS's assessment of local capacity to provide what is needed), not just sanitary concerns.

Plants and Plant Products

Kenya has a ban on wheat from the Pacific Northwest, due to concerns over the flag smut fungus that appears to be unjustified. USDA is currently working with Kenya Plant Health Inspectorate Service (KEPHIS) to resolve this issue.

Corn entering Kenya is subject to a total aflatoxin limit of 10 parts per billion (ppb) and a 13.5 percent maximum moisture content. Both the moisture and aflatoxin standards also apply to locally sourced corn. The 10 ppb aflatoxin limit does not appear to be scientifically justifiable; the Codex Alimentarius Commission and U.S. standard is 20 ppb. Further, most U.S. corn has a moisture content higher than 13.5 percent and is therefore prevented from importation. However, the United States accepts these restrictions due to specific aflatoxin and grain storage concerns in Kenya. Under special circumstances such as food shortages, Kenya has allowed higher moisture content for imported corn, which must then be dried and milled immediately upon arrival to reduce the risk of aflatoxin contamination.

Popcorn imports are restricted due to a 6 percent maximum moisture requirement. The U.S. limit is 12.5 percent to 15 percent; the 6 percent limit appears to lack a scientific basis.

Whole peas are not permitted due to the risk of *pseudomonas pisi* fungus, although split peas are allowed. Beans are not allowed due to the occurrence of *corynebacterium flaccumfasciens* bacteria in some parts of the United States. KEPHIS and USDA are working toward alternatives to outright bans that mitigate risks from these imports but are also less trade restrictive.

Lentils are banned due to the presence of darnel weed. However, darnel weed also exists in Kenya, calling into question the justification for Kenya's ban on U.S. lentils.

IMPORT POLICIES

Tariffs

Kenya has a liberalized economy with no price controls on major products and quantitative import restrictions appear limited to where environment, health or safety concerns exist. Kenya maintains high *ad valorem* import tariffs, a value-added tax (VAT), and a 1.5 percent Railway Development Levy (RDL) 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 12.7 percent in 2013.

Kenya applies the East African Community (EAC) Customs Union's 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. "Sensitive" products and commodities, comprising 58 tariff lines, have applied *ad valorem* rates above 25 percent. This includes rates of 60 percent 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.

Revenue from the 1.5 percent RDL on all imports funds the construction of a standard gauge railway line between the Port of Mombasa and Nairobi. Though the current VAT Act was passed in 2013, it went into effect with no specific guidelines. For example, there is no clarity on which types of plant, machinery, and electronic services are exempted from the VAT. Contentious issues regarding the Act are expected to be addressed through subsequent financial bills. In addition, VAT-exempt companies, including importers, experience lengthy wait times in receiving their VAT refunds.

Nontariff Measures

All importers pay an import declaration fee of 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. Exporters who do not obtain a CoC in advance must have their goods inspected at the port of entry, which costs approximately 15 percent of the cost, insurance, and freight value of imported goods, and runs the risk of having the goods rejected after paying shipping costs. After a CoC is issued, the importer provides it to the Kenya Bureau of Standards (KEBS), 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 asserts that its import controls are necessary to address health, environmental, and security concerns.

Customs Procedures

Bureaucratic procedures at the Port of Mombasa increase the cost of imported goods. 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.

The Kenya Revenue Authority's online customs clearance system has contributed to improvements in overall efficiency and transparency. Due to recent procedural changes, the Kenya Port Authority (KPA) reported a 13.2 percent improvement in container offtake at the Port of Mombasa. KPA reported that the average time it takes to clear cargo at the port decreased from 5.8 days in June 2013 to 3.7 days in June 2014, a 36 percent improvement.

GOVERNMENT PROCUREMENT

U.S. firms have had limited success in bidding on government tenders in Kenya. Reportedly, corruption often influences the outcome of public tenders. Foreign firms, some without proven track records, have won government contracts when partnered with well-connected Kenyan firms.

The Public Procurement and Disposal Act allows for exclusive preferences for Kenyan citizens if the funding for the procurement 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. The Act 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 Kenyan nationals 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.

The Act allows for limited tendering under certain conditions, such as when the complex or specialized nature of the goods or services requires the pre-qualification of contractors. It also allows limited tendering if the time and costs required to examine and evaluate a large number of tenders would be disproportionate to the value of the tender.

In February 2013, the government of Kenya enacted the Public Private Partnership Act which guides the engagement of the private sector in infrastructure development. Kenya will require an estimated KES 172 billion ($2 billion) to KES 258 billion ($3 billion) annually for the next 10 years to meet infrastructure financing gaps.

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

Kenya was not listed in the 2014 Special 301 Report. The government of Kenya's lax enforcement of IPR continues to be a challenge for U.S. firms. Pirated and counterfeit products in Kenya present a major impediment to U.S. business interests in the country, as well as health and safety hazards for consumers. KEBS, the Pharmacy and Poisons Board, the Kenya Copyright Board, and the Anti-Counterfeit Agency (ACA) are the government agencies tasked to maintain product standards and combat counterfeit products. The ACA reports an influx of counterfeit products to Kenya, especially electronics such as phones, TV sets, and phone batteries, and an upsurge in the counterfeiting of pharmaceuticals, pesticides, and soft and alcoholic drinks. Unfortunately, weak enforcement of anti-counterfeit legislation and poor coordination among agencies has resulted in a rise in counterfeited goods. Kenyan authorities are taking steps to improve enforcement, but face resource constraints.

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. Such monopolies are limited almost entirely to infrastructure (*e.g.*, power, telecommunications, and ports), and many of these sectors have been partially liberalized. The Kenyan government wholly owns the National Oil Corporation and the Kenya Pipeline Corporation, and competition with these companies is limited. Kenya Electricity Generating Company, Kenya Power and Lighting, and the Geothermal Development Company, dominate the electricity generation portion of the energy sector.

In June 2014, the Kenyan government stiffened regulations on local content requirements for foreign contractors. The National Construction Authority (NCA) restricts the categories of work open to foreign contractors and stipulates that foreign contractors must either form joint ventures with local contractors or locally subcontract a percentage of the work. Under the new regulations, a foreign contractor is only eligible to register for a Category 1 contract (*i.e.*, a building contract above KES 500 million). In addition, the new regulations require joint ventures to recruit from the local labor market and to recruit foreign technical or skilled workers only with the approval of the NCA when such skills are not available locally. The foreign contractor also must agree to transfer technical skills that are not available locally to its local firm or person.

INVESTMENT BARRIERS

Despite efforts to increase efficiency and public confidence in the judiciary, a backlog of cases and continuing corruption – both perceived and real – burden and reduce the credibility of Kenya's judicial system. 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 of 80 percent and 66.7 percent, respectively, in the telecommunications and insurance sectors. The government allows telecommunications companies a three-year grace period to find local investors to achieve the local ownership requirements.

The 2010 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 acquire 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. In 2013, the Presidential Task Force on Parastatals Reforms recommended that the sectors be rationalized to remove redundancies by trimming the current number of state-owned companies from 262 to 187.

Fees and security bonds discourage the employment of foreign labor. New foreign investors with foreign staff are required to submit plans for the gradual phasing out of non-Kenyan employees.

OTHER BARRIERS

Corruption

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 often engage in corrupt practices with impunity. While judicial reforms are moving forward, bribes, extortion, and political considerations continue to influence outcomes in civil cases. A 2014 Ernst and Young survey revealed that one in every three Kenyan companies surveyed had paid bribes to win contracts and that 27 percent of the chief executives, financial controllers, and internal auditors surveyed cited high levels of fraud in their companies. In the Transparency International East African Bribery Index 2014, Kenya scored 25 on a scale of zero to 100 (with zero perceived as highly corrupt), down two points from last year's score of 27.