KENYA

TRADE SUMMARY

The U.S. goods trade surplus with Kenya was $52 million in 2010, down $321 million from 2009. U.S. goods exports in 2010 were $363 million, down 44.5 percent from the previous year. Corresponding U.S. imports from Kenya were $311 million, up 10.9 percent. Kenya is currently the 100th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Kenya was $247 million in 2009 (latest data available), up from $185 million in 2008.

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). Kenya's high import tariffs impede trade, especially in the agricultural sector. The Kenyan government sometimes alters the application of import regulations on agricultural products to reflect fluctuations in domestic supply, and based on political factors. According to the WTO, Kenya's average applied tariff rate was 12.6 percent in 2009 for all products.

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. "Sensitive" products/commodities, comprising 58 tariff lines, have applied ad valorem rates above 25 percent, including milk and milk products, corn, popcorn, wheat and wheat flour. For some products/commodities, the tariffs vary in different EAC countries.

Due to continuing concerns about food security, the government of Kenya permitted duty-free importation of white maize through January 2010. Corn imported from outside COMESA and EAC normally is assessed a 50 percent ad valorem tariff. President Kibaki ordered this waiver of tariffs on all food items during most of 2009, but these tariffs have since been re-imposed. For 2010, the government of Kenya has reduced the tariff on wheat from 35 percent ad valorem to 10 percent for Kenyan millers importing for milling purposes. The EAC has reduced the ad valorem tariff on rice from 75 percent to $200 per ton or 35 percent, whichever is higher.

While the U.S. Government welcomed the simplification of the tariff system that resulted from the establishment of the EAC Customs Union in 2005, the United States has raised concerns with Kenya and other EAC members about tariff increases introduced on several U.S. exports. The increased tariffs included a 10 percent tariff on previously duty free unshelled almonds and a 25 percent tariff for shelled almonds and other nuts that had previously been 15 percent. Kenya, however, reduced the import tariff on used clothing from $0.30/kg or 45 percent, whichever is higher, to $0.20/kg or 35 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: Pre-Export Verification of Conformity; a Certificate of Conformity; Import Standardization Mark; and valid pro forma invoices from the exporter.

Kenyan law stipulates that all licensed importers of petroleum products participate in a domestic crude processing program. As a result, the Kenya Petroleum Refinery Ltd, a parastatal entity, receives 1.6 million tons of crude oil for refining each year. This represents approximately half of the total petroleum demand in Kenya. Of the remaining demand, a tendering system accounts for 35 percent and the remaining 15 percent is sourced through channels not governed by tendering requirements.

Customs Procedures

Numerous bureaucratic procedures at the Port of Mombasa significantly increase the cost of imported goods. Multiple agencies, including those responsible for customs, police, ports, and standards inspection, subject importers to excessive inspection and clearance procedures. Each day's delay for a truck costs its owner approximately $400 and delays for a ship costs its owner about $25,000 per day.

EXPORT SUBSIDIES AND OTHER EXPORT PROMOTION PROGRAMS

The Kenyan government designed the Manufacturing Under Bond (MUB) program to encourage manufacturing for export by exempting enterprises operating under the program from import duties and value added taxes (VAT) on imported plant, machinery, equipment, raw materials, and other imported inputs. The program also provides a 100 percent investment allowance on plant, machinery, equipment, and buildings. The government of Kenya expects goods produced under the MUB system to be exported. If not, the goods are subject to a surcharge of 2.5 percent when sold domestically and imported inputs used in their production are subject to all other tariffs and import charges. The program is open to both local and foreign investors.

Firms operating in Kenya's Export Processing Zones (EPZ) are provided a 10 year corporate tax holiday and 25 percent tax rate thereafter; a 10 year withholding tax holiday on dividend remittances; duty and VAT exemption on all inputs except motor vehicles; 100 percent investment deduction on capital expenditures within 20 years; stamp duty exemption; exemption from various Kenyan laws; exemption from pre-shipment inspection; on-site customs inspection; and work permits for senior expatriate staff. The EPZ law allows manufacturers and service providers 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.

GOVERNMENT PROCUREMENT

In 2005, Kenya enacted the Public Procurement and Disposal Act (the Act), which provides for a Public Procurement Oversight Authority, established on January 1, 2007. The Minister of Finance appoints and parliament approves its nine-member Oversight Advisory Board.

The government of Kenya designed the Public Procurement and Disposal Act to make procurement more transparent and accountable and established penalties for violations of its provisions. The Act provides that procurement agencies may annually update pre-qualified firms. The Act reserves for Kenyan citizens procurements where the funding is 100 percent from the government of Kenya or a Kenyan state-related entity and the procurement is below 50 million Kenyan shillings (approximately $650,000) for goods or services and 200 million Kenyan shillings (approximately $2.6 million) for public works. It also sets the following preferences that are applied in the evaluation of bids: 15 percent for goods manufactured, mined, extracted, or grown in Kenya; 6 percent where locals have below 20 percent of shareholdings; and 8 percent where locals have shareholdings between 20 percent and 50 percent.

The Act allows for restricted tendering under certain conditions, such as when the complexity or specialized nature of the goods or services requires the pre-qualification of suppliers. The Act can impose restrictions on the number of tenders if the time and costs required to examine and evaluate a large number of tenders would be disproportionate to the value of the tender.

The Supplies Management and Practitioners Bill of 2006 became law in October 2007. It addresses a loophole in the Public Procurement and Disposal Act by entrusting only a procurement professional with the responsibility for conducting procurement in any public entity. The Act generally has not yet been implemented.

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 partnered with well-connected Kenyan firms.

Kenya is not a signatory to the WTO Agreement on Government Procurement.

INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION

Kenya's enforcement of IPR continues to be a serious challenge. Pirated and counterfeit products in Kenya, mostly imported from Asia, present a major impediment to U.S. business interests in the country. Shoes, textile products, office supplies, tubes and tires, medicines, 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 late October 2008, piracy and counterfeiting of business software, music, consumer goods, and pharmaceuticals in Kenya cost firms about $715 million in lost sales annually. KAM estimates that the government loses over $270 million in potential taxes annually.

The Pharmaceutical Society of Kenya contends that over 50 percent of anti-malaria drugs sold in Kenya are counterfeit. A random survey by the National Quality Control Laboratories and the Pharmacy and Poisons Board concluded that 30 percent of all drugs in Kenya are counterfeit.

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 substandard goods also end up in the Kenyan marketplace without paying the necessary taxes. Batteries, in particular, have been a problematic product in the EPZs.

The Kenya Copyright Board (KCB) has the authority to inspect, seize, and detain suspect articles and to prosecute offenses. The KCB is severely understaffed with only three prosecutors and two police officers detailed to the organization. The KCB continues to work jointly with U.S. rights holders in conducting raids.

Kenyan artists have formed organizations to raise the awareness of intellectual property rights and to lobby the government for better enforcement. Two of the most active groups are the Music Copyright Society of Kenya and Kopiken. Kenya's Music Copyright Society claimed in September 2008 that 90 percent of its potential earnings are lost to piracy and urged the Kenya Revenue Authority to require authentication stickers on musicians' releases. IPR enforcement against pirated Kenyan and foreign works remains weak.

The Anti-Counterfeit Bill of 2008 passed Parliament in December 2008. Long sought by the business community, the bill provides for the creation of an Anti-Counterfeit Agency (ACA) and strengthens the ability of law enforcement agencies to investigate and prosecute manufacturers and distributors of counterfeit and pirated goods. The government inaugurated the ACA in December 2009 and operationalized it in June 2010. However, the ACA remains severely underfunded, receiving less than half of its budget request for 2010. KAM continues its strenuous efforts to increase government focus on the counterfeit and piracy issues that negatively impact virtually every legitimate manufacturer in Kenya. In response local authorities working with U.S. rights holders, have seized more than 9,000 counterfeits in Kenya since November 2008.

INVESTMENT BARRIERS

Although the Kenyan judicial system is working to improve its efficiency and timeliness, a backlog of cases burdens the system, including cases that are investment-related. Corruption further reduces the credibility of the judicial system. Companies cite these deficiencies as obstacles to investment, particularly as they make financial institutions reluctant to provide loans for investment in Kenya, and charge higher interest rates when they do. The employment of foreign labor in Kenya is discouraged through the use of fees and security bonds. New foreign investors with expatriate staff are required to submit plans for the gradual phasing out of non-Kenyan employees.

A law passed in 2007 reduced the allowable level of foreign investment in firms listed on the Nairobi Stock Exchange (NSE) from 75 percent to 60 percent. A grandfather clause allows firms that exceed the new limit to maintain existing shareholdings, while investment shares can be increased above the 60percent threshold if the shares reserved for local investors are not fully subscribed, and subject to prior written approval. Foreign investment in a range of industries is subject to sector-specific caps, including in brokerage companies (30 percent), fisheries (49 percent), fund management (51 percent), insurance (66.7 percent), and telecommunications (80 percent). The process for acquiring land in Kenya is cumbersome and opaque, and land titles can be insecure due to past abuses relating to the distribution and redistribution of public land. The Kenyan constitution prohibits foreigners from holding a freehold land title; land may be acquired by foreigners through leasehold only.

Kenya has been slow to open public infrastructure to competition. Reform and partial privatization of the telecommunications, power, and rail sectors have begun, but are proceeding at a slower than scheduled pace. Kenya's Finance ministry has developed rules and regulations for public-private partnerships (PPP) and is in the process of developing a Secretariat to help review and regulate such partnerships. A new PPP law failed to pass Parliament in 2008.

Kenya imposed a universal service fee of up to a maximum one percent of gross revenue on all licensees in the postal sector under the Universal Access and Service Regulation of May 2010. In January 2011, the government of Kenya indicated that it would apply this fee at a 0.5 percent level. Industry has expressed concern with such fees as express delivery services fall outside the universal service obligation.

OTHER BARRIERS

Corruption remains a substantial trade barrier in Kenya. A number of U.S. firms have exited Kenya due, at least in part, to corruption issues. A 2008 Business Climate Index of the East African Business Council revealed that $10 million in bribes are paid to police and customs officials each year. The International Finance Corporation's Investment Climate Assessment for Kenya rated corruption as a severe or major obstacle by three-quarters of firms surveyed, with two-thirds of respondents expected to pay bribes for government contracts.