KENYA

TRADE SUMMARY

The U.S. trade balance with Kenya went from a trade surplus in 2002 of $83 million to a trade deficit in 2003 of $52 million. U.S. goods exports in 2003 were $197 million, down 27.5 percent from the previous year. Corresponding U.S. imports from Kenya were $249 million, up 32.1 percent. Kenya is currently the 95th largest export market for U.S. goods. The stock of U.S. foreign direct investment in Kenya in 2002 was $20 million, down from $22 million in 2001.

OVERVIEW

Kenya's economic prospects have brightened with the December 2002 election of President Kibaki and the National Alliance Rainbow Coalition (NARC) government, but Kenya's economic growth remains retarded by many of the same factors that have plagued it for the last decade: poor infrastructure, bloated and inefficient parastatals, corruption, crime, and low levels of domestic and foreign investment. After an unprecedented negative 0.3 percent growth rate in 2000 and a modest 1.2 percent increase in 2001 and 2002, Kenya's economy was expected to grow by 1.8 percent in 2003, far below its potential.

In 2003, the NARC government implemented some of the IMF and World Bank conditions for resumption of aid, including the enactment of anti-corruption legislation (the Anti-Corruption and Economic Crimes Act of 2003 and the Public Officer Ethics Act). The government also established the Kenya Anti-Corruption Commission (KACC), but some controversy remained over staffing of the body. Seeking to shore up Kenya's legal and enforcement structures, in early January 2003, the government revived the Ministry of Justice and Constitutional Affairs, which President Moi abolished in the 1980s, and created the Department of Ethics and Governance in the Office of the President to spearhead the government's fight against corruption. At the same time, the government established an office in the Ministry of Justice to spearhead the fight against graft. In October 2003, the government conducted a much-lauded purge of corrupt judges and magistrates. In November 2003, the IMF approved the Poverty Reduction and Growth Facility (PRGF) for Kenya. About $35 million is available immediately while over $245 million would be available over the next three years. The World Bank was expected to release the suspended tranche of $50 million under the Economic and Public Sector Reform Credit.

Over the last six years, Kenya has signed several trade agreements geared toward gaining export opportunities. Kenya is a member of the East African Community (EAC), the Intergovernmental Authority on Development (IGAD), the Common Market for Eastern and Southern Africa (COMESA), and the World Trade Organization (WTO). Kenya is eligible for preferential access to the U.S. market under the African Growth and Opportunity Act (AGOA). Kenya has implemented the WTO Customs Valuation Agreement and the Financial Services Agreement and has passed legislation designed to implement the Trade-related Aspects of Intellectual Property Rights (TRIPS) agreement.

IMPORT POLICIES

Kenya's trade regime has been liberalized, apart from a small list of import licensing controls based on health, environmental and security concerns. However, imports are still subject to some barriers to access. All imports with f.o.b. value of more than $5,000 are subject to pre-shipment inspection (PSI) for quality, quantity, and price, and require a Clean Report of Findings by a government-appointed inspection agency. In June 2003, the Finance Minister specified that the Import Declaration fee, which includes a PSI fee, would be 5,000 Kenya shillings (about $66). Importers who fail to obtain inspection in advance pay a 15 percent penalty for local inspection (25 percent for motor vehicles).

High import duties and value-added tax (VAT) pose trade barriers and provide protection to domestic producers, especially in the agricultural sector. Kenya's import regulations on agricultural products are sometimes altered to reflect fluctuations in domestic supply and demand as well as political factors. However, in the last three years the government has lowered the import duty for inputs and raw materials used in the manufacturing sector from 2.5 percent to zero. Duties on a number of raw materials and capital goods previously taxed at 5 percent were reduced to zero in the 2002/2003 budget. Import duties for fabrics are set between 25 percent and 35 percent, while duties on basic inputs such as yarn are zero. The current import duty on foodstuffs that compete with Kenyan products -- like meat and meat products, poultry and poultry products, and dairy products -- is 35 percent.

In its 2003/2004 budget statement, the government reduced the export tax on raw hides and skins from 20 percent to 15 percent. Import duties on timber and cottonseeds were waived to discourage massive logging and to revive cotton growing. To encourage production of cheaper animal feeds, the VAT on inputs was reduced from 18 percent to zero.

The Kenyan 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 3-4 years), the Ministry of Agriculture restricts cereal seed imports by setting quantitative ceilings. However, once a variety is certified, the quantitative restrictions are lifted.

The standard VAT was reduced from 18 percent to 16 percent in June 2003. Discriminatory application of the VAT has in the past distorted trading in some commodities, especially sugar and maize.

Customs Procedures

Customs rules are detailed and rigidly implemented, often leading to delays in clearance of both imports and exports. At the beginning of 2000, Kenya started implementing the WTO Customs Valuation Agreement. Under the agreement, Kenya uses the transaction value for valuation of goods imported from other WTO signatories. Kenya maintains its PSI regime, which is administered by two private sector firms. The companies' mandates include ensuring that up-to-date customs valuation and risk assessment methods are applied.

STANDARDS, TESTING, LABELING AND CERTIFICATION

Commercial and research applications of agricultural biotechnology in Kenya are currently regulated through guidelines, which are neither formal regulations nor enacted law. The guidelines, published in 1998, describe a committee-based approach for review and approval of importation of transgenic material, to include specific review of end uses (e.g. planting seeds for trials). Substantial quantities of transgenic product have been imported into Kenya for food aid purposes since the establishment of the Biosafety Committee, and significant volumes of food products derived from transgenic crops are available commercially. Kenya has received food aid containing transgenic components. These shipments do not appear to have been tested for transgenic content. Kenya also imports maize from South Africa, where biotechnology varieties are commercially available. Kenya is a party to the Cartagena Protocol on Biosafety.

The Kenya Bureau of Standards (KBS), a regulatory body under the Ministry of Trade and Industry, inspects imports to ensure conformity to International Standardization Organization (ISO) and other product standards. KBS also conducts product testing and certification for individual product categories. Products 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.

The Kenya Plant Health Inspectorate Service (KEPHIS) subjects certain imported agricultural goods to further inspection. The Inspectorate also regulates the import and export of plant materials and trade in bio-safety 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. KEPHIS evaluates commercial hybrid grain seeds for a period of three years before the seeds can be released to market. The certification process is tedious and restrictive, and the three-year period needed for the government to approve or reject a variety is burdensome.

GOVERNMENT PROCUREMENT

Under legal notice No. 51 of March 15, 2001 by the Minister for Finance, a Public Procurement Directorate in the Finance Ministry was established. The Directorate is the central organ for policy formulation, implementation, and oversight of the public procurement process in Kenya. The Directorate monitors the overall functioning of the public procurement process in Kenya and submits proposals for action to the Minister. Regulations require establishment of Ministerial or District Tender Committees (MTCs or DTCs). The Accounting Officer (Permanent Secretary for ministries and the Chief Executive for corporations) chairs and directs the procurement process for goods worth less than Ksh 500,000 (about $6,600) according to the Exchequer and Audit (Public Procurement) Regulations 2001. Tenders for goods and services exceeding that amount are supposed to go through the MTC or DTC. The MTC and DTC review tender documents and requests for proposals where the estimated value exceeds Ksh 1 million (approximately $13,157). The chairman can veto any committee decision. Any veto is supposed to be reported to the Public Procurement Complaints, Review and Appeals Board. The Minister of Finance appoints a chair of the Board from the private sector. Board decisions are final unless judicial review action is commenced within thirty days under any existing written law concerning judicial review of administrative decisions.

Any member of a procuring entity, the Public Procurement Directorate, or the Appeals Board who breaches regulations is subject to a fine not to exceed Ksh 2 million (about $26,315). A corporation that violates the regulations is subject to a fine not to exceed Ksh 5 million (approximately $65,789). In 2003 the government proposed the Public Procurement and Disposal Bill to the Public Procurement Oversight Authority. The bill aims to make procurement more transparent and accountable and would require procurement agencies to carry out an annual update of pre-qualified firms, especially when dealing with restricted tenders such as military tenders. Parliament did not pass the bill before the end of the legislative year.

Government reform measures over the last three years have afforded wider publicity to government tenders, established an appeals committee, and appointed people from the private sector to the Appeals Board. The government has increased transparency in bidding by removing from its tenders the clause that read, “the government reserves the right to accept or reject any bid and is not obliged to give any reasons for its decisions.” With the removal of the clause, the Central Tender Board (CTB) now publishes its decisions and, if the bidder asks, provides reasons for rejecting certain bids. However, tenders are frequently manipulated and awarded to noncompetitive firms in which government officials have a significant interest, and conflict-of-interest regulations are rarely enforced. Cases have been reported in which tender specifications are tailored to favor one firm. In November 2003, a tender worth over $190 million involving procurement of Kenya Ports Authority cranes was cancelled after it was established that three Kenyan cabinet ministers had, by seeking postponement of the tender, interfered in the tender process. Similar cases involving corruption and tendering for insurance of public property have been reported. Procurement decisions can also be dictated by donor-tied aid. Kenya is not a signatory to the WTO Agreement on Government Procurement.

In May 2003, the government suspended more than 1,000 procurement officers after an internal audit found massive and widespread irregularities in government tendering and procurement. Since that time, many of the same officers were brought back to work so that the government could function and there have been no more significant changes in government procurement procedures.

EXPORT SUBSIDIES

Firms operating in Export-Processing Zones (EPZ) are exempted from all withholding taxes on dividends and other payments to non-residents during the first 10 years. They are also exempted from import duties on machinery, raw materials, and intermediate inputs. There are no restrictions on management or technical arrangements, and EPZ companies are allowed expedited licensing procedures.

EPZ firms are allowed to sell up to 20 percent of their output on the domestic market. However, EPZ firms are liable for all taxes on products sold domestically plus a 2.5 percent penalty. There is no general system of preferential financing, although sectoral government development agencies in areas such as tourism and tea are supposed to provide funds at below-market rates to promote investment and exports.

INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION

Kenya is a member of most major international and regional intellectual property conventions – 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 stagnant due to the lack of cooperative procedures among the signatory states. One prospect for patent, trademark and copyright protection is embodied in the African Intellectual Property Organization (AIPO), although its enforcement and cooperation procedures are as yet untested.

The Kenyan Parliament passed an amended version of the Kenya Industrial Property Act, which came into force in June 2002, in an effort to make the Act compliant with Kenya’s obligations under the WTO Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement.

An amended Trademarks Bill was passed in August 2002. The bill provides that goods and services for which application is made for registration of a mark shall be classified in accordance with the Nice Classification System for Goods and Services. The amended bill is designed to be in conformity with the Madrid Agreement and Protocol as well as the TRIPS Agreement. The government has drafted a “Layout Designs of Integrated Circuit Bill” and circulated copies to stakeholders and the WIPO for comments.

An amended Copyright Bill was passed into law in November 2001, but has yet to be implemented. The Act protects audio as well as video recordings. Computer programs, sound recordings, broadcasts, and literary, musical, artistic and audiovisual works are protected under the Act. The Act created the Kenya Copyright Board, which has the authority to inspect, seize and detain suspect articles and to prosecute offenses. Violations are subject to fines and a maximum of ten years in jail. Although copyrights are protected in theory under Kenyan law, violation of copyrights, especially on music and films, is pervasive, and enforcement remains sporadic at best. Kenyan artists have formed organizations to raise awareness of intellectual property rights and to lobby the government for better enforcement, but merchants are still free to peddle pirated versions of Kenyan and international works without fear of arrest or prosecution. Pirated materials and counterfeit goods produced in other countries are readily available in all major towns in the country. These materials include pre-recorded audiocassette tapes, videocassettes, CDs and consumer products. Although the exact amount is not available, a local music lobby group estimates that the government loses close to Ksh 15 billion annually on taxes. Historically, however, penalties and enforcement for copyright infringement have been low. Understanding of the importance of intellectual property is extremely limited.

SERVICES BARRIERS

In general, individuals and companies supplying services, whether local or foreign, are accorded the same treatment. However, foreign companies offering services in construction, engineering, and architecture may face discrimination on tenders for public projects. New foreign investors with expatriate staff are required to submit plans for the gradual phasing out of non-Kenyan employees. In 1999, the government of Kenya increased fees and security bonds under the Immigration Act by 50 percent to 100 percent in an attempt to discourage the employment of foreign labor. The government indicated in 2003 that it would not renew work permits for some expatriates, arguing that the domestic workforce should be tapped to fill positions. The Kenyan bar admits foreign lawyers for a maximum duration of 12 years. Medical personnel (doctors) must serve a one-year “induction” in the public hospitals and sit for exams before they are considered for registration in the country.

Since 1995, the government has privatized some government assets through the sale of state-owned tourist facilities, the flotation of shares of state-owned financial institutions on the Nairobi Stock Exchange, and the off-loading of government shares in the Mumias Sugar Company. After awarding a tender for the sale of Kenya Reinsurance Corporation (Kenya-Re) in October 2002, the government suspended the sale. There has been no action on the sale of the 35 percent government stake in Kenya Commercial Bank (KCB) since February 2001.

In July 1999, the government dissolved the Kenya Posts and Telecommunications Corporation (KPTC), under the Kenya Communications Act of 1998. Three separate entities were then formed: Telkom Kenya (telecommunications); the Communications Commission of Kenya (CCK), the regulatory body; and the Postal Corporation of Kenya (postal services). Telkom Kenya is permitted to maintain its monopoly on Very Small Aperture Terminals (VSATs), Internet lines, and most land lines for five years (1999 - 2004). The government has indicated that it intends to license a second landline telephone operator, restricted to provision of telephone lines. In August 2001, the government announced that three Kenyan firms had succeeded in acquiring the rights to operate eight regional licenses in competition with Telkom Kenya. Telair Communications landed five of the eight licenses for a reported $23 million. Safitel netted two regional licenses for $9 million, and Bell-Western acquired the remaining regional license for $25,000. However, these regional entities have not begun operations. As a result, the government has said it will cancel their licenses while the firms argue that changes in circumstances merit renegotiated contracts.

The CCK has 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. These two companies have well over 1.8 million subscribers, almost six times the 320,000 landlines provided by Telkom. In fall 2003, the government awarded a tender to a third mobile operator, Econet Wireless, but the award has been challenged in court.

After more than one year of negotiations to sell its 49-percent stake in Telkom Kenya, the government cancelled the sale in late 2001. The government’s failure to privatize Telkom Kenya and sell Kenya-Re has cast doubts on the willingness of the government to privatize other parastatals, such as the Kenya Ports Authority and the Kenya Railways Corporation. The government says its draft Privatization Bill, published in November 2003, will lay the framework for privatization but Parliament will not be able to act until it reconvenes in spring 2004, and political considerations will likely complicate enactment.

INVESTMENT BARRIERS

KENYA

The Kenyan government says it would like to attract foreign investment, and the relative political stability has increased the incentive for private sector development and the NARC government's anti-corruption efforts have eased investor fears. However, Kenya still needs to address rampant corruption; degraded road, rail, and telecommunications infrastructure; high energy costs; and inefficient government expenditure if the country is to attract meaningful foreign investment.

The government has begun to restructure the financial system and taken measures to increase the role of the private sector and to establish greater accountability and transparency. A managed floating exchange rate regime has been adopted, and companies may retain foreign exchange earnings and repatriate capital and profits without certification.

OTHER BARRIERS

The Kenyan government maintains some restrictions on foreign ownership of publicly traded companies and companies in the areas of financial services and telecommunications. In June 2002, the rules were amended to allow up to 75 percent foreign ownership (personal or corporate) of firms listed on the Nairobi Stock Exchange. If foreign ownership in a company is 75-percent at the time of listing on the NSE, the foreign owner is allowed to maintain (or reduce) but not to increase that share. Foreign investors may be allowed to increase their investment with prior written approval from the Capital Market Authority if the shares reserved for local investors are not fully subscribed. Foreign brokerage companies and fund management firms must be locally registered companies, with Kenyan ownership of at least 30 percent and 51 percent, respectively.

The CCK, which regulates telecommunications and radio communications in the country, restricts the number of ISPs (approximately 90 ISPs currently) and prohibits them and other carriers from establishing switches, international gateways, or direct satellite links. This restriction has forced continued dependency on Telkom Kenya and inhibited competition and improvements in customer service. Foreign ownership of an ISP is restricted to 40 percent. The CCK specifically prohibits ISPs from providing the following services: voice telephony, uploading of telecommunications traffic by satellite, and use of wireless communications. ISPs must agree, in writing, not to provide Internet protocol telephony through their networks (paging services are excluded from this requirement). ISPs must also provide the CCK with information on charges for all services, as well as the names and addresses of 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 legal system protects and facilitates acquisition and disposition of all property rights, including land, buildings and mortgages. Foreigners are not allowed to have a freehold title anywhere in the country. However, leasehold titles, normally 99 years for land in towns and coastal beachfronts and 999 years elsewhere, is allowed. The cumbersome and opaque process required to purchase land, and concerns about security of title because of past abuses relating to distribution of public land, are serious impediments to new investment. Lack of confidence in the speedy and fair resolution of disputes and requests from officials for illicit payments continue to dampen the country's prospects to attract more foreign investment.

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.

Infrastructure

KENYA

The government of Kenya has been hesitant to open public infrastructure to competition because the state-owned companies that control infrastructure are considered "strategic" enterprises. As a result, the reform and partial privatization of telecommunications, power, and rail has fallen behind schedule.

The Kenyan government split the Kenya Power and Lighting Company (KPLC) into three entities in 1997: a power generator (KenGen), a distributor (KPLC), and a regulator (the Electricity Regulatory Board, ERB), to regulate retail tariffs and to approve power purchase contracts between KPLC and producers. The government also licensed Independent Power Producers to sell electricity to the grid. In late 2001 the ERB commissioned a study to review electricity tariff policy. The draft report was presented to key stakeholders in January 2002 recommending an upward adjustment of electricity tariffs to make the struggling KPLC profitable. The study recommendations are yet to be implemented.

In an effort to reduce the cost of power in the country, Kenya joined a regional organization, the East African Power Pool, in November following the inauguration of the Central African Power Pool in April 2003. The new pool seeks to strengthen the security of power supply in the region and to increase cost-effectiveness, access, reliability, and quality supply. The memorandum of understanding signed in November 2003 would enable member countries to share resources and experiences and to connect their power grids.

The Kenya Railways Corporation has contracted for the maintenance of all 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. The government has indicated it would like to contract with a private company to operate the railway, but plans for privatization seem to have stalled.

Textiles and Apparel

In June 2001 the government of Kenya imposed a 35 percent duty on imported fabrics (up from 25 percent - 30 percent), reportedly to protect the local textile industry. Fiber used in textile factories is zero-rated while the import duty on yarn is 20 percent. In the 2002/2003 fiscal year budget, the Minister for Finance increased the tax on secondhand clothes from Ksh 15 per kilogram to Ksh 25 (about $.30) per kilogram. The greatest obstacle to the sale of new U.S. apparel on the Kenyan market is the high price relative to secondhand goods.