

II. TRADE POLICY REGIME: FRAMEWORK AND OBJECTIVES

(1) TRADE POLICY

(i) Trade policy objectives

1. Starting in the mid 1980s, the Kenyan Government shifted away from an import substitution strategy towards a more outward-oriented growth policy. The general trade policy objectives of Kenya include moving towards a more open trade regime, strengthening and increasing overseas market access for Kenyan products, and further integrating Kenya into the world economy. These policy objectives have been pursued through multilateral, regional and bilateral trade negotiations, in particular within the African region. The focus is on the adoption of common regional positions and building economic and trade relations with emerging groupings in the region and further away such as in South East Asia. The different integration organizations within Africa are expected to operate as building blocks towards the achievement of a single large market on the African continent. As stated in its National Development Plan, within the existing arrangements, Kenya will urge the continued reduction and eventual elimination of tariff and non-tariff barriers to trade among participating countries, while recognizing the need to implement changes at the institutional level to promote these regional initiatives.¹ The Plan also states the need for a shift in the Government's role away from control and regulation to facilitation of private sector development, and for closing the gap between policy objectives and their implementation.

2. Sectoral policies are aimed at enhancing production and productivity, through a continuous process of economic reform and trade liberalization, as a way to promote a more efficient allocation of resources, while improving the environment for private domestic and foreign investment. Specific emphasis is placed on strengthening the agriculture sector, and promoting value-added activities through the processing of agricultural goods.

(ii) Institutional and legal framework

3. Since Kenya's previous Trade Policy Review (in 1993), the structure of the legislative and executive bodies has remained generally unchanged. Executive power is vested in the President and the Cabinet. The President is Head of State, Head of the Cabinet, and Commander-in-Chief of the Armed Forces. Election of the President, for a five-year term, is by direct popular vote; the winning candidate at a presidential election must receive no less than 25% of the votes in at least five of Kenya's eight provinces.² Under the Constitution, the President may be re-elected only once.³ The President appoints the Vice-President and the Ministers (currently 15) from amongst the members of Parliament who belong to his party. The Parliament remains as the only supreme law-making body in Kenya and, as such, exercises control of public finances.⁴

4. Legislative power is vested in the Parliament, which consists of the President and the National Assembly.⁵ The central legislative authority is the unicameral National Assembly, formed by 210 directly elected representatives, 12 nominated members, and two ex-officio members

¹ Government of Kenya (1996a).

² Local administration is divided among 63 rural districts. The districts are joined to form seven rural provinces. The Nairobi area has special status and is not included in any district or province. The Government supervises the administration of districts and provinces (*Background Notes: Kenya*. Available at: <http://www.state.gov> [7 June 1999]).

³ The Constitution of Kenya, Chapter II, Part I, §9.

⁴ *Kenya – Government*. Available at: <http://www.rcbowen.com/kenya/government> [28 May 1999].

⁵ The Constitution of Kenya, Chapter III, Part 2, §30.

comprising the Speaker, elected by the National Assembly, and the Attorney-General, nominated by the President. The maximum term of the National Assembly is five years from its first meeting. It can be dissolved by the President at any time, and the National Assembly may force its own dissolution by a vote of no confidence, whereupon Presidential and Assembly elections must be held within 90 days.

5. Kenya's legal system is based on its 1963 Constitution and on English Common Law. In September 1997 the National Assembly approved legislation that amended the Constitution with a view to ensuring multi-party elections. The Constitution can be amended by an affirmative vote, on the Second and Third Readings, of 65% of the membership of the National Assembly (excluding the Speaker and Attorney-General).⁶

6. The body of laws consists of Acts passed by the National Assembly and signed into law by the President, as well as a number of laws enacted during the colonial period by the British Parliament of the Legislative Council of the former colony. English Common Law and doctrines of equity apply in Kenya subject to amendments to reflect local circumstances. In addition, Kenyan law recognizes African customary law, which consists of legal rights and duties of indigenous Kenyans according to inherited customs and traditions. Customary law applies only where it does not conflict with written law and is not immoral or unjust.⁷

7. The Cabinet initiates and formulates most legislative proposals; bills are drafted in consultation with the private sector and other stakeholders. After being read and passed by the National Assembly, bills are presented to the President, who has 21 days to signify to the Speaker his assent or refusal. In case of refusal, he must, within 14 days, submit a memorandum to the Speaker indicating the specific provisions to be reconsidered by the National Assembly, including his recommendation for amendments. The National Assembly subsequently reconsiders the bill taking into account the President's comments, and either: (i) approves the President's recommendations with or without amendment and resubmits the bill to the President for assent; or (ii) refuses the recommendations and approves the bill in its original form by a resolution supported by a vote of not less than 65% of all members of the National Assembly (excluding ex-officio members), in which case the President must assent to the bill within 14 days.⁸

8. The judiciary is headed by High Courts, consisting of the Chief Justice and at least 30 high court judges, all appointed by the President under the advice of a judicial service commission.⁹

(iii) Trade policy formulation and implementation

9. The agencies in charge of trade policy formulation have not changed since the previous review. The main responsibility for trade policy formulation is with the Ministries of Tourism, Trade and Industry; Finance and Planning; and Agriculture and Rural Development (which constitute the Cabinet's Economic Sub-committee); and the Central Bank.

10. In general, trade policy is formulated by the Cabinet's Economic Sub-committee. Recommendations may also be made by the two main inter-ministerial and consultative committees: (i) the Joint Industrial Commercial and Consultative Committee, which consists of the Kenya Chamber of Commerce and Industry (KNCC&I), the Kenya Association of Manufacturers (KAM), and a group of research institutes and private enterprises; and (ii) the Export Promotion Council

⁶ The Constitution of Kenya, Chapter III, Part 2, §47.

⁷ *Kenya in Brief*. Available at: <http://www.leisu.edu> [28 May 1999].

⁸ Flanz (1996).

⁹ *Background Notes: Kenya*. Available at: <http://www.state.gov> [7 June 1999].

(EPC).¹⁰ The EPC, established in 1992 as a public entity under the Ministry of Tourism, Trade and Industry, is responsible for organizing export promotion activities abroad, sponsoring contact promotion programmes and sales missions, and carrying out market opportunity surveys. In addition, the EPC, in consultation with KAM, KNCC&I, and leading manufacturers and exporters, formulates the Common Plan of Action for the development of exports in Africa.¹¹

11. There are no independent bodies with a formal mandate to carry out public reviews and assessments of the Government's trade policy.

12. Trade policy implementation is mainly by the Ministry of Tourism, Trade and Industry, which is responsible for regulating imports, promoting exports, protecting consumer interests and ensuring fair trade. This Ministry is also in charge of implementing the industrial protection policy, which includes the administration of imports of industrial raw materials and capital goods, and regional initiatives, such as COMESA. The responsibilities of the Ministry of Finance and Planning include, *inter alia*, the collection of taxes and import duties through the Kenya Revenue Authority (the Government's collection agency), the administration of the Export Promotion Programmes Office (EPPO), which provides tax rebates for exported goods, and the coordination of ACP/EU relations and fiscal and monetary policies.

(iv) Trade laws and regulations

13. The main legislation relating to international trade is the 1984 Customs and Excise Act, revised in 1996 (Table II.1). The Act regulates import and export procedures; computation of duties; exemption and remission of duties; refund, rebate and duty drawback; and customs valuations procedures. It also contains ten schedules, which provide details on, *inter alia*, import duties, suspended duties, goods exempted from duties, value of imported goods, and prohibited and restricted goods. The schedules related to import and suspended duties and the value of goods were modified recently by the Finance Act of 1999. The Imports, Exports and Essential Supplies Act, which stipulates import and export licensing procedures, is still in place; however, according to the authorities, in practice these procedures are no longer followed.¹² The Foreign Investment Protection Act (1981), the Investment Promotion Center Act (1992), and the Trade Licensing Act of 1967, amended in 1990, contain provisions for foreign investment and licensing of business activities.

Table II.1
Main trade-related laws in Kenya

Law	Area
The Customs and Excise Act, 1996	Import and export procedures and other regulations; import and export duties; and excise duties
The Finance Act, 1999	Customs valuation; and amendments to the tariff
Imports, Exports and Essential Supplies Act	Licensing of imports and exports
The Foreign Investment Protection Act, 1981; and Investment Promotion Centre Act, 1992	Foreign investment
The Trade Licensing Act, 1990	Licensing of businesses
The Industrial Property Act, 1991; The Copyright Act, 1991; The Trade Marks Act, 1982; The Seeds and Plant Varieties Act, 1991	Intellectual property rights
The Restrictive Trade Practices, Monopolies and Price Control Act, 1990	Competition

Table II.1 (cont'd)

¹⁰ GATT (1994).

¹¹ Government of Kenya (1996a).

¹² Information provided by the Kenyan authorities.

Law	Area
Export Processing Zone Act, 1991	Export promotion
The Local Government Act, 1998; The Sale of Goods Act, 1981; The Government Contracts Act, 1979; The Architects and Quantity Surveyors Act, 1978	Government procurement
The Standards Act, 1981	Standards
The Pest Control Products Act, 1985; The Meat Control Act, 1977; The Fertilizers and Animal Foodstuffs Act, 1977; The Animal Disease Act; The Plant Protection Act	Sanitary and phytosanitary measures

Source: WTO Secretariat, based on information provided by the Kenyan Authorities.

14. The Kenyan authorities are updating certain trade-related laws that have become outdated, but the legislative framework has not yet been completely revised. Laws governing foreign trade are sometimes inconsistent with current trade policies and practices. Intellectual property laws have undergone some amendments to conform with the TRIPS Agreement; a new Industrial Property Bill is being discussed in Parliament. An Investment Code is also envisaged (see below). The authorities are also revising the government procurement laws and intend to draft legislation and regulations on contingency measures. The rationalization of trade legislation will enhance the predictability of Kenya's trade regime and provide greater certainty for business.

15. The legal environment within which businesses operate in Kenya appears to lack efficiency. This is a consequence, in particular, of the incomplete collection and publication of legal materials, and the inadequacy and slow dissemination of laws. Another problem is the wide discretionary power that remains in the administration of laws and regulations, such as those on tax and customs duties. The slow and cumbersome adjudication process of the Kenyan courts and the absence of adequate specialized commercial courts to adjudicate business disputes expeditiously also add to the difficulties of the private sector.¹³ The authorities are taking steps to ensure full compliance with the rule of law. In addition, since August 1997 Kenya has taken measures to address governance issues and eliminate distortions resulting from relatively weak institutions. Measures undertaken include establishing accountability and transparency regarding financial infractions; safeguarding the independence of the Kenya Revenue Authority; establishing an independent Kenya Anti-Corruption Authority; and addressing outstanding issues in government procurement.

(2) TRADE AGREEMENTS AND ARRANGEMENTS

(i) World Trade Organization

16. Kenya signed the Final Act of the Uruguay Round and the Marrakesh Agreement establishing the World Trade Organization on 15 April 1994. Accession to the WTO was ratified on 23 December 1994 and Kenya became a member of the WTO on 1 January 1995. Under the Single Undertaking, all WTO Multilateral Agreements became binding on Kenya. However, none of the WTO Agreements have been incorporated into Kenyan law.¹⁴ Private individuals cannot invoke provisions of the WTO Agreements before national courts, but the Agreements are binding for Kenya vis-à-vis other WTO Members. Kenya is not a signatory of any of the plurilateral agreements.

¹³ Government of Kenya (1997a).

¹⁴ In Kenya, international treaties and agreements have to be adopted through a domestic law; in case of conflict, the national law prevails over the international agreement.

17. As a developing country, Kenya benefits from a transition period to implement a number of commitments under various WTO Agreements; Kenya notified the delayed application of the Agreements on Customs Valuation and Import Licensing Procedures.¹⁵

18. Table II.2 shows Kenya's status in relation to notification requirements under the WTO Agreements as at October 1999.

Table II.2
Status of selected notification requirements to the WTO, 1999

WTO Agreement	Description of requirement	Periodicity	Document No. of most recent notification or number of notification
Agriculture (Art. 18.2)	Domestic support	Annual	G/AG/N/KEN/4, G/AG/N/KEN/5, 26 November 1997
Agriculture (Art. 10 and 18.2)	Export subsidies (outlays and quantities)	Annual	G/AG/N/KEN/1, G/AG/N/KEN/2, G/AG/N/ KEN/3 26 November 1997
Agriculture (Art. 18.3)	Domestic support (modification of legislation)	Before new measure is adopted or 30 days after adoption	None
Textiles and Clothing (Art. 3.1)	Outstanding measures as of 1 January 1995	Once	G/TMB/N/109, 20 June 1995
Textiles and Clothing (Art. 2.17)	Administrative arrangements	Ad hoc	
Textiles and Clothing (Art. 6.9)	Bilateral agreements	Ad hoc	
Textiles and Clothing (Art. 6.1)	Transitional safeguards	Once	G/TMB/N/110, 20 June 1995
Subsidies (Art. 32)	Laws and regulations	Once by March 1995, then changes	G/SCM/N/1/KEN/1, 22 May 1996
Subsidies (Art. 25)	Specific subsidies granted	Annual	None
Subsidies (Art. 25.11)	Countervailing duty actions taken	Every six months when measure is taken	None
Anti-dumping (Art. 18)	Laws and regulations	Once by March 1995, then changes	G/ADP/N/1/KEN/1, 22 May 1996
Anti-dumping (Art. 16.4)	Anti-dumping actions taken	Every six months preliminary or final anti-dumping actions	None
Safeguards (Art. 12)	Laws and regulations	Once by March 1995, then changes	G/SG/N/1/KEN/1, 10 May 1996
Safeguards (Art. 12)	Investigations and actions taken	Ad hoc	
Technical Barriers to Trade (Art. 2.9)	Technical regulations	Ad hoc	
Technical Barriers to Trade	Acceptance of the WTO TBT Code of Good Practice	Once	G/TBT/CS/N/24, 29 January 1996
Technical Barriers to Trade (Art. 15.2)	Laws and regulations	Once, promptly after the WTO Agreement enters into force and changes thereafter	None

Table II.2 (cont'd)

¹⁵ WTO document WT/LET/1/303, 2 March 1995.

WTO Agreement	Description of requirement	Periodicity	Document No. of most recent notification or number of notification
Sanitary and Phytosanitary Measures	Measures taken	Ad hoc	G/SPS/NKEN/1, 8 January 1999 and G/SPS/NKEN/1/Corr.1, 20 April 1999
Preshipment Inspection (Art. 5)	Laws and regulations which put the Agreement into force	Once, then changes only	None
Import Licensing Procedures (Art. 7.3)	Questionnaire; rules and information concerning procedures for the submission of applications	Annual for questionnaire; rules and information once, then changes	G/LIC/N/3/KEN/1, 4 December 1997
Import Licensing Procedures (Art.1.4(a) and 8.2 (b))	Laws and regulations relevant to import licensing		
Rules of Origin	Preferential and non-preferential rules of origin	Non-preferential in April 1995; preferential as soon as entry into force	G/RO/N/9, 19 April 1996
Customs Valuation	Delay in application of the WTO Agreement on Customs Valuation	Once	WT/LET/1/REV.1, 2 March 1995
Trade-related Investment Measures	Notifications under Article 6.2 of the TRIMs Agreement of publications in which TRIMs may be found	Ad hoc	None
GATT Council for Trade in Goods, G/L/59	Complete notifications on non-tariff measures	Every two years, beginning January 1996	None
GATT (Art. XXVIII)	Members reserved their right under the provisions of Art XXVIII:5 of the GATT to modify their Schedules during the three-year period commencing on 1 January 1997	Triennial	None
State trading enterprises	Complete notification of state trading enterprises	Due on 30 June 1995	None
GATS (Art. 3.3)	Significant alterations in the rules governing scheduled sectors including new rules	Ad hoc	None
GATS (Art. 3.4 and/or 4.2)	Enquiry point	Once	S/ENQ/43, 23 June 1997
TRIPS (Art. 63.2)	Laws and regulations	Once, then changes	IP/N/1/KEN/1, 5 June 1996

Source: WTO documents.

19. Kenya grants MFN treatment to all its trading partners.

20. The Kenyan authorities have expressed dissatisfaction regarding the result of the Uruguay Round, specifically in the areas of agriculture and textiles, and have also indicated technical barriers to trade as one of the fields requiring particular attention within the multilateral trading system. The need for enhanced technical assistance has also been raised, mainly in the area of intellectual property.

21. In preparation for the 1999 Ministerial Conference, Kenya has raised concerns about the inclusion on the agenda of the WTO of issues that are considered not to be trade-related, such as labour standards, environment, and investment. The Kenyan authorities consider that these issues would need further study before they are negotiated within the WTO. In contrast, Kenya would recommend, *inter alia*, the complete abolition of export subsidies affecting agricultural goods; further

reduction in tariffs on products of export interest to developing countries; and the enhancement of technical assistance.¹⁶ In addition, on behalf of the African Group, Kenya presented proposals regarding the interaction between trade and competition policy; technical assistance; the customs valuation agreement; and the TRIPS agreement.¹⁷

22. Kenya has never been involved in dispute cases under the WTO dispute settlement mechanism. Neither has Kenya been involved in dispute settlement outside the WTO.

(ii) Regional agreements

23. At the regional level, Kenya's economic cooperation arrangements currently revolve around the African region: the Common Market for Eastern and Southern Africa (COMESA), the East African Co-operation (EAC), the Organization of African Unity (OAU), and the Inter Governmental Authority on Development (IGAD).¹⁸

Common Market for Eastern and Southern Africa (COMESA)

24. Kenya is a signatory of the COMESA Treaty. The current members are Angola, Burundi, Comoros Islands, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, Somalia, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.¹⁹ The COMESA Treaty superseded the Preferential Trade Area for Eastern and Southern African States (PTA).²⁰ The COMESA agenda is to deepen and broaden the integration process among member States through: the adoption of more comprehensive trade liberalization measures, such as the complete elimination of tariff and non-tariff barriers to trade and the adoption of a Common External Tariff (CET); the free movement of capital, labour, goods and right of establishment within COMESA; the adoption of a common set of standards and technical regulations, quality control procedures, certification schemes, and sanitary and phytosanitary regulations; the standardization of taxation rates (including value-added tax and excise duties), and conditions regarding industrial cooperation, particularly on company laws, intellectual property rights and investment laws; and the establishment of a Monetary Union.²¹

25. COMESA members agreed to create a free-trade area (FTA) by 31 October 2000.²² All members were supposed to have reduced tariffs by 80% as at October 1996. However, the status of implementation of the tariff reduction programme was different among members.²³ COMESA has

¹⁶ WTO document WT/GC/W/233, 5 July 1999.

¹⁷ WTO documents WT/GC/W/300, 6 August 1999; WT/GC/W/299, 6 August 1999; WT/GC/W/301, 6 August 1999; and WT/GC/W/302, 6 August 1999.

¹⁸ Government of Kenya (1996a).

¹⁹ On 27 July 1999, Tanzania announced its intention to withdraw from COMESA.

²⁰ WTO Document WT/COMTD/N/3, 29 June 1995.

²¹ *Objective of COMESA*. Available at: <http://www.comesa.int/backgrnd>. [25 May 1999].

²² *Kyodo News International, Inc.*, 31 May 1999; and *Financial Times*, 27 May 1999.

²³ As at June 1999, three countries (Kenya, Madagascar and Egypt) had reduced tariffs by 90%. Comoros, Eritrea, Mauritius, Sudan, Tanzania, Uganda, and Zimbabwe had reduced tariffs by 80%; Malawi by 70%; and Burundi, Rwanda and Zambia by 60%. Namibia and Swaziland were given an extension until October 1999 to fully implement COMESA's tariff. The Democratic Republic of Congo reduced its tariffs by 60% in 1998, and had to further reduce them in 1999 (to reach an 80% reduction) with a view to full liberalization by the year 2000. The Seychelles was allowed to complete its customs reform programme in 1999 and thereafter reduce tariffs by 90%. Angola, Djibouti and Ethiopia did not reduce any tariffs.

also agreed to implement a Common External Tariff by the year 2004; the CET will be 0%, 5%, 15% and 30% on capital goods, raw materials, intermediate goods, and final goods, respectively.²⁴

26. In order to facilitate trade within the region, COMESA members have agreed to implement the Automated System for Customs Data and Management (ASYCUDA) and EUROTRACE.²⁵ The objective of ASYCUDA/EUROTRACE is to assist the business community to clear goods faster from customs areas, make available up-to-date and accurate international trade statistics, modernize customs administrations and, through improved efficiencies, increase revenues. Thirteen COMESA countries have already implemented the system, and eight members are in the process of doing so. Kenya, however, has not implemented this system.²⁶

27. COMESA rules of origin stipulate that goods must be wholly produced; or contain imported content of not more than 60% of the c.i.f. value of the total cost of materials used in production; or contain not less than 45% ex-factory value added; or contain not less than 25% value added if the final product is considered to be of particular importance to the economic development of member States. All goods eligible for preferential tariff treatment must be accompanied by a COMESA Certificate of Origin, duly completed, stamped and authenticated by the authorized signatories in the country of origin.²⁷

28. The Monetary Harmonisation Programme is to be implemented in four phases, from 1992 to 2025. The final phase should culminate in full monetary union, which implies the use of irrevocable fixed exchange rates, a single currency, or parallel currencies; full harmonization of economic, fiscal, and monetary policies of member States; full integration of the financial structure of member States; pooling of foreign resources; and the establishment of a common monetary authority.²⁸ During COMESA's Heads of State Summit, held in Nairobi in May 1999, it was decided to re-launch the monetary harmonization programme with the introduction of limited currency convertibility between and among member States with substantial cross-border trade. A coordinating body to be made up of experts from Central Banks and Ministries of Finance is to be formed to oversee implementation of policy measures to take the process of monetary harmonization to the level of monetary union.

29. The COMESA Heads of State have established several institutions to assist members in attaining their development objectives. These institutions are the Eastern and Southern African Trade and Development Bank (PTA Bank); the COMESA Clearing-House, the PTA Reinsurance Company and the COMESA Bankers' Association. Each of these institutions performs a specialized function to be carried out by the COMESA Secretariat in Lusaka (Zambia).²⁹ The PTA Bank provides trade and project financing to public and private investors domiciled in member States. At present, the Bank has 15 members including Kenya. The COMESA Clearing-House was brought into existence when the countries of the region had strict exchange controls regimes in place and foreign exchange was

²⁴ *The Free-trade area and Common Tariff Structure*. Available at: <http://www.comesa.int/finance> [25 May 1999].

²⁵ The ASYCUDA system is a computerized customs management system, which also covers foreign trade procedures. It handles manifests and customs declarations, accounting procedures, warehousing, and import and export licences. It also generates trade data. The EUROTRACE system is able to take the data generated by ASYCUDA and integrate it into a database for the production of external trade statistics (COMESA ASYCUDA- EUROTRACE Project. Available at: <http://www.comesa.int/trade> [26 May 1999]).

²⁶ *The Free-trade area and Common Tariff Structure*. Available at: <http://www.comesa.int/finance> [25 May 1999].

²⁷ *COMESA Rules of Origin*. Available at: <http://www.comesa.int/trade> [25 May 1999].

²⁸ *Monetary and Fiscal Co-operation in COMESA*. Available at: <http://www.comesa.int/finance> [26 May 1999].

²⁹ *The Association of Commercial Banks of the Common Market for Eastern and Southern Africa*. Available at: <http://www.comesa.int/finance> [25 May 1999].

scarce. The importance of the Clearing-House has diminished as most COMESA countries have liberalized their foreign exchange regimes.³⁰ The PTA Re-Insurance Company (ZEP-RE), established in 1990, has 17 signatories and aims at fostering/assisting the development of the insurance and reinsurance industry in the COMESA sub-region, and promoting the growth of national, sub-regional and regional underwriting and retention capacity.³¹

30. In addition, the COMESA Treaty provides for a Court of Justice. The Court's primary function is to uphold the rule of law in the operation of the Treaty by ensuring adherence to law in the interpretation and application of the Treaty. Its general jurisdiction is to adjudicate upon all matters that may be referred to it under the Treaty. The Court became operational in 1998.³² Kenya has never been involved in trade disputes under this framework.

Commission for East African Co-operation

31. The Agreement establishing the Permanent Tripartite Commission for East African Co-operation was signed by Kenya, Tanzania and Uganda, on 30 November 1993. The EAC Secretariat was established in March 1996 and has its headquarters in Arusha, Tanzania. The treaty establishing the EAC was expected to be signed by the end of 1999. The East African Co-operation objectives include harmonizing tariffs and customs regimes, free movement of people, and improving regional infrastructure by the year 2000.³³ A preferential tariff is intended to prevail within the EAC and a common external tariff (CET) is envisaged for 2004.

32. Since the cooperation agreement was signed, Kenya, Uganda and Tanzania have tried to harmonize their fiscal and monetary policies; they have signed a double taxation arrangement, which also provides for joint measures to prevent tax evasion. Other achievements include pre- and post-budget consultations between the finance ministers, synchronization of the budget day in the three countries, regular consultations between the central banks, the full convertibility of the three currencies, cooperation in capital and securities regulation, and the creation of common internal passports. In an attempt to promote trade and investment, the East African Business Council has been established, drawing members from national private-sector organizations in the region. Lawyers have also formed their own forum, the East African Law Society.³⁴

33. The three countries are undertaking joint projects in infrastructure, including a digital transmission system financed by the telecommunications authorities of the three countries, together with the European Investment Bank (EIB) and the East African Development Bank. A regional road network has also been planned.³⁵

34. In April 1998, a new draft treaty set out the steps to political federation, based on the report from a meeting held in November 1997. It will confer on the EAC recognition as a legal entity acting in the common interest of member States. Discussions on broadening the membership base, perhaps to include Rwanda, Burundi and, although less likely, the Democratic Republic of Congo, will also

³⁰ *The COMESA Clearing-house*. Available at: <http://www.comesa.int/finance> [26 May 1999].

³¹ *The PTA Re-Insurance Company (ZEP-RE)*. Available at: <http://www.comesa.int/finance> [25 May 1999].

³² *COMESA Court of Justice*. Available at: <http://www.comesa.int/finance> [26 May 1999].

³³ Dun & Bradstreet Information Services (1998).

³⁴ EIU (1998).

³⁵ EIU (1998).

continue, as will discussions among leaders about the relationship of the EAC with the existing COMESA and the Southern African Development Community (SADC).³⁶

Cross-Border Initiative (CBI)

35. Kenya has been participating in the CBI, which has been developed in close collaboration with the relevant regional integration organizations in the Eastern and Southern African sub-region under the sponsorship of the African Development Bank (ADB), the EU, the IMF, and the World Bank.³⁷ The main objective of the CBI is to assist these countries to speed implementation of the various economic cooperation and integration programmes and projects already agreed upon under various integration organizations, through the provision of financial and technical assistance.³⁸

The Organization of African Unity (OAU)

36. The OAU was founded in 1963 by 30 African nations to promote solidarity and higher living standards, and to defend the sovereignty of member States. Another 21 signatories have since joined, the last of which was South Africa, in 1994. Morocco left in 1985.³⁹ As an OAU member, Kenya signed in 1991, at Abuja (Nigeria), the African Economic Community Treaty (AEC) provided for by the 1980 Lagos Plan of Action. This Treaty, outlined six stages, including the removal of tariff and non-tariff barriers to trade and the establishment of a continent-wide customs union by 2004. A commitment was also made to the establishment of an African Common Market (ACM), with a central bank and single currency over a period of 34 years.⁴⁰

Inter-governmental Authority on Development (IGAD)

37. Formerly known as Inter-governmental Authority on Drought and Development (IGADD)⁴¹, the IGAD was established in January 1986 by seven East African countries: Djibouti, Ethiopia, Eritrea, Kenya, Somalia, Sudan and Uganda. Its initial aim was to combat drought and desertification. In March 1996, at a summit in Nairobi, IGAD adopted a new charter to revitalize and expand its mandate to include new priority areas of economic cooperation, conflict prevention, resolution and management and humanitarian affairs. IGAD gained official recognition from the Organization of African Unity as a regional economic organization in June 1997, and began to focus more on economic integration.⁴²

(iii) Bilateral agreements

38. Kenya has signed bilateral trade agreements with Argentina, Bangladesh, Bulgaria, China, Djibouti, Egypt, Ethiopia, Hungary, India, Iran, Lesotho, Nigeria, Pakistan, Poland, Romania, Rwanda, the Republic of Korea, Sudan, Swaziland, Tanzania, Thailand, Zambia and Zimbabwe. However some of these agreements are non-operational since they have never been ratified.⁴³ In

³⁶ EIU (1998).

³⁷ This initiative is now actively supported by 13 countries in the region, including Kenya.

³⁸ Government of Kenya (1996a); and *Cross-Border Initiative*. Available at: <http://www.comesa.int/trade> [26 May 1999].

³⁹ EIU (1998).

⁴⁰ EIU (1998).

⁴¹ In March 1996, at a summit in Nairobi, IGADD renamed itself the Inter-governmental Authority on Development (IGAD).

⁴² Kenya. Available at: <http://www.fco.gov.uk> [27 May 1999].

⁴³ Those with Bangladesh, Hungary, Romania, Swaziland, Tanzania, and Zimbabwe.

addition, agreements with the former Czech and Slovak Republic, the former Yugoslavia, and the former USSR have expired.

(iv) Other

39. Kenya is a signatory to the Lomé Convention, which affords a group of 70 African, Caribbean and Pacific (ACP) countries preferential trade and aid links with the EU. The fourth and current convention (Lomé IV), signed in 1989, which superseded agreements signed in Lomé in 1975, 1979 and 1984, is to expire in 2000.⁴⁴ Negotiations between the EU and the ACP countries on renewing the convention started on September 1998 and are still under way.

40. One of the instruments of ACP-EU cooperation concerns non-reciprocal trade preferences granted by the EU to imports of industrial and processed agricultural products originating in the ACP countries, and market access under "commodity protocols" (bananas, rum, beef and veal, and sugar).⁴⁵ The convention offers two other schemes: (a) the STABEX set up to cover losses of earnings caused by a fall in prices or a decline in production of the main ACP agricultural exports (a total of 49 products are on the STABEX List); and (b) SYSMIN, a special financing facility for countries reliant on the export of minerals.

41. Kenya has benefited directly under the National and Regional Indicative Programme in terms of financial assistance, as well as from preferential access to the EU market for some of its exports. Since the bulk of Kenya's exports receipts come from commodities such as tea and coffee, it has been a major beneficiary of the Stabilization of Export Earning Scheme (STABEX) Fund.⁴⁶

42. Kenya also benefits from preferential tariff treatment under the Generalized System of Preferences (GSP). Kenyan products receiving preferential treatment under GSP include tea, coffee, pyrethrum, and horticultural products, mainly exported to the United States, Japan, Canada, Switzerland, Norway, and the European Union.

(3) FOREIGN INVESTMENT REGIME

(i) Regulatory framework

43. Private foreign investment in Kenya is governed by the Foreign Investment Protection Act (FIPA) of 1981, the Investment Promotion Centre Act of 1986, amended in 1992, and the Trade Licensing Act of 1967, which was revised in 1990. The three acts are being consolidated into one legal document, an Investment Code, to clearly regulate the legal rights and obligations for both foreign and local investors and to provide legal guarantees for all investors. Through the Investment Code the Government envisages streamlining investment approval procedures and harmonizing the incentive package.⁴⁷

44. Under the FIPA, foreign investors may receive an investment approval certificate from the Ministry of Finance and Planning provided their proposed investment promotes economic development, or is "likely to benefit" the Kenyan economy.⁴⁸ All foreign investors are entitled to

⁴⁴ The European Union's waiver to apply non-reciprocal trade preferences to imports from the ACP countries granted by the WTO expires on 29 February 2000 (WTO document WT/L/186).

⁴⁵ Titles I and II of Part III of the Fourth ACP-EEC Convention, OJ L229, Vol. 34 of 17 August 1991, as amended at Mauritius on 4 November 1995 (EU TPR forthcoming in 2000).

⁴⁶ *Kenya-EU cooperation*. Available at: <http://www.oneworld.org/euforic/courier> [7 June 1999].

⁴⁷ Government of Kenya (1996a); and Government of Kenya (1997a).

⁴⁸ The Foreign Investment Protection Act, Art 3(1), Revised Edition 1981.

repatriate both capital and profits, and are protected under the Act from compulsory acquisition of their enterprises.⁴⁹ Moreover, following the repeal of the Foreign Exchange Act, this certificate is no longer necessary for repatriation of profit. The Kenyan Constitution also provides a guarantee against expropriation of private property. Expropriation may only occur either for security reason or public interest, whereupon fair and prompt compensation is guaranteed.⁵⁰

45. The agency in charge of investment in Kenya is the Investment Promotion Centre (IPC), established in 1986 to promote domestic and foreign investment, provide advice and assistance to foreign investors, and advise the Government on policies and procedures to encourage both domestic and foreign investment. The Centre is run jointly by the business community and the Government and is publicly funded; services offered by IPC carry no cost. The IPC has become a one-stop window for investment procedures through which it facilitates the acquisition of necessary approvals and licences; applications by foreign investors are processed within one month.⁵¹

46. The IPC also identifies the types of licences required for the investment and facilitates their acquisition. A multiplicity of licences are required for new investments depending on the sector, but IPC approval (which is granted with the consent of the relevant Ministries/Departments) confers on the investor the right to undertake the new business and acquire the relevant licences within a period of up to one year. The Government recognizes the need to harmonize licensing requirements, which had proven a constraint to investment.⁵²

47. Kenya grants national treatment to foreign investors. In general, most business activities are open to foreign investors, except those related to matters of security or health. In this case, approval of such projects requires careful examination by the relevant ministries. Kenyan co-ownership is required in the telecommunication and insurance services industries (Chapter IV(5)).⁵³ Foreign ownership of agricultural land and small-scale retail operations continues to be prohibited.⁵⁴ In addition, according to the Trade Licensing Act, foreigners are not allowed to conduct business: in any places outside a "general business area"; or in any specific goods unless the licences specifically authorize them to do so.⁵⁵ Licensing fees vary from KSh 110 to 6,600, depending on the type of business and on its location (rural areas, urban areas, or general business areas, with fees increasing accordingly).

48. A company incorporated outside Kenya may carry out business in Kenya through a branch. In order to establish a branch, the following documents and details must be submitted to the Registrar of Companies: (a) a certified copy of the company's own Memorandum and Articles of Association or equivalent constitution documents; (b) a list containing the names, addresses, nationalities and occupations of its directors and company secretary; (c) a statement of existing mortgages and charges created by the company in Kenya and, if any, the names and addresses of one or more Kenyan

⁴⁹ Investors can repatriate: after tax profits, including retained profits that have not been capitalized; the proceeds of the investment after payment of the relevant taxes; and principal and interest associated with any loan (IPC, 1997).

⁵⁰ IPC (1997).

⁵¹ Dun & Bradstreet (1998).

⁵² Government of Kenya (1997a).

⁵³ WTO documents GATS/SC/47/Suppl.1, 26 February 1998 and S/C/W/107, 12 May 1999.

⁵⁴ GATT (1994).

⁵⁵ The list of specified goods comprises 72 items including staple foods, cloth, charcoal, basic tools, shoes, firewood, hides and skins, handicrafts, and spare parts for motor vehicles and bicycles (The Trade Licensing Act, Revised Edition 1990).

residents who are authorized to accept legal notices on the company's behalf; and (d) the address of the company's registered or principal office.⁵⁶

49. As stated in a Sessional Paper prepared by the Government, bureaucracy and corruption are still considered a major constraint to investment in Kenya. Long and slow bureaucratic procedures, duplication of licensing requirements, and "lukewarm" attitudes of public servants to processing applications for approvals and licences required by business can be costly and hamper investment. In order to cut delays, businessmen occasionally offer inducements to speed up the process; this has the effect of increasing the cost of setting up business in Kenya. The establishment of an Investment Promotion Centre (IPC) has not yet succeeded in reducing the amount of time required in pre-operational activities.⁵⁷ As noted previously, in July 1997 the Government created the Kenya Anti-Corruption Authority (KACA) with a view to preventing abuse involving the use of public funds.

(ii) Investment incentives and promotion

50. In order to attract FDI, Kenya offers tax incentives to locals and foreigners in the form of tax holidays, accelerated depreciation, investment allowance, lower duties on intermediate capital goods, and gradual reduction of corporate rates.⁵⁸ In addition, large-scale private investment projects with expenditure on capital goods in excess of US\$5 million within a two-year period, and with a potential to generate net economic benefits for the country, can recover the duties paid on imported capital goods for the project against income liability.⁵⁹ However, according to the Government, dwindling domestic markets, increased costs of capital and production, and the existence of widespread controls and bureaucratic red-tape minimizes the effectiveness of these incentives.⁶⁰ Various programmes are in place for enterprises producing specifically for export: the Export Processing Zones (EPZ) and Manufacturing Under Bond (MUB) (Chapter III).⁶¹ The IPC also processes applications for export-oriented projects under the MUB programme. Under the new Investment Code the incentives given under the EPZ and the MUB are to be harmonized.⁶² Kenya has not notified any trade-related investment measures to the WTO.

51. Kenya has a double taxation agreement with Zambia; discussions on proposed similar agreements with other countries are yet to be concluded. In addition, as part of the establishment of the East African Co-operation (EAC), Kenya, Uganda and Tanzania have signed a tripartite taxation agreement.⁶³

52. Kenya has signed bilateral investment treaties for the promotion and protection of foreign direct investment with Germany, the Netherlands, the United Kingdom, and the United States (Overseas Private Investment Corporation and Export-Import Bank programmes only).⁶⁴ Kenya is a member of the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for the Settlement of Investment Disputes (ICSID).⁶⁵

⁵⁶ *Investment Profile Kenya*. Available at: http://www.mbendi.co.za/ernsty/kenya/inv_menu.htm [26 May 1999].

⁵⁷ Government of Kenya (1997a).

⁵⁸ No attempt has been made to estimate the revenue forgone due to these investment schemes.

⁵⁹ IPC (1997).

⁶⁰ Government of Kenya (1996a).

⁶¹ *Guide to Investing in Kenya*. Available at: <http://www.kenyaweb.com/business/ipc> [25 May 1999].

⁶² Government of Kenya (1996a).

⁶³ Dun & Bradstreet (1998).

⁶⁴ UNCTAD (1997); and Dun & Bradstreet (1998).

⁶⁵ *Guide to Investing in Kenya*. Available at: <http://www.kenyaweb.com/business/ipc> [25 May 1999].