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China in Kenya: Addressing Counterfeit Goods and Construction Sector Imbalances

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A 'China–Africa Toolkit' has been developed to serve African policymakers as an information database, a source of capacity building and a guide to policy formulation

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ABSTRACT

China has become a key player in trade, investment and development co-operation in Kenya. Although mainly in the construction and manufacturing sectors, Chinese investments in Kenya have attracted praise and condemnation in equal proportion from various quarters. In particular, their efficiency in completing projects contrasts with the low quality of Chinese products sold in Kenya and unfair market practices adopted by Chinese firms. This paper seeks to assess the collateral effects of Chinese goods and construction firms on Kenyan consumers and businesses. Although China has a unique model for engaging Africa, China–Kenya trade is heavily balanced in China's favour: Kenya exports unfinished products to China and imports value-added products from China, which include significant counterfeit products. There is also a discriminatory tendency to award construction tenders to Chinese firms. Similar effects are reported across other East African Community (EAC) member states. The Kenyan government enacted an Anti-Counterfeit Act in 2008 and National Construction Authority Act in 2010 to address counterfeiting and construction sector market failures respectively. However, these new regulations need to be perfected in Kenya and better co-ordination is needed among EAC countries, as they work towards enacting similar laws in order to address effectively these issues.

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ABBREVIATIONS AND ACRONYMS

AERC	African Economic Research Consortium
BRICS	Brazil, Russia, India, China and South Africa
EAC	East African Community
ECDPM	European Centre for Development Policy Management
EU 27	European Union 27 member states
FDI	foreign direct investment
IT	information technology
KAM	Kenya Association of Manufacturers
KES	Kenyan shillings
LAPSSET	Lamu Port and Southern Sudan–Ethiopia Transport Corridor
MDGs	Millennium Development Goals
OECD	Organisation for Economic Co-operation and Development

INTRODUCTION

In recent years, China has increased its involvement in Africa, pursuing market opportunities and raw materials for its firms. China has made significant loans to countries such as Ethiopia and has extensive oil interests in Southern Sudan, while Chinese contractors are gaining a dominant position in infrastructural development projects across East Africa. Kenya has not been left behind, despite lacking the raw materials that attract Chinese companies elsewhere in Africa and facing many challenges. These include food insecurity, due to droughts and famine; disasters, such as floods, landslides and fires;[1] high poverty levels; poor sanitation and inadequate medical services; low education levels and high corruption levels. However, for China, Kenya is geographically well placed to become a business hub for East Africa and a gateway to Central African countries.

In 1963, when China established diplomatic relations with Kenya, trade between the two countries was in Kenya's favour at KES[2] 9.2 million.[3] Since then, a number of Chinese companies have invested in various projects,[4] and by 2010 China had become the leading source of Kenya's foreign direct investment (FDI), investing KES 2.5 billion into the country's economy.[5] Currently Chinese firms have a major stake in Kenya's local infrastructure sector, through projects such as the expansion of the Jomo Kenyatta International Airport, the construction of the Nairobi–Thika superhighway, the upcoming construction of a second port (Lamu Port) and the Southern Sudan–Ethiopia Transport Corridor (LAPSSET) project (an ambitious plan to construct a port, roads, railway and pipeline connecting the corridor), the construction of vehicle assembly plants and oil exploration. Other potential areas of co-operation are manufacturing (whereby Chinese firms set up companies in Kenya) and tourism targeting Chinese travellers. Chinese firms have also invested in Kenya's pharmaceutical (eg Huawi), technological (eg ZTE Technologies) and media sectors. China Central Telecoms has signed a telecommunications agreement with Kenya Broadcasting Corporation, and recently a Chinese firm won a digital signal tender.[6]

Although the two countries have a good mutual relationship, Kenyans both admire and criticise Chinese firms. They are admired for their efficiency and speed (compared to local construction firms) and for how they have helped turn around the country's depleted road network. However, they have drawn criticism from local and other foreign contractors over dubious tender practices[7] and counterfeit products from China, while communities are concerned about the negative environmental effects of nearby project sites. Firms often choose to use Chinese labour rather than indigenous workers and follow unconventional labour practices,[8] which results in friction between Chinese and local workers. Local companies also face stiff competition from Chinese products' increased penetration in the Kenyan market and a reduced market share.

Given these varying perceptions of China in Kenya, it is important to analyse the effectiveness of a broader partnership with Beijing in order to better understand its implications for local businesses, consumers and communities. In particular, what the collateral effects are of Chinese goods and construction firms on their Kenyan counterparts and how effective the measures are by Nairobi and the East African Community (EAC) to tackle the negative effects.[9]

Policy frameworks underlying China–Kenya relations

China and Kenya relations can be divided into three phases: 1963–1977, the immediate post-independence period under Kenya's first President Jomo Kenyatta; 1978–2002, President Daniel Arap Moi's regime period, or pre-reform Kenya; and 2003–present, democratic Kenya under President Mwai Kibaki. In the first period, bad blood characterised relations between China and Kenya, with accusations and counter accusations of undermining sovereignty: Nairobi accused China of plotting to overthrow the Kenyan government and expelled the Chinese Third Secretary, while China accused Kenya of vilifying Beijing. In 1966 demonstrations took place outside Kenya's embassy in Beijing, which led to Kenya recalling its ambassador to China, and the youth wing of the then ruling party, Kenya African National Union staging a counter-demonstration outside the Chinese embassy in Nairobi. Both countries expelled the other's chargé d'affaires in 1967.

During the second period (1978–2002), the two governments of former President Moi and Prime Minister Zhao Ziyang started to rebuild relations. High-level state visits led to the conclusion of two economic and technical co-operation agreements, which had been under discussions since 1977 and covered a number of projects. Exchange of goods between the two governments' state agencies began and, from the beginning of 1990, Kenya's imports from China steadily picked up. In 1978, agreements on Economic and Technological Co-operation and on Trade were signed, followed by an agreement on Promotion and Protection of Investments in 2001.

In the third period, (2003–present), a reform coalition took over Kenya's leadership and President Kibaki embraced the Chinese partnership approach. Nairobi and Beijing signed agreements that attracted huge Chinese investments in Kenya, increased Chinese imports and contracted Chinese construction companies to develop projects in Kenya. Over the past decade, China and Kenya have signed many bilateral agreements covering economic, technological, energy, tourism, health, aviation, media, archaeology and education.[10] For example, in April 2011 the two governments signed 10 agreements, including a concessional loan to finance a proposed Kenyatta University Teaching and Referral hospital; solar energy generation; a malaria treatment project; hydropower station construction and upgrading; educational exchange and co-operation; a Memorandum of Understanding between China State Administration of Radio, Film and Television and Kenya's Ministry of Information and Communication; and a co-operation agreement between China Central Telecoms and Kenya Broadcasting Corporation.[11]

China has adopted a unique model for engaging with Kenya. Unlike traditional partners, whose involvement in Africa is designed to work towards the objectives of the Millennium Development Goals (MDGs), China promotes South–South co-operation in the areas shown in Table 1, based on a mutually beneficial relationship, such as technical skills exchange.

Table 1: Overview of new and traditional partners' involvement in Africa

	Emerging economies	Traditional partners
Sector	Health, agriculture, education, production capacities, peace and security and infrastructure	MDGs, trade liberalisation, promotion of democracy and human rights and fragile states
Modalities	Interest in flexible procedures, cost efficiency and speedy project delivery timeframe	Importance of Paris/Accra agenda, greater attention to capacity building, governance, transparency, involvement of no-state actors and accountability
Channels	Bilateral relations; aid is almost exclusively disbursed directly to recipient governments	Regional, pan-African and multilateral endeavours are also prominent features of their approach

Source: Rampa F & S Bilal, *Emerging economies in Africa and the development effectiveness debate*, ECDPM, DP107, March 2011, http://www.ecdpm.org/Web_ECDPM/Web/Content/Download.nsf/0/1806201EBEF1B3E9C125785C00316E14/$FILE/11-107%20final.pdf

China in Kenya: Trade, investments and development co-operation

Table 1 and Figures 1, 2 and 3 show Kenya's trade figures with the Brazil, Russia, India, China and South Africa (BRICS) countries, the US, Japan and the EU during the period 2001–2010. The EU remains Kenya's largest trading partner. In the past decade, exports from the EU, China and India to Kenya have steadily increased, except for in 2009 when trade volumes declined due to the 2008 financial crisis. Traditional partners such as the US and Japan have moderate trade volumes with Kenya, while Russia and Brazil are the least significant trading partners.

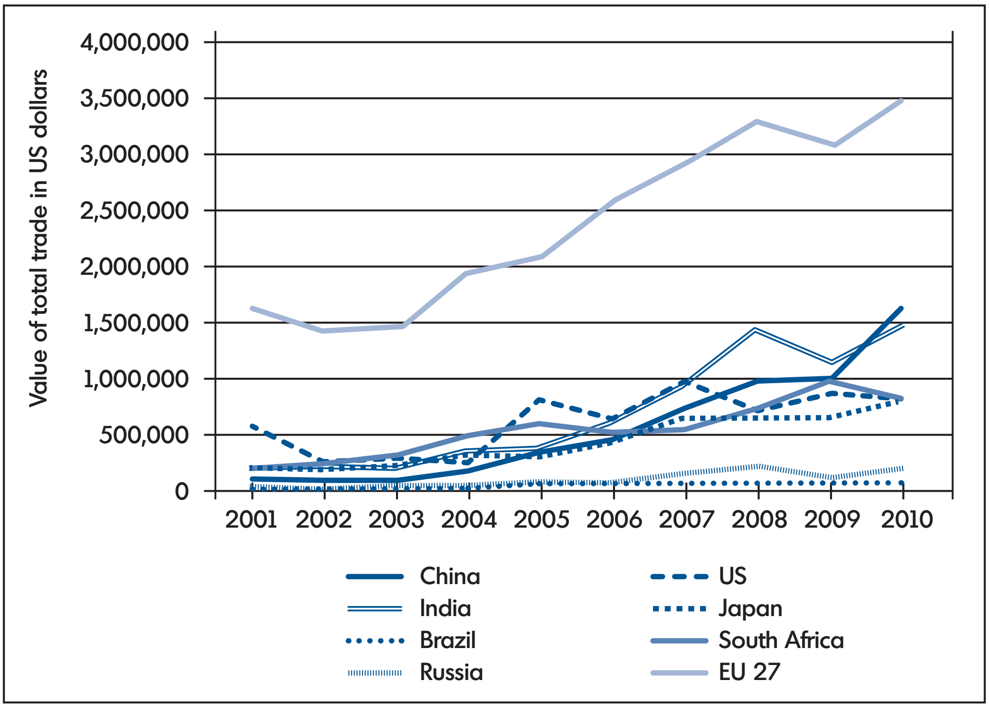
Despite declining marginally in 2009, China's trade has increased steadily. This steady growth has translated into a one-sided trade pattern in China's favour and an increasing trade imbalance that reached a high in 2010. The reason for the higher increase compared to other countries is that Kenya exports unfinished goods[12] to China, whereas Chinese imports[13] mainly finished manufactured goods into Kenya.[14] Recognising this widening trade imbalance, the two governments recently agreed to work towards bridging the gap.[15] Some effective short to long-term measures could include EAC countries enacting legislation that ensures value is added to locally produced commodities before exporting, similar to the law in Uganda that requires any extracted oil to be processed before exporting.

Table 2: Value of Kenya's trade with BRICS, US, Japan and EU, 2001–2010 ($ thousand)

Country/Year		2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
China	Imports	94,875	74,956	86,513	163,335	304,058	412,441	678,736	932,203	965,179	1,579,659
	Exports	3,033	3,684	7,621	10,558	16,957	21,554	21,859	29,432	32,180	32,995
	Trade balance	-91,842	-71,272	-78,892	-152,777	-287,101	-390,887	-656,877	-902,771	-932,999	-1,546,664
India	Imports	170,349	166,580	175,360	262,623	326,044	524,285	844,550	1,309,547	1,078,089	1,354,587
	Exports	29,108	34,503	35,635	51,063	53,108	52,218	86,725	98,193	66,479	111,239
	Trade balance	-141,241	-132,077	-139,725	-211,560	-272,936	-472,067	-757,825	-1,211,354	-1,011,610	-1,243,348
Brazil	Imports	14,026	13,690	12,077	15,032	37,396	42,762	64,577	67,831	65,194	62,958
	Exports	228	89	333	360	734	501	2,592	2,175	1,051	334
	Trade balance	-13,798	-13,601	-11,744	-14,672	-36,662	-42,261	-61,985	-65,656	-64,143	-62,624
Russia	Imports	16,165	6,610	21,822	30,575	39,516	41,649	97,468	166,207	63,292	126,663
	Exports	700	1,823	11,215	13,035	18,029	21,927	28,575	49,514	46,787	59,330
	Trade balance	-15,465	-4,787	-10,607	-17,540	-21,487	-19,722	-68,893	-116,693	-16,505	-67,333
US	Imports	526,640	211,104	245,550	197,468	563,057	343,314	661,605	402,263	649,103	516,626
	Exports	40,388	19,691	40,891	48,231	228,094	291,277	285,763	299,605	226,081	290,518
	Trade balance	-486,252	-191,413	-204,659	-149,237	-334,963	-52,037	-375,842	-102,658	-423,022	-226,108
Japan	Imports	197,219	190,862	209,323	278,870	305,371	408,086	611,196	649,334	632,703	763,522
	Exports	16,827	8,951	18,178	21,222	24,962	17,479	19,343	33,948	28,829	26,755
	Trade balance	-180,392	-181,911	-191,145	-257,648	-280,409	-390,607	-591,853	-615,386	-603,874	-736,767
South Africa	Imports	251,152	230,472	296,329	446,183	564,570	470,888	525,304	678,170	913,785	785,850
	Exports	4,922	8,818	16,129	21,036	28,363	33,495	34,866	52,887	46,317	32,000
	Trade balance	-246,230	-221,654	-280,200	-425,147	-536,207	-437,393	-490,438	-625,283	-867,468	-753,850
EU 27	Imports	1,081,847	1,027,058	736,743	1,170,954	1,229,172	1,638,137	1,812,339	1,960,953	1,887,504	2,181,454
	Exports	557,686	408,594	720,065	752,002	838,515	930,738	1,084,852	1,299,906	1,183,487	1,278,617
	Trade balance	-524,161	-618,464	-16,678	-418,952	-390,657	-707,399	-727,487	-661,047	-704,017	-902,837

Source: International Trade Centre, http://www.trademap.org/Bilateral_TS.aspx

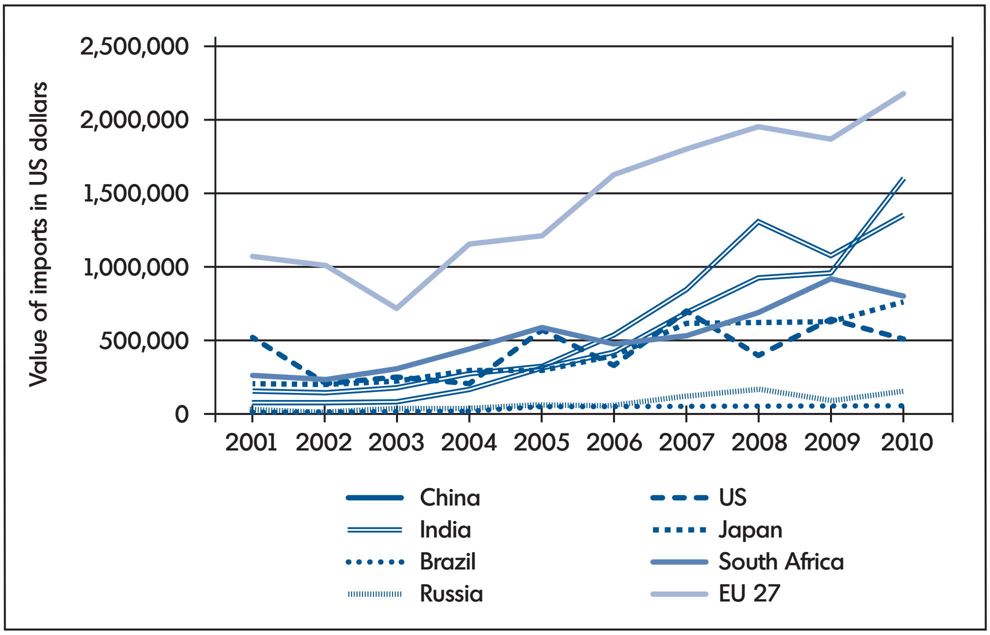
Figure 1: Total Kenya trade with BRICS, US, Japan and EU, 2001–2010 ($)



Note: Brazil, Russia, India, China and South Africa are presented independently.

Source: International Trade Centre, http://www.trademap.org/Bilateral_TS.aspx

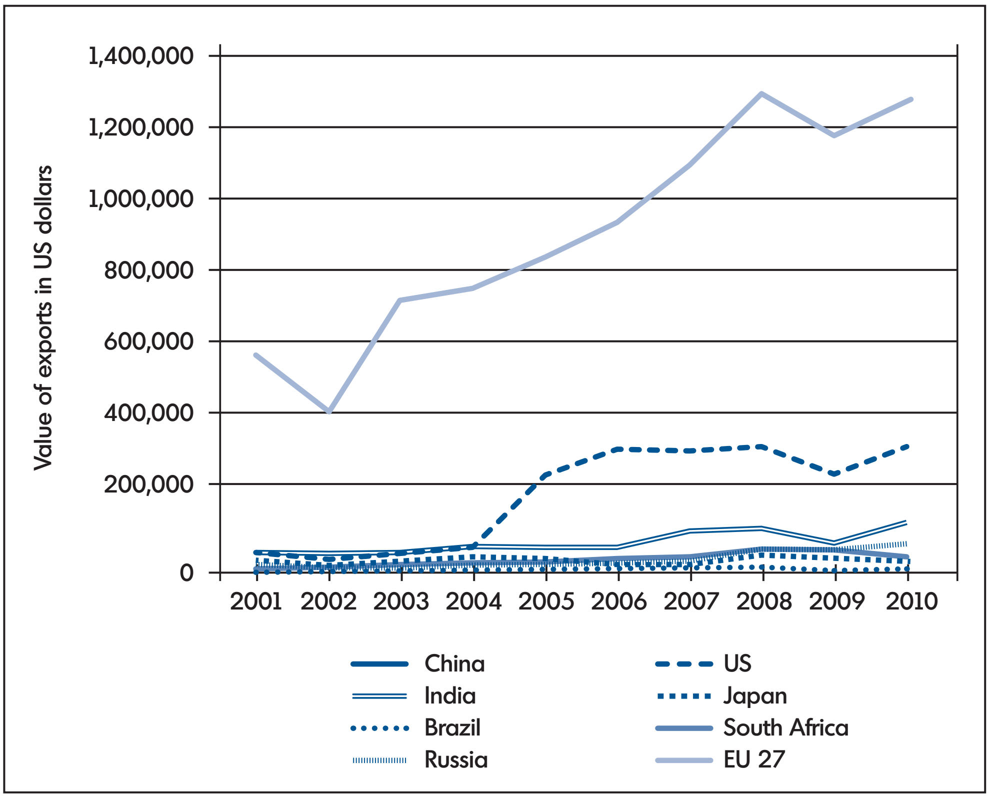
Figure 2: Kenya imports from BRICS, US, Japan and EU, 2001–2010 ($)



Note: Brazil, Russia, India, China and South Africa are presented independently.

Source: International Trade Centre, http://www.trademap.org/Bilateral_TS.aspx

Figure 3: Kenya exports to BRICS, US, Japan and EU, 2001–2010 ($)



Note: Brazil, Russia, India, China and South Africa are presented independently.

Source: International Trade Centre, http://www.trademap.org/Bilateral_TS.aspx

Over the past few years, Chinese investment (through loans and grants) in Kenya has more than doubled. China's investment ranges from large projects such as the construction of roads and health facilities and oil exploration, to small businesses such as Chinese restaurants opening in major cities and towns. The most notable projects are the construction of the Thika superhighway, which is partially funded by China and the African Development Bank, channelled through the Kenyan Ministry of Roads,[16] and the planned construction of LAPSSET, in which China is the key financier (see Table 3). The latest is a KES 16.7 billion concession loan to construct Nairobi's southern bypass to ease traffic congestion. The loan will cover 85% of the construction costs while the government will meet the balance.[17]

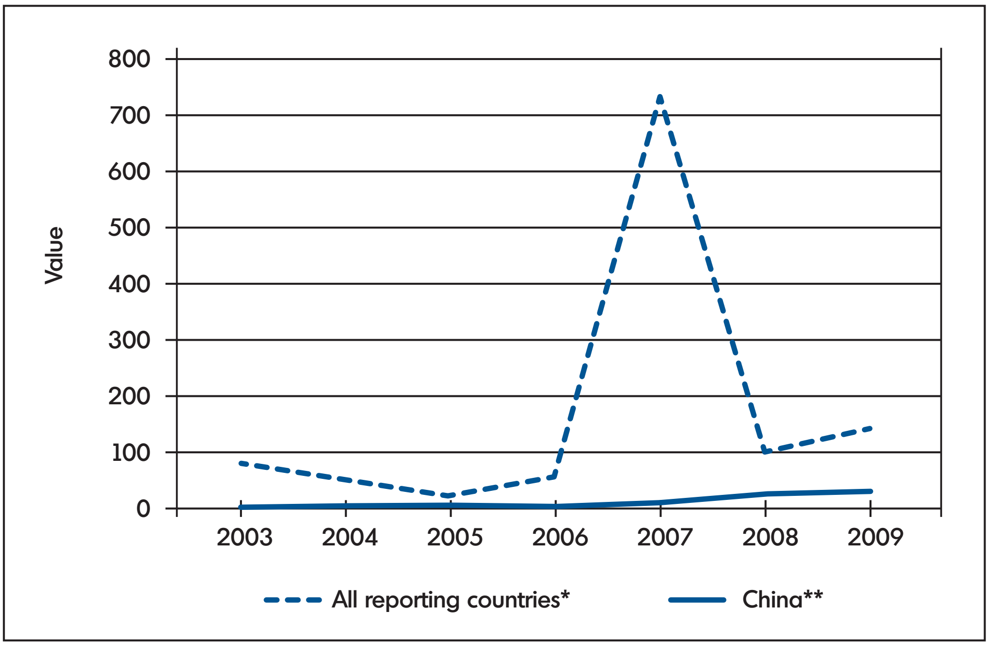
Table 3: Types of investment by China in Kenya ($ thousands)

Mode of investment	Project	2003	2004	2005	2007	2010
Loans	Gambogi Serem Road	3,100	–	–	–	–
	Kipsigis-Shamkhokho Road	3,000	–	–	–	–
	Purchase of tractors	66	–	–	–	–
	Rural telecommunications development programme	–	–	24,500	14,583	–
	Kenya power distribution system modernisation and strengthening	–	–	20,130	6,600	19,220
	Kenya e-Government		–	–	–	7,688
	Nairobi Eastern and Northern Bypass Project	–	–	–	–	57,662
	Nairobi-Thika Highway Improvement Project (LOT 3)	–	–	–	–	60,289
	Drilling of Olkaria IV Geothermal Wells	–	–	–	–	55,791
Grants	Kasarani Sports Ground maintenance	39	3,620	–	43,846	12,698
	Various courses in China	300	–	–	–	–
	Government office equipment	–	120	–	–	–
	Maize flour processing project in Bomet and drought-hit areas	–	3,330	–	1,766	–
	Tsunami relief Kenya	–	–	442	–	–
	Economic and technical co-operation Kenya	–	–	10,387	–	–
	Rehabilitation of Nairobi roads and street lighting	–	–	–	21,538	–
	Technical training courses to government officials	–	–	548	–	–
	Gambogi Serem Road	–	–	–	–	640
	Construction of hospital in Eastlands	–	–	–	–	1,096

Source: Adapted from Onjala J, *A Scoping Study on China–Africa Economic Relations: The case of Kenya*, AERC (African Economic Research Consortium), May 2008

China's FDI (see Figure 4) has created an opportunity for technological transfers and increased competitiveness in key sectors, including retail, tourism, transport, construction, energy and telecommunication.

Figure 4: Kenya's foreign direct investment, Net inflows ($ millions)



Source: *World Development Indicators; World Bank; **Heritage Foundation

In addition to direct investments, China has also offered diverse development aid to Kenya including package deals projects and humanitarian aid.[18] Most recently, during the famine that struck the larger Horn of Africa, China donated foodstuff worth KES 2 billion to Kenya.[19] Chinese development aid to Kenya supports infrastructure development; improvement of education standards, both academic and technical; human relief and tariff exemptions. Other areas of assistance include the modernisation of power distribution; rural electrification, water; renovation of sports facilities; provision of anti-malaria drugs; construction of a malaria research centre and the modernisation of international airports in Kenya.[20] The impact of Chinese investment and aid to Kenya has been mixed. The low import prices of Chinese consumer and producer goods have reduced monopolistic tendencies among Kenyan enterprises, and yet employees and firms are negatively affected by the influx of cheap products. These effects in turn trickle down to the national economy with both gains and losses – see Annex 1 for illustrations.

IMPACT ANALYSIS

Overview

Local contractors argue that Chinese companies have increased unhealthy competition in the market, which leads to local companies being unable to compete and having to close down. In Kenya approximately 44 Chinese firms are working on various projects.[21] They include small and medium enterprises that provide auto repairs and maintenance, home furnishings, construction, agricultural machinery and restaurants.[22] Kenyan contractors have demanded the government introduce protectionism measures, arguing that infant industries need to be protected so that they can grow and become profitable. However, the government has 'confidence in Chinese contractors for the good job they have done and continue to do'.[23] Indeed, compared to other contractors, Chinese firms provide high quality and competitively priced work in the construction sector.

The Chinese government helps its companies to be competitive through a number of measures,[24] for instance by providing companies with operating capital, which gives them a competitive edge. The Chinese government also at times negotiates at a government-to-government level on behalf of their companies for contracts. In this context,the open and fair procurement process in the awarding of tenders is seen to be violated, an argument that the Kenyan government has refuted.[25]

The increase in cheap Chinese products affects local companies, which have to retrench employees (to cut operation costs) due to declining revenues and loss of market share. Kenyan companies also have higher production costs, as their equipment is often obsolete compared to the modern Chinese factories. However, some companies have benefited through trading with Chinese companies and importing cheap goods from China. Certain producers also gain, albeit in isolation. For example, the Chandarana retail chain reportedly has a factory in China that manufactures products to sell on the Kenyan market.[26] Nevertheless, Kenyan exports face competition from Chinese exports in other developing countries.[27]

As more Chinese manufacturers enter the Kenyan market, the manufacturing sector is becoming more labour intensive and attracting workers from the rural areas of Kenya. This development could change rural–urban incomes and population disparities. However, the downside is that improved technology may result in unskilled workers losing their jobs.[28]

In addition, the continued scramble for market share by new actors such as China presents a unique opportunity for Kenya to take greater ownership of and to co-ordinate various donor projects, as well as to set up strong institutions that improve accountability and transparency of foreign companies operating in the domestic economy, ensuring alignment with the country's needs and national development strategy. For example, in addition to China's role in infrastructure construction, tariff exemption and unconditional aid in Africa, there is room for greater collaboration in general budget support, debt relief, investment in manufacturing plant and equipment, capacity building and technical training.

Counterfeit goods

According to the Kenya Association of Manufacturers (KAM),[29] China remains the main source of counterfeit goods, and trade in counterfeits results in an annual net loss of $368 million.[30] In other developing and developed countries, Chinese imports (mainly fast-moving consumer goods[31]) have been red flagged as counterfeit[32] and are subject to stringent import clearance.[33] In Kenya, banned products are mainly imports from China.[34] Manufacturers feel the impact of counterfeits through brand erosion, loss of sales and market share, the closure of factories and unfair competition. Counterfeits cost the government approximately $84–490 million[35] in lost taxes every year, and tracking counterfeit activities absorbs valuable resources and discourages innovation in new products, as companies fear unfair competition. The potential effects of counterfeits are summarised in Table 4.

Table 4: Summary of main potential socio-economic effects of counterfeit products

Impact area	Potential effects
Innovation and growth	• Reduction in incentives to innovate • Negative effects on medium and long-term growth rates
Criminal activities[a]	• Increase in flow of financial resources to criminal networks, thereby increasing their influence in economies
Environment	• Negative environmental effects of sub-standard infringing products • Environmental effects from disposing of counterfeit and pirated products
Employment	• Employment shifts from rights holders to infringed firms where working conditions are often poorer
Foreign direct investment	• Small negative effects on levels of FDI investment flows and possible effects on structure of FDI
Trade	• Negative effects of products where health and safety concerns are high

a See Gastrow P, *Termites a Work: Transnational Organised Crime and State Erosion in Kenya*, Setpember 2011, http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_2562.pdf

Source: Organisation for Economic Co-operation and Development (OECD), *The Economic Impact of Counterfeiting and Piracy*. Geneva: OECD, 2008, http://www.oecd.org/dataoecd/13/12/38707619.pdf

In 2010 the Consumer Federation of Kenya carried out a survey of the counterfeit market. It identified the commodities most likely to be counterfeited[36] (shown in Table 5) and found that counterfeit consumer goods are often packed in small packages aimed at low-income consumers. The survey also found that 60% of businesses had reservations about whether the government's interventions to curb counterfeits trade were adequate. The report concluded that businesses need more education about the anti-counterfeit laws.

Table 5: Products with high counterfeit rates

Category	Brands
Body care	Vaseline, Ladygay, Petroleum Jellies, Body creams and facial creams
Washing detergents	Omo, Toss, Jamaa bar and Panga bar
Toothpaste	Colgate
Tea leaves	Ketepa and Brookebond
Cooking fats	Kasuku, Kimbo and Elianto

Category	**Brands**
Maize meals	Jogoo and Pembe
Culinary products	Roycomchuzi mix, Haria and SimbaMbili
Shoe polish	Kiwi Noir, Kiwi and Lude shoe polish
Cigarettes	Sportsman, Roaster and Unfiltered cigarettes
Analgesics	Paracetemol
Batteries	Tiger head and Bells
Paints	Crown and Duracoat
Cement	Bamburi, Nyumba and Blue Triangle
Drinks	Quencher rtd, Afiartd and Afia squash
Mineral water	Pacific, Royal, Springs and Aquamist
Bleaches	Jik and Topex
Deodorants	Gift of Zanzibar
Spreads	Croma, Prestige and Blueband
Electronics	Watches, mobile phones, radios and other electronic gadget

Source: TNS Research International and Consumer Federation of Kenya, Scope and Impact of counterfeit in consumer goods sector, 2010, http://www.cofek.co.ke, accessed 15 November 2011

Substandard[37] and counterfeit goods also negatively affect the wellbeing of unsuspecting consumers, while the use of counterfeit fertilisers, chemicals and seeds result in decreased agricultural productivity. Counterfeit medicines can have medium-to-long-term health consequences.[38] In general, Kenyans perceive Chinese products to be of low quality compared to other products in the market. Nevertheless, most Kenyan consumers across different income groups purchase Chinese products occasionally because they are affordable and provide business opportunities to small and medium enterprises.

The survey revealed mixed perceptions among Kenyan consumers about Chinese products and their impact on businesses and consumption patterns. Across all income and age groups, the majority of consumers had bought or traded in Chinese products at least once. However, for Nairobi residents[39] with incomes of between KES 20,000 and KES 40,000, 42.3% said they had bought or traded in these products many times, while 53.4% admitted to occasionally purchasing or trading in Chinese products. Among middle-class residents aged 21–40 years, 65.6% indicated that they had bought or traded in such products many times, while 69.1% said occasionally.

On consumers' perception of counterfeit products in Kenyan market, the survey reported mixed views on their benefits and costs. The view that counterfeits from China are of low quality is held by the majority of consumers with an income of between KES 31,000 and KES 40,000 (35.5%) and aged 31–40 years (45.9%). Half of these two groups also believe that the presence of such goods results in loss of business opportunities. However, consumers aged 31–40 years also believe that Chinese products in the Kenya market mean a wider variety of products (38.2%), low prices (39.4%), employment creation (45.0%) and business opportunities (37.3%) as illustrated in Annexes 3 and 4.

Construction sector imbalances

In the late 1960s, Kenya established a National Construction Corporation with the aim of promoting indigenous contractors and ensuring fair competition in the sector. During President Kenyatta's regime, the corporation realised its mandate through promoting the construction by local contractors of some landmark Kenyan government buildings and civil servant houses. However, these gains were short lived and, during President Moi's regime in the 1970s, the corporation collapsed because of the practice of sub-contracting for commission that led to inefficiency, corruption and poor quality work. The collapse of the corporation created a quality-inspection vacuum: projects stalled and were not completed, as constructors operated as cartels and skipped arbitration procedures in the 1980s and 1990s. Foreign contractors, in particular China, therefore filled the vacuum, and brought some 'sanity' to the construction sector, as the Kenyan Prime Minister said:

> The emergence of Chinese contractors in this country has created some kind of discipline and competition in this sector. They are the ones who have driven the cowboy contractors out of business. They are able to bid at much lower reasonable prices and complete contracts. So, sanity has finally come back to this industry. Before the emergence of the Chinese in this industry, the Government was being held at ransom by cowboy contractors. They knew that they were the only ones available.[40]

Nonetheless, growing Chinese involvement in the sector has created a number of problems. In 2010, at the Kenya National Contractors Conference held in Nairobi, (a conference that attracted over 5 000 local contractors[41]) participants highlighted challenges facing the construction industry as high taxation on construction materials and operations; awarding of huge projects to foreign contractors; cumbersome procurement processes; delay in payments after project completion and the lack of tailor-made insurance schemes for contractors. Participants noted that foreign contractors have a competitive edge over their counterparts, as they are supported by their governments. In particular, Chinese contractors receive favourable financial terms from the Chinese government, whereas local contractors often have to source operating capital from banks at high interest rates and to start repayments immediately.[42]

The Ministry of Public Works, which convened the conference, blamed local contractors for continued stalled projects, falling construction standards, conflict of interest (as some ministry officials are also directors of construction firms) and for taking on too many projects at the same time. In contrast, the operations of Chinese and other foreign contractors are more efficient and of higher quality, characterised by a division of labour across the various projects' phases. The imbalance that exists between local and foreign contractors has led to the Kenyan government intervening in the sector.

Government intervention

In 2010, the Kenyan Parliament enacted the National Construction Authority Act 2010[43] that established a National Construction Authority mandated to (among others) prescribe the qualification or attributes required for registration as a contractor; promote quality assurance in the construction industry; encourage the standardisation and improvement of construction techniques and materials; accredit and register contractors and regulate their professional undertakings; and accredit and certify skilled construction workers and construction site supervisors. The authority is thus entrusted with regulating the construction sector to ensure fair competition in procurement/tendering processes for both local and foreign contractors. However, it is too early to assess the effectiveness of the Act.

The Kenyan Parliament has also enacted the Anti-counterfeit Act of 2008 that took effect from July 2009. The Act sets up an Anti-counterfeit Agency to enlighten and inform the public on related matters, combat trade on counterfeit goods, devise and promote training programmes to combat counterfeiting, and co-ordinate with national, regional and international organisations involved in combating counterfeiting.[44] However, the Agency's capacity to fight counterfeiting has been questioned and/or hindered on various fronts.

Both consumers and producers perceive the Agency as not doing enough in fighting counterfeiting,[45] which could in part be because overlapping agencies with different mandates are involved in implementing the Act. Concerns over stakeholder representation on the Agency's board and the replacing of the Attorney General's prosecution role by a Director of Public Prosecution under the new Constitution have undermined trust in the two bodies. This implies that the office of Director of Public Prosecution, the Kenya Bureau of Standards and the Kenya Revenue Authority, among others, need to work together better to implement the Act. Furthermore, a case was filed at the Constitutional Court in Kenya, challenging the constitutionality of sections 2.32 and 2.34 of the Act, in particular the definition of generic drugs. The court ruled in favour of the petitioners, arguing that the wording in the Act was vague, which means that the relevant sections will need to be corrected. In the meantime, the Agency's mandate to inspect generic drugs imported and distributed in Kenya is hindered, and the court ruling provides a safe haven to counterfeiters.

Despite their limitations, these two laws are regarded as ground breaking within Eastern Africa and represent a possible precedent that other EAC member states could follow.

What can the EAC do?

Poor regional infrastructure is a key obstacle to the EAC's integration objective, and most infrastructure projects focus on national objectives and trade facilitation across borders. China is involved in major infrastructure projects across a number of EAC countries, which will help improve regional infrastructure and thus facilitate trade among member states. However, of concern is the fact that China has not indicated clearly its willingness to involve regional economic communities through the Forum for Co-operation between Africa and China.[46] Empirical analysis has proved that a positive correlation exists between regional integration and infrastructural development, and so EAC member states need to take greater ownership and encourage China to participate in infrastructural projects that fast track the region's integration process.

Nevertheless, increased Chinese competition in the EAC means that local companies in the construction and manufacturing sectors are not able to compete favourably in providing goods and services. Co-ordination is needed within the EAC, spearheaded by the secretariat, to achieve mutually beneficial outcomes for member states in the two sectors.

Interestingly, apart from Kenya, other EAC member states have not taken concrete measures to tackle counterfeiting. As presented in Annex 2, although Burundi, Uganda and Tanzania have laws on anti-counterfeit goods and intellectual property rights, sound legislation is still needed. The EAC Legislative Assembly is considering an anti-counterfeit, anti-piracy and intellectual property rights Bill. If enacted, member states would be required to harmonise their respective laws with those of the EAC. For an Act to be effective, and given that discussions on the EAC's initiative is still ongoing, the EAC needs to address the weaknesses of Kenya, Tanzania, Uganda and Burundi's laws including defining counterfeit goods; civil versus criminal penalties; the broad scope of anti-counterfeit laws (ie intellectual property protection); challenges of implementing intellectual property laws at border stations; international scope of anti-counterfeit laws to incorporate efficient intellectual property rights; in transit shipment of goods; access to generic medicines; civil rights; the burden on government resources of combating counterfeits and revenue loss; excessive penalties and one-sided enforcement mechanism.[47]

Debates on these weaknesses of existing anti-counterfeit laws have hindered the enactment of an EAC anti-counterfeit and piracy law. In particular, stakeholders (including civil society, pharmaceutical manufacturers, and patients' lobby groups) have raised concerns that need to be addressed: definition of counterfeit medicines (as the current definition includes generic medicines); the lack of compatibility with the World Trade Organization's Trade-Related Aspects of Intellectual Property Rights agreement (that restricts counterfeits to trademark goods and pirated copyright with relevant definitional flexibilities on protection of intellectual property); and the proposed names of the anti-counterfeiting agency (for instance, Kenya would have a Commission, Uganda, a National Bureau of Standards and in Tanzania an Interdepartmental Task Force). Consensus is needed on these issues to conclude debate on the bill.

Way forward

Overall, although China is seen as the main source of counterfeit goods, authorities in Kenya report other sources as being direct imports (for example electronics from United Arab Emirates; pharmaceuticals from India and other consumers goods from wider Asia); local production by rogue manufacturers to increase their profitability and competitiveness with affordable goods (often in small packages) produced by genuine manufacturers; diversion of transit goods in the local market through conflict-prone countries such as Democratic Republic of Congo and Somalia (in particular through the Port of Kismayu) facilitated by corrupt customs officials at the points of entry; and rogue manufacturers altering products to increase production and thereby profit margins. The inability of consumers to differentiate between fake and genuine goods has also hindered the fight against counterfeiting. Some of the negative effects of counterfeiting are that manufacturers have no incentive to innovate, criminal activities increase, the environment degrades, and consumers are subject to health hazards.

To this end, the Kenyan authorities[48] mandated with combating counterfeiting have identified a number of measures that, if well implemented, could enhance their work. Measures include sensitising consumers on how to differentiate fake from genuine products, through civic education; encouraging consumers to report suspected counterfeit goods and counterfeiters to the relevant authority; co-ordinating the different agencies involved in combating counterfeiting; and enforcing stiffer penalties for counterfeiters, which would act as a deterrent to would be counterfeiters or those already involved. If well co-ordinated among EAC member states, such anti-counterfeiting measures could go a long way to combating counterfeiting in the region.

Similarly, before Chinese contractors arrived in the construction industry, Western, American and politically correct local contractors dominated the construction sector in Kenya. As mentioned previously, local construction contracting was characterised by low-quality work, delayed and stalled projects; Western and American constructors are characterised by having to comply with governance, human rights and media freedom and other sectoral conditions before projects are funded/ implemented. Chinese contractors are characterised by the use of Chinese materials and labourers; poor social responsibility towards the community; negative environmental impacts (due to some extent, to the absence of environmental impact assessments before beginning work on projects); labour standards violation and non-transparent tender bidding practices. The failed National Construction Corporation offered an opportunity to correct existing imbalances in construction sectors, and the National Construction Authority Act 2010 is expected to instil the necessary discipline in the sector, enhance competition, set construction standards, achieve construction timeframes and facilitate further integration of the EAC. In summary, interventions by the Kenyan government in addressing imbalances in the construction sector offer plenty of lessons to other EAC members and could be shared as best practices.

Notwithstanding the less positive side effects, the Chinese presence in Kenya and the EAC brings opportunities that the EAC member states should leverage: opportunities for developing the infrastructure needed for the desired regional integration, technological transfer, a widening market for commodities, entrepreneurial skill development. This could be done through sharing experiences among EAC countries and China, in particular teachings emanating from China's own development process.

On the challenges raised by the influx of counterfeits from China, Kenya and other EAC countries, governments should tighten their anti-counterfeit initiatives by enacting appropriate laws and improving co-ordination among various national and regional agencies entrusted with fighting counterfeits. Consumers should be better educated so that they can spot and report counterfeits to authorities. Given that counterfeit commodities are often in small quantities targeting low-income groups, genuine manufactures could package goods in different quantities to tap into these market segments.

China remains a key investment and trading partner to Kenya, and measures also need to be taken on the Chinese side. For instance, the Chinese government should formulate a legal framework that compels its companies to comply with the two laws highlighted above. Recognising that counterfeit goods from the country have a negative impact on the attractiveness of its products to consumers and that they stigmatise genuine producers, China has enacted measures to combat the manufacturing of counterfeits from mainland China.[49]

To regulate their countries' industries, other EAC member states could follow the precedent set by Kenya by enacting construction legislations and implementing the EAC policy on Anti-counterfeiting, Anti-piracy and Intellectual Property Rights. If not effectively and aggressively combated, the uncompetitive construction sector and counterfeit products will have far-reaching effects that would affect both social and economic conditions in member states. Kenya's efforts are a good starting point, but a more co-ordinated approach among EAC member states should be articulated among the various heads of states.

ANNEXES

ANNEX 1: MAGNITUDE OF COUNTERFEITS ACROSS EAC AND THEIR IMPACT[50]

1 In 2001 Nice House of Plastics, a Kampala-based manufacturer of toothbrushes, among other products, recorded a loss in sales equivalent to 2 million toothbrushes because of counterfeits. This nearly led to the closure of its factory.

2 In the last five years, Eveready Company Limited, a dry cells manufacturer based in Nairobi, has been forced to undertake prohibitively costly anti-counterfeit efforts to reduce the very high incidences of fake dry cells prevalent in the market.

3 Despite investing $200 million in 2008, DIMAC PVC, a manufacturer of PVC pipes in Burundi, lost 70% of its market share. The company is facing collapse due to the proliferation of counterfeit and substandard pipes imported into the country allegedly from Uganda, Tanzania and Kenya.

4 The Confederation of Tanzanian Industries estimates that the Tanzanian government loses 15–25% of total domestic revenue, or 540–900 billion Tanzania shillings per year due to tax evasion related to counterfeits and substandard goods.

5 Zanzibar and Burundi have no indigenous manufacturing sectors largely because of widespread counterfeiting and piracy.

6 According to the Chairman of the Burundi Manufacturer's Association, 10 manufacturing firms have closed down in the past three years due to counterfeiting.

7 In Kenya, music and film industries are on the verge of collapse because of piracy, which is estimated to be over 90% of all copyright works.

8 Zanzibar, Rwanda and Burundi have no local music and film industries of note, which is blamed on the prevalence of piracy.

9 Counterfeiting and piracy is rife in Zanzibar: government and the private sector estimate that over 90% of all consumer goods sold in the island are counterfeit or pirated.

10 Microsoft Corporation East Africa estimates that 80% of all software installations in the EAC region are pirated, resulting in an estimated loss of $100 million annually.

11 In Kenya, the Information Technology (IT) industry is projected to deliver $20 million in tax revenues between 2008 and 2011. If Kenya's 80% software piracy rate were reduced by 10%, the multiplier effect would generate over 1 100 additional jobs, $12 million more in tax revenues and $163 million spending in the local IT sector over the next four years.

12 The proliferation of counterfeits has led to the closure of a number of manufacturing companies in the region. For example, GlaxoSmithKline Beecham, the global pharmaceutical giant, closed its production line in Nairobi, retaining only a sales office. Sara Lee, the manufacturer of KIWI shoe polish, reduced its production capacity to below 40% due to unfair competition from counterfeits.

13 HACO Industries, a Nairobi-based manufacturer of the well known BIC ball point pens loses an estimated KES 100 million to counterfeiters. The company estimates that it has lost 80% of its market revenue in Tanzania due to counterfeiting, and 25% in other parts of the region.

14 The Standards and Regulatory Committee of the KAM estimates that counterfeit and substandard products cost the East African region over $500 million in lost government tax revenue annually.

ANNEX 2: EAC MEMBER STATES' LEGISLATIONS AND INSTITUTIONS ON COUNTERFEITING

Burundi	
• The Copyright Law of 2005 • Trademarks Law of 1964 • Industrial Designs and Patents Law of 1964 • Chapter IV Anti-Competitive Practices of the Commercial code (Décret-loi n° 1/045 du 9 juillet 1993 portant dispositions générales du Code du Commerce)	• Department of Industrial Property within the Ministry of Commerce, Industry and Tourism • Burundi Bureau of Standards
Kenya	
• Industrial Property Act of 2001 • The Copyright Act of 2001 • Trade Marks Act (Cap 506) • Trade Descriptions Act, 2009 • The Anti-Counterfeit Act, 2008	• Kenya Industrial Property Institute • Weights and Measures Department • Kenya Copyright Board • Pharmacy and Poisons Board • The Kenya Revenue Authority (Customs Department) • Kenya Bureau of Standards
Rwanda	
• Draft Law on Protection of Intellectual Property	• Rwanda Revenue Authority, Customs Department • Rwanda Bureau of Standards • Commercial Courts • The Ministry of Trade and Industry
Tanzania	
• The Patent Act of 1987 • The Trade and Service Marks Act of 1986 • The Copyright and Neighbouring Rights Act of 1999. • Merchandise Marks Act, 1963	• Business Registrations and Licensing Agency • Tanzania Food and Drugs Authority • Counterfeit Department of the Fair Competition Commission • The Judiciary (High Court, Commercial Court, District courts) • Police • Tanzanian Revenue Authority (Customs Department) • Tanzania Bureau of Standards • Copyright Society of Tanzania

Uganda	
• The Patents Act (Cap 216) and Regulations, 2003 • The Copyrights and Neighbouring Rights Act 19 of 2006; • The Trade Marks Act (Cap 217) and the Trade Marks (Amendment) Rules of 2005 • Copyright and Neighbouring Rights Bill, 2004 and the Counterfeit Goods Bill, 2007	• Uganda National Bureau of Standards • The Uganda National Council for Science and Technology

ANNEX 3: FREQUENCY OF PURCHASE OR TRADE IN CHINESE PRODUCTS (%)

	By monthly income group (KES)					
	Below 10,000	**10,000–20,000**	**21,000–30,000**	**31,000–40,000**	**41,000–50,000**	**Over 50,000**
Occasionally	6.8	17.8	26.3	27.1	16.1	5.9
Many times	7.4	17.1	20	22.3	14.9	18.3
Only once	16.1	14.5	24.2	21.0	11.3	12.9
Don't know	45.5	18.2	0	27.3	0	9.1
Total	**9.8**	**16.9**	**22.1**	**23.8**	**14.2**	**13.1**

	By age group (years)				
	15–20	**21–30**	**31–40**	**41–50**	**Over 50**
Occasionally	3.7	31.5	38.6	18.1	8.7
Many times	3.9	23.7	41.9	24.7	5.9
Only once	16.7	30.6	37.5	15.3	0
Don't know	9.1	36.4	18.2	9.1	27.3
Total	**6.1**	**27.8**	**39.4**	**20.5**	**6.3**

Source: Adapted and modified from Onjala J, Impact of China – Africa trade relations, AERC, April 2010, http://www.aercafrica.org/documents/china_africa_relations/Kenya.pdf

ANNEX 4: IMPACT OF CHINESE PRODUCTS ON KENYANS (%)

	By monthly income group (KES)						
	Below 10,000	10,000–20,000	21,000–30,000	31,000–40,000	41,000–50,000	Over 50,000	Total
More products to consume	10.0	18.3	28.3	19.2	14.2	10	20.2
Affordable or low prices	9.3	23.6	24.7	20.9	12.6	8.8	30.6
Poor quality goods	7.9	11.8	25.0	35.5	11.8	7.9	12.8
Provide employment opportunity	5.1	23.7	18.6	23.7	15.3	13.6	9.9
Loss of employment opportunity	20.0	0	40.0	0	20.0	20	0.9
Provide business opportunity	4.1	16.4	21.2	24.0	15.1	19.2	24.6
Loss of business opportunity	0	16.7	16.7	50.0	0	16.7	1

	By age group (years)					
	15–20	21–30	31– 40	41–50	Over 50	Total
More products to consume	5.1	25.7	38.2	22.1	8.8	21.1
Affordable or low prices	4.4	28.1	39.4	21.7	6.4	31.5
Poor quality goods	4.7	32.9	45.9	12.3	3.5	13.5
Provide employment opportunity	1.7	15.0	45.0	28.3	10.0	9.3
Loss of employment opportunity	0	40.0	20.0	20.0	20.0	0.8
Provide business opportunity	1.3	24.0	37.3	31.3	6.0	23.8
Loss of business opportunity	0	0	50.0	50.0	0	0.9

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8 Long working hours, human rights violations and a lack of job opportunities for local professions, causing low technological transfers.

9 Given that over the years Kenya has experienced a volatile currency exchange rate, and to avoid use of different base currency exchange rates, the paper uses the KES and US dollar interchangeably, as reported by various reference sources.

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11 *Nairobi Star*, 'East Africa: Kenya, China in Sh8 billion university hospital deal', 22 April 2011, http://allafrica.com/stories/201104250544.html.

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stationary; common medicines and drugs; apparels; motor vehicle and motorcycle tyres; tubes and spares; watches; mobile phones; music and literary works; and computer software.

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