



AMCHAM
KENYA

HIGH-LEVEL REPORT ON TRADE BARRIERS FACING
AMERICAN COMPANIES IN KENYA AND PROPOSED
INTERVENTIONS

INTRODUCTION

On the margins of the recent meeting between U.S. President Donald Trump and Kenya's President Uhuru Kenyatta, the U.S. Trade Representative Robert Lighthizer and Kenyan Cabinet Secretary for Industry, Trade and Cooperatives, Peter Munya (represented by Trade Principal Secretary Dr. Chris Kiptoo in Washington, DC) announced the establishment of a U.S.-Kenya Trade and Investment Working Group to explore ways to deepen the trade and investment ties between the two countries.

U.S. and Kenya enjoy a strong bilateral relationship that is symbolized by the trade between the two countries that stands at about \$1.0 billion a year. Under the economic dialogue announced by the Presidents, the U.S.-Kenya Trade and Investment Working Group will support comprehensive trade policies and begin to lay the groundwork for a stronger future trade relationship.

The American Chamber of Commerce Kenya welcomes the move by the two countries and pledges its support to ensure that the U.S.-Kenya relationship grows stronger in the future. In support of this, AmCham undertook a dipstick survey among its members, to identify some key trade barriers faced by American companies operating in Kenya. The broad areas polled include:

1. Immigration and employment laws
2. Laws and Governance
3. Government Procurement
4. Regulatory Environment
5. Tax Regime
6. Localization Measures
7. Customs and Border Measures
8. Intellectual Property Rights (IPR)
9. Investment and Services
10. State-owned enterprises engagement

This report highlights some key challenges and presents proposed recommendations that can be used as a base in supporting the establishment and operation of the U.S.-Kenya Trade and Investment Working Group. In light of this report, the American Chamber of Commerce Kenya looks forward to further dialogue on the issues presented and the establishment of the U.S.-Kenya Trade and Investment Working Group. AmCham Kenya pledges its unwavering support to ensure and facilitate the operation of the Working Group through representation so as to enhance trade between U.S and Kenya as the Champion of American Businesses in Kenya.

#1. Immigration and Employment Laws

Challenges Highlighted:

- a. The current work permits regime does not recognize intra-company transfers and treats such moves as new hires relocating to work specifically in Kenya. They are subjected to same requirements and in some instances denied work permits thus affecting company plans of skills transfer and cultural exchange.
- b. American multinationals have their regional hubs for Africa based in Nairobi with senior employees overseeing operations around Africa based in Nairobi. The challenge faced by such companies is that in applying for work permits, they are being treated in the same manner as companies with operations in Kenya while in reality, most of their expatriate staff are based here but run their Africa wide businesses.
- c. Uncertainty brought about by the recent changes and numerous directives on the immigration policy and its application. There is also lack of proper and effective communication channels to articulate changes and directives issued by the Administration, resulting in unpredictability from a business planning perspective.
- d. Lengthy duration of time it takes for foreign experts to get working permits. This is also coupled by the high costs and struggle that various companies go through to get some of these permits.
- e. Lack of clear guidelines on whether a Special Pass can be used as a work permit in the interim before the issuance of a work permit. This also brings uncertainty in the business planning processes.

Proposed Interventions

- a. U.S. Government support on advocating for a more predictable and favorable immigration policy in Kenya that will enhance and attract more investment by U.S. companies into Kenya.
- b. Consideration for the creation of a work permit category that deals with intra-company transfers cases or give exemptions to such moves in order to allow companies to easily carry out such transfers.
- c. Consideration for the introduction of a category of permits that covers regional hubs as has been recognized by the Special Economic Zones Act of 2017.

#2. Laws and Governance

Challenges Highlighted

- a. Contract enforcement has and continues to be a challenging issue, particularly for large government contracts that various organizations have been involved with. There is significant non-payment risk for contracts that have been fully delivered to the Government of Kenya, occasioning business revenue losses.
- b. Corruption remains a significant barrier especially in public procurement, locking out most American companies.
- c. Commercial dispute resolution can take inordinate amounts of time to resolve (sometimes years).

Proposed Interventions:

- a. U.S. Government support on commercial diplomacy (when necessary) in resolving contract enforcement issues and payment risk challenges.
- b. Support from USG/USAID in the strengthening/development of local judicial commercial dispute resolution mechanisms.

#3. Government Procurement

Challenges Highlighted

- a. Graft in government/public procurement remains a major challenge, creating an uneven playing field that is designed to corruptly inflate contract values and steer procurement in favor of vendors who are ready to pay bribes through deeply vested political connections. U.S. companies often stand limited chances of success in such compromised procurement environments.
- b. Lowest bidder policy and a lack of transparency in procurement processes makes it virtually impossible for American companies to compete for public projects.
- c. KEMSA (Kenya Medical Supplies Authority) which is the major government purchasing body for healthcare products lacks sufficient capacity for technical evaluation for the non-pharm products (medical devices). This is a major challenge that hinders timely provision of quality/essential supplies.

Proposed Interventions

- a. Support for push of change in government procurement policy to consider other factors such as quality, project lifetime value, local content, skills transfer etc. This would create points of differentiation and would make American companies more competitive.
- b. Technical assistance to GoK to strengthen its procurement processes and systems. USDA's Global Procurement Initiative (GPI) could be a good starting point.
- c. Technology adoption such as Blockchain and Artificial Intelligence that hold the promise of curbing graft and instilling trust in government procurement processes.
- d. Accountability, reporting and enforcement of Public Procurement standards by both the Ethics and Anti-Corruption Commission (EACC) and the Public Procurement and Oversight Authority.
- e. Support for government purchasing bodies in capacity building and exposure on global quality standards for various products and services

#4. Regulatory Environment

Challenges Highlighted

- a. No clear formula on how business license taxes are derived. They vary depending on invoice generated by taxing authority, yet they end up being huge business expenses – rates/fire licenses/business permits etc.
- b. New laws that lack specificity e.g. new requirements by Nairobi City County preventing public motorcycles from entering the Central Business District has adversely affected courier services such as Uber Eats.
- c. KEBS (Kenya Bureau of Standards) requirement for all products to have both manufacturing and expiry dates on primary, secondary and tertiary levels of labelling. This is a big challenge for medical devices as the standard practice is to have only the expiry dates on all the three levels.

Proposed Interventions

- a. Streamline regulatory issues such as licensing for foreign investors/companies. Shorten processes and turnaround.

- b. Creation of different categories/classification for local and international players for vetting and regulatory purposes – makes it easier/fairer to vet and regulate e.g. in customs licensing
- d. Review of the current KEBS requirements e.g for labelling of medical devices and consider extension or waivers to allow adequate time for compliance.
- c. Clear and transparent regulations to be set in place in regard to licenses and permits at a County Government level.
- e. Relaxing laws to allow NYSE quoted companies to join local professional bodies for accreditation (e.g. architecture, engineering or quantity surveying)

#5. Tax Regime

Challenges Highlighted

- a. Protectionist policies through punitive taxes/tariffs. E.g 25% import duty, and 10% excise on imported consumer products leads to high landing cost for imported products. This makes them less competitive in the market.
- b. Lack of predictability of taxation measures and other procedures affecting multinationals including inadequate consultation and consensus before adoption.
- c. High cost of tax audits by Kenya Revenue Authority (KRA)

Proposed Interventions

- a. More tax incentives for investors to encourage foreign direct investment.
- b. Clarity and transparency on structure of the taxation process to enable better planning and to cushion businesses from such shocks.
- c. Focus on increasing Kenya's competitiveness as opposed to taking protectionist measures.
- d. Enhanced communication on changes effected in the tax laws to avoid uncertainty from a business planning perspective.
- e. Support from U.S. Government in advocating for the revision of import duties and consensus building before adoption of far-reaching taxation measures

#6. Localization Measures

Challenges Highlighted

- a. Possibility of the introduction of some form of local ownership requirement in the draft ICT National Policy (yet to be released) and also the draft provisions in the Data Protection Bill, restricting cross-border data flows and mandating data localization for special/sensitive personal information to servers in Kenya.

Proposed Interventions

- a. Policies should focus on competitiveness by encouraging both local and foreign investment for market and business reasons, rather than through mandates such as 20% local equity ownership that increases compliance and regulatory burden and in the process stifles competition and innovations.

#7. Customs and Border Measures

Challenges Highlighted

- a. Introduction of multiple requirements and regulations that result in barring trade, for example, the new inspection, testing, verification requirements, randomization of containers allocation at the port, inefficiencies of SGR transfers and the additional costs transferred to traders.
- b. Lengthy duration of time it takes to clear for both incoming imports and outgoing exports.
- c. Entry of non-regulated drugs into the country. This is despite the fact that correct import permits have been issued, but customs do not check whether the packs cleared meet Kenya requirements.
- d. Influx of genuine parallel imports from Indonesia, UK, Dubai etc.
- e. KEBS new requirement that starting 1st October – all goods must undergo physical inspection prior to shipment to Kenya, resulting in extended system downtime which could affect healthcare service delivery in hospitals. Medical equipment are usually systems made up of multiple unique components which cannot be sampled and whose quality can only be ascertained through successful system installation and for some through servicing rather than inspecting sub-components.

- f. Lack of full enforcement of 2017 Finance Bill on local insurance before clearing of imported cargo, this makes it easy for importers to continue importing cargo on CIF basis.
- g. Lack of clear guidance on the use of single window online system in cargo clearance.

Proposed Interventions

- a. KEBS should consider exempting medical equipment/ devices which are within Pharmacy & Poisons Board (PPB) mandate from such processes because PPB is responsible for ascertaining product quality for medical equipment systems.
- b. Categorize and segment importers based on their trade and compliance history, and hence exempt compliant importers from government red tape in order to promote/enhance trade.
- c. Need to enhance compliance by strengthening government customs agencies.

#8. Intellectual Property Rights (IPR)

Challenges Highlighted

- a. Presence of fake/counterfeit products in the market. For example, there was a case in July of 2017 where fake Caterpillar branded generators were being sold in Kenya

Proposed Interventions

- a. Introduce tighter controls at Kenya Revenue Authority customs border points as well as with agencies such as Kenya Bureau of Standards.
- b. Strengthen IPR legislation to effectively protect investors.

#9. Investment and Services

Challenges Highlighted

- a. US nationals investing in Kenyan Equities and other debt instruments are at a big disadvantage to other foreigners since the IRS taxes foreign investment income at 30% when filing US tax returns even though the final tax on dividends in Kenya is 5% and interest on bonds, such as Infrastructure Bonds, are exempt in Kenya.
- b. U.S. is 1 of only 2 countries that tax the worldwide income of its citizens. IRS taxation for American citizens - from FBAR, to Form 8938, and other tax forms is detrimental to Americans living and working abroad. It is increasingly difficult up keep up with the IRS documentation, leading to foreign financial institutions increasingly avoiding American customers for fear of running afoul of U.S. Treasury sanctions.

Proposed Interventions

- a. Consider Territorial Taxation for Individuals (TTFI).
- b. Consider a U.S. Bilateral Investment Treaty offering U.S. nationals a 100% tax credit for taxes paid in Kenya.

#10. State-owned Enterprises

Challenges Highlighted

- a. Most suppliers or contractors dealing with state-owned enterprises experience delay in payments for goods or services rendered. This is majorly caused by lack of funds or delay in funds disbursement from the National Treasury.
- b. Long payment cycles result in heavy commercial exposure for suppliers/vendors.

Proposed Interventions

- a. Timely payment and predictable cycles to suppliers.
- b. Structured USG support on public procurement issue resolution