



**The American Chamber of Commerce**  
SOUTH AFRICA

# AMCHAM SOUTH AFRICA POLICY POSITION PAPER

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# AMCHAM SOUTH AFRICA

## Policy Position Paper 2021

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# 1.Introduction

The American Chamber of Commerce in South Africa (AmCham) is a non-profit organisation which represents the collective voice of U.S. investors in South Africa. AmCham holds regular interactions with its members through a number of standing fora and other engagements, and through these processes is able to identify the common policy concerns of its members.

These views, supplemented by insights from AmCham's South Africa Business Barometer 2021 survey (which included U.S. companies who are not AmCham members) and interviews conducted with representatives of U.S. companies in South Africa, informs the policy positions adopted in this document. They are presented here in a spirit of helpful co-operation and hope to inform solutions to the main challenges experienced by U.S. investors.

The commitment of U.S. companies operating in South Africa to the country is absolute and unreserved. Indeed U.S. firms have a long history of conducting their business in accordance with the highest principles of ethical and social responsibility, going back to the 1977 Sullivan Codes which mandated an end to racially discriminatory practices in the workplace. The same sort of standard is maintained today by company cultures and a determination to meet prevailing regulatory standards both in South Africa and back in the U.S.

South Africa today faces a new set of challenges rooted in low levels of economic growth since 2008 and exacerbated by the Covid-19 pandemic. This is manifest in low levels of economic inclusion, high levels of unemployment and inadequate levels of fixed investment. The South African government has committed itself to rebuilding a new and better economy in the wake of the pandemic. AmCham believes the experiences and insights of U.S. firms are of value in this endeavour.

## 2. AmCham's Vision

AmCham would like to see a healthy growing U.S. private sector in South Africa which plays its part in driving development and improving the livelihoods of all South Africans. AmCham believes that economic growth is a necessary condition for inclusive development.

AmCham believes that in the development process, different roles need to be played by business and government.

The role of business is to invest, run operations, generate returns for stakeholders and employ people. As part of this, responsible companies are involved in community and supplier development as well as ensuring that they have a future pipeline of skills both directly into the business and the surrounding economy. Responsible companies 'put something back' and the track record of AmCham members is second to none in this respect, as demonstrated in the AmCham South Africa Business Barometer 2021.

The role of government is to create an enabling environment within which investment can happen and business be conducted. Government also has additional social responsibilities, ensuring the welfare of those among its citizens who cannot directly benefit through business. From a business perspective, it is primarily government's responsibility to ensure that the rule of law prevails, macro-economic stability is maintained, contracts are enforced, and the country secured against internal and external threats.

Business and government are not discrete sectors. There are obvious areas where cooperation is required if outcomes are to come close to optimal. Education, training and social policy are only the most obvious of these. In such areas, as well as in their presence in the country, U.S. companies, alongside all businesses in South Africa, government and indeed all of society, are bound in a common cause. AmCham believes that where U.S. companies are able to do well, that cause is advanced.

### 3. Growth and Stability

South Africa's public finances have been under pressure for some years as expenditure has outstripped revenue. AmCham is pleased to note that the government has recognised the problem and is acting to solve it but also understands that this is a long road, and that fiscal discipline will need to be constantly applied for many years. AmCham notes that for 2021/22, state revenues have been higher than anticipated (thanks to high commodity prices) and welcomes the temporary relief. However, we suggest that this should not be allowed to distract from the present path of fiscal responsibility.

AmCham concurs with the view of the IMF, expressed in 2021, that with appropriate reforms South Africa could raise GDP per capita 50 to 60 percent<sup>1</sup> in a short period of time. U.S. companies are eager to see the country fulfil its potential and not only for selfish reasons. The impact of a higher growth rate on social development and personal life prospects in South Africa would be immensely positive.

### 4. Security and Safety

The safety employees of U.S. companies, their suppliers, customers and citizens generally are a concern that has re-intensified recently. AmCham notes with concern that the portion of the national budget allocated to policing has been cut<sup>2</sup> in recent years and while we understand that fiscal prudence requires trade-offs, this is not one we are happy to see.

The AmCham 2021 Business Barometer found that crime was the second biggest challenge to doing business

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<sup>1</sup> Duval, R. Ji, Y. and Shibata, I. (2021) Labor Market Reform Options to Boost Employment in South Africa IMF 11 June <https://www.imf.org/en/Publications/WP/Issues/2021/06/11/Labor-Market-Reform-Options-to-Boost-Employment-in-South-Africa-460735>

<sup>2</sup> Parliament Budget Office (2021) Brief on 2021 Budget Cuts on National Votes – Standing Committee on Appropriations September 2021 [https://www.parliament.gov.za/storage/app/media/PBO/Analysis\\_and\\_Reports/2021/october/01-10-2021/Sep\\_2021\\_Brief\\_on\\_2021\\_Budget\\_Cuts\\_on\\_National\\_Votes.pdf](https://www.parliament.gov.za/storage/app/media/PBO/Analysis_and_Reports/2021/october/01-10-2021/Sep_2021_Brief_on_2021_Budget_Cuts_on_National_Votes.pdf)

in South Africa. From an investor perspective, it is imperative that government take decisive steps to deal with the problem. As an element of their commitment to South Africa, U.S. companies are open to any initiative where the state draws on the capacity and cooperation of the private sector in this regard.

Beyond personal safety, high levels of crime are a disincentive to investment. U.S. firms are concerned about the financial and reputational risks raised by civil unrest and criminal activity in South Africa. Furthermore, the additional cost of private security adds to the cost of doing business in South Africa.

## 5. South Africa-U.S. Relations

If South Africa's economy is to grow, this requires increased trade with the US. But this relationship has faltered over the last decade. South Africa's export growth rate has halved since 2010 and has been much lower than that of the global economy and South Africa's peers. The U.S.'s share of South Africa's trade has fallen from 14% in 2001 to 7 percent in 2019.<sup>3</sup> AmCham would like to see a future U.S.-SA trade relationship develop in a manner which is comprehensive, mutually beneficial and reciprocal. The present basis of the relationship, the Africa Growth and Opportunities Act (AGOA), is due to expire in 2025. AmCham does not want to see a situation where the current scheme runs its course without a new initiative to replace it.

AmCham believes a bilateral trade treaty between the U.S. and South Africa will be the optimum future course of action. Such a treaty will probably need to be between the U.S. on one side and the entire Southern African Customs Union (SACU) – Botswana, Lesotho, Namibia, South Africa and Swaziland plus Mozambique, on the other. It will take a focused effort if the SACU countries are to present a united front.

One of the limitations of AGOA is that it is not reciprocal (does not allow preferential access to the South African market by U.S. exporters) and is, as a result, the subject of considerable criticism in the U.S. Other critics question whether a country with industrial and commercial sectors as developed as those in South Africa should participate in AGOA at all. AmCham believes there is no reason why a bilateral trade treaty should not provide all the market access benefits currently available in terms of AGOA.

AmCham commits to supporting and participating in an initiative to negotiate a bilateral trade treaty between the US and South Africa.

## 6. Business-Government Relations

AmCham believes that private sector driven growth is the only way to build a bigger, better and more inclusive economy. We are pleased to engage proactively with government and to participate in consultative forums such as Nedlac, although we do worry that, at times, the process of consultation seems to take priority over outcomes.

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<sup>3</sup> Stern, M. and Ramkolowan, Y. (2021) Understanding South Africa's trade policy and performance, Policy Paper 26, Economic Research Southern Africa, June <https://www.econrsa.org/publications/policy-papers/understanding-south-africas-trade-policy-and-performance>

Given the country's strained economic circumstances, widespread and far-reaching policy reform is now an urgent priority. Areas in most urgent need of reform include energy security, digital readiness, infrastructure development, education and skills development, investment promotion, red tape reduction, regional integration and the modernisation of network industries, amongst others.

Many of the concerns of U.S. companies have to do with processes where they interface with the civil service. We believe that some elements of policy are not clear (and will enlarge upon these below), while in other cases the civil service or relevant public regulator is mired in administrative complexity. The transactions costs of these interactions can be onerous.

AmCham notes that there have been promises on the part of government, most recently in the 2020 Economic Reconstruction and Recovery Plan (ERRP)<sup>4</sup>, to optimise the regulatory environment, promote public accountability and transparency, and strengthen the capacities of the state. As such measures will go a long way towards addressing the problems of red tape, corruption and poor governance, we endorse them both wholeheartedly and as a matter of urgency.

## 7. Climate Change

AmCham fully supports the need for a transition to a lower carbon economy, tailored at a country level to meet South Africa's development, economic and energy security ambitions as outlined in the country's latest (2021) Nationally Determined Contribution (NDC) to the United Nations Framework Convention on Climate Change. U.S. companies in South Africa have supported the processes through participation in the President's Climate Change Commission.

AmCham believes that green energy, especially in power generation, mining and manufacturing should be a major driver of future economic growth. AmCham is concerned however that various government departments and agencies are not necessarily on the same page when it comes to the urgency of climate change mitigation and adaptation. South Africa faces disproportionate risk as it is the world's 14<sup>th</sup> largest carbon emitter<sup>5</sup> while being only the 38<sup>th</sup> largest economy<sup>6</sup>. Higher costs of capital and exclusion from developed world markets are only two of the potential business threats.

Carbon taxes and a global carbon trade will inevitably be part of the response to the climate change threat. U.S. companies accept that carbon taxes will be a business issue and would like to see a design and implementation process that does not impose onerous compliance and reporting costs on business.

AmCham would like to see a more coherent all-of-government approach to climate change issues. Although

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<sup>4</sup> Government of South Africa (2020) The South African Economic Reconstruction and Recovery Plan [https://www.gov.za/sites/default/files/gcis\\_document/202010/south-african-economic-reconstruction-and-recovery-plan.pdf](https://www.gov.za/sites/default/files/gcis_document/202010/south-african-economic-reconstruction-and-recovery-plan.pdf)

<sup>5</sup> World Population Review (2021) South Africa <https://worldpopulationreview.com/country-rankings/carbon-footprint-by-country>

<sup>6</sup> Businesstech (2021b) The richest countries in the world – and where South Africa fits in, 5 September <https://businesstech.co.za/news/finance/516596/the-richest-countries-in-the-world-and-where-south-africa-fits-in/>

we believe the Department of Environment, Forestry and Fisheries has done well in piloting South Africa's NDC, an effective process needs to also draw on the resources of the Departments of Finance, Public Enterprises, Mineral Resources and Energy, Trade, Industry and Competition (DTIC), and Cooperative Governance, with Eskom, as well as organized business and labour. The international community is offering ever increasing sums of concessional finance and South Africa has obtained access to some of these. AmCham believes that further access requires national policy coherence and a track record of effective implementation.

## **8. Network Industries**

### **8.1. Energy**

Energy security was the highest-ranking challenge listed by U.S. companies in the 2021 AmCham Business Barometer survey, with concerns about rising energy costs ranking fourth (out of 19 factors). While significant elements of the energy system are moving in the right direction, including the raised cap on self-generation, progress with the latest renewable energy bid window (REIPPPP 5) and efforts to secure 'green' finance, U.S. companies still find the energy space lacking policy clarity.

AmCham believes greater national energy security is a matter of urgency. We support moves away from a single vertically integrated state-owned industry and towards a more distributed system, with maximum possible levels of private sector participation. Such a system requires the introduction of competition, fair access to the transmission network and an independent regulator. AmCham would like to see government provide greater clarity on the role of the private sector going forward as well as a continuous two-yearly updating of the Integrated Resources Plan (IRP) as originally intended.

Developments in the energy space have been slow with the (as yet unresolved) supply crisis first breaking in 2008 and IRP2019 taking nine years to develop. It is worth making a point about U.S. investors in this context which also applies to other industries. U.S. firms operating in South Africa usually have to engage with their principals back in the U.S. before proceeding with local investments. This can be a complicated and time-consuming business and is not facilitated by unclear, over-complicated or shifting policy frameworks.

### **8.2. Transport**

South Africa's transport network is dominated by state-owned entities which are not independently regulated (e.g., rail, road and port terminals). Not only are there clearly inefficiencies in the system – South Africa's container terminals were ranked at the bottom of the list of 351 ports listed by the World Bank/IHS Markit in 2021<sup>7</sup> – but large elements lack transparency (for example, subsidies between Transnet divisions are not public knowledge).

A number of U.S. companies have commented on how expensive and inefficient they find South African ports.

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<sup>7</sup> World Bank/IHS Markit (2021) Global Container Port Performance Index <https://ihsmarkit.com/research-analysis/new-global-container-port-performance-index-cppi.html>



Some have had to use (more expensive) air freight to deliver products from their South African subsidiary to international customers.

AmCham believes that enabling private sector participation, possibly through public-private partnerships, is imperative in ports, rail and road management. Allowing the private sector into these currently closed spaces will not only provide greater efficiencies (through competition) but also an injection of capital to rejuvenate decaying infrastructure. We have seen positive statements from government in this respect and endorse these although we would like to see more rapid implementation.

### **8.3. Digital Industries**

U.S. investors are especially valuable because so many of them are at the cutting edge of the Fourth Industrial Revolution. Where a new software solution succeeds in the U.S. market, it will almost inevitably be introduced into the South African economy soon after. AmCham believes the future South African economy will be increasingly digitalized and that the country needs to capitalize on the global technology revolution, including developments in the U.S.

IT and telecommunications operators depend on Government for their regulatory operating environment. A number of U.S. companies have commented that South Africa is not digitally prepared for the new era. This is not simply a matter of education and training, although more resources need to be put into these areas, but also the release of more spectrum and the opening of more opportunities for the private sector to drive broadband rollout and cloud storage. These are not areas which can cost-effectively remain only under government control. While some degree of data sovereignty is essential, it should not be so severe as to stifle international data flows, innovation and investment.

AmCham notes that the IT and telecommunications space is characterised by fast-moving change. Most of the capacitated international role-players have a presence in South Africa and are willing to provide input into the design of appropriate regulatory systems. But processes to consult them have been slow and cumbersome. AmCham would like to see this interface improved.

## **9. Specific Policy Issues**

### **9.1. Broad-Based Black Economic Empowerment**

AmCham strongly supports policies to achieve compensation for past discrimination but does have concerns about the impact of current transformative legislation. The 2021 AmCham Business Barometer survey found that many U.S. companies find B-BBEE legislation unclear and the compliance cost onerous.

AmCham is concerned that B-BBEE policy has not promoted socio-economic inclusion, despite this being one of its stated purposes. In its present form it has become an obstacle to growth which is a necessary precondition for greater inclusiveness. AmCham would prefer to see policy measures which clearly target socio-economic hardship and could borrow extensively from such examples as the South African Institute of Race Relations'

policy proposal, Economic Empowerment for the Disadvantaged<sup>8</sup>.

AmCham would like to see more urgent engagement from government to clarify issues and ease the burden of doing business in the empowerment space. U.S. companies report that policy has become mired in excessive administrative and practical complexity. Some pressing examples are:

- The complexity and frequently changing details of the Broad-Based Black Economic Empowerment (B-BBEE) Codes of Good Practice. Scarcely a year goes by without some sort of amendment being made. New sectoral charters are frequently added to the space and, even though they do not seem to be formally binding<sup>9</sup>, add to the 'clutter' and are often inconsistent with the Codes.
- The Codes are, in the view of AmCham, massively over-detailed and unwieldy. Details, such as who is responsible for paying for textbooks<sup>10</sup> when a U.S. firm sponsors a black student's university education, are surely not a matter for national regulation.
- Approval of equity equivalent arrangements is a laborious process, typically taking two years, with almost all delays being on the government side. Some U.S. firms are concerned about the degree of ministerial discretion involved and complain of inconsistency in deciding which companies qualify for equity equivalent offsets.
- The system of allocating points to determine companies' levels of B-BBEE compliance is both complicated and characterised by internal inconsistencies. Among other issues, equity equivalents do not qualify for the same number of points as companies who have done (51 percent) equity deals.
- Study grants made to black students which require that they work for the company for a period after graduation can no longer (since 2019) be counted towards B-BBEE ratings. In other words, companies can no longer accumulate B-BBEE points by training their 'own people' even where those individuals are black South Africans.
- The Codes, especially in their revised 2019 form<sup>11</sup>, are so full of jargon, cross-references and formulae as to be beyond the comprehension of many smaller companies. Those with the financial muscle to

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<sup>8</sup> SAIRR (2018) Economic Empowerment for the Disadvantaged: A Better Way to Empower South Africa's Poor, July <https://irr.org.za/reports/occasional-reports/files/economic-empowerment-for-the-disadvantaged.pdf>

<sup>9</sup> Leon, P. Leyden, P. and Müller, E. (2021) Key consequences of the Gauteng High Court's decision in Minerals Council of South Africa v The Minister of Mineral Resources and Energy and Thirteen Others (Case No. 20341/19)(Mining Charter III Judgment), Herbert Smith Freehills <https://www.lexology.com/library/detail.aspx?g=de622f59-6c08-4a0c-9f37-38e01da2cc98>

<sup>10</sup> Department of Trade and Industry (2019) Broad-Based Black Economic Empowerment Amendment Act, Statement 300, General Principles for Measuring Skills Development. Point 5.6. p. 6, 31 May [https://www.bbbeeommission.co.za/wp-content/uploads/2019/06/42496\\_31-5\\_Amended-Statement-000-300-and-400.pdf](https://www.bbbeeommission.co.za/wp-content/uploads/2019/06/42496_31-5_Amended-Statement-000-300-and-400.pdf)

<sup>11</sup> Department of Trade and Industry (2019) Broad-Based Black Economic Empowerment Amendment Act (53/2003): Codes of Good Practice, Notice 303, 31 May [https://www.bbbeeommission.co.za/wp-content/uploads/2019/06/42496\\_31-5\\_Amended-Statement-000-300-and-400.pdf](https://www.bbbeeommission.co.za/wp-content/uploads/2019/06/42496_31-5_Amended-Statement-000-300-and-400.pdf)

employ professional ratings agencies have been known to receive different scores from agencies which have looked at identical data.

- A disturbingly high percentage of B-BBEE issues are resolved in the courts. This is indicative of the degree of uncertainty U.S. companies face in the space. It is also business cost which could be entirely avoided through adequate consultation and appropriate administrative reforms.

AmCham suggests there is a need for a once-off review and simplification of both the B-BBEE Codes of Good Practice and the overall B-BBEE regulatory environment. Thereafter an ongoing annual review mechanism needs to be put in place, with the full participation of the private sector. We note that the ERRP promises to ‘simplify and align B-BBEE legislation and regulations’ and suggest this is an opportunity to review the policy and to institute a standing review mechanism.

AmCham does not believe the B-BBEE Commission, in its current form, is adequately capacitated to provide the needed standing review mechanism. Many U.S. firms have found the Commission lacking in transparency, unresponsive and inclined to make policy through administrative decisions. Generally inadequate channels for communication on B-BBEE issues mean that critical policy decisions are determined by the judiciary.

## 9.2. Skills and Education

The World Bank<sup>12</sup> identifies ‘insufficient skills as the key constraint to reducing poverty and inequality’ in South Africa. The Bank’s 2018 report on South Africa goes on to add that ‘despite slow and steady progress, learning outcomes are still poor by global and regional standards’.

U.S. companies willingly participate in skills development programmes in South Africa, investing at least R500 million in the process every year, by our most conservative estimate. More than two-thirds of U.S. companies surveyed for the AmCham South Africa Business Barometer 2021 survey indicates that education is their top focus in Corporate Social Investment spending with some spending more than R50 million in the sector. The same survey found that some 70 percent of U.S. companies have little trouble finding the skills they need to run their businesses. This accords with the findings of the ManPower Group which identified a 34 percent shortage<sup>13</sup> of needed skills in South Africa.

It is in this 30-34 percent gap that many issues arise. Most South African school leavers and all-too-many graduates are not market-ready from the perspective of U.S. companies. Programmes like the Youth Employment Service (YES) have been eagerly picked up and implemented by U.S. companies. Unfortunately, this programme and all similar state and business sponsored schemes fail the test of scale. Their impacts are simply too limited to fill South Africa’s skills gap.

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<sup>12</sup> World Bank (2021) Building back better from COVID-19, with a special focus on jobs, South Africa Economic Update, Edition 13 <https://openknowledge.worldbank.org/handle/10986/35987>

<sup>13</sup> Manpower Group (2021) Employment Outlook Survey, September 14 <file:///C:/Users/dwchr/Downloads/manpowergroup-employment-outlook-q4-2021.pdf>

Where U.S. companies need to import essential scarce skills, they encounter an over-complex and often unhelpful administrative system. Proving that the skills they require are not available in the domestic market can be an onerous and time-consuming task. The government's own scarce skills list is inflexible, now excludes the previously very useful 'general manager' category and is invariably out of date as a result of the bureaucratic process (involving several government departments) required to draw it up. The ideas of a points system or exemptions for certain higher education qualifications, mooted in the Government's 2016 Green Paper<sup>14</sup> have never been implemented.

### 9.3. Creating Jobs

South Africa's very high unemployment rate (nearly 35 percent overall)<sup>15</sup>, especially among black youth, is a matter of concern to U.S. companies in the country. AmCham does not believe the problem can be dealt with only on the supply side (education and employment placement programmes) but that it also requires reforms on the demand side i.e., the labor market. Job creation at the sort of scale required to make a real impact on South Africa's unemployment issue requires more labor-intensive growth.

Given South Africa's history of apartheid and exclusion, AmCham understands that labor rights are a sensitive issue. However, there is no need for reform to challenge the substantive rights of workers; all that is required is a simplification of the system and allowing careful future-facing exemptions from what are currently over-rigorous employment standards.

Wage rates at AmCham's member companies are near the top end of the South African scale. Nevertheless, U.S. companies would prefer to be part of a thriving business ecosystem, and this requires more competition at the labor-intensive end of the market. Such competition will only be possible with greater flexibility in minimum wages, wage negotiation mechanisms as well as employment and dismissal procedures.

AmCham would like to see a comprehensive review and simplification of the labor market system, with the active participation of organized Labor in the process.

### 9.4. Competition Policy

South Africa entered the democratic era with an economy over-concentrated and over-regulated to the point of immobility. Competition policy is one of the main measures to address this problem. AmCham supports the greatest possible degree of competition in the economy, subject to such public interest considerations as the

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<sup>14</sup> Department of Home Affairs (2016) Green Paper on International Migration, 24 June  
[https://static.pmg.org.za/40088\\_gon738.pdf](https://static.pmg.org.za/40088_gon738.pdf)

<sup>15</sup> Businesstech (2021c) These are the areas in South Africa where more people are unemployed than working, 3 December  
<https://businesstech.co.za/news/business/542792/these-are-the-areas-in-south-africa-where-more-people-are-unemployed-than-working/>

elimination of negative externalities and other instances of market failure.

The Competition Act, as amended in 2018, allows the Competition Commission to effectively block investment unless certain conditions (typically a freeze on restructuring, extra skills development contributions, new jobs, promises of business expansion) are met. These conditions are typically negotiated on a case-by-case basis (and thus do little for investment climate certainty). Nevertheless, interviewees representing companies subjected to these conditions were uncomplaining.

AmCham would like to see further clarification of the 'public interest' criteria used by the Competition Commission with a view to ensuring that the application of these is not a disincentive to future investment, as well greater clarity on the jurisdictions of the B-BBEE and Competition Commissions and the elimination of areas of overlap.

## 9.5. Localisation

'Localisation' (import substitution) is the official policy of the SA government, implemented by the DTIC. It has deep roots but has been intensified by government's determination to use it as a route out of the post COVID-19 economic recession, as reflected in its 2020 Economic Reconstruction and Recovery Plan.

U.S. companies in South Africa are supportive and eager to localise their supply chains where possible, but only under appropriate business conditions. Many find the existing localisation policy threatening as it is not clear what demands will be made of them in future. AmCham would rather see localisation driven by incentives (as it is in the South African motor industry) than by regulatory compulsion.

U.S. companies also worry about capacities, prices and quality of 'localised' goods and the effect this will have on competitiveness and inflation. Quantitative modelling<sup>16</sup> shows large variation in capacity and ability to localise in the short to medium run. Examples from other countries show the downsides of moving too fast and too rigidly as well as the importance of productivity enhancements and export competitiveness to drive sustainable localisation.

South Africa should be looking to deepen its integration into global value chains, not to further distance itself. This low level of integration is the reason South Africa's recovery from the economic effects of the pandemic is projected to badly lag its peers<sup>17</sup>. Businesses miss out on international trade and the technology transfers that come with participation in international value chains. AmCham believes that the more South Africa seeks to insulate itself, the less it will benefit from a global recovery.

## 9.6. Intellectual Property

U.S. investors in South Africa usually have a unique selling proposition, much of which is based on their own patented Research and Development. They tend to be very sensitive to developments that threaten their

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<sup>16</sup> Intellidex (2021) Localisation: What is Realistic, 17 May <https://www.intellidex.co.za/insights/localisation-report/>

<sup>17</sup> OECD (2020) Economic Surveys: South Africa Snapshot, July [http://www.treasury.gov.za/comm\\_media/press/2020/20200731%20OECD%20Economic%20Survey%20SA%202020.pdf](http://www.treasury.gov.za/comm_media/press/2020/20200731%20OECD%20Economic%20Survey%20SA%202020.pdf)

intellectual property (IP) rights.

The issue of IP in South Africa is contentious. The uncertain status of legislation proposed to modify Section 25 of South Africa's national constitution (which protects property rights) to allow expropriation without compensation<sup>18</sup> adds to the uncertainty. Section 25 refers to all property classes, including intellectual property. Government has proposed amendments to the Copyright Bill and the Performer's Protection Amendment Bill and has been sitting on these for some years. There has been opposition including a challenge in the U.S. which threatened to remove South Africa's AGOA trade preferences. Government and business have agreed on a phased approach to the issue, with the first phase focusing on pharmaceutical patents.

Last year (2020), South Africa (along with India) has proposed a World Trade Organization (WTO) exemption on pharmaceutical patents for Covid-19 vaccines. There has been some momentum for such an initiative from international NGOs, with some support from the World Health Organization and the U.S. government. The laudable objective is to accelerate the distribution of COVID-19 vaccines in developing countries.

However, AmCham does not agree that IP is a barrier to vaccine access. On the contrary in fact, a weak IP environment is itself an obstacle to the development of medicines. Pharmaceutical companies would not develop vaccines in the first place if they did not expect to generate revenues down the line. There has been significant technology transfer to South Africa since the Covid-19 pandemic broke and the future of such positive developments is threatened by the IP controversy.

AmCham favors the most rigorous protection of intellectual property. We note that IP protection is not only critical to pharmaceutical manufacturers but across a range of industries including software, manufacturing and indeed any globally branded item including cosmetics, soft drinks and many consumables.

## 9.7. Regulatory Optimization

Many of the issues discussed above suggest that compliance costs (red tape) are a problem. South Africa ranks 84<sup>th</sup> (out of 190 jurisdictions)<sup>19</sup> in the World Bank's red tape index, Doing Business, in 2020 (with ranking 1 indicating the least red tape). It has fallen from a ranking of 28 in 2008<sup>20</sup> which indicates that, far from improving, regulatory compliance issues in South Africa have become more onerous.

Laws and regulations tend to pile tasks onto the private sector as if it has a bottomless capacity for compliance. Information from U.S. companies indicates that this is far from the case. Even the country's well-regarded tax authorities are generally regarded as demanding too much, too often, against deadlines which are tight for the private sector and very relaxed for the authorities. Nor, despite, statements to the contrary from national

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<sup>18</sup> Government of South Africa (2015) Expropriation Bill (B4D-2015)  
[https://www.gov.za/sites/default/files/gcis\\_document/201605/b4d2015pdf.pdf](https://www.gov.za/sites/default/files/gcis_document/201605/b4d2015pdf.pdf)

<sup>19</sup> World Bank (2020) Ease of Doing Business <https://data.worldbank.org/indicator/LC.BUS.EASE.XQ>

<sup>20</sup> White, L. Brown, L. and Rees, L. (2014) South Africa: One Step Forward, Two Steps Back, Gordon Institute of Business Science, University of Pretoria [https://www.gibs.co.za/about-us/centres/dynamic\\_markets/publishingimages/cdm/sa%20dmi%20briefing-%20one%20step%20forward,%20two%20steps%20back.pdf](https://www.gibs.co.za/about-us/centres/dynamic_markets/publishingimages/cdm/sa%20dmi%20briefing-%20one%20step%20forward,%20two%20steps%20back.pdf)

political leaders, is compliance deluge letting up.

The 2021 Companies Amendment Bill contains onerous new disclosure requirements<sup>21</sup> regarding wages and salaries and the differentials between the top and bottom. The point, for AmCham, is not that there might be issues about remuneration (although U.S. firms in South Africa are famous for offering much better packages than the national average) but that this is yet one more administrative burden imposed by government on business.

The category of business worst affected by excess regulation is small and medium enterprises. Many AmCham members are bigger companies which can find the resources to deal with transaction costs. But this is not universally true, with smaller U.S. companies (turnover less than R100 million) markedly more inclined to say that they struggle to understand and implement requirements. However even these smaller U.S. firms are not small and medium enterprises (SMEs) as the term is used in South African policy.

### **9.8. Small Business**

South African SMEs are especially heavily impacted by excessive regulation and barriers to market entry. This is of concern to U.S. investors as many of their suppliers or customers fall into this category. Although 67 percent of U.S. companies who responded to the AmCham South Africa Business Barometer 2021 survey develop smaller enterprises as part of their B-BBEE contribution, all U.S. investors have commercial relationships of some sort with South African SMEs. U.S. companies witness the struggles of these firms on a daily basis.

Red tape is prominent among these problems despite South African government promises and indeed sporadic interventions to simplify the regulatory environment. Combined with factors like the domination of large or state-owned companies in many sectors, lengthy payment periods (from government and public sector clients) and rigid wage demands, it is clear that South Africa does not offer an SME-friendly environment.

AmCham believes an initiative is needed to optimize the legal and regulatory environment from a business perspective. Such a programme should not be conducted solely by civil servants as it has been demonstrated around the world that such processes deliver limited outcomes. It needs to include municipalities and functions which have been devolved to provincial levels as well the national level.

AmCham advocates a revival of an amended version of the Red Tape Impact Assessment Bill<sup>22</sup> which was previously rejected by Parliament on procedural grounds. That Bill required all departments and self-regulatory agencies to reduce red tape by 25 percent over five years. Equally important, AmCham suggests, is the establishment of a Regulatory Impact Assessment Unit at the Apex of government, perhaps in the

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<sup>21</sup> Businesstech (2021) New law will push more skilled people to leave South Africa, 2 November 2021 <https://businesstech.co.za/news/business/533666/new-law-will-push-more-skilled-people-to-leave-south-africa/#:~:text=Business%20group%20Sakeliga%20has%20opposed,people%20to%20leave%20South%20Africa.>

<sup>22</sup> Government of South Africa (2016) Red Tape Assessment Bill (B13 – 2016) [https://www.gov.za/sites/default/files/gcis\\_document/201610/b13-2016redtapeimpactassessment18oct2016.pdf](https://www.gov.za/sites/default/files/gcis_document/201610/b13-2016redtapeimpactassessment18oct2016.pdf)

Presidency/National Treasury's Operation Vulindlela<sup>23</sup>. The amendments to the Bill should ensure that red tape is not regarded only as a SME issue but a problem for firms of all sizes. This should complement the use of Socio-Economic Impact Assessments for all proposed legislation, a mechanism advocated by AmCham and seemingly accepted (in principle) by the government as long ago as 2007<sup>24</sup> but never implemented.

### **9.9. Regional Integration**

AmCham enthusiastically supports measures to integrate the markets of sub-Saharan Africa through implementation of the African Continental Free Trade Agreement (AfCFTA). It is worth pointing out that 'business opportunities in Africa outside of South Africa' was the single most selected positive feature in AmCham's South Africa Business Barometer 2021 survey. The potential of a single market of 1.2 billion people not only offers opportunities to U.S. companies but would transform the continent into an economic superpower.

AfCFTA will have to be built element by element. AmCham is pleased to note that South Africa has been one of the leaders of the process but is concerned that protectionist aspects of the country's localisation policy may interrupt progress.

AmCham also notes with concern that South Africa ranks very badly in 'Trading across borders', as reflected in the World Bank publication Doing Business in 2020. We are aware of initiatives to improve border efficiency, including One-Stop Borders Posts and the introduction of a single import/export window. We are also aware that many of the problems in land freight occur 'across the border' in South Africa's neighbouring countries. Nevertheless many U.S. firms continue to find dealing with the South African Authorities, including the Customs and Excise division of SARS, to be a pain point. Some complain that their SARS relationship managers are seldom in place long enough to build a proper relationship. Border crossing and logistics into African markets are prone to disruption which makes doing business difficult. AmCham is not confident that the new Border Management Authority, currently in implementation, will, on its own, make much difference to the situation.

## **10. The Way Ahead**

AmCham will continue to represent the interests of its member companies, advocating appropriate business climate reforms as well as providing feedback and advice to U.S. firms. AmCham's preferred policy positions are laid out in the document above. This may look like a very large agenda, but the AmCham Business Barometer 2021 shows that some issues are more important to US firms active in South Africa than others.

AmCham is engaged in on-going consultation with its members in defining priorities for policy advocacy. The top on-going systemic issues at the end of 2021 are energy, safety and security, red tape around B-BBEE,

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<sup>23</sup> Presidency of South Africa/National Treasury (2021) Operation Vulindlela Summary Booklet

<http://www.treasury.gov.za/Operation%20Vulindlela%20Summary%20Booklet%20March%202021.pdf>

<sup>24</sup> Department of Planning, Monitoring and Evaluation (2007) Socio Economic Impact Assessment System (SEIAS)

<https://www.dpme.gov.za/keyfocusareas/Socio%20Economic%20Impact%20Assessment%20System/Pages/default.aspx>



Intellectual Property rights and digital readiness. Other issues – often related to competition policy, logistics or localisation – appear on the agenda from time-to-time. AmCham thus engages with both longer-term business environment issues and short-term advice and crisis management.

AmCham will monitor and assess the policy environment and will continue to act as a voice for the collective interests of U.S. business in South Africa. We believe these interests are not only compatible with those of South Africa as a nation, but largely synonymous. It cannot be stressed too much that AmCham and the U.S. companies it represents see themselves as involved in a partnership with South African government and society. Advocacy will be done in collaboration with organised business and via, but not exclusively confined to, consultative mechanisms which include government, organised labour and social interests. In addition to the agenda openly expressed in this document, AmCham will continue to push for greater general clarity and stability in the South African policy environment. We believe this is in the interests not only of U.S. companies but, more importantly, of the country.

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