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Memorandum to Senate Standing Committee on Roads and Transportation

Submitted by Okoa Mombasa Coalition on 21 November 2019 at Parliament Buildings, Nairobi

Summary:

Okoa Mombasa respectfully submits this Memorandum to the Senate Standing Committee on Roads and Transportation, urging the Committee to conduct an in-depth inquiry into actions by the Executive that deliberately erode the economy of Mombasa and the Coastal region as a whole.

The directive to transport all cargo arriving at the Port of Mombasa and destined inland via the Standard Gauge Railway (SGR) has had the effect of transferring port operations inland as well, leaving behind destitution and shattered livelihoods. The directive is illegal as it violates the Constitutional obligation for public participation; it also creates a monopoly and amounts to a restrictive trade practice contrary to the Competition Act. The proposed privatisation of Container Terminal 2 similarly will result in job losses for thousands of employees.

Those most affected by these decisions, the people of Mombasa, were not consulted or given the opportunity to participate in decision-making processes, yet they disproportionately bear the burden of these decisions, effectively undermining the goals and objectives of devolution.

Background:

Okoa Mombasa Coalition is a group of workers, unions, businesses, civil society organisations and other individuals that have come together out of concern for the livelihoods and wellbeing of the residents of Mombasa. The Coalition came together on 2 August 2019 in response to government policies related to the port which have had a negative impact on residents, who were not given an opportunity to participate in the decision-making process as mandated by the Constitution. These policy directives have resulted in thousands of job losses, shrinking of small businesses and the weakening the social and community ties in Mombasa.

The Coalition firmly believes that the issues facing Mombasa represent a microcosm of the concerns facing other Counties in Kenya. As such, the Coalition's frames its primary goal as advocating for the rights of residents in devolved units to share benefits of resources located within their localities – local participation for local resources.

For the purposes of our submission to this Committee, we focus our attention on Mombasa Harbour and the Port of Mombasa. We draw a distinction between the Harbour – a natural resource – and the Port, an aggregation of services and functions that directly or indirectly facilitate the docking of ships and the loading and offloading of cargo, among other things. The City of Mombasa owes its importance and identity to the fact that it has both a harbor and a port, and the two cannot be separated. The economy of Mombasa depends on the Port to survive. According to KNBS figures, the largest contributor to Mombasa's Gross County Product (GCP) is the transport and storage subsector, consistent with Mombasa Port's positioning as the Gateway to East Africa. It stands to reason that if you decimate this subsector, you strike the very heart of Mombasa's economy. Against this background, the directive compelling all cargo destined inland to be loaded on the Standard Gauge Railway has effectively killed Mombasa's economy and caused a ripple effect beyond the County, as we detail below.

The Standard Gauge Railway (SGR):

The Mombasa-Nairobi-Naivasha standard gauge railway (SGR) is the most expensive infrastructure project in Kenya's history. The Mombasa-Nairobi line was completed at a cost of Ksh. 327b, and the extension from Nairobi to Naivasha is reported to have cost KSh.150b, for a total of Ksh. 477b. By way of comparison this is 15 times the cost of the Nairobi-Thika highway, which was the country's biggest infrastructure project before the SGR. The lion's share of this money was borrowed from China. The Mombasa-Nairobi line is financed by loans from the Exim Bank of China to the tune of USD 3.6 billion. The details of the Nairobi-Naivasha loan have not been published.

Take or Pay Agreement

By way of an Auditor General's Management Letter to the KPA Management dated 16 November 2018, it came to light that the SGR loans were secured against a so-called "take or pay" agreement between the Kenya Ports Authority (KPA) and Kenya Railways. This agreement binds KPA to provide Kenya Railways with a certain amount of freight, so that enough fees are generated to pay the SGR loans. Specific targets and fees are listed in a schedule appended to the agreement. KPA is obliged to pay – from its own resources – any shortfall in revenue arising from failure to deliver the specified cargo. The revenues in the schedule are calculated at the rate of $0.12 (12 US cents) per km/ton. This is equivalent to a tariff $870 per 20 foot container (of 15 tonnes or less) from Mombasa to Nairobi. The current tariff is $500, which is a rate of $0.069 (6.9 US cents) per km/ton.

Report of the Joint Technical Committee on the Efficiency and Cost Effectiveness of the Transportation of Cargo using the SGR

This Government report provides a comparison of the cost of freight by road haulage and SGR. Its main conclusions are as follows:

1. The average transport for 20ft and 40ft containers from Mombasa to Nairobi by road is USD 650 and USD 850 respectively.
2. The average transport for rail transport for 20ft and 40ft containers from Mombasa to Nairobi is USD 1,420 and USD 2,120 respectively.
3. The difference between road and rail for 20ft and 40ft containers amounts to USD 770 (118% increase) and USD 1,270 (149% increase) respectively.
4. By rail, additional costs are incurred due to re-marshalling, storage and demurrage. If removed, the cost of rail transport for 20ft and 40ft containers is USD 1,030 and between USD 1,395 and USD 1,470, which is still higher compared to road transport by USD 380 and USD 545 at least, respectively.
5. If certain other costs are removed from the rail shipping equation – namely empty container return by rail, shipping line margins and KPA shunting of empties to container depots – the cost of shipping a 20ft container by rail is USD 780 and a 40ft container is between USD 1,095 and USD 1,170.

Operational and Financial Performance of the SGR

According to figures published by KNBS, the SGR carried 2.8 million tonnes of freight in 2018, which generated revenue of Ksh. 4 billion. In the first two months of 2019, it carried 662,000 tonnes, which earned Sh. 959 million. This trend, if sustained, projects to Ksh. 5.8 billion from 4 million tonnes of freight.

These figures fall far short of the revenues required by the “take or pay” agreement. At 12 US cents per km/ton, the annual freight requirement of 5.7 million to 7.58 million tonnes implies a revenue requirement of between $342 million (Ksh. 34.2 billion) and $455.8 million (Ksh. 45.6 billion) per year, which is between 6 and 8 times the freight revenue projection for 2019.

These figures cast serious doubts on the commercial and economic viability of the SGR. They show that the SGR cannot service its debts using the "take or pay" model and raise serious doubts as to whether a proper feasibility study for the SGR was undertaken. We would like to draw the Senate's attention to the fact that Transport CS James Macharia informed the nation late last year that the Chinese authorities had asked the government for a feasibility study of the whole project as a condition for financing Phase 2B, which China subsequently declined to finance.

The government's strategy to bridge the revenue shortfalls was to impose a directive compelling the transportation of all cargo to the hinterland on the SGR, bypassing all of the traditional port services based in Mombasa – truck transport, temporary container storage, clearing and forwarding, etc. According to a University of Nairobi study commissioned by the County Government of Mombasa, this has caused nearly 3,000 Container Freight Station (CFS), fuel station employees and truck drivers to lose their jobs. Over 8,000 more jobs are threatened if the directive remains in place, and some Kshs 33.3bn in revenues has been lost, representing 16% of Mombasa County's GDP.

According to Article 10(2) of the Constitution, the national values and principles of governance include participation of the people. Despite court jurisprudence having developed the content of public participation, this exercise was not undertaken, in contravention of the law. Further, the directive amounts to a restrictive trade practice that "prevents, distorts or lessens competition in trade" contrary to the Competition Act.

Container Terminal 2:

We bring to the attention of the Committee the question of Container Terminal 2 (CT2) because it portrays a similar disregard for the people of Mombasa and their interests. CT2 was built with a loan of Ksh. 27 billion from JICA. The loan is currently serviced by Kenya Ports Authority (KPA). KPA has contributed a further Ksh. 20 billion to CT2's development, acquiring superstructures, quay cranes, yard cranes, mobile trucks and offices. No investor, local or foreign, has put in a single cent in the facility. It was 100% built by KPA and is owned by the state.

The proposed privatisation process of CT2 was carried out through amendment of the Merchant Shipping Act to exempt the Kenya National Shipping Line (owned 47% by the Italian owned Mediterranean Shipping Company) from the provisions of the Act, which disallows shipping lines from operating a terminal or other related shipping services except transportation by sea.

The national government's attempt to privatize Container Terminal 2 at Mombasa Port is, similar to the SGR directive, an effort to hollow out Mombasa's economy. CT2 is the most modern section of Mombasa's Port and one of the top shipping facilities in Africa. By some estimates, it is capable of producing upwards of KES 30 billion in revenue per year. It also employs over 3,000 people in well-paid, mostly unionized jobs.

Privatisation of such a high-value public asset will undoubtedly result in automation at the Port leading to the loss of nearly 4,000 jobs and the consequent loss in livelihoods for the families and communities that depend on these employees. The much-touted creation of 2,000 seafarers' jobs through this privatisation deal does not mitigate the damage and loss that will be occasioned to Mombasa County's socio-economic framework. No public participation was carried out on this decision and procurement rules were also circumvented by labelling the transaction a government to government transfer rather than what it is - privatisation.

Petition to the Senate

The result of the above actions has been to effectively transfer revenues and incomes that contribute to Mombasa's economy to Nairobi and Naivasha and into private pockets, a deliberate act of discrimination against the County and residents of Mombasa. Mombasa has been forced to bear the burden of paying for the exorbitant SGR and potentially, for CT2, without commensurate benefits accruing. These actions violate the objects of devolution, specifically the objective "to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them". The residents of Mombasa were not consulted or given an opportunity to participate in decisions that affect them and the resources within their County.

We are petitioning the Senate to open an inquiry into these grave injustices. The Senate should also demand the publication of all the documents related to the SGR loan, in particular the agreement signed by the Government of Kenya in this respect.

Khelef Khalifa
On behalf of Okoa Mombasa