

THE UNIVERSITY OF PRETORIA

Critical Assessment of the Legislative Framework for private and public-private models of Special Economic Zones in Zambia

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Declaration

I KATE MANDO MUNUKA hereby declare that this mini-dissertation is my original work and that other works cited or used are clearly acknowledged. This work has never been submitted to any University, College or Institution of learning for an academic or other award.

Signed:.....

Date:.....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

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Dedication

To my loving parents Hilda and Taddeus Munuka and my family who have always believed in me with unwavering support.

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From the outset I thank God for the past challenging but amazing year of study and my completion of the LLM programme in International Trade and Investment Law program.

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God bless you all.

List of Abbreviations

COMESA	Common Market for Eastern and Southern Africa
DTA	Double Taxation Agreement
GATT	General Agreement on Trade and Tariffs
PPP	Public Private Partnership
RTA	Regional Trade Agreement
SADC	Southern Africa Development Community
SEZ	Special Economic Zone
SCM	Subsidies and Countervailing Measures
SI	Statutory Instrument
TRIMS	Trade Related Investment Measures
WTO	World Trade Organisation
ZDA	Zambia Development Agency

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Abstract

The focus of this study is to critically analyse the legislative framework for private and public private zonemodels in Zambia. The analysis is against the background of Zambia's commitment to promote private sector development and the initiative to use the investment policy tool of special economic zones (SEZs). The analysis is based on the salient provisions of Zambia's Development Agency Act and Public Private Partnerships Act which regulate SEZs and public private partnerships respectively..

The main question sought to be addressed is the efficacy of the legislative framework for private and public private model zones, taking into account accommodation of private sector participation and nature of the investment and business environment. In addressing this question this study will analyse the salient provisions of the aforementioned laws showing how private sector actors are accommodated in the development and operation of the zones. The provisions under the aforementioned laws are to an extent analysed in conjunction with some of Zambia's international trade and investment obligations such as the World Trade Organisation Trade Related Investment Measures. An examination of how the incentives in SEZs are used is also provided as well as some lessons from Ghana, Mauritius and identified international best practices

The main findings of the study include the following:

- In so far as admission of investors to develop and operate SEZs is concerned the legislative framework does not generally discriminate between local and foreign investors and that admission through PPPs accommodates various kinds of well-known PPPs, even allowing prospective investors to kick start projects through submission of unsolicited proposals;
- The need for Zambia's SEZ policy to continuously evolve and diversify by undergoing relevant changes and improvements so that it remains relevant and adapts to the evolving nature of market availability and needs of SEZs whilst leveraging on Zambia's comparative advantages;
- The interplay between SEZs and Zambia's international obligations present challenges and opportunities and thus revealing cause for the better appreciation of opportunities and complexities of SEZ policies and consequence of Zambia's membership in more than one regional arrangement

- Need to periodically review the incentive structure so that Zambia does not inadvertently loss revenue through incentives that do not necessarily prove useful to investors or yield the intended benefits for the country.

Based on the foregoing findings, among others, this study concludes that factors relating to the establishment of SEZs in Zambia incorporate private sector participation through the lifecycle of SEZs, that is to say from the time the investment is sought to be made to when it is becomes operational making significant stride towards achieving openness to private sector participation through private and public private zone models.

Against the foregoing findings and conclusion this study recommends, *inter alia*, for continuous and timely observation and assessment of the shifts in use of SEZ policies *vis-à-vis* changes in the macroeconomic conditions in which the SEZ policy is to be implemented and investor market availability. The rationale of the recommendation is so that any necessary review of the Zambian SEZ policy and pursuit of enhanced private sector development is done from an informed position.

1. Chapter One: General Introduction

1.1 Introduction and Background

The current trend in Africa's development agenda reflects a pro-private sector inclusive development strategy and increasing recognition of the private sector as a strategic development partner by various governments.¹ This trend is evidenced by the spur to public-private partnerships in predominately public areas and increase in the private-public partnership development projects across Africa. In addition to this, are the commitments and measures being undertaken by various governments to make countries more attractive destinations for potential and existing investors from the private sector.²

In a recent article on *Africapitalism*, Barboza contends that Africa is brimming with talent and innovation and that the continents' growth and development can best be achieved through private sector investment that creates economic prosperity and social wealth. In this regard Africa's leaders must urgently focus on creating an enabling environment for business to flourish.³ Recent reports relating to private sector participation appear to suggest that gaps between investment needs and investment availability are often not just due to lack of finance but also lack of bankable projects related to inadequate investment climate.

Farlam aptly summarises the value in cooperation between the private sector and the government by stating as follows:

Public Private Partnerships (PPPs) potentially bring the efficiency of business to the public service delivery and avoid politically contentious aspects of full privatisation. PPPs allow governments to retain ownership while contracting the private sector to perform a specific function and operating infrastructure or providing basic services. Both sides stand to benefit from the contractual agreement. Government earns revenue by leasing state-owned assets or alternatively pays the private sector for improved infrastructure and better service delivery. Often the private sector can do the job more efficiently, which can lower prices and improve rollout. The private operator gets reimbursed either by government or consumers for doing its work, at a profit.⁴

¹United Nations Global Compact Leaders' Summit 2013: Summary Report (2013) 36

² H Scottman The Law and Business of International Project Finance (2008)

³The Africapitalist (2013 Volume 2 Issue 1) 6

⁴ P Farlam 'Assessing Public-Private Partnerships in Africa' (2005) I

In Zambia, the government's commitment to develop the private sector is affirmed in the 2014 Budget Speech by the Minister of Finance which identifies private sector development as one of the macroeconomic objectives, policies and strategies for 2014 and the medium term.⁵ The commitment speaks to continuous implementation of reforms aimed at building and enhancing a sustainable legislative and regulatory environment for private sector-led growth, including the continuation of licensing reforms. Key reforms include: the establishment of provincial one-stop shops for business registration and decentralisation of certain elements of the procedures for registration to local authorities to reduce the cost of doing business.⁶

Another trend akin to the calls for private sector participation by African countries is the use of Special Economic Zones (SEZs) as an investment policy tool for attracting and promoting investment. The number of SEZs has exploded globally, from 79 in 1975 to more than 3500, with most of that expansion occurring in the past 20 years. FIAS gives a figure of 2,500 zones currently operating in emerging and developing economies.⁷ On the African continent, Sub-Saharan Africa accounts for four (4%).⁸

Countries look to establishment of the SEZs with more open market regimes as providing a variety of benefits such as increased foreign direct investment, regional development, technology transfer, foreign exchange income and employment.⁹ Other intangible benefits for developing countries include: business climate reputation, export orientation, bureaucratic performance and the ability to experiment with increased openness and liberalisation of policy in a controlled setting.¹⁰ In Zambia the Multi-Facility Economic Zone (MFEZ or SEZ) policy introduced the creation and use of SEZs. The rationale of the said policy being to attract foreign direct investment and promote economic diversification from the extractive sectors.¹¹

⁵2014 Budget Address by the Minister of Finance delivered to National Assembly (2013) available at <http://www.zambia.or.jp/docs/2014nationalbudgetaddress.pdf> (accessed on 30 October 2013)

⁶<http://www.psdzambia.org/reform-priority-areas.htm> (accessed 21 November 2013)

⁷FIAS: The Multi-Donor Investment Climate Advisory Services Special Economic Zones: Performance, Lessons learned and Implications for Zone Development (2008)

⁸FIAS (n 7 above)

⁹Rakhine Tahaya Association Pros and Cons of SEZs 1-3

¹⁰Rakhine Tahaya Association (n 9 above) 1-3

¹¹ Statement on the Multi-Facility Economic Zones by Minister of Commerce Trade and Industry delivered to National Assembly (2009) 1- 6

SEZs depending on their core benefits and structural characteristics may take different forms ranging from free trade zones,¹² traditional and hybrid export processing zones,¹³ free ports,¹⁴ enterprise zones¹⁵ and single factory¹⁶ zones.¹⁷ SEZs can be structured in various forms for purposes of establishment within a particular country, with private and public-private zone models being among the type options.

Private models began to develop as a new phenomenon in the development of SEZs with a 2008 study finding 62% of zones in developing and transition economies to be private-sector developed and operated compared to 25% in the 1980s, with formal public-private partnerships emerging as a popular option.¹⁸ Traditionally SEZs were largely a public business model and fell solely under the functions of the government. Today, SEZs may be privately owned, developed or operated while in some cases they are owned, developed or operated under public-private partnership arrangements with the governments.¹⁹

African countries such as Liberia, Senegal and Mauritius launched export processing or free zone programs in the early 1970s but while other countries did not operationalise until the 1990s thus making them relative late entrants to the SEZ activities.²⁰ This has also resulted in important implications in considering the success of economic zone SEZs in Africa, particularly the difference in macroeconomic environments in which zones programs develop in present times when compared to the 1970s and 1980s²¹.

Zambia is a late entrant to usage of SEZ policies as the MFEZ programme was only launched in 2009.²² However it is worth noting that accommodation of private sector participation dates way back to implementation of the post-independence agenda through which the nationalist

¹² Fenced-in, duty-free areas, offering warehousing, storage, distribution facilities for trade, and re-export operations Rakhine Tahaya Association (n 9 above) 4

¹³ Industrial estates aimed primarily at foreign markets with the Hybrid model being sub-divided into a general zone open to all industries and a separate area reserved for export oriented enterprises Rakhine Tahaya Association (n 9 above) 4

¹⁴ Large areas accommodating all types of activities, including tourism and retail sales, on-site residence and provide a broader set of incentives and benefits Rakhine Tahaya Association (n 9 above) 4

¹⁵ Zones intended to revitalize distressed urban or rural areas through the provision of tax incentives and financial grants Rakhine Tahaya Association (n 9 above) 4

¹⁶ Individual enterprises regardless of location that do not require location within designated zone to receive incentives and privileges offering broader benefits and more flexible controls than bonded manufacturing warehouse schemes Rakhine Tahaya Association (n 9 above) 4

¹⁷ FIAS (n 7 above) 10

¹⁸ FIAS as cited in S Woolfey Special Economic Zones and Regional Integration in Africa (2013) 9

¹⁹ T. Farole Special Economic Zones in Africa: Comparing Performance and Learning from Global Experience (2011) 37

²⁰ Farole (n 19 above)

²¹ Farole (n 19 above) 67

²² MFEZ statement (n 11 above) 1-2

government opted for a mixed economy with the view to create a conducive climate for private capital so that both public and private sectors support each other.²³ In 2009, the then Minister of Commerce, Trade and Industry, issued a statement on the implementation of Multi-Facility Economic Zones (MFEZs) as a new business model under the auspices of the Triangle of Hope Initiative by the Japanese International Cooperation Agency.²⁴

The initiative was aimed at helping Zambia achieve economic development by attracting more domestic and foreign direct investment through a strengthened policy and legislative environment.²⁵ The recommendation for establishing MFEZs was designed to make Zambia a centre of excellence in economic development through increased activity in trade and manufacturing sectors, which can have numerous positive spill-over effects in other sectors.²⁶

The key legislation regulating investment is the Zambia Development Act (ZDA Act)²⁷. Select provisions of the ZDA Act as read together with the Multi-Facility Economic Zone (MFEZ) Regulations primarily regulates SEZs in Zambia. An examination of these provisions reveals the framework accommodates public, private and public private model zones in Zambia. Currently, Zambia has six SEZs.²⁸

A development worth noting is that rapid expansion in SEZs is happening amidst of substantial changes in the macroeconomic contexts they are situated.²⁹ More importantly, the global trade and investment environment is changing in ways that may no longer support the traditional export oriented SEZs.³⁰ It therefore follows that for countries that have not yet established SEZs, the traditional multinational assembly activities within global production networks is far from the path to be pursued.³¹ At the same time for countries that have already established export SEZs, the challenge is perhaps more acute and is about remaining competitive, which means upgrading production capabilities and attracting investment in higher value-added activities.³² Zambia can fall within the latter category of countries with a more acute challenge as it has already established SEZs.

²³ M Malila *Legal Aspects of Commerce and Investment in Zambia :Past Present and Future (1990-1991)* 624

²⁴ MFEZ Statement (n 11 above) 1- 3

²⁵ MFEZ Statement (n 11 above) 1

²⁶ MFEZ Statement (n 11 above) 1

²⁷ No.16 of 2006

²⁸ These are: Chambishi, Lusaka East, Lusaka South, Lumwana; Ndola Sub Saharan Gemstones Exchange and Roma

²⁹ T Farole & G Akinchi *Special Economic Zones: Progress, major challenges and future directions (2011)* 5

³⁰ Farole & Akinchi (n 29 above) 5

³¹ Farole & Akinchi (n 29 above) 5-6

³² Farole & Akinchi (n 29 above) 6

1.2 Problem Statement

The emphasis and attention on usage of SEZs as models of development has usually been accorded to the public model zones in Zambia. Limited focus has been given to private and public-private zone models, despite global trends indicating the increased usage of these models.³³ Generally, credible private sector participation is hailed on account of the associated efficiency advantages and progressive dynamic operation mix that it brings.³⁴ This study seeks to analyse the extent to which the regulatory framework for private and public-private model SEZs provides entry and operational freedom; access to incentives or taxation treaties and preferential or regional markets; and stakeholder engagement to private sector actors. In doing so, this study shall seek to identify and address the gaps and deficiencies in the said regulatory framework and how they can be addressed.

1.3 Research Questions

The central question in this study is to assess efficacy of the regulatory framework for private and public private model zones, taking into account accommodation of private sector participation and nature of the investment and business environment. In addressing aspects of the central question, other related questions will include:

- a) The extent to which private zone and public-private partnership zone models supported are under Zambian legislation; and in light of related World Trade Organisation and regional obligations and compliance thereof;
- b) Whether there are any incentives used as part of the government's strategy to improve the investment and business environment; and
- c) Whether there are international best practices and lessons that can be learnt from other African countries that have implemented the private and public-private zone models.

1.4 Thesis Statement

This study argues for need to accord balanced attention and importance to private and public-private model SEZs, having regard to the macroeconomic environment and peculiar circumstances of such models. This is premised on the ability of private and public-private

³³ O Tseyenbaljir (X) Possibility of Private Sector Participation in Special Economic Zone Projects: A case of Mongolia 3-4; Farole & Akinchi (n 29 above) 7

³⁴ UNCTAD Economic Development in Africa Report: Intra-African Trade - Unlocking Private Sector Dynamism (2013) 75; D. Brautigam et al. China's investment in African Special Economic Zones: Prospects, Challenges and Opportunities (2010)

zone models being crucial models of development on the account of the associated private sector advantages if properly managed. This is especially so, where SEZs are used within the context of a conducive business environment and as a policy tool for country-wide investment strategy.

1.5 Objective and Significance of the Study

The main objective of this study is to examine the efficacy of the legislative framework for private or public-private partnership SEZs in accommodating private sector participation. This study is relevant to investors, policy makers and academicians as it seeks to provide insight and knowledge on SEZs involving participation of Africa's growing and dynamic private sector. The study will also contribute to continuing calls by stakeholders that governments should look to develop policies that are private sector inclusive in achieving economic development, through the creation of enabling business environments for private businesses and public private partnerships to develop. Thus the study is important for future SEZ policy strategies.

1.6 Preliminary Literature Review

SEZs have over the past few decades become a common policy tool for many countries seeking to achieve economic development. A common thread in the literature relating to SEZs is the exploratory approach towards identifying characteristics of the various types of zones that have been used globally. Some argue that SEZs have generally been a successful policy tool model while others argue that the use of SEZs has not been able to achieve the much needed economic development benefits with which they are associated with.

FIAS from a global perspective looks at the performance, lessons learned and implications for zone development alluding to the fact that there has been a dramatic change in the way zones have been conceived, developed, regulated and governed.³⁵ These changes include: the growing prominence of private sector developed zones, use of public-private partnerships, implementation of international trade compliant policy, incentive and innovative regulatory frameworks. The study analyses major development trends in terms of SEZ configuration and regulation approaches. This study converges with the FIAS study in so far as it examines private and public private zone models and Zambia's international trade obligations. The

³⁵Multi-Donor Investment Climate Advisory Services. Special Economic Zones: Performance, Lessons learned and Implications for Zone Development (2008)

study will further examine the efficacy of the regulatory framework and nature of the investment and business environment using Zambia as a case study.

Woolfrey³⁶ focuses on how establishment of SEZs in member countries of regional trade arrangements can be harmonised with the regional frameworks and whether goods produced from SEZs of member countries should be eligible for benefits arising from the regional framework. The analysis briefly touches on development of SEZs and evolution in the types of zones highlighting the development of private zones. This study highlights the implications of Zambia being a member of regional trade arrangements but does not delve into harmonisation of domestic regulatory frameworks with regional frameworks.

ODI and SAIAdiscuss select factors necessary for successful special economic zones such as human resources development, infrastructure and technology and argue for the necessity of appropriate SEZ complimentary policies³⁷. The discussion converges with this study in so far as it argues for complimentary policies appropriate to SEZs. This study will however mostly focus on the nature of complimentary policies appropriate to private and public private zone models.

Casslooks at the use of incentives and investment promotion agencies in attracting investments into transition economies and alludes to the popularity of incentives in SEZs and use of streamlined administrative procedures.³⁸There is convergence with this study in relation to discussing incentives in SEZs. This study however further explores how the strategy has been applied in Zambian SEZs.

Scheepers discusses SEZs in the context of attracting foreign direct investment in South Africa based on the then draft Special Economic Zones Bill of South Africa and legislative attempts to differentiate its provisions from the Industrial Development Zones Act.³⁹A snapshot of private zones models is given in the study however this study diverges as it focuses primarily on SEZs of private or public-private partnership model with a view to assess accommodation of private participants.

³⁶Special Economic Zones and Regional Integration in Africa(2013)

³⁷G20 and African Development (2011) Working paper to support discussions on the G20 Working Group on Development

³⁸Attracting FDI to transition economies: the use of incentives and Investment Promotion Agencies (2007) Transnational Corporations Volume 16 81

³⁹ Unpublished: A Case study for Special Economic Zones in South Africa as a means of attracting Foreign Direct investment (2012)

1.7 Research Methodology

This study will be desk top and library based research and includes review of legislation, textbooks, journal articles, case law and other relevant publications on private zone development, public private partnerships and incentives regimes. The research approach will be exploratory and analytical in nature. Primary sources will include international treaties and conventions, domestic legislation and policy papers while secondary sources will include information from books, articles, journals and reports from relevant local, regional and international institutions.

1.8 Overview of Chapters

This first chapter discusses the African governments' calls and recognition of private sector actors as credible partners in achieving economic development through partnerships and SEZ policies and introduces Zambia's SEZ policy. It sets out research problem, thesis statement, significance of the study, research methodology, preliminary literature review highlighting scholarly views on SEZs policies and the research questions to be addressed by this study.

Chapter 2 provides a background on the evolution of SEZs, differences between predominately public zones and zones that involving greater private sector participation and the highlights the benefits of private sector participation. The chapter gives an overview of existing SEZs in Zambia and briefly identifies some challenges associated with SEZs whilst noting the significant role investment legislative frameworks play in providing legal security to the private sector.

Chapter 3 analyses the legislative framework governing establishment and operation of private and public private SEZs and how private sector participation is facilitated. Salient features of the Zambia Development Act and Public Private Partnership Acts are analysed with a view of bringing out existing framework dynamics for private and public private model SEZs. The chapter provides further analysis on the relationship between SEZ admission considerations and some of Zambia's international trade and investment obligations under international, regional and bilateral arrangements. The SEZ incentives structure, access to Double Taxation Agreements (DTA) and operational aspects are also analysed.

Chapter 4 draws on international best practices and notable lessons of SEZs as well as lessons from Ghana and Mauritius's SEZ legislative frameworks highlighting some approaches pertaining to movement of goods, labour, streamlining of zones, continuous evolution of SEZ

policies and usage of non-fiscal incentives in an attempt to address grey areas within the Zambian legislative framework

Chapter 5 provides findings of this study, concluding remarks and some recommendations worth considering for adoption in Zambia's framework.

1.9 Scope and Limitation

The scope of this study is limited to the private and public private zone models of SEZs. This study will not analyse public zone models save to the extent that evolution of SEZs or comparisons with such zones are highlighted. The limitations experienced include the limited direct access to frontline information of experiences from regulatory agencies, private sector actors on some issues explored.

1.10 Definition of key terms

Special Economic Zone: demarcated geographic area within a country's national boundaries where rules of business are different from those that prevail in the national territory. These differential rules principally deal with investment conditions, international trade and customs, taxation and the regulatory environment.⁴⁰ Notable models of SEZs referred to in this study include:

Public Economic Zones: SEZs that are established developed, operated and managed by a government or public body. These models will ordinarily allow the participation of private actors in the zones as business operators or through other limited avenues

Private Economic Zones: SEZs that allow for active and fuller participation of the private sector actors throughout the life cycle of the SEZ.

Public-Private Economic Zones: SEZs that involve a partnership between a government or public body and a private actor in its establishment, development or operation.

Multi-Facility Economic Zone and Industrial Park: area or premises in Zambia that have been declared to be a multi-facility economic zone or industrial park subject to terms and conditions stipulated in relevant licence or permit⁴¹

⁴⁰Farole & Akinchi (n 29 above) 3

⁴¹Section 18 ZDA Act

Investment Climate: policy regulatory, institutional and behavioural factors, both present and expected, influencing returns and risks associated with investment⁴² and that provide incentives sufficiently robust to induce the private sector to invest.⁴³

Incentives: measurable economic advantages that governments provide to specific enterprises with the goal of steering into favoured sectors or regions or of influencing the character of such investments and these can be fiscal or non-fiscal⁴⁴

Private Sector: part of the national economy made of private enterprises and includes personal sector and corporate sector and is responsible for financing and allocating most of the resources within the economy.⁴⁵

⁴²<http://info.worldbank.org/etools/docs/library/whytheinvestmentclimatematters> (accessed on 17 November 2013)

⁴³<http://sitesources.worldbank.org/INTPRS1/resources/thematic-workshops> (accessed on 17 November 2013)

⁴⁴Investment Climate Advisory services of the World Bank Investment Law Reform: Handbook for practitioners (2010) 55

⁴⁵<http://www.businessdictionary.com/definition/private-sector.html> (accessed 17 November 2013)

2. Chapter Two: Historical Overview of Private and Public Private Zones

2.1 Introduction

From inception of SEZs, public zones dominated as the primary model adopted by states that sought to use the policy as a channel of attracting investment into domestic economies. Promotion of SEZs is said to be an attempt to deal with infrastructural deficiencies, procedural complexities, bureaucratic hassles and barriers raised by monetary, trade, fiscal, taxation, tariff and labour policies as these structural bottlenecks affect the investment climate adversely by increasing production and transaction costs.⁴⁶

Private zone models appeared on the SEZ global stage in the 1950s and thereafter grew to be a preferable choice to both the countries implementing SEZs for the first time and those with existing zones.⁴⁷ With reference to the latter countries⁴⁸, this wave of private models resulted in privatisation of the public zone models or alignment towards development on public-private partnership basis with the private sector.

This chapter explores the historical background to development of private and public-private zone models then proceeds to examine the differences between the public and private zone models. Thereafter some benefits of private sector participation in SEZs and insight on SEZs in Zambia are discussed before concluding.

2.2 Evolution of Private and Public Private Partnership SEZs

SEZs have been an important policy instrument for many governments seeking to attract foreign investment, promote export-oriented growth, and generate employment.⁴⁹ It is therefore no surprise that SEZs are potentially important channels through which investments are made.⁵⁰ Popularity of SEZs as a policy tool has grown enormously in the past 20 years: In 1986, the International Labour Organisation's database reported 176 zones in 47 countries and by 2006; it reported 3,500 zones in 130 countries.⁵¹

⁴⁶ A Aggarwal Special Economic Zones: Revisiting the Policy Debate(2006) 4533

⁴⁷ Farole & Akinchi (n 29 above) 28

⁴⁸ Costa Rica and Coloumbia are examples of countries that privatised their zones Farole& Akinchi (n 29 above) 37

⁴⁹ Rakhine Tahaya Association (n 9above) 1-3

⁵⁰ D Brautigam et al (n 34 above)1

⁵¹ Farole (n 19 above) 17

The first SEZ known to exist in the world was the Shannon Free Zone, which dates back as far as 1958.⁵²In Africa, the first SEZs are said to have been established around the 1970s in Liberia, Mauritius and Senegal.⁵³However in Sub-Saharan Africa most countries did not develop zone programmes until the 1990s. Today, many African countries have SEZs while other countries on the continent are looking into establishment of these zones.

Traditionally, the nature of the initial SEZs known to exist, were export inclined, the Export Processing Zones (EPZs).By the mid-1980s, EPZs were a fixture of trade and industrial policy in all regions of the world.⁵⁴Notably, SEZs established between the 1950s and 1970s were largely public affairs and governments planned, financed, promulgated the regulations, administered the regime, conducted the investment promotion, interfaced with investors and managed the real estate side of the operation including building, renting, and maintaining.⁵⁵However, today's SEZs have however diversified from being export inclined to pursuing a wider and more sophisticated spectrum of activities other than just export activities.

Around the 1960s private zones appeared on the global scenewith the first privately developed and operated EPZ being La Romana Free Zone, in the Dominican Republic in 1969. Soon after, Coasta Rica and Colombia privatized their public zones and created entirely new private zones while Asian countries caught on to the models in the 1990s, with Thailand and the Philippines launching private zones.⁵⁶ In Africa, most zones were originally set up as public zones until around the 1990's when the first private and public partnership (through the partnership of the Ghanaian government and foreign partners in development of the Tema) zone were set up at Tema area in Ghana.⁵⁷ As of 2011, Ghana had four EPZs in operation since run by private companies under supervision of the Ghana Free Zone Board.⁵⁸Other countries in Africa that have adopted private zones route include Mauritius, Kenya and Zambia.⁵⁹.With the wave of private models emerged use of PPPs based on extensive cooperation and co investment by public and private partiesin SEZs.⁶⁰

⁵² Farole & Akinchi (n 29 above) 28

⁵³ In 1970,1971 and 1974 respectively Farole & Akinchi (n 29 above) 36

⁵⁴Farole (n 19 above) 36

⁵⁵ Farole (n 19 above) 18

⁵⁶ Farole (n 19 above) 37

⁵⁷OECD/World Bank Aid for Trade Case Study: Ghana Free Trade Zones (undated) 2 available at : <http://www.oecd.org/aidfortrade/47811415.pdf>

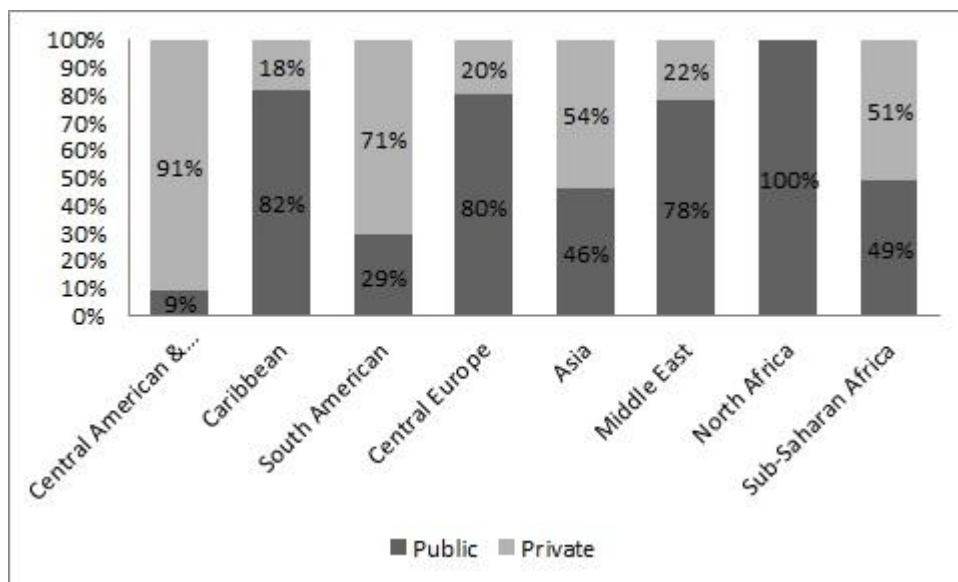
⁵⁸F Bost West African Challenges: Are Special Economic Zones good for development (2011)12

⁵⁹Countries accommodate development of SEZs by private sector

⁶⁰ Farole (n 19 above) 39

Six main forms of PPP currently exist, each representing an increase in private participation and a progressive shift of risk from the state to the private sector.⁶¹ Among these are service contracts (aspects of management or services are subcontracted to specialist firms for a fee)⁶², concessions (which bring private capital to expand on existing infrastructure and turn the zone into a high-value asset)⁶³, and divesture or privatization.⁶⁴ It is useful to note that Africa has a number of the Chinese overseas SEZs, which broadly represent public - private models as they involve cooperation between Chinese private actors and the relevant governments.⁶⁵ In 2006, the Chinese Government announced support for the establishment of overseas economic and trade cooperation zones and 5 of the approved zones are in the in Ethiopia, Mauritius, Nigeria and Zambia.⁶⁶

Having provided insight into the growing trend of private and public-private zones, the figure below is illustrative of the global scene split between private and public zones.



Source: *Special Economic Zones in Africa*⁶⁷

2.3 Some underlying differences between public zones models and private zone models

Some countries in opt to have public zones while other countries in addition to public zones opt for private zones and/or public-private zones within their jurisdictions. The consequence

⁶¹ Farole (n 19 above) 39

⁶² Schedule I of the PPP Act

⁶³ Schedule I of the PPP Act

⁶⁴ Farole (n 19 above) 36

⁶⁵ D. Brautigam & T Xiayong African Schenzen: China's Special Economic Zones in Africa (2011) 33

⁶⁶ D. Brautigam et al (n 34 above) 1-3

⁶⁷ T Farole (n 19 above) p191

of the co-existence of public and private model zones is that in some countries, if not all, public zones have been made to compete with private zones under similar operating conditions to avoid unfair competition.⁶⁸ In private zone models the level of private sector participation in the SEZs varies depending largely on the policy intent, legal framework and strategy supporting the SEZs. Thus, it becomes necessary to highlight the differences that exist between public SEZs and SEZs models accommodating greater private sector participation. This can either be through development and operation of a SEZ, establishment of a business enterprise or other dynamic means of participation.

A public zone as highlighted by the earlier definition is one primarily managed by the government. The government or public body is responsible for the management, regulation and smooth operation of the zones at almost all key levels. The role of the private sector is usually limited to operating a business enterprise under a licence or permit subject to the accompanying conditions in the SEZ.

In a private zone model the private sector actors have more prominent roles in relation to which may range from the initiation of the process to set up the zone to operational management of all the zone activities. In this model, the role of the government is largely providing facilitative support to the private actors in relation to issues such as land allocation, resettlement of persons from the areas designated as zones and processing of incentives and other governmental administrative procedures. It is worth noting that though a SEZ may be private, the government may hold equity in the company responsible for development or operations or a seat on the board of directors of the particular zone to represent and safeguard public interests.

A public-private zone model represents the middle path between the public model and private model as the government and the private sector actor enter into a partnership or joint venture arrangement to facilitate the establishment, management or operation of a SEZ. In this arrangement, the parties' role is largely determined by the partnership agreement and surrounding circumstances.

⁶⁸Farole (n 19 above) 37

2.4 Benefits of private sector participation

SEZ policy and practices have evolved over time, as has the external environment and one notable trend in worldwide SEZ development over the past 15 years has been the growing importance of zones that are privately owned, developed, or operated.⁶⁹

International experience suggests that private driven SEZs tend to operate more effectively than government driven zones, in Africa however, such projects have been rare.⁷⁰ While there may be no overwhelming evidence to support the position that private zones perform better than public zones, it is contended that the positive attributes associated with private sector participation support the proposition. For some states, the move towards greater or increased inclusion of private sector actors was meant to alleviate the pressure on public funds in relation to developing SEZs.⁷¹ For the private sector actors, the principal pull factor lies in the opportunity to turn zones into profitable real estate ventures and generate income from innovative services provision to firms.⁷²

With the growing private sector participation SEZs, the traditional public model structure is increasingly becoming problematic. Specifically, the structure creates a conflict of interest in which the government's responsibility to regulate of zones in a country does not fact in the competing dynamics between SEZs managed by private sectors and those managed on behalf of the government. More often than not, the same government agencies are responsible for regulation and development, so they are essentially regulating themselves.⁷³

2.5 Challenges

Although African countries such as Mauritius have had success with zones, many problems such as administrative weaknesses, ineffective management, policy uncertainty, and poor strategic and operational planning, that plague the wider investment environment in Africa have also hindered the development of most of the SEZ projects in Africa.⁷⁴ Some of the problems associated with the SEZs stem from the legal framework of the policies and laws establishing and regulating SEZs.

⁶⁹(FIAS 2008) as quoted in Farole (n 19 above) 18

⁷⁰ D. Brautigam et al (n 34 above) 3

⁷¹O Tseyenbaljir (X) Possibility of Private Sector Participation in Special Economic Zone Projects: A case of Mongolia 1-2; Farole (n 19 above) 37

⁷²O Tseyenbaljir (X) Possibility of Private Sector Participation in Special Economic Zone Projects: A case of Mongolia 1-2; Farole (n 19 above) 37

⁷³ Farole (n19 above) 169-170

⁷⁴ Farole (n 19 above) 169-170; D. Brautigam et al (n 34 above) 2

While the aforementioned challenges are not specific to Zambia it is submitted that investments should be encouraged in Zambia. An investment climate depends heavily on the legal framework which gives insight on the prevailing legal security⁷⁵ and extent of private sector accommodation. The nature of the design, implementation and management of current and future African SEZs is thus likely to prove crucial in determining whether they are able to promote economic growth on the continent.⁷⁶ An analysis of the laws governing the establishment and operation of SEZs is thus relevant as it assists in providing an understanding of the Zambian perspective in accommodating and facilitating private sector participation in SEZs.

2.6 SEZs in Zambia

Zambia's SEZs are known as MFEZs or industrial parks as per the provisions of the ZDA Act and the policy leading to establishment of SEZs was introduced in 2009⁷⁷ and since then, the Government has declared 6 SEZs. The brief details of each SEZ are provided below:

Chambishi Multi-Facility Economic Zone

This zone was declared as such in 2007 pursuant to Statutory Instrument (S.I) No.16 of 2007 and is situated in the Copperbelt province. The zone is being developed by the Zambia-China Economic and Trade Corporation. It is also one of the Chinese overseas economic zones in sub-Saharan Africa and can be said to be a form of public-private partnership model. This zone is designated to specialise in metal processing and electronics assembly.⁷⁸ The mining activities and Chambishi Non-ferrous Metals Company are not technically considered to be part of the zone.⁷⁹

Lusaka East Multi Facility Economic Zone

This zone was declared as such pursuant to SI No.50 of 2010 and is situated close to Kenneth Kaunda International Airport in the Lusaka Province. It was declared as an extension to Chambishi SEZ and is being developed by the Zambia-China Economic and Trade Corporation.

⁷⁵M Ndulo Chinese Investments in Zambia (2008) 6

⁷⁶ UNCTAD africa (n 34 above) 116

⁷⁷ MFEZ statement (n 11 above)

⁷⁸ <http://www.polity.org.za/article/special-economic-zones-can-south-africa-follow-in-the-dragons-footsteps-2013-08-29> : accessed on 7 March 2014

⁷⁹ D. Brautigam et al (n 34 above) 6

It covers an area of 5.7 square kilometres and is designated to specialise in activities such as logistical management, warehousing, showrooms, conference centers, hotels, value addition activities, light manufacturing activities, bonded warehouses and hospitality facilities.⁸⁰

Lusaka South Multi Facility Economic Zone

This SEZ was established pursuant to SI No.47 of 2010 and is located at the south eastern-urban edge of Lusaka in the Lusaka Province. This zone is being promoted and developed through the Ministry of Commerce Trade and Industry in partnership with the private sector. This zone is expected to be the model upon which all special economic zone developments will be based and is thus expected to have world class infrastructure.⁸¹ It covers 2100 hectares and is conceived for specialised activities pertaining to domestic and industrial development for both domestic and foreign investors.

According to the master plan this zone is to be developed in phased development approach and involves the establishment of a special purpose vehicle through which the private sector is expected to participate under a public-private partnership framework for developing, marketing and managing the zone.

Lumwana Multi-Facility Economic Zone

This zone was established pursuant to S.I No. 51 of 2010 in the North Western province and is being developed by the Lumwana Development Company.

The zone covers 350 square metres and is designated for light and heavy industries such as agro processing, horticulture, fisheries and hotel accommodation. The zone has ear marked areas for commercial industrial agriculture and tourism.⁸²

Sub-Sahara Gemstone Exchange Industrial Park

This SEZ was established pursuant to SI No.49 of 2010 in the Copperbelt Province and is being developed by Phoenix Material, a wholly owned Zambian company

The zone covers 130 hectares and is designated for streamlining gemstone mining export procedures targeted at assisting buyers, sellers and producers of rough and processed gemstones and jewellery to freely participate and conduct regular auctions and routine

⁸⁰ (Unpublished)

⁸¹ (Unpublished) ZDA MFEZ section draft commentary on SEZ overview in Zambia

⁸² (see n 81 above)

transactions.⁸³ The zone is also to be specialised in other light industries such as logistical centres and service industry enterprises

Roma Industrial Park

This SEZ was declared pursuant to SI No.48 of 2010 in Lusaka Province and is being developed by CPD enterprise a private enterprise. The zone covers 130 hectares and is designed largely for light industries, housing estates and shopping malls. The zone is designed to include an incubation centre in small and medium enterprises.⁸⁴

2.7 Conclusion

The Chapter has shown the evolution of SEZs and how private zone models emerged as a preferred model leading to its adoption by a number of countries. The chapter highlighted some of the benefits associated with private sector participation and gave insight on the distinction between private and public models by stating the roles of the government and private actors in the respect models. Some of the challenges affecting SEZs and the investment climate were also highlighted, noting the crucial role of the legal framework in providing legal security to investors. Lastly the chapter gave details of the declared SEZ areas in Zambia

⁸³ (see n 81 above)
⁸⁴ (see n 81 above)

3. Chapter Three: Legislative Framework for Private and Public Private SEZs in Zambia

3.1 Introduction

The legislative framework regulating SEZs is the ZDA Act and the MFEZ Regulations. Legislation relating to taxation and PPPs to the extent of connectedness with the operation of SEZs will also be analysed in order to obtain a better appreciation of the existing framework. The gist of the MFEZ Policy in Zambia was discussed earlier and as such the analysis of the legal regime is to be viewed against it, especially the key objectives of establishing the MFEZs.

This chapter will begin by introducing the provisions of the ZDA Act which allow the creation of SEZs in Zambia and functions of the ZDA Agency empowered to administer the framework of SEZs. The chapter will move on to discuss construction of the terms ‘investor and ‘investment’ and the admissions criteria used in evaluating investors’ SEZ applications in light of Zambia’s international trade obligations. This will be followed by a discussion of the interplay between SEZs and access to regional markets and accessibility of PPP arrangements under the policy and law regulating PPPs. Thereafter matters relating to management and operation in SEZs including the composition of the ZDA’s board and the dispute settlement and exit approaches will be discussed. Finally, the chapter will discuss the incentive structure applicable to SEZs and provide a conclusion.

The ZDA Act regulates admission and promotion of investments in Zambia. The ZDA Act *inter alia* seeks to foster economic growth and development by promotion of trade and investment through an efficient, effective and coordinated private sector led economic development strategy, facilitate dialogue with the private sector and create confidence in public sector support for businesses.⁸⁵ The ZDA Act thus not only regulates SEZs but also other strategies and aspects of investment targeted at fostering economic development. The terms used for SEZs under the ZDA Act are MFEZ and Industrial Parks, which terms were defined earlier in the study, however for purposes of this study SEZ shall be used to

⁸⁵Preamble to the ZDA Act

collectively refer to both terms.⁸⁶Section 18 of the ZDA Act empowers the Minister responsible for Commerce, Trade and Industry (Minister) in Zambia to declare areas as SEZs. This provision is supported by other provisions within the ZDA Act and the MFEZ Regulations which provide further details on SEZ regulation and operation.

A one stop facility, known as the ZDA Agency (Agency) is established under the ZDA Act and charged with the administration of the Act. With particular reference to SEZs, the Agency's functions include⁸⁷ the development or facilitation of SEZs by investors; administering, controlling and regulating and ensuring compliance with laws relevant to activities of SEZs; monitoring and evaluating the activities, performance and development of enterprises operating in the zones and prescribing and enforcing measures for the business or activity carried out within a SEZ so as to promote the safety and efficiency of its operations; promote and market SEZs among investors; and exploring ways of fostering business linkages, such as partnerships, joint ventures and other strategic alliances in greenfield investments. The foregoing functions of the Agency signify its importance and crucial role in the development and operation of SEZs.

3.2 Construction of 'Investment' and 'Investor'

The ZDA Act as read with the MFEZ Regulations requires an investor who wishes to develop a SEZ to lodge an application using the prescribed form set out in the schedule.⁸⁸ 'Investor' is defined as any person, natural or juristic, whether a citizen of Zambia or not, investing in Zambia in accordance with the provisions of the ZDA Act, including a micro or small business enterprise and rural business enterprise.⁸⁹ Internationally, there are various meanings attributed to the term 'investing'⁹⁰ but for purposes of the analysis in this study, the construction must be drawn from the definition scope under the ZDA Act. It is constructed as contribution of capital, in cash or in kind, by an investor to a new business enterprise, expansion or rehabilitation of an existing business enterprise or purchase of an existing business enterprise from the State. The scope of investment is thus not limited to new venture as it includes extensive developments being made to existing enterprises and projects

⁸⁶ZDA Act (n 21 above)

⁸⁷ Section 5(2)(o)-(r) and (w)

⁸⁸Section 68(1)(a) ZDA Act and Regulation 6 of MFEZ Regulations

⁸⁹Section 3 ZDA Act

⁹⁰ Z Douglas Law of International Investment Claims(2012)161-164 captures a discussion on the meaning of investment in various contexts

involving the privatisation⁹¹ of previously state owned enterprises. It can therefore be construed that an outright purchase of a public venture by a private investor subject to other pertinent considerations could amount to an investment within the meaning of the ZDA Act.

Development of SEZs can be undertaken by investors who are either local or foreign and natural or juristic persons ready to contribute capital either in cash or kind towards a new business enterprise or expansion or rehabilitation of an existing one or purchase of an existing business enterprise from the State. A business enterprise is clarified to mean any undertaking carrying on business in the field of manufacturing, agriculture, agroprocessing, transport, fishing, commerce, energy generation, communications, construction, mining, tourism, education and skills training.⁹² It therefore follows that the contribution of capital must be through the form of an undertaking carrying on business in the fields listed above. It is not apparent why the definition of business enterprise is tied to the aforementioned fields, however, a perusal of Zambia's Sixth National Development Plan⁹³ can lead to the inference that the said fields are key sectors necessary for the country's better progression towards economic development.

While the ZDA Act accommodates both local and foreign investors, it specifically categorises a local investor as a person making direct investment in Zambia and a citizen, permanent resident or company incorporated in Zambia. It is therefore understood to mean that any natural or juristic person who does not meet the local investor criteria is to be regarded as a foreign investor. The ZDA Act when referring to 'investor' does not expressly draw distinction between local and foreign investors, however when some provisions are considered in conjunction with other investment related laws, the distinction becomes critical. For instance, in construction activities which are a crucial part in the development of SEZs, regulations and guidelines implemented by the National Construction Council (NCC) sometimes involve a variation in requirements depending on whether the entity seeking a service is a local or foreign player in the industry. For the most of Sub-Saharan Africa, the primary focus of NCCs is the local industry; however a few differences emerge at least in the cases of Malawi and Zambia where governments and donors have pushed for reserved

⁹¹ Privatisation involves the transfer of ownership of property or businesses from a government to a privately owned entity. <http://www.investopedia.com/terms/p/privatization.asp> (accessed on 12 April 2014) It is thus submitted that the investing criteria concerning the purchase of a business enterprise by a private entity from the State under the ZDA Act falls within the scope of privatisation.

⁹² Section 3 ZDA Act

⁹³ Ministry of Finance (2011-2015)

procurement or mandatory local-foreign joint ventures as measures for opening up opportunities for local firms, especially for larger, foreign funded contracts.⁹⁴

It appears that in so far as access to opportunities for establishment and development of private SEZs in Zambia is concerned, the ZDA Act does not generally discriminate between local and foreign investors. However, it is also helpful for access to opportunities for development of zones to be appreciated in the context of considerations used by the Agency to evaluate relevant SEZ applications.⁹⁵

3.3 Admission criteria and WTO regime compatibility

The considerations⁹⁶ to be taken into account in respect of an application to develop a SEZ by an investor vary in nature and include: the promotion of economic development and growth, extent of employment opportunities creation and human resources development of proposed zone development, degree of export orientation of proposed zone development project, environmental impact of the proposed zone development and where necessary the proposed measures to deal with adverse environmental consequences and the possibility of technology transfer associated with the proposed zone development. Interestingly, one of the provisions appears to be a 'catch all' clause which empowers the board of the Agency to take into account any other considerations it considers appropriate in relation to an application.⁹⁷

Additional consideration details⁹⁸ are set out in the MFEZ Regulations, some being a complete or hybrid repetition of the aforementioned considerations. Accordingly, the considerations to be highlighted under the regulations will only be to the extent that the same are not alluded to previously. These considerations include: the attraction and levels of local and foreign investment, amount and quality of local employment creation, extent of skills development and transfer to local entrepreneurs and communities, extent to which project leads to expansion of local production, utilisation levels of local raw materials and intermediate goods, production of new products, extent to which project leads to diversification of the economy, social development, import substitution and increased foreign exchange earnings.

⁹⁴ S Brushett and S Seth Construction Industry Development and the Road Sector: Effectiveness of National Construction Councils (2005) 4

⁹⁵ Section 9 ZDA Act; Regulation 6 and 8 MFEZ Regulations

⁹⁶ Section 69(1) of ZDA Act

⁹⁷ Section 69(1)(f)

⁹⁸ Regulation 8 of MFEZ Regulations

It is submitted that some considerations for evaluating an application development develop a SEZ appear to be some kind of Performance Requirements. Performance Requirements are stipulations, imposed on investors, requiring them to meet certain specified goals with respect to their operations in the host country used together with other policy instruments, such as trade policy, screening mechanisms and incentives, to enhance various development objectives.⁹⁹ These kinds of requirements are generally prohibited under the Trade Related Investment Measures (TRIMS) if such requirements are in violation of Article III and XI of the General Agreement on Trade and Tariffs (GATT) under the WTO regime, to which Zambia is a party.¹⁰⁰ The prohibited measures include local content and trade balancing requirements which violate Article III of GATT and import restrictions, foreign exchange balancing, and domestic sales which violate Article XI of GATT.¹⁰¹

While not all kinds of performance requirements prohibited under TRIMS, Regional Agreements and Bilateral Investment Treaties (BITs) have also increasingly begun to restrict the use of performance requirements by host countries.¹⁰² For instance in a case where an investor is a national of a home state which has a BIT with Zambia in which some considerations under the ZDA Act are considered to be prohibited performance requirements, a potential conflict may arise in the absence of proper negotiation, possibly putting the investor in a complicated situation. Most of the performance requirements are only prohibited when applied as a condition for the establishment, acquisition, expansion, management, conduct or operation of a covered investment.¹⁰³ Currently, considerations in relation to SEZs under the ZDA Act apply to investors at establishment or operation phase, while some apply in relation to qualification for incentives as will be shown below.

While the use of performance requirements should be carefully applied in order to ensure compliance with the WTO regime and regional and BIT arrangements, policies falling within the scope of performance requirements are critical and important for developing countries such as Zambia.¹⁰⁴ The economic rationale for performance requirements depend on the

⁹⁹ UNCTAD Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries (2003) 2

¹⁰⁰ UNCTAD (n 99 above) 1-2

¹⁰¹ R Ado 'Local Content Policy and WTO rules of Trade Related Investment Measures (TRIMS): Pros and Cons' (2013) 140

¹⁰² For instance the United States Model BIT addresses the issue of local content requirements.

¹⁰³ UNCTAD (n 99 above) 5

¹⁰⁴ Notification G/TRIMS/N/1/ZMB/125 dated April 1995 to the WTO Council Trade in Goods indicates that Zambia at time when the WTO was formed was not applying any TRIM inconsistent with provisions of Article III or Article XI of the GATT 1994. Zambian SEZs had not yet been established at the time.

objective of the measure¹⁰⁵ and if effectively managed and implemented the policies can be used to promote economic development in the host countries. Justification arguments include the infant industry protection argument, social compensation arguments which try to justify the use of the rule to compensate the communities for the negative impacts from resource operations they suffer; the political harmony argument, which uses the policy as a medium of reconciling conflicting resource communities; the market power argument, which justifies the use of the policy to protect weak and disadvantaged industries in the global competition and finally the strategic sectors argument which tries to secure economically sensitive sectors.¹⁰⁶

Noting the MFEZ policy and provisions of the ZDA Act, it appears that most of the aforementioned arguments would suffice in supporting the inclusion of considerations that resemble performance requirements. This is especially so when it is acknowledged that the commercial interests of international corporations do not always coincide with a host country's developmental objectives, for example, with regard to sourcing behaviour and reallocation of profits through transfer pricing practices.¹⁰⁷ Investors are generally not in favour of performance requirements as they tend to alter the way in which affairs are ordinarily conducted in absence of performance requirements.

The degree of export orientation of the SEZ and utilisation of preferential trade agreements is required to be taken into account when an application to develop a SEZ is made. Particularly in the case of export inclination, where export performance attracts a subsidy, the provisions of the Subsidies and Countervailing Measures Agreement (SCM) may apply under WTO regime in so far as preventing of trade distortion suffices. It is important to note that WTO disciplines apply only to measures imposed by WTO members—that is, governmental measures. Today with the majority of SEZs being privately owned, developed, and operated, measures imposed by private SEZ operators are not subject to WTO disciplines, unless the implementation in issue is that of a governmental measure.¹⁰⁸ To this end private zone models can help governments remain compliant with their WTO obligations.

¹⁰⁵ UNCTAD (n 99 above) 6

¹⁰⁶ Ado (n 101 above) 143

¹⁰⁷ UNCTAD (n 99 above) 2

¹⁰⁸ S Creskoff & P Walkenhorst *Achieving WTO Compliance for Special Economic Zones in Developing Countries* (April 2009) 4

3.4 Access to Regional Trade Arrangements

SEZs in Africa may become increasingly attractive to domestic and foreign investors as the platforms from which to sell to regional markets.¹⁰⁹ The consideration requirement tied to the utilisation of preferential trade arrangements is on one hand positive as this can stimulate competition and technological transfer among regional market participants. In considering the utilisation of preferential agreements, the relationship between Regional Trade Agreements (RTAs) and SEZs is potentially quite complex as the establishment of RTAs affects the possibilities of zone creation within RTA member states and significantly alters the trading environment in which the SEZ enterprises operate.¹¹⁰ It should be noted however that the existence of SEZs in potential RTA member states can create both challenges and potential synergies for RTA initiatives.¹¹¹ On the other hand, it can create challenges as utilisation of preferential trade agreements, ordinarily involves a considerable level of export activities, which may be excluded by restrictive regional rules of origin for qualifying goods if the activities do not meet the applicable threshold.

International dynamics can have an impact on national investment policies, including through regional integration or international competition for the attraction of specific types of foreign investment.¹¹² Use of regional arrangements is also sometimes complicated by the lack of clear guidelines in the particular preferential arrangements on the treatment of SEZs in member countries. Zambia is a member of Common Market for Eastern and Southern Africa (COMESA) and Southern Africa Development Community (SADC), which both have ambitious agenda to implement harmonised measures in investment such as the COMESA Common Investment Area and the SADC Protocol on Finance and Investment¹¹³ respectively. The SADC Protocol mandates state parties to co-ordinate their investment regimes and cooperate in creating a favourable investment climate within the region with core investment protections.¹¹⁴ These include substantive protections along with provision for investors to institute arbitration proceedings directly against host States to enforce vested rights under the Protocol.¹¹⁵

¹⁰⁹ UNCTAD africa (n 34 above)117

¹¹⁰ Woolfrey (n 36 above) 14

¹¹¹ Woolfrey (n 36 above) 14

¹¹² UNCTAD Investment Policy Framework for Sustainable Development (2012)12

¹¹³ The protocol seeks to harmonise implementation of investment laws and standard setting in member countries.

¹¹⁴ Article 3 and Annex 1 of SADC Protocol

¹¹⁵ Latam & Watkins SADC Protocol on Finance and Investment :An underused Investment Protection Tool in Southern Africa(2013) 1

In addition to the foregoing, are the requirements,¹¹⁶ which largely relate to capacity and corporate governance, relating to corporate and financial standing of the ‘investor’. Particularly, a person intending to develop a SEZ is required to submit a detailed business plan of the proposed facilities (both the proposed and existing) setting out the full extent of area to be developed including building restrictions.

3.5 Public Private Partnerships

Like the regulation of SEZs, PPP arrangements and projects in Zambia are subject to a specific policy and legislation and the primary goals of the PPP policy include:¹¹⁷

- provision of infrastructure and effective delivery of social services to ensure economic growth ;
- improved competitiveness and wealth creation through strategies attracting private sector finance and investment;
- encouragement of partnerships between Zambian and foreign firms and favourable fiscal policy that encourages private sector investment; and
- promotion of effective and efficient delivery of public infrastructure and related services through provision of appropriate incentives to respective stakeholders and minimisation of costs and time in processing PPP transactions.

The policy guidelines are supported by the Public Private Partnership Act [Act No.14 of 2009] (PPP Act) which regulates PPP arrangements in Zambia. The purpose of the PPP Act¹¹⁸ includes to, *inter alia*, promote and facilitate the implementation of privately financed infrastructure projects and effective delivery of social services by enhancing transparency, fairness and long term sustainability; provide for public-private infrastructure partnership for construction and operation of new infrastructure facilities and systems and the maintenance, rehabilitation, modernisation, expansion and operation of existing infrastructure facilities and systems ;and provide for the implementation of PPP agreements between contracting authorities and concessionaires.

Despite the existence of the PPP Act, in the context of development of SEZs, whether public, private or on PPP basis, the ZDA Act remains the primary regulatory legislation.

¹¹⁶ Regulation 6(1) MFEZ Regulations

¹¹⁷ <http://www.zda.org.zm/sites/default/files/Public-Private%20Partnership%20in%20Infrastructure%20Development%20in%20Zambia.pdf> (Accessed on 14 January 2014)

¹¹⁸ Preamble of PPP Act

Among the functions¹¹⁹ of the PPP unit under the Ministry of Finance, that is responsible for the implementation of the PPP Act are: promotion of private sector participation in financing, construction, maintenance and operation of projects, advising the government on project development procedures and PPP policy matters, monitoring progress and implementation of PPPs, managing and enforcing agreements and facilitating and marketing investment in PPPs in liaison with the Agency.¹²⁰

The requirement which obligates facilitation and marketing of investments in liaison with the Agency resonates with provisions under the ZDA Act which requires the Agency's exploration of means of fostering business linkages such as partnerships, joint ventures and other strategic alliances, in greenfield investments.¹²¹ In addition, the ZDA Act requires state institutions exercising any power under any other law relating to or having an effect on trade and industry to consult the Agency before exercising such power.¹²² A strict interpretation of the liaison obligation when read and considered together with the construction of an investment would suggest that PPPs can only extend to SEZ greenfield investments which are essentially new projects.¹²³ This interpretation would potentially exclude non-greenfield investments such as the re-establishment or privatisation of state owned enterprise ventures.

The PPP Act allows participation by any private sector actor that may wish to participate in the financing, construction, rehabilitation, maintenance, operation and management of any infrastructure projects and facilities.¹²⁴ The partnership arrangements (either on stand alone or combination basis with some form of variation) that may be entered into between contracting parties and private sector participants are: Build and Transfer, Build Lease and Transfer, Build Operate and Transfer, Build Own and Operate, Build Own Operate Transfer, Build Transfer and Operate, Develop Operate Transfer, Rehabilitate Operate Transfer, Rehabilitate Own and Operate and Lease Management Contract, Management and Service.¹²⁵

The relevance of varied arrangements can also be appreciated from the indication in the PPP policy that the choice of an arrangement for a particular project would ordinarily depend on government policy in the relevant sector and on potential value for money to be

¹¹⁹Section 5(1) (a)(b)(l)(k)(p) and (q) and 5(2) PPP Act

¹²⁰ Section 5 (1) (k) PPP Act

¹²¹ Section 5(1)(w) ZDA Act

¹²² Section 14 ZDA Act

¹²³ 12(1)(e) & (2)(k) ZDA Act as read with PPP Act

¹²⁴ Section 17; schedule I of PPP Act

¹²⁵ Schedule I of the PPP Act

generated.¹²⁶ An investor therefore appears to have negotiating space regarding the type of PPP arrangement they pursue subject to statutory and administrative guidelines. PPPs have become important avenues for infrastructure development in developing countries with experience showing that high-quality regulatory and institutional settings are critical to ensure the development benefits of such PPPs.¹²⁷

The PPP Act in facilitating private sector participation in PPPs not only allows for response to calls for partnership opportunities but also submission of unsolicited proposals for PPPs for consideration and evaluation after advertisement for competitive proposals in relation to project relating to the unsolicited proposal.¹²⁸ Evaluation of such unsolicited proposals takes into account considerations such the novel methods, approaches or concepts demonstrated; scientific, technical or socio economic merits; capabilities and related experience, facilities or techniques of the private entity or unique combination qualities that are integral factors for achieving the proposal's objectives; and benefit to the public. Once the proposal, whether unsolicited or otherwise, has culminated into a PPP agreement, the relevant authority is required to assist in obtaining rights and making available easements related to the project site and necessary for implementation.¹²⁹ It can thus be seen that in so far as development of SEZs is concerned, the ZDA Act and PPP Act are accommodating to the private sector actors jumpstarting establishment of zones on own volition by either initiating the process or responding to a call for applications and meeting the relevant criteria. The ZDA Act places no specific restrictions on types of SEZs to be developed, however it can be argued that considerations applicable to applications to develop SEZs are linked to the objectives of the MFEZ policy and as such SEZs ought to further the objectives of the policy.

3.6 Composition of Agency's Board

The constitution of the board of the agency is responsible for overall implementation of the ZDA Act the consideration of applications relating to SEZs. Appointment to the board is undertaken by the Minister and the structural composition of the board consists of 2-6 representatives for the private sector with the other 10 members belonging to predominantly public sectors.¹³⁰ While this representation quota *prima facie* stands out as measure of private sector inclusiveness in relation to investment regulation and views, no further

¹²⁶ See 'Types of public private partnerships' under PPP Act

¹²⁷ UNCTAD (n 112 above) 15

¹²⁸ Section 42 of PPP Act

¹²⁹ Section 46 and 47 of PPP Act.

¹³⁰ Section 6-7 of ZDA Act

qualifications or guidelines pertaining to private sector expertise are elaborated. In working with the private sector dialogue can assist at all stages of policy reform, from identification of problems, design of reforms, legislation of reforms, implementation, monitoring and evaluation of reforms.¹³¹ The aforementioned position can therefore call into question the need to strike a reasonable balance between public and private sector representatives, transparency of the representative selection process and legitimacy of the private sector representation. It follows that systematic and effective inclusion of relevant and appropriately qualified private sector representatives in a transparent manner would work towards strengthening the partnerships and implementation of laws.

3.7 Operating in SEZs

The ZDA Act requires a person wishing to operate a business enterprise in a SEZ to apply for a licence.¹³² The opportunities to apply for a licence are also open to both local and foreign investors and similar considerations to those highlighted earlier with slight modification apply in the evaluation of licence applications. An interesting provision is the specification of types of businesses that may operate under a SEZ licence as either being a commercial business or production business enterprises.¹³³

The ZDA Act does not expressly distinguish between the two types of enterprise, however an insight into the nature of the commercial and production enterprises can be drawn from the defined terms of commercial activity highlighted above and the regulatory provision dealing with the production of goods and services respectively.¹³⁴ An interpretation of commercial business enterprise within the context of the ZDA Act, suggests that in addition to the basic attributes of a commercial business, the activity of the business must fall within the scope of a commercial activity criteria¹³⁵. In the case of a production enterprise, it can therefore be inferred from the MFEZ Regulations as one that engages in some form of production of either goods or services for export to International or local markets.¹³⁶ Established business enterprises in SEZs are prohibited from carrying on unauthorised activities, and as such the

¹³¹ Bannock Consulting Ltd Reforming the Business Environment: Mechanisms and Processes for Private – Public Sector Dialogue (2005)36

¹³² Section 68(1)(e)

¹³³ Regulation 16 MFEZ Regulations

¹³⁴ Section 3 ZDA Act

¹³⁵ See definition of commercial activity above

¹³⁶ Section of regulations

business to be conducted must either be commercial or production oriented and in accordance with the peculiar scope of authorisations and conditions attached to a licence.¹³⁷

Licensed investors are required to enforce measures for the nature of the business activity carried out and also to inform the Agency of any material changes to business plans and any kind of non-implementation issues relating the investment¹³⁸ Licensed investors are allowed to delegate the operations of the business enterprise to an agent or representative.¹³⁹ Similarly, investors with a valid permit are allowed to delegate the management and administration of the zone to appointed agents and representatives, lease, sublease or sell the land or buildings to and charge rent and other applicable fees. In addition assigning, ceding or transferring of the permit and effecting improvements to the SEZ or its facilities are also allowed subject to the Agency's approval.¹⁴⁰ Investors with permits are however required to enforce measures promoting efficiency and safety of zone operations, maintain adequate security and suitable provision for movement of persons, goods, conveyances and vessels leaving or entering the zone.¹⁴¹ It appears that in terms of accrual of rights and fulfilment obligations during the operational phase, investors with permits have more rights to exercise but also more obligations to fulfil compared to licenced investors.

3.8 Exit approaches and Dispute settlement

The ZDA Act also sets out exit approaches for investors in SEZs. From inception of the investment cycle the investor is accorded the opportunity to notify the Agency of any implementation challenges that may arise in respect of the agreement or the initial business plan.¹⁴² In PPPs, when the specified partnership period or role lapses, investors may withdraw from the partnership project.¹⁴³ In relation to dispute resolution, where an investment related dispute in connection with matters covered under the ZDA Act arises, investors may invoke provisions of the Arbitration Act¹⁴⁴ for settlement of the disputes.¹⁴⁵ One view on the implication of the aforementioned provision is that it can be understood as representing a

¹³⁷ The ZDA Act requires investors' details to be included in the licence which also sets out the applicable conditions.

¹³⁸ Section 70 ZDA Act

¹³⁹ Section 74 ZDA Act

¹⁴⁰ Section 75 ;Regulation 15 MFEZ

¹⁴¹ Regulation 15 MFEZ Regulations

¹⁴² Section

¹⁴³ Section 56-60 of PPA Act

¹⁴⁴ Act No 19 of 2000

¹⁴⁵ Section 21 of ZDA Act

standing consent by the Agency to submit any dispute falling within the ambit of the ZDA Act to arbitral jurisdiction based on the provisions of the Arbitration Act.

Another view is that where an investment through a SEZ is protected under the provisions of a BIT that elevates breach of national legislation or investment agency authorisation to a treaty claim could potentially be capable of submission for arbitration under the BIT. Alternatively, where the investor and host state have separate settlement terms relating to the investment, such terms may override the aforementioned provisions. The aforementioned views cannot be ruled out as between 1966-2013 Zambia's has signed BITs with 12 different countries containing dispute settlement clauses.¹⁴⁶ The use of national legislation to trigger arbitral jurisdiction continues to be controversial as the preferred stance by states is to argue that offers to arbitrate in national legislation are insufficient to trigger treaty jurisdiction.¹⁴⁷

3.9 Incentive structure and DTAs

The ZDA (MFEZ and Industrial Park) (Priority Sectors) (Declaration) Order, 2014 sets out the incentives applicable to all SEZs investors.¹⁴⁸ Critical to accessing incentives is for an investor to hold valid permit or licence. Further criterion pertaining to qualification for incentives under the Income Tax and Customs and Excise Acts is dependent on whether the investor has either made a major investment of not less than USD500 000 or invested an amount of USD10 000 000 (or the equivalent thereof respectively) or acquired equipment or machinery for use in a business investing in a priority sector.¹⁴⁹ It is pointed out that the major investment criterion involves the exercise of the Minister's discretionary powers to extend incentives to an investment. A priority sector is one that has a high growth potential and any products regarded as priority products are to be construed in similar context.¹⁵⁰

Sectors enlisted as priority sectors include manufacturing, energy and water development, tourism, agriculture and housing in the context of construction and establishment of infrastructure.¹⁵¹ In relation to manufacturing, specific reference is made to manufacturing activities carried out in a SEZ. It would appear the priority sector areas are inclined towards the diversification agenda of the MFEZ policy, suggesting that the usage of incentives is to make the SEZ policy tool more attractive. Where an investor is operating in a priority sector

¹⁴⁶ http://unctad.org/Sections/dite_pcb/docs/bits_zambia.pdf (Accessed on 30 April 2014)

¹⁴⁷ J Paulsson 'Arbitration without Privity' ICSID Review-Foreign Investment Law Journal p. 232-235

¹⁴⁸ Schedule II of ZDA Act

¹⁴⁹ Section 58 of ZDA Act

¹⁵⁰ The priority sectors are listed in Schedule II of ZDA Act

¹⁵¹ Schedule II of ZDA Act

and carrying out an enlisted activity under the sector, the Minister's exercise of discretionary powers may not necessarily be problematic. The situation may however be problematic for investments in a non-priority sector as the major investment threshold must be satisfied in order to qualify for incentives. It is worth noting that the monetary threshold in order to qualify for incentives on the pretext of a major investment is different and much higher than that applicable in the case of priority sectors.¹⁵²

The major investment threshold involves negotiations with public officials pertaining to the Minister's exercise of discretionary power to grant incentives. Policy advisors and tax practitioners contend that eligibility for incentives provided by law should be based on clear criteria and not granted through special permission or certification by investment agencies or ministries as clear criteria approaches ensure prompt decision making and quick turnaround time essential to attracting and retaining investment.¹⁵³ Criteria and information on the incentive ought to be open to public scrutiny as differentiation among investors in granting incentives is undesirable and distorts the business environment and signals an uneven playing field.¹⁵⁴ By way of illustration as to administrative challenges that arise in relation to the granting of incentives, is the matter pending before the High Court of Zambia in which a judicial review of the Minister's decision to withdraw incentives is being sought, in relation to incentives granted to Varun Beverages Limited (Varun).¹⁵⁵ The said incentives were granted through the exercise of statutory discretion by the Minister but later withdrawn to the detriment of Varun despite the position that, *inter alia*, it had in fact satisfied the major threshold criteria, attended to relevant procedures and obtained relevant authorisation before commencement of the project that allowed for the application for incentives.

Exemption or relief from taxation duties is left under the primary jurisdiction of the Zambia Revenue Authority and is only operative once the particular investment has been certified as being compliant with provisions of the law.¹⁵⁶ Therefore an investor must as a precondition to accessing or making a claim for incentives applicable to the investment, obtain certification of compliance with the law. Section 61 of the ZDA Act recognises access to benefits investors may derive from Double Taxation Agreements (DTAs) entered into between their home countries and the Zambian government and allows these benefits to exist concurrently

¹⁵²S James Providing Incentives for Investment: Advice for Policy Makers in Developing Countries (2010) 3

¹⁵³James (n 149) above 3

¹⁵⁴International Finance Corporation (IFC) A Handbook for Tax Simplification (2009) 159

¹⁵⁵Case pending judicial review of the Minister's decision to revoke the incentives granted to the investor under section 58 of the ZDA Act under cause number 2012/HP/196

¹⁵⁶Section 59 ZDA Act

with incentives that may be applicable to investments. This position accords an investor the opportunity to maximise on the incentives and benefits flowing from both the regulatory framework and DTA. However, this may also become costly to the government as it may be losing additional revenue through granting of incentives which are of limited impact where a DTA or independent agreement granting incentives to an investor exists.¹⁵⁷

If the investment operates under a DTA without tax sparing (that is, the home country respecting the incentives offered by the host country), tax holidays simply transfer tax revenues from the country receiving the investments to the country of origin.¹⁵⁸ Host countries pay a price for potential benefits as allowing tax holidays or exemptions ultimately affects the revenue base, and if the intended benefits cannot be reaped, citizens can be affected in terms of loss of welfare.¹⁵⁹ The incentive structure under the ZDA Act is largely fiscal inclined concerning relief and exemption from tax duties and obligations.¹⁶⁰ This somehow overlooks benefits that can be derived by businesses from usage of non-fiscal incentives in respect of SEZs and diversification from predominately fiscal incentives.

It would therefore be useful for the government to develop a mechanism providing periodic evaluation of any incentive-based investment-attraction strategy's relevance, appropriateness and economic benefits against their budgetary and other costs, including long-term impacts on resource allocation.¹⁶¹ Undertaking periodic analysis of the costs, impacts, benefits and relevance relating to the granting of incentives would be useful to informing policy. However, the diversification must be done cautiously as unprecedented fiscal and non-fiscal incentive packages in order to attract investors, is nowadays marred with sceptical views about the real outcome, especially in terms of cost and benefits linked to what host governments offer to investors.¹⁶² The challenge for the African SEZs, most of which were designed along traditional EPZ lines, is to remodel, building on sustainable sources of comparative advantage rather than relying on factors such as low wages, incentives, and trade preferences, which have not provided sufficient base on which to carve out a competitive position in global markets.¹⁶³

¹⁵⁷ IFC (n 154 above) 150-151 & 160

¹⁵⁸ James (n 149 above) 4; IFC (n 154 above) 150

¹⁵⁹ Y Kim Chinese led SEZs in Africa: Are they a driving force of China's soft power (2013) 10-11

¹⁶⁰ Taxes applicable under Customs and Exercise and Income Tax Acts as per section 56 of ZDA Act

¹⁶¹ Farole (n 29 above) 240

¹⁶² Kim (n 156 above) 10-11

¹⁶³ Farole (n 29 above) 240

The incentives under the ZDA Act are structured to a ‘standard’ applicable time period for covered investments.¹⁶⁴ It appears that the incentives applicable to investments cease to apply on an automatic phase-out basis when the stipulated period for incentives lapses. Initially incentives attached to the grant of the licence or permit would kick in through a 5 year period from the first date of declaration of dividends. However recent legislative amendments were made in respect of the commencement date and incentives will now be effective from the date of commencement of business as opposed to the date of first declaration of profits.¹⁶⁵ This revision may particularly not be favourable to investors as in the early years of the project; most activities revolve around getting the project running and may not necessarily be profit making thus not making the incentive strategy any more competitive or uniquely attractive than most neighbouring countries.¹⁶⁶ This argument is supported by experience and analysis showing that tax incentives do not play as important a role in the investment decisions of either domestic or foreign investors as certainty regarding matter such as tax, political stability, rule of law, and security.¹⁶⁷ Thus, like any other market intervention, incentives are justified if they correct market inefficiencies or generate positive externalities.¹⁶⁸ It is therefore necessary that a proper balance of the provision of relevant and effective incentives and prevention of loss of unwarranted revenue be reached in the use of SEZs.

3.10 Conclusion

This Chapter addressed the construction of the terms ‘investor and investment’ under the ZDA Act and establishing that in and of itself the Act does not distinguish in its provisions between local and foreign investors but that when construed with other investment related laws the distinction may have operational consequences. Participation through PPPs was discussed through examination of the PPP policy and PPP Act finding that PPP participation is open to any private sector actor and contemplates initiation of PPPs at private actor’s volition. Significant leeway as to the PPP arrangement structure to be adopted in projects is also given subject to sector specific policies and guidelines. It was also noted that the Agency’s board accommodates 2 private sector representatives in conduct of its business but that’s no guidelines as to expertise and other selection criteria are given thus begging the question of transparency and effectiveness of the selection. A need for the board composition

¹⁶⁴ Section 55 ZDA Act

¹⁶⁵ Zambia Revenue Authority Budget overview of Tax changes (2013) 5, para 12.9

¹⁶⁶ S James (n 149 above) 2

¹⁶⁷ IFC (n 154 above) 156

¹⁶⁸ IFC (n 154 above) 155-156

to be balanced between private and public actors to ensure effective dialogue was also addressed.

The considerations applied to SEZs were found to potentially resemble performance requirements and discussed in context of Zambia's WTO TRIMS obligations, BIT provisions highlighting potential challenges and developing countries justifications perspective. Similarly, considerations relating to utilisation of preferential access and export inclination by the SEZs were identified with a view to highlight potential trigger points relating Zambia's WTO SCM obligations where export subsidies are tied to export performance by the government. The potential denial of benefits to goods from SEZs in markets where the RTA framework has restrictive access was discussed noting the harmonisation agenda by SADC and COMESA in which Zambia is a member country.

Investors in SEZs are accorded rights and under specified obligations in respect of the investment permits or licences held. The licences and permits coupled with investor's compliance with the law and satisfaction of applicable criteria were identified as key to accessing incentives which were identified as fiscal inclined. The incentives when construed with the DTA access accorded to investors was found to be more costly for the government than an investment attraction strategy hence prompting calls for continuous review of SEZ incentives to ensure they are relevant and cost effective. It was also noted that incentives involving the exercise of discretion are also characterised by administrative hurdle that would ordinarily be detrimental to investors as illustrated by the Varun Beverages case pending before the Zambian Court.

Investors in SEZs are also allowed in relation to matters arising under the ZDA Act to submit claims for arbitration. Possible implications that could arise in the event of a BIT or separate dispute settlement terms existing were pointed out thus highlighting that breaches arising under the ZDA Act are capable of elevation to status of a treaty claim amenable to arbitral jurisdiction of a BITs dispute settlement. Having analysed the issues concerning SEZs in Zambia the next chapter shall consider some lessons and experiences in implementation of SEZs from Ghana, Mauritius and international best practices.

4. Chapter Four:Lessons from Ghana, Mauritius andInternational Best Practices

4.1 Introduction

Zambia is not the only country to have implemented private and public- private zones in Africa and notable among African experiences are those of Ghana and Mauritius. Ghana was one of the early African countries to implement private and public- private models in use of SEZ policy in Africa with its major SEZs being run by privately under supervision of the Ghana Free Zones Board (GFZB) since the SEZ policy was implemented.¹⁶⁹ Mauritius was one of the earliest African countries to have implemented SEZ policies and is in fact one of recognised as a unique success story in the use of the policy in Africa.

This chapter highlights lessons from Ghana and Mauritius indicating how the SEZ policy and legislation addresses issues relating to SEZs respectively and international best practices with a view to identifying notable measure worth considering in Zambia's framework. Firstly, Ghana's position in relation to movement of goods in a SEZ, labour regulation, incentives and streamlining of the SEZ policy through the existing SEZs shall be examined. Secondly, lessons to be drawn from Mauritius will be discussed with specific purpose of drawing on evolution of its SEZ policy. Finally, international best practices relating to the issues addressed in the previous chapter shall be discussed.

4.2 Lessons from Ghana

Ghana has four SEZs: Tema, Sekondi and Shama EPZs and the Ashanti Technological Park which are implemented through the Free Zones Act (FZA). The concept behind the SEZs is promotion of processing and manufacturing of goods and encouraging development of commercial service activities and airport areas.¹⁷⁰ This concept can be seen through the streamlined orientation of the zones. For example: Tema EPZ focuses on manufacturing; Shama EPZ focuses on the oil sector; Ashanti Technological Park focuses on agriculture; and Sekondi EPZ whose development is still ongoing but set to focus on a different industry.¹⁷¹

¹⁶⁹ Bost (n 58 above)12

¹⁷⁰ http://www.gfzb.gov.gh/about%20us/gfzb_profile.php (Accessed on 28/4/2014)

¹⁷¹ <http://www.gfzb.gov.gh/export%20processing%20zone/index.php> (Accessed on 28/4/2014)

4.2.1 SEZ Policy streamlining

Despite the aforementioned streamlining, the Ghanaian SEZ policy has similar objectives to that of the MFEZ policy. The SEZ encompasses objectives such as: attraction of investments, employment creation, increases of forex earnings, enhancement of technological, managerial skills and expertise, technology transfer and diversification of exports.¹⁷² The SEZs in Ghana are focused on varied sector areas, as indicated above, whilst also accommodating various sub-areas of business activity to feed into the investment and business environment surrounding SEZs. This does not appear to be the case in Zambia as it cannot be clearly stated that from the SEZ overview provided earlier that each zone is predominately focuses on a particular sector. To effectively support development in specific sectors and appropriate implementation of the desired SEZ objectives, adopting specialised focus and streamlined industrial approach for SEZs to on the priority sector classification may be desirable for Zambia.

4.2.2 Incentives structure

The FZA allows investors 100% ownership of a business enterprises operating in SEZs in addition to incentives such as: income tax exemption on profits from the first 10 years (with the applicable rate thereafter being capped at 8%); unrestricted rights to transfer profits; withholding tax exemption on dividends from a SEZ enterprise or funds servicing foreign loans.¹⁷³ The incentives do not phase out after a particular period but rather are exempted initially and later re-introduced at a reduced and capped rate. It is worth noting that 100% ownership of business enterprises in SEZs excludes application of normal incorporation procedures and shareholding structure under the corporate law legislation or conditions of joint partnerships with locals. Zambia's Companies Act provides for the registration of a foreign branch of a foreign entity but still requires some indirect connection to be made to Zambia through its management structure.¹⁷⁴ The structuring of incentives is worth considering for adoption, as once incentive period granted under the SEZ lapses in Zambia, the normal rate applicable to national territory applies a situation which occur before investors can utilise the incentives.

¹⁷² <http://www.gfzb.gov.gh/about%20us/objectives.php> (Accessed on 28/04/2014)

¹⁷³ Section 29

¹⁷⁴ Companies Act of Zambia

4.2.3 Movement of SEZ produced goods

The movement of goods between the zone area and national territory is controlled with a cap placed on the volume of SEZ produced goods to be made commercially accessible to the national territory in addition to smuggling prohibitions¹⁷⁵The foregoing provisions on SEZ produced goods can work towards facilitating a mechanism that minimises undermining effects of gaps in a SEZ policy.The ZDA Act is silent on movement of SEZ produced goods between the SEZ and national territory thus leaving loopholes in regulatory mechanism.Ghana also tracks and analyses valuable data on economic outcomes such as exports, investment, employment, taxes, local purchases but other African programs appear to have no systematic process for data collection, despite many of them requiring licensed investors to fill out relatively detailed forms on periodical basis.¹⁷⁶

4.2.4 Labour regulation

The FZAgants owners of SEZ enterprises liberty to negotiate terms of employment with the employees on, *inter alia*, wages, hours of work, dispute in accordance with International Labour Organisation (ILO) standards.¹⁷⁷While there is no express mention of the national territory employment law being inapplicable, the indication of employment negotiationswithin ambit of the ILOstandards suggests the inapplicability of the national laws.In Zambia the labour market is primarily regulated by the Employment Act and other labour related legislation¹⁷⁸, all of which do not have any special provisions applicable to SEZs.It follows that the employment laws applicableto SEZs are not *sui generis* they also apply to national territory. Zambia's position on labour regulation may not detrimental to the SEZ but it is desirable for SEZ employment regimes to be clarified taking into account the uniqueness of SEZs and criticisms that exist in respect of Zambia's labour laws.¹⁷⁹ There be may exist cause to revisit this position as it has been observed that even in countries where strict laws in place to protect labour,practical implementation is not strictly enforced due to host government's capacity limitationin monitoring.¹⁸⁰

4.3 Lessons from Mauritius

Mauritius' EPZ is considered Africa's most successful example of the free enterprise type of EPZ, in which companies are granted status on an individual basis and are free to locate

¹⁷⁵ Section 23-24 and 40

¹⁷⁶ Farole (n 19 above)234

¹⁷⁷ Section 34

¹⁷⁸ Industrial and Labour Relations Act and the Minimum Wages and Conditions of Employment Act

¹⁷⁹ Regulation 15 MFEZ Regulation requires returns on employment in SEZs to be submitted to the Agency

¹⁸⁰ Jauch, 2003:108) as cited inKim (n 156 above) 12

anywhere on the island, including in parks not restricted to EPZ enterprises.¹⁸¹The spectacular success of exports from the Mauritius free zone during the 1980s had a deep impact on the region, sparking a veritable frenzy of legislation-creation during the 1990s and 2000s.¹⁸²

4.3.1 Incentives structure

Mauritius distinguishes between onshore and offshore activities relating to SEZs, allowing investors in SEZs to sell about 50% of their goods in national territory.¹⁸³Entry and exit of goods from SEZs is monitored for purposes of administration and implementation of incentives and other benefits. Fiscal and non-fiscal incentives offered in the SEZ broadly include free port handling services, 100% ownership of enterprises, 0% corporate tax, preferential market access, exemption from customs duties on all imported goods, free repatriation of profits, access to offshore banking facilities and reduced port handling charges for all goods destined for re-export and re-export value opportunities.¹⁸⁴Zambia's incentives as mentioned earlier are fiscal inclined and as such the blend of fiscal and non-fiscal incentives in Mauritius SEZs is an approach worth considering in Zambia especially in relation to services availability and delivery to investors.

4.3.2 Provision of facilities

Private sector inclusion is evident in administration of SEZs as the framework allows for participation through 'private or third party free port developer' licensee status which allows for building, developing and managing warehouses and logistics facilities to be rented by operators.¹⁸⁵Where existing facilities do not cater for a particular investor's preference, a specific authorisation can be issued to an investor wishing to set up facilities on exclusive use basis.¹⁸⁶This approach has potential to stimulate innovation and competitiveness in provision of facilities and services to investors' as it is primary role of the private or third party free port developers. While the Zambian framework does allow private SEZ developers it does shed much light on scope of facilities or make provision for select investors to exclusively develop facilities.

¹⁸¹ Farole (n 19 above) 30

¹⁸² Bost (n 58 above) 6

¹⁸³ Part V Free Port Act

¹⁸⁴ Part V of Free Port Act

¹⁸⁵ Section 14-15 and schedule II of Freeport Act

¹⁸⁶ Section 7 and schedule II of Free Port Act

4.3.3 SEZ Policy evolution

Aside from the aforementioned legislative provisions, a crucial and distinguishing factor is that the Mauritius' SEZ policy continued to evolve and diversify from export bias through the zones' continued existence.¹⁸⁷ The policy underwent pertinent changes and improvements in order to remain relevant and adapt to evolving nature of SEZs, market availability and needs. While appreciating that Mauritius' SEZs were launched in the 1970s, the evolving policy has been a crucial factor in the success and as such it is submitted that though SEZs in Zambia have only existed since 2009, it would be crucial to ensure the MFEZ policy remains relevant to, market availability and evolving needs in SEZ programmes.

4.4 Some International Best Practices

Over time, various studies have been conducted on SEZs and a number of measures have been identified as practices crucial to future of SEZs in Africa. The practices below are largely guided by the issues discussed in the preceding chapter from Zambia's SEZ framework and these include:¹⁸⁸

- The need for use of SEZs to be pursued in a wider context for development of a country and not as a stand-alone enclave without integration with the offsite national territory.¹⁸⁹
- Getting on board the full and consistent support of high level government officials to ensure the SEZ policy and implementation are treated as an important part of the country's overall development strategy rather than side-lined in the development strategy. It is also essential that the policy evolves with the prevailing market and zone trends to remain relevant;¹⁹⁰
- Effective coordination among stakeholders (including the private sector) and all relevant ministries and to ensure the effective implementation of the law;
- Taking into account new generational issues such as respect for human rights especially in the area of labour and relating gender dynamics and environmental issues among other things;
- Focusing on areas of comparative advantage especially as regards natural resources abundant in country and leveraging on the size of the markets in which the SEZ is

¹⁸⁷ UNCTAD (n 34 above) 115

¹⁸⁸ UNCTAD (n 34 above) 115-116; Farole (n 19 above) 30-31

¹⁸⁹ UNCTAD (n 34 above) 115-116; Farole (n 19 above) 30-31

¹⁹⁰ UNCTAD (n 34 above) 115-116; Farole (n 19 above) 30-31

based and tapping into the advantages on both the supply and demand sides of SEZs within the context of regional integration arrangements;¹⁹¹

- Combining the usage of fiscal and non-fiscal incentives whilst appreciating the inherent limitation of incentives and that while being useful in the short term and incentive schemes do not substitute a conducive investment climate.¹⁹²

Perusal of foregoing reveals that practices such as: stakeholder engagement, use of regional arrangements, incentives and environmental considerations are actually captured in Zambia's framework and would only require review and remodelling with an appreciation of prevailing contextual environment of implementation. Therefore it can be inferred that Zambia's SEZ framework is not entirely deficient however room for improvement still exists and such it would be useful for the remaining practices to be incorporated in the implementation framework.

4.5 Conclusion

This chapter against the background of the analysis given in the preceding chapter has provided some international best practices considered useful in improving the SEZ framework and interpretation. Lessons worth considering from the approaches of Ghana and Mauritius's SEZ policy in areas of policy streamlining and evolution, incentive structure, movement of goods and provision of facilities have also been discussed indicating the significance under each area.

It is noted that some of the international practices already find expression in the Zambian framework thus only requiring improvement while other practices would have to be incorporated in the framework after consideration. Similarly the Ghana and Mauritius approaches gave insight as to how aspects relating to the aforementioned could improve and clarify corresponding provisions in Zambia's framework.

¹⁹¹ UNCTAD (n 34 above) 115-116; Farole (n 19 above) 30-31

¹⁹² UNCTAD (n 34 above); 115-116 Farole (n 19 above) 30-31

5. Chapter Five: Findings and Recommendations

5.1 Findings

This study set out to critically analyse the legal framework for private and public-private model SEZs in Zambia and in doing so an overview and analysis of the relevant ZDA Act, MFEZ Regulations and PPP Act provisions was undertaken. The analysis was undertaken against the background of increased calls for private sector inclusive development in Africa and also the emerging trend of using SEZ policies as strategy tool for development.¹⁹³ The paper in looking at the evolution of SEZ policies also found that private and public private models emerged as a preferable model on account of associated efficiencies and benefits of private sector participation.¹⁹⁴

This study found that in so far as admission of investors to SEZs is concerned the ZDA Act does not discriminate between local and foreign investors. However when the relevant provisions are read in conjunction with other relevant legislation that may be useful to either development or operation of a foreign investor status may trigger other admission or compliance measures not necessarily required of locals.¹⁹⁵ This study also found that admission and operation through PPPs accommodates various kinds of well-known PPPs and allows prospective investors to kick start projects through submission of unsolicited proposals.¹⁹⁶

Considerations against which investment admission of private sector participants is gauged revealed that some of the considerations in the legislation appear to be performance requirements which depending on the manner of implementation could potentially either be challengeable under the WTO regime or BIT's provisions existing between the investor's home state and Zambia in the case of the said considerations triggering a conflict with terms of the BIT.¹⁹⁷ Further thereto, the study finds that while access to preferential markets and regional arrangements is available under the SEZ legislative framework, Zambia is a member of more than one regional arrangement, each with different harmonisation agendas. This study finds that such position calls for deeper appreciation of opportunities and

¹⁹³ Chapter 1

¹⁹⁴ Chapter 2

¹⁹⁵ Sections 3.2, 3.6 & 3.5 above

¹⁹⁶ Section 3.6 above

¹⁹⁷ Section 3.3 above

complexities of SEZ policies and the interplay of Zambia's memberships in regional arrangements.¹⁹⁸

The incentives structure indicates that most of the incentives are fiscal and relate to exemption from income and customs and excise tax obligations, taking effect from commencement of SEZ activity. One avenue of qualifying for incentives involves the Minister's discretionary power and with aid of a case pending before the Zambian Courts the problems associated with incentives not based on standard criteria is illustrated as the withdrawal of incentives initially granted through this avenue is cited in the matter as jeopardising the investors' project. It is also found that co-existence of accessibility to DTAs and incentives may pose a potential threat to state revenue base thus calling for careful analysis of incentives to ensure they remain relevant and effective.¹⁹⁹

Through the experiences of Ghana and Mauritius' SEZs legislation and insight on international best practices, pertinent issues and lessons worth considering for integration into the Zambian SEZ framework are discussed. These include the regulation and control of movement of goods between SEZs and national territory, control of smuggled goods, use of non-fiscal incentives and a specialised labour regime. This study also finds that there exists need for SEZ policy to continuously evolve and diversify by undergoing pertinent changes and improvements so that it remains relevant and adapts to the evolving nature of SEZ market availability and needs.²⁰⁰

The findings of this study were in pursuit of establishing the efficacy of the legal framework for private and public-private model SEZs, taking into account accommodation of private sector participation and the nature of the investment and business environment. Notwithstanding some of aforementioned concerns raised in the course of the study, it is submitted that the legislative framework is not wholly deficient and room for considerable improvement exists, through which Zambia can maximise and leverage on the potential and benefits flowing from use of SEZs.

5.2 Concluding Remarks

This study has critically analysed the legislative framework for private and public-private zone models showing how the Zambia's commitment to private sector inclusions and

¹⁹⁸Section 3.4 above

¹⁹⁹Section 3.9 above

²⁰⁰Section 4.2-4.4 above

development and the use of the SEZ policy finds expression under the ZDA Act, MFEZ Regulations and PPP Acts. The study has shown how the factors relating to the establishment of SEZs in Zambia make leeway to incorporate private sector participation through the lifecycle of SEZs, that is to say from the time the investment is sought to be made to when it becomes operational. Zambia's legislative framework makes significant stride towards achieving openness to private sector participation through private and public private zone models and providing investment attraction measures through incentives and according investors access to preferential markets and DTAs.

The analysis of the interaction between considerations for issuance of SEZ permit and licences and some of Zambia's international trade and investment obligations in international, regional and bilateral arrangements all go to support the position that the SEZ policy should be pursued not only as part of country wide reforms but also as a strategy of tapping into the benefits flowing from international arrangements.

At the same time the gaps and deficiencies identified in the study, partly through the lessons to be drawn from Ghana and Mauritius, make a case for review and improvement of the legislative framework. The improvements ought to be with a view to make the policy and legislative framework more effective as an investment policy tool and relevant for the country's pursuit of economic development in the wider context.

5.3 Recommendations

In view of the foregoing, the following recommendations are regarded as necessary and useful in continued use of the SEZ policy in Zambia:

- Engaging in periodical assessment of the shifts in use of SEZ policies vis-à-vis changes in the macroeconomic conditions in which policies are to be implemented and investor market availability;
- Adopting periodical review of the incentive structure and qualifications with a view to striking a balance between fiscal and non-fiscal incentives and ensuring qualification for incentives is based on standard criteria to avoid pitfalls concerning discretionary incentives. This review may extend to looking into inclusion of other SEZ structural and operational mechanisms pertaining to movement of SEZ produced goods, specialised regulation of labour relevant to SEZ needs and means of enhancing the provision of facilities in SEZs;

- Adopting streamlined plans for SEZs aided by prior careful assessment of the plans' complementarity with Zambia's comparative advantages and diversification agenda that the SEZ policy seeks to achieve;
- Monitoring the harmonisation measures between domestic regulation of SEZs and international obligations emerging as a result of Zambia's membership in regional arrangements as the existing levels of integration deepens or evolves in SADC and COMESA. The ways in which the implementation of the SEZ policy could be altered or influenced in by deeper integration in future should also be appreciated in the case regional arrangements and access to preferential markets;and
- Facilitating effective and timely participation and representation of the private sectoractors working in the field of SEZs in affairs concerning establishment, management and operation of SEZs. This could include the strengthening of coordination among all stakeholders involved in affairs concerning SEZ policy so that key stakeholder views are into consideration and accommodated.

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