

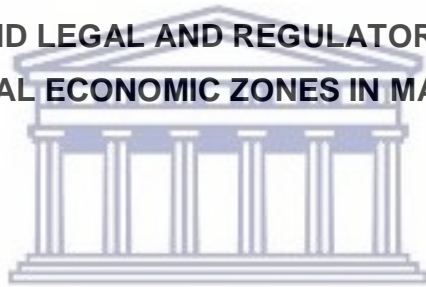


**UNIVERSITY of the
WESTERN CAPE**

FACULTY OF LAW:

DEPARTMENT OF MERCANTILE AND LABOUR LAW

**DEVELOPING A SOUND LEGAL AND REGULATORY FRAMEWORK FOR
SPECIAL ECONOMIC ZONES IN MALAWI**



**Mini Thesis Submitted in Partial Fulfilment of the Requirements for the Master
of Laws (LLM) Degree in International Trade, Business and Investment Law**

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DECLARATION

I, **Ricky Chingota**, declare that the thesis titled '**Developing a Sound Legal and Regulatory Framework for Special Economic Zones in Malawi**' is my original work and that all other works used or quoted have been indicated and acknowledged as complete references. This work has not been submitted to any University, College or other institution of learning for any academic or other award.



Signed :

Ricky Chingota

Date :

9 August 2019

This mini-thesis has been submitted for examination with my approval as University supervisor.



Signed :



Prof. Riekie Wandrag

University of the Western Cape

Date :

9 August 2019

DEDICATION

To the Lord God Almighty: for His enduring love; and for giving me strength and guidance during times that I made difficult choices and took scary steps. He has done things for me that only He can do. I forever owe my life to Him.



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I also thank my brother Everson and my fiancé Melody for their love and support. Their presence in my life is a true blessing.

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KEY WORDS

Economic growth

Export Processing Zone

Export promotion

Foreign direct investment

International best practice

Investment promotion

Legal and regulatory framework

Special Economic Zone



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ACRONYMS AND ABBREVIATIONS

ADB	Asian Development Bank
AfCFTA	African Continental Free Trade Area
ASCM	Agreement on Subsidies and Countervailing Measures
ASEAN	Association of South East Asian Nations
AU	African Union
BOO	Build Operate Own
BOT	Build Transfer and Operate
BRP	Business Residence Permit
CEACR	Committee of Experts on Application of Conventions and Recommendations
CIIP	Competitive Industries and Innovation Programme
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
EPA	Economic Partnership Agreement
EPZ	Export Processing Zone
ESG	Environmental, Social and Governance
EZ	Enterprise Zone
FDI	Foreign Direct Investment
FE	Free Enterprise
FIAS	Foreign Investment Advisory Service
FTZ	Free Trade Zone
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes
ILO	International Labour Organisation
ITUC	International Trade Union Confederation
LDC	Least Developed Country
MENA	Middle East and North Africa

MITC	Malawi Trade and Investment Centre Limited
MRA	Malawi Revenue Authority
OECD	Organisation for Economic Co-operation and Development
PPP	Public-Private Partnership
PTA	Preferential Trade Area
RBM	Reserve Bank of Malawi
RTA	Regional Trade Agreement
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
SDT	Special and Differential Treatment
SEZ	Special Economic Zone
SUFZ	Single Unit Free Zone
SZ	Specialized Zone
TEP	Temporary Employment Permit
TFTA	Tripartite Free Trade Area
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VAT	Value Added Tax
WIDER	World Institute for Development Economics Research
WTO	World Trade Organization

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CHAPTER ONE

INTRODUCTION

1.1 Research background

Export Processing Zones (“EPZs”) were introduced in Malawi in 1995. EPZs are one of several types of Special Economic Zones (“SEZs”).¹ The legal and regulatory framework for the Malawi EPZs was established by the Export Processing Zones Act, 1995² (“EPZ Act”). There is also subsidiary legislation made under the EPZ Act, namely, the Export Processing Zones (Fees and Forms) Regulations³ (“EPZ Regulations”).

EPZs primarily focus on promoting the processing and manufacturing of goods for export.⁴ The Malawi EPZs were thus intended to provide a conducive environment for investment in export-oriented industries. The reasoning by the Malawi Government was that such investment would aid economic growth by, among other things, producing competitive goods for the international market, diversifying Malawi’s exports and reducing over-reliance on traditional export commodities.⁵ The Malawi Government is reported to be among other Southern African governments that introduced EPZs with the hope that the EPZs would bring foreign direct investment (FDI),⁶ new industries and jobs to their respective countries.⁷

¹ FIAS ‘Special Economic Zones: Performance, Lessons Learned and Implications for Zone Development’ (2008) 10 (hereinafter referred to as FIAS (2008)). SEZs are generally defined as geographically delimited areas administered by a single body, offering certain incentives (generally duty-free importing and streamlined customs procedures, for instance) to businesses which physically locate within the zone.

² Chapter 39:06 of the Laws of Malawi.

³ Government Notice No. 96 of 1995.

⁴ FIAS (2008) 10.

⁵ Ministry of Industry and Trade *The Decline of Export Processing Firms under the Export Processing Zone Regime in Malawi* (2015) 3 available at <https://info.undp.org> (accessed on 10 May 2018).

⁶ FDI has been defined by the OECD as a category of investment that reflects the objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) resident in an economy other than that of the direct investor. The lasting interest implies the existence of a long term relationship between the direct investor and the direct investment and significant influence on the management of the enterprise. See <https://www.oecd.org/daf/inv/investment-policy/2487495.pdf> (accessed on 26 April 2019).

⁷ Jauch H ‘Export Processing Zones and the Quest for Sustainable Development: A Southern African Perspective’ (2003) available at <http://ccs.ukzn.ac.za/files/jauch.pdf> (accessed on 15 June 2018). The other Southern African governments are Zimbabwe, Namibia and Mozambique.

Recent studies, however, indicate that the Malawi EPZs have not succeeded in attracting FDI and consequently aiding economic growth as was the intention.⁸ This lack of success is evidenced by, among other things, the decline in the number of business entities operating in the existing EPZs over the years.⁹ The EPZs' failure has led to some stakeholders questioning the relevance of the EPZs to the Malawi economy.¹⁰ Arguing that the EPZ concept is a narrow and inadequate approach to attracting investment, the stakeholders have recommended that the country takes a wider approach to its SEZ programme by establishing multi-sectoral SEZs.¹¹ As opposed to only having EPZs (which focus on manufacturing goods for export), a multi-sectoral approach to SEZs will entail introducing other types of SEZs which cover a wide assortment of economic sectors. The hope is that a wider approach will potentially attract increased FDI which will result in more benefits to the country's economy.

Following the above-stated recommendation, the Malawi Government, in December 2017, announced that it had commenced the process of setting up a legal and operational framework for the proposed multi-sectoral SEZs.¹² The announcement was made through the Malawi Trade and Investment Centre Limited ("MITC") which is a state-owned company. The MITC was incorporated by the Malawi Government (through the Ministry of Industry and Trade) on 2 December 2010 and is recognised under the Investment and Export Promotion Act, 2012 ("IEP Act") as a company which is generally mandated to facilitate investments in Malawi in accordance with the IEP Act.¹³

⁸ Ministry of Industry and Trade (2015) 8.

⁹ Ministry of Industry and Trade (2015) 9.

¹⁰ Ministry of Industry and Trade (2015) 3.

¹¹ Ministry of Industry and Trade (2015) 17.

¹² Chinamulungu O 'Special Economic Zones project takes off – MITC' *The Nation Online* 27 December 2017 available at <http://mwnation.com/special-economic-zones-project-takes-off-mitc/> (accessed on 10 May 2018).

¹³ Part III of the Investment and Export Promotion Act, 2012. Chapter 39:05 of the Laws of Malawi.

1.2 Research objectives

It has been observed that an effective legal and regulatory framework is the first of several steps necessary for the development of successful SEZs.¹⁴ The failure of Malawi's EPZs might have partly resulted from inefficiencies in or ineffectiveness of the country's EPZ law. As Malawi intends to introduce diverse SEZs, this study seeks to propose a legal and regulatory framework that would be sound enough for the intended SEZs.

The study analyses the current Malawi EPZ law against international best practices in the development of SEZ laws and identifies shortcomings in the Malawi law that need to be remedied. The study also analyses Zimbabwe's new SEZ legislation with the aim of drawing lessons that could potentially assist in shaping Malawi's SEZ legal framework. The choice of Zimbabwe as a case study is motivated by the desire to learn from experiences of fellow countries within the SADC and COMESA regions. It is also motivated by the fact that Malawi and Zimbabwe have for several years had a vibrant trade relationship which would extend to a commitment to share experiences.¹⁵

Learning from the above-stated assessment and bearing in mind relevant circumstances prevailing in Malawi, the study proposes a legal and regulatory framework that would be sound enough to create a conducive environment in, and potentially enhance the performance of, the Malawi SEZs.

1.3 Research question

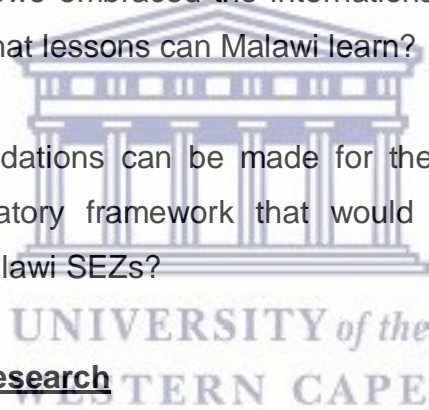
From the outline in the preceding paragraphs, the main question to be addressed in this research is: What kind of a legal and regulatory framework

¹⁴ Farole T. *Special Economic Zones in Africa: Comparing Performance and Learning from Global Experiences* (2011) 11 available at <https://openknowledge.worldbank.org/handle/10986/2268> (accessed on 11 May 2018) (hereafter Farole T (2011)). The other steps to SEZ development include: de facto implementation; location of a zone; infrastructure quality; policies to promote links between SEZs and domestic economy; co-location of SEZs with trade gateway infrastructure; supporting domestic investment in the zones; addressing social infrastructure needs; improving approach to social and environmental compliance issues; and effective monitoring and evaluation.

¹⁵ Apart from both countries being members of SADC and COMESA, Malawi and Zimbabwe have also previously entered into a number of bilateral trade agreements. See <https://mitc.mw/trade/index.php/bilateral-agreements-between-malawi-and-zimbabwe.html>. See also <https://edf.mw/index.php/trade-guidance> (both accessed on 27 May 2019)

would be sound enough and capable of improving the investment climate in Malawi SEZs? A detailed answer to the main question would require that the study also answers the following sub-questions:

- (i) What are the international best practices in developing legal and regulatory frameworks for SEZs?
- (ii) Is the current legal and regulatory framework for Malawi EPZs in line with the international best practices or does it have any shortcomings?
- (iii) If any shortcomings exist in the legal and regulatory framework, how do they affect the performance of Malawi EPZs and how can such shortcomings be remedied?
- (iv) How has Zimbabwe embraced the international best practices in its new SEZ laws and what lessons can Malawi learn?
- (v) What recommendations can be made for the development of a sound legal and regulatory framework that would be capable of improving investment in Malawi SEZs?



1.4 Significance of the research

Over the years, there has been a global proliferation of SEZ types which are more diverse than the traditional EPZs.¹⁶ Having had an unsuccessful EPZ programme spanning over two decades, Malawi now plans to follow the global trend by introducing multi-sectoral SEZs. Thus, the country intends to take a broader approach to SEZs. It is hoped that such broader approach will attract more local and foreign investment, which will eventually contribute to economic growth.¹⁷

¹⁶ Zeng DZ 'Special Economic Zones: Lessons from the Global experience' PEDL Synthesis Paper Series No. 1 (2016) available at https://assets.publishing.service.gov.uk/media/586f9727e5274a130700012d/PEDL_Synthesis_Paper_Piece_No_1.pdf (accessed on 17 June 2018) (hereafter Zeng DZ (2016)).

¹⁷ Ministry of Industry and Trade (2015) 17.

Several SEZs around the world have not been as successful as they were intended to be due to various factors including deficiencies in the host countries' legal and regulatory frameworks.¹⁸ It has been noted that in cases where SEZs have succeeded, the setting up of an effective legal framework is the first among the steps necessary for SEZ development.¹⁹ It is therefore crucial that as Malawi plans to expand its SEZs, the existing EPZ programme, including its legal and regulatory framework, should be assessed. Such an assessment would provide lessons which would assist in developing a sound legal and regulatory framework for the future. Inefficiencies in the SEZ legal and regulatory framework would likely contribute to yet another failure of an even bigger program for Malawi.

1.5 **Research methodology**

This work was a desktop research. Primary resources of information included: the Malawi EPZ Act and EPZ Regulations made thereunder; reports published by the Malawi Ministry of Trade and Industry; and publications by international organisations/ institutions such as the Organisation of Economic Co-operation and Development (OECD) and the Foreign Investment Advisory Service (FIAS), which have developed principles that are regarded as best practices for development of SEZ programmes.²⁰

Most of the relevant materials were accessed on the internet. The course materials made available as part of the "Project Finance: Special Economic Zones" module of the LLM in International Trade, Business and Investment Law programme were also used. Research was also carried out at the libraries of the University of the Western Cape and the University of Malawi.

¹⁸ Farole T (2011) xiii.

¹⁹ Farole T (2011) 11.

²⁰ See Farole T & Kweka J 'Institutional Best Practices for Special Economic Zones: An Application to Tanzania' Africa Trade Policy Notes (2011) 1 available at <http://siteresources.worldbank.org/INTRANETTRADE/Resources/SEZTanzaniaPolicynoteFinal.pdf> (accessed on 17 June 2018). See also MENA-OECD Investment Program 'Towards Best Practice Guidelines for the Development of Economic Zones' (2009) 10 available at <https://www.oecd.org/mena/competitiveness/44866585.pdf> (accessed on 15 May 2018) (hereafter MENA-OECD Investment Programme (2009)).

The study has taken descriptive, analytical and prescriptive approaches. The descriptive approach has been used in providing an overview of the current EPZ legal framework and existing international best practices relating to SEZ laws. The analytical approach has been applied in assessing the soundness of the current Malawi EPZ legal framework against international best practices and drawing lessons therefrom. A comparative analysis of Zimbabwe's new SEZ legislation has been carried out, with the aim of drawing lessons that may potentially assist in shaping Malawi's SEZ legal framework. Recommendations on developing a sound legal and regulatory framework for Malawi SEZs have taken a prescriptive approach.

1.6 Chapter outline

This research is divided into the following five chapters:

Chapter One

This is the introductory chapter of this thesis. It is made up of the research background, objectives, research questions, significance of the research, research methodology and an outline of all the chapters.

Chapter Two

This chapter will provide an overview of the different types of SEZs, their respective objectives as well as their structures. It will also examine the principles and best practices that have been developed by international organisations/institutions and the extent to which these are relevant in developing SEZs.

Chapter Three

Chapter three will examine the existing Malawi EPZ law in light of the international best practices and will identify any shortcomings that need to be remedied. It will also present a brief analysis of Zimbabwe's new SEZ legislation, with the aim of drawing lessons, if any, that may potentially assist in shaping Malawi's SEZ legal framework.

Chapter Four

Chapter four will examine legal and economic circumstances prevailing in Malawi that are worth taking into account in developing a new legal and regulatory framework for Malawi's SEZs.

Chapter Five

This chapter will conclude the study and make recommendations on developing a sound legal and regulatory framework for Malawi SEZs. The recommendations will be made based on the analysis of the existing Malawi EPZ regime, the international best practices, lessons drawn from Zimbabwe's approach to SEZs as well as relevant legal and economic circumstances prevailing in Malawi.



CHAPTER TWO

FUNDAMENTALS OF THE SEZ CONCEPT AND INTERNATIONAL BEST PRACTICES IN DEVELOPING SEZ PROGRAMMES

2.1 Introduction

A legal and regulatory framework is one of the building blocks for any SEZ programme. Before analysing what a legal and regulatory framework entails, it is important that the SEZ concept is discussed. Such basic understanding would assist in appreciating the different motivations for, and approaches to, development of SEZs by different countries and institutions around the world.

This chapter will begin by discussing the definition of SEZs and will provide an overview of the different types of SEZs and their respective objectives and characteristics. The chapter will also briefly discuss the history and evolution of SEZs as well as the trends and statistics in development of SEZs around the world. It also examines SEZ development principles and best practices that have been identified or devised by authors and international organisations/institutions as well as the extent to which such principles and best practices are relevant in developing SEZs. The discussion in this chapter will lay a foundation for an analysis (in the subsequent chapters) of the current Malawi EPZ regime and identification of areas that need consideration and/or improvement in order to strengthen the legal and regulatory framework for the SEZs.

2.2 Definition of SEZs

SEZs have over the years evolved into various forms and are often called by different names in different countries.²¹ This state of affairs has resulted in various definitions being ascribed to SEZs depending on how they are conceptualised in a particular country or by a particular authority. Thus, there is no standardisation of terminology for SEZs and the terminology applied in

²¹ Competitive Industries and Innovation Programme (CIIP) 'Special Economic Zones: An Operational Review of Their Impact' (2017) 11 available at <https://openknowledge.worldbank.org/handle/10986/29054> (accessed on 17 June 2018); also 'ASEAN Guidelines for Special Economic Zones Development and Collaboration' adopted by ASEAN Economic Ministers AEM in 2016 available at <https://asean.org/wp-content/uploads/2016/08/ASEAN-Guidelines-on-SEZ-Development.pdf> (accessed 4 December 2018).

literature and in common usage can be confusing.²² It is not unusual to find that words like 'free zones', 'free trade zones', 'customs-free zones', 'special economic zones', 'export processing zones', are in practice used almost interchangeably.²³ This reflects the linguistic preferences of authorities implementing SEZs as much as functional differences between different types of SEZs.²⁴

There are various SEZ definitions, some of which are commonly used in literature. Most of the definitions attempt to capture the fundamental elements of SEZs. One commonly used definition is by Farole who has defined an SEZ as a demarcated geographic area contained within a country's national boundaries where the rules of business are different from those that prevail in the national territory.²⁵ Such differential rules mainly deal with investment conditions, international trade and customs, taxation, and the regulatory environment; whereby the zone is given a business environment intended to be more liberal from a policy perspective and more effective from an administrative perspective than that of the national territory.²⁶

Another SEZ definition similar to that of Farole states that an SEZ is a delimited geographic area within a country, with a zone management that provides infrastructure and services to tenant companies, and where the rules for doing business are different and are promoted by a set of policy instruments that are not generally applicable to the rest of the country.²⁷ Yet another definition has coined SEZ as a policy concentrate designed to increase growth by creating an economic environment which offers significantly better investment and

²² Palit A & Bhattacharjee S *Special Economic Zones in India: Myths and Realities* (2008) 6 and 7.

²³ MENA-OECD Investment Program 'Towards Best Practice Guidelines for the Development of Economic Zones' (2009) available at <https://www.oecd.org/mena/competitiveness/44866585.pdf> (accessed on 15 May 2018).

²⁴ MENA-OECD Investment Programme (2009) 4. See also Costachie S 'Free Zones, Some Theoretical Aspects' (2008) 11 *Annals of the University of Craiova: Series Geography* 138 139.

²⁵ Farole T (2011) 23.

²⁶ Baissac C 'Brief History of Special Economic Zones and Overview of Policy Debates' in Farole T 'Special Economic Zones in Africa: Comparing Performance and Learning from Global Experiences' (2011) available at <https://openknowledge.worldbank.org/handle/10986/2268> (accessed on 11 May 2018) (hereafter Baissac C (2011)).

²⁷ Ge W 'Special Economic Zones and the Opening of the Chinese Economy: Some Lessons for Economic Liberalization' (1999) 27 (7) *World Development* 1267; also Hamada K 'An Economic Analysis of the Duty-Free Zone' (1974) 4 *Journal of International Economics* 225.

operating conditions than the rest of the domestic economy, and ensures that conditions of international competitiveness are created.²⁸

It is worth noting that Farole's definition of SEZs has been subjected to critique. It has been argued, and Farole has acknowledged, that the definition may not fully capture the reality of SEZs because some countries make no distinction with regard to taxation laws in their SEZs and the rest of the country.²⁹ It has further been argued that other countries have done away with the geographic spatiality of the SEZ and have instead made the SEZ a purely legal space with applicability across the entirety of the national territory or large portions of it.³⁰ In coming up with his SEZ definition, Farole was cognisant of the fact that there is a variation of SEZ definitions across countries and institutions, and that the continuous evolution of SEZs (as evidenced by new types of zones being developed and older types disappearing or being adapted) would require that any attempt at a comprehensive SEZ definition must be sufficiently broad to encompass the bewildering array of past, present, and future zones, and yet sufficiently precise to exclude those that do not display the essential structural features that make a zone a zone.³¹

In light of the above critique, it would not be easy to come up with an SEZ definition that is widely or universally accepted as comprehensive. In Malawi, no unique definition of SEZs appears to have been provided by literature on the subject. This thesis will therefore, bearing in mind the critique, proceed with Farole's definition as it captures the basic SEZ elements and is commonly used. The said definition is considered sufficient for purposes of the discussion in this thesis.

2.3 Types of SEZs and their objectives and characteristics

With the evolution of SEZs over time, a multiplicity of names and forms of SEZs have come about and this is due to several factors, including: the need to

²⁸ Tinarwo J 'Transforming African Agriculture through Special Economic Zones: Opportunities and Challenges' available at <https://www.afdb.org/en/aec-2016/papers/paper/transforming-african-agriculture-through-special-economic-zones-opportunities-and-challenges-4909/> (accessed 4 December, 2018).

²⁹ Farole T (2011) 23.

³⁰ Farole T (2011) 23.

³¹ Farole T (2011) 24.

differentiate among types of zones that display very real differences in form and function; differences in economic terminology among countries; the desire by zone promoters to differentiate their product from those of the competition; and the consequences of multiple translations.³² Therefore, there is little consistency in the classification of SEZs.³³ Just as defining the exact parameters of SEZs is difficult, distinguishing between different types of SEZs can be similarly complex.³⁴

The Foreign Investment Advisory Service (FIAS) has attempted to deal with the inconsistency in SEZ classification by coming up with SEZs types namely: Free Trade Zone; Export Processing Zone; Enterprise Zone; Freeport; Single Factory EPZ; and Specialised Zone.³⁵ With the exception of the Single Factory EPZ, the common principles underpinning the SEZ concept include: (i) a delimited, secure area (also referred to as ring-fenced enclaves³⁶) under single administration; (ii) a special incentive and regulatory regime; and (iii) location-based incentive eligibility.³⁷

In addition to the SEZ types stated by FIAS, Zeng has identified other SEZ types namely: Comprehensive SEZs; Industrial Parks; Bonded Areas; and Eco-Industrial Zones.³⁸ The mentioned SEZ types, together with their objectives and characteristics, are discussed below.

2.3.1 Export Processing Zones (“EPZs”)

EPZs are industrial estates that offer special incentives and facilities for manufacturing and related activities.³⁹ A well-known example of an EPZ is the Shannon Free Zone in Ireland which was established in 1958 and is considered the world’s first modern EPZ.⁴⁰ The implementation of the Shannon EPZ was

³² Farole T (2011) 24.

³³ Farole T (2011) 24.

³⁴ UNCTAD ‘World Investment Report: Special Economic Zones’ (2019) 135 available at https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf (accessed on 30 July 2019) (hereinafter ‘UNCTAD World Investment Report (2019)’)

³⁵ FIAS (2008) 3.

³⁶ MENA-OECD Investment Programme (2009) 4.

³⁷ FIAS (2008) 3.

³⁸ Zeng DZ (2016) 2.

³⁹ Farole T & Akinci G ‘Special Economic Zones: Progress, Emerging Challenges and Future Directions’ (2011) 2 available at <http://documents.worldbank.org> (accessed 15 June 2018).

⁴⁰ FIAS (2008) 30.

successful and this provided impetus for other countries (such as Puerto Rico and India) to pursue similar lines of development.⁴¹

Since the 1970s, EPZs were known to be primarily aimed at attracting export oriented investments and usually covering a wide array of manufacturing industries.⁴² EPZ activities were focused exclusively on export markets; investment in EPZs was restricted to foreign capital; and activities were limited to manufacturing.⁴³ The EPZ model was successful in many East Asia and Latin America countries, such as the Republic of Korea, Taiwan, China, Vietnam, Bangladesh, Mauritius, Dominican Republic, and El Salvador.⁴⁴

Since the 1990s, EPZs have evolved dramatically and the types of activities permitted in EPZs have expanded significantly.⁴⁵ EPZs now typically take two forms namely: the traditional EPZ model, in which the entire area within the zone is exclusively for export-oriented enterprises licensed under an EPZ regime; and the hybrid EPZ model which, in contrast, is typically sub-divided into a general zone open to all industries regardless of export orientation and a separate area reserved for export-oriented, EPZ-registered enterprises.⁴⁶

It has been observed that EPZs have their limitations as they tend to become enclaves without much linkage with the local economy and they rely heavily on fiscal incentives.⁴⁷ Deriving substantial benefits from EPZs has been highly problematic in some cases and history has many examples of failure.⁴⁸ Given these limitations, many countries began to move towards the modern concept of SEZs which have wider size, have more linkages with the local economy, are

⁴¹ Wong KY & Chu DKY 'Export Processing Zones and Special Economic Zones as Generators of Economic Development: The Asian Experience' (1984) Vol. 66, No. 1 *Geografiska Annaler. Series B, Human Geography* 1. Also available at <http://www.jstor.org/stable/490524> (accessed 17 June 2018).

⁴² MENA-OECD Investment Programme (2009) 4.

⁴³ Zeng DZ (2016) 3

⁴⁴ Zeng DZ (2016) 3.

⁴⁵ Farole T (2011) 28.

⁴⁶ FIAS (2008) 10.

⁴⁷ Zeng DZ (2016) 3.

⁴⁸ Moran TH 'International Experience with Special Economic Zones (SEZs): Using SEZs to Drive Development in Countries around the World' (2011) available at <https://www.coursehero.com/file/26059997/130522annexure-b1doc/> (accessed on 12 May 2018).

multifunctional and are less reliant on incentives.⁴⁹ One example is in India where, upon enacting an SEZ Act in 2005, EPZs that had been in existence were converted into modern SEZs.⁵⁰ Going by the trend in which countries are moving away from EPZs, it would appear that the common view is that EPZs have outlived their usefulness.

2.3.2 Single Factory EPZs

Single Factory EPZs are also known as Free Enterprises (“FEs”) or Single Unit Free Zones and they provide incentives to individual enterprises regardless of location.⁵¹ This is a variation since, unlike the other EPZs discussed above, individual enterprises do not have to locate within a designated zone to receive incentives and privileges.⁵² Enterprises are provided with EPZ status and allowed to locate anywhere in the national territory or in a designated part of the territory.⁵³ Some countries such as Mauritius, Madagascar, Mexico and Fiji rely exclusively on Single Factory EPZs.⁵⁴ In other countries such as Costa Rica, the United States, and Sri Lanka, Single Factory EPZs and the other EPZs coexist.⁵⁵ Single Factory EPZs also exist in Sub-Saharan Africa although no increase in their numbers appears to have been recorded in recent years. As the only distinction between Single Factory EPZs and the other EPZs is their location in a national territory, the usefulness of Single Factory EPZs also appears to have dwindled.⁵⁶

⁴⁹ Zeng DZ ‘Global Experiences with Special Economic Zones – with a Focus on China and Africa’ (2015) 3 available at <https://openknowledge.worldbank.org/handle/10986/22400> (accessed on 12 May 2018).

⁵⁰ Punj A *Development of Special Economic Zones and its Impact on Labour Rights and Livelihood in National Capital Region* (unpublished PhD thesis, University of Dehli, 2013) 2. Available at <http://hdl.handle.net/10603/26845> (accessed 15 June 2018).

⁵¹ MENA-OECD Investment Programme (2009) 4.

⁵² FIAS (2008) 3.

⁵³ Moran TH ‘International Experience with Special Economic Zones (SEZs): Using SEZs to Drive Development in Countries around the World’ (2011) 14 available at <https://www.coursehero.com/file/26059997/130522annexure-b1doc/> (accessed on 12 May 2018). Also Costachie S ‘Free Zones, Some Theoretical Aspects’ (2008) 11 *Annals of the University of Craivora: Series Geography* 138 145.

⁵⁴ FIAS (2008) 10.

⁵⁵ Farole T (2011) 28.

⁵⁶ This is evidenced by, for instance, Malawi’s departure from this type of SEZ. See chapter three for full discussion.

2.3.3 Free Trade Zones (“FTZs”)

FTZs are the oldest form of SEZs and are also known as Commercial Free Zones or Free Zones.⁵⁷ They are fenced-in, duty-free areas, which offer warehousing, storage, and distribution facilities for trade, transshipment, and re-export operations, located in most ports of entry around the world.⁵⁸ Thus, FTZs are said to be the most ubiquitous in a majority of seaports and in some airports.⁵⁹ They are usually under the direct or indirect administration of ports and they are also physically segregated from both the port’s main area and the outside by fences, walls and gates because they lie outside the country’s customs territory.⁶⁰ Their activities are limited to trade-related processes which include warehousing, storage, sales, exhibitions and light processing operations such as packaging, labelling, quality control, and sorting.⁶¹ FTZs continue to be widely used.

2.3.4 Enterprise Zones (“EZs”)

EZs are intended to revitalize distressed urban or rural areas through the provision of tax incentives and financial grants,⁶² and through increasing private sector participation.⁶³ EZs exclude duty free imports but may provide zoning relief, tax payment and licence exceptions. Activities in EZs mainly include manufacturing, trade and other related commercial activities.⁶⁴ While EZs offer incentives, they do not provide a specific regulatory regime.⁶⁵ Most EZs are in developed countries such as the United States of America, France and the United Kingdom. They are not common in Africa and only South Africa is reported to have developed them.⁶⁶

⁵⁷ Farole T (2011) 27.

⁵⁸ Moberg L ‘The political economy of special economic zones’ (2015) 11 (1) *Journal of Institutional Economics* 171. Also FIAS (2008) 3; and MENA-OECD Investment Programme (2009) 4.

⁵⁹ Farole T (2011) 27.

⁶⁰ Baissac C (2011) 27.

⁶¹ Farole T (2011) 28.

⁶² FIAS (2008) 3.

⁶³ Palit A & Bhattachargee S *Special Economic Zones in India: Myths and Realities* (2008) 5.

⁶⁴ Palit A & Bhattachargee S *Special Economic Zones in India: Myths and Realities* (2008) 5.

⁶⁵ Baissac C (2011) 27.

⁶⁶ FIAS (2008) 11.

2.3.5 Freeports

Freeports are generally a much broader concept and typically encompass much larger areas with the objective of encouraging diversified economic growth and to liberate the economy.⁶⁷ They accommodate all types of activities including tourism and retail sales, permit people to reside on site, and provide a broader set of incentives and benefits.⁶⁸ It has been argued that the term 'Freeport' in the FIAS classification of SEZs can be confusing as it is used to describe SEZs in general. Freeports can include entire economic regions, the populations that live and work in these regions and all the economic activities that take place there and they can contain or even overlap political and administrative units.⁶⁹ Freeports have been widely used in Asia and the Pacific, particularly in China, India, Indonesia, Malaysia and Singapore.⁷⁰ There appears to be no country in Sub-Saharan Africa that has established Freeports.⁷¹

2.3.6 Specialized Zones ("SZs")

These are targeted at specific sectors or economic activities.⁷² Examples include science/technology parks, petrochemical zones, logistics parks, and airport-based zones.⁷³ They may restrict the access of companies in non-priority sectors, and their infrastructure is mostly tailored according to their sectoral targets.⁷⁴ Examples of SZs include the Singapore Science Park, the Labuan Offshore Financial Centre in Malaysia, the Dubai Internet City in the United Arab Emirates and the Kuala Lumpur Airport Free zone in Malaysia.⁷⁵

2.3.7 Comprehensive SEZs

These are also called 'Multi-functional Economic Zones' and are zones of a large size that have a mix of different, industrial, service and urban-amenity

⁶⁷ FIAS (2008) 3.

⁶⁸ FIAS (2008) 10.

⁶⁹ Farole T (2011) 29.

⁷⁰ FIAS (2008) 3.

⁷¹ FIAS (2008) 16.

⁷² MENA-OECD Investment Programme (2009) 5.

⁷³ FIAS (2008) 3.

⁷⁴ MENA-OECD Investment Programme (2009) 5.

⁷⁵ FIAS (2008) 11.

operations.⁷⁶ In some cases they are said to encompass a whole city or jurisdiction. Examples are Shenzhen City and Hainan Province in China.⁷⁷ The characteristics of Comprehensive SEZs appear to be similar to those of FIAS' Freeports (discussed above).

2.3.8 Bonded Areas

These are also known as 'Bonded Warehouses' and are specific buildings or other secured areas in which goods may be stored, manipulated, or may undergo manufacturing operations without payment of duties that would ordinarily be imposed.⁷⁸ To some extent, Bonded Areas are similar to FTZs or Freeports. However, the major difference is that Bonded Areas are subject to customs laws and regulations, while FTZs are exempt from these provisions.⁷⁹

2.3.9 Eco-Industrial Zones

These focus on ecological improvements in terms of reducing waste and improving the environmental performance of firms.⁸⁰ They often use an "Industrial symbiosis" concept and green technologies to achieve energy and resource efficiency. Given the severe environmental challenges, the number of countries that are embracing this new type of zone is increasing.⁸¹

From the types of SEZs discussed in the preceding paragraphs, it appears that EPZs, Single Factory EPZs, FTZs, Comprehensive SEZs and SZs are the most used types. This notwithstanding, the trend in recent years has been that countries are moving away from EPZs and Single Factory EPZs. This is the direction that Malawi has now taken.

2.3.10 Proposed SDG Model Zones

In its World Investment Report of 2019, UNCTAD has proposed the development of an entirely new type of SEZ named the 'SDG model zone'

⁷⁶ Zeng DZ (2016) 2.

⁷⁷ Zeng DZ (2016) 2.

⁷⁸ Zeng DZ (2016) 2.

⁷⁹ Zeng DZ (2016) 2.

⁸⁰ Zeng DZ (2016) 2.

⁸¹ Zeng DZ (2016) 2.

which will be driven by the United Nations SDGs.⁸² UNCTAD envisages that conceptually, SDG model zones would be built around three key elements which include: a strategic focus on attracting investment in SDG-relevant activities; the highest levels of ESG standards and compliance; and promoting inclusive growth through linkages and spillovers.⁸³ Among other things, it is said that the SDG model zones could adopt the highest international standards, set the benchmark and act as catalysts for improvements across all zones through innovation and experimentation with new approaches.⁸⁴

This thesis notes that at present, the SDG model zones have not been tried and tested. Further, as UNCTAD has also acknowledges, different stages of development require different forms of SEZs.⁸⁵ As countries develop, it is important to continuously assess the extent to which SEZs are fit for purpose and to adapt zone programmes to evolving contents and development objectives.⁸⁶ It would appear that whilst the proposed SDG model zones may in practice be implemented by developed countries with relative ease, least developed countries like Malawi may find it difficult to implement the proposed SDG zone model (which designed to involve innovation and experimentation with new approaches) as compared to the commonly used modern SEZ types.

2.4 Common characteristics of SEZs

Although the types of SEZ discussed above (except the proposed SDG model zones, which are yet to be implemented) differ from one another in form or function, they all share certain hallmarks.⁸⁷ Broadly, four characteristics define SEZs and these are: (a) they are geographically delineated areas, usually physically secured (with the exception of Single Factory SEZs); (b) they have a single management or administration; (c) they offer benefits for investors physically within the zone; and (d) they have a separate customs area (duty-free benefits) and streamlined procedures.⁸⁸ Additional characteristics that

⁸² UNCTAD World Investment Report (2019) 202.

⁸³ UNCTAD World Investment Report (2019) 202.

⁸⁴ UNCTAD World Investment Report (2019) 203.

⁸⁵ UNCTAD World Investment Report (2019) 196.

⁸⁶ UNCTAD World Investment Report (2019) 196.

⁸⁷ Zeng DZ (2016) 3.

⁸⁸ FIAS (2008) 9.

have also been mentioned in literature as being common among SEZs are that: they are optimally established and operated as part of a national economic development reform strategy, and not as a “one off” venture; and they range in size and scope, from individual small industrial parks to entire regions of a country.⁸⁹

The SEZ types also share features that contribute to their “special” nature and these features are as follows:

- (i) Special regulatory regime: SEZs normally operate under more liberal economic laws than those that typically prevail in a country, regarding issues such as labour, land use, and foreign investment.⁹⁰ The special regulatory regime is usually managed by a dedicated governance structure (centralised or decentralised) whose attributes vary according to the nature of the SEZ regime, the prevalent administrative culture, the number of existing SEZs, and the role of the private sector in developing and operating SEZs.⁹¹ The purpose of this structure is to ensure efficient management of the regime and to ensure that investors benefit from its provisions.⁹² The said purpose is achieved by coordinating activities within the zone and advocating for firms in the zone in interactions with government.⁹³
- (ii) Public services: SEZs are normally serviced with efficient customs and fast-tracked registration and licensing, often through “one-stop-shop” services.⁹⁴
- (iii) Infrastructure: SEZs in most cases have much better and more reliable physical infrastructure such as roads, power, water, real estate, and

⁸⁹ Kechichian E ‘Special Economic Zones as an Institutional Micro Climate’ available at <http://www.tepav.org.tr> (accessed 24 November 2018).

⁹⁰ Zeng DZ (2016) 3. See also UNCTAD World Investment Report (2019) 161.

⁹¹ Altbeker A, McKeown K & Bernstein A ‘Special Economic Zones: Lessons for South Africa from international evidence and local experience. Edited proceedings of a Round Table convened by the Centre for Development and Enterprise.’ Available at <https://www.africaportal.org/publications/special-economic-zones-lessons-for-south-africa-from-international-evidence-and-local-experience/> (accessed 4 December 2018).

⁹² Farole T (2011) 24.

⁹³ Competitive Industries and Innovation Programme (CIIP) ‘Special Economic Zones: An Operational Review of Their Impact’ (2017) 12 available at <https://openknowledge.worldbank.org/handle/10986/29054> (accessed on 17 June 2018).

⁹⁴ Zeng DZ (2016) 3.

telecommunications compared to the domestic economic environment.⁹⁵ The infrastructure works to support the activities of the firms and economic agents operating within the SEZs.⁹⁶ SEZs also usually have a government land policy that has zoned land specifically for the purpose of the SEZ.⁹⁷

- (iv) Fiscal incentives: Investors in SEZs, particularly the anchor investors, often enjoy fiscal incentives.⁹⁸ The fiscal incentives are based on rules and legislation and are aimed at reducing taxes for firms and sometimes for key employees thereby attracting firms or inducing them to invest.⁹⁹ They take the form of reduced corporate taxes or tax holidays; investment tax credits or accelerated depreciation allowances to encourage capital formation; or sometimes lower import taxes and tariffs.¹⁰⁰

2.5 Rationale for setting up SEZs

SEZs are set up because of the social values or return they are expected to generate.¹⁰¹ The expectation is for SEZs to generate or participate in the economic growth and transformation of their host countries in a way that is faster or more effective than would be the case without them.¹⁰² SEZs also seek to increase the competitive environment of a country through an increase in investment and a decrease in business costs.¹⁰³

It is said that initially, the rationale for creating SEZs sprung from the idea of setting up special investor-friendly sites where foreign investors could import

⁹⁵ Zeng DZ (2016) 3.

⁹⁶ Farole T (2011) 24-25.

⁹⁷ Competitive Industries and Innovation Programme (CIIP) 'Special Economic Zones: An Operational Review of Their Impact' (2017) 12 available at <https://openknowledge.worldbank.org/handle/10986/29054> (accessed on 17 June 2018).

⁹⁸ Zeng DZ (2016) 3.

⁹⁹ Competitive Industries and Innovation Programme (CIIP) 'Special Economic Zones: An Operational Review of Their Impact' (2017) 17 available at <https://openknowledge.worldbank.org/handle/10986/29054> (accessed on 17 June 2018)

¹⁰⁰ Competitive Industries and Innovation Programme (CIIP) 'Special Economic Zones: An Operational Review of Their Impact' (2017) 11 available at <https://openknowledge.worldbank.org/handle/10986/29054> (accessed on 17 June 2018)

¹⁰¹ Baissac C (2011) 25.

¹⁰² Farole T "Second Best? Investment Climate and Performance in Africa's Special Economic Zones' (2010) 5 available at <https://openknowledge.worldbank.org/handle/10986/3930> (accessed 4 December 2018).

¹⁰³ FIAS (2008) 12.

inputs duty-free and assemble final goods for sale in international markets.¹⁰⁴ Underlying this rationale is the conviction that the comparative advantage of the host economy is cheap labour.¹⁰⁵ The benefit for the host country comes in the form of lowest-skill job creation in manufacturing and assembly, pulling labour out of primary production (e.g. agriculture and extractive industries) and from urban unemployment, with the added advantage of strengthening of the balance of payments through increased exports.¹⁰⁶

From an economic perspective, Zeng has categorised SEZ benefits into: (a) “static” economic benefits such as employment generation, export growth, government revenues, and foreign exchange earnings; and (b) the more “dynamic” economic benefits such as skills upgrading, technology transfer and innovation, economic diversification, productivity enhancement of local firms, etc.¹⁰⁷

FIAS has argued that the rationale for setting up SEZs differs between developing and developed countries. For developing countries, SEZs have traditionally had both a policy and an infrastructure rationale.¹⁰⁸ The policy rationale considers SEZs as: supporting a wider economic reform strategy; serving as “pressure valves” to alleviate growing unemployment; serving as experimental laboratories for the application of new policies and approaches; and attracting foreign direct investment.¹⁰⁹ The infrastructure rationale (of fully serviced sites with purpose-built facilities for sale or lease) is one of the most important driving forces behind zone development in infrastructure-poor countries.¹¹⁰ The aim is to enhance the competitiveness of manufacturers and service providers and to realize agglomeration benefits from concentrating industries in one geographical area.¹¹¹

¹⁰⁴ Moran TH (2011) 4.

¹⁰⁵ Moran TH (2011) 4.

¹⁰⁶ Moran TH (2011) 4.

¹⁰⁷ Zeng (2016) 3.

¹⁰⁸ FIAS (2008) 12.

¹⁰⁹ FIAS (2008) 12. Most new SEZ programmes, particularly in the Middle East, are designed to attract foreign investment.

¹¹⁰ Farole T (2010) 6.

¹¹¹ FIAS (2008) 12.

For developed countries, the rationale for setting up SEZs is more varied.¹¹² While the main rationale behind SEZ programmes is to enhance trade efficiency and manufacturing competitiveness, some countries have set up SEZs explicitly intended to promote foreign investment while others have set up with the aim of revitalizing economically distressed parts of a country.¹¹³

2.6 History and evolution of SEZs in summary

From a policy perspective, the evolution of SEZs has been summarized as follows:

(i) A shift from import substitution strategies

In the 1960s and 1970s, EPZs were developed as supplements to protectionist economic strategies focused on import substitution.¹¹⁴ The performance of these strategies was usually uninspiring and this led countries¹¹⁵ to create enclaves for foreign-oriented activities.¹¹⁶ EPZs were expected to absorb surplus labour without immobilizing a domestic capital base that was oriented toward domestic production. The countries that applied this strategy were initially interested only in the static economic benefits of the tool such as employment creation, generation of foreign exchange through exports and creation of economic value added.¹¹⁷

(ii) Export-oriented economic growth model

At the same time, a number of Asian countries chose to focus their economic strategies on exports rather than import substitution.¹¹⁸ EPZs were primarily developed to act as catalysts in the transition from inward-looking or traditional exports to non-traditional exports.¹¹⁹ This export-

¹¹² FIAS (2008) 12.

¹¹³ FIAS (2008) 13.

¹¹⁴ Baissac C (2011) 40.

¹¹⁵ Such as Brazil, India, Kenya, Malaysia, and Mauritius.

¹¹⁶ Baissac C (2011) 40.

¹¹⁷ Baissac C (2011) 26 and 41.

¹¹⁸ Baissac C (2011) 41.

¹¹⁹ Baissac C (2011) 41.

oriented growth model led to the emergence of the newly industrializing countries of East and South East Asia.¹²⁰

(iii) China experiments

China's approach to SEZs has been one of the most radical applications of the concept.¹²¹ Once it became clear that the country was failing to effect economic development through the strategies of the Mao era, the government chose to use the first four SEZs¹²², from 1979 onward, as a gigantic experiment in controlled capitalism in a command economy.¹²³ The four SEZs had an almost immediate positive impact and by 1981 they accounted for 59.8 percent of total FDI in China.¹²⁴ The four SEZs continued to succeed and they brought unprecedented rates of economic growth in China.¹²⁵

(iv) Increase in SEZs despite dismantling of protectionist policies

Changes to the international politico-economic order in the 1980s put an end to the inward-looking protectionist economic strategies of the 1960s and 1970s.¹²⁶ As economic liberalization saw the protectionist policies of the era dismantled, many argued that SEZs were losing relevance in this new environment, as trade and investment barriers were disassembled. However, the number of SEZs continued to increase dramatically.¹²⁷

¹²⁰ Baissac C (2011) 41. South Korea and Taiwan-China were the main countries that chose this route.

¹²¹ Baissac C (2011) 41.

¹²² These four were in Shenzhen, Zhuhai and Shantou (in Guangdong Province) and in Xiamen (in Fujian Province).

¹²³ Baissac C (2011) 41.

¹²⁴ Zeng DZ 'Building Engines for Growth and Competitiveness in China: Experience with Special economic Zones and Industrial Clusters' (2010) 10 available at <https://openknowledge.worldbank.org/handle/10986/2501> (accessed on 24 March 2019).

¹²⁵ Zeng DZ 'Building Engines for Growth and Competitiveness in China: Experience with Special economic Zones and Industrial Clusters' (2010) 10 available at <https://openknowledge.worldbank.org/handle/10986/2501> (accessed on 24 March 2019).

¹²⁶ Baissac C (2011) 42.

¹²⁷ Baissac C (2011) 42. For instance, the number of countries operating SEZs grew from 25 in 1975 to more than 130 (as of 2008) and the number of SEZs also increased from 79 in 1975 to more than 3,500 within a space of 30 years.

2.7 Trends and statistics in development of SEZs

Since the first modern EPZ was established in Shannon, Ireland in 1959, there have been profound changes in the SEZ concept and the approach to SEZ development.¹²⁸ Traditionally, SEZs were developed as isolated enclaves both in terms of the underlying policy framework and geographic location.¹²⁹ Access to incentives and privileges was tightly controlled and qualifying firms were required to be substantially export-oriented (particularly for EPZs), to be engaged in recognized manufacturing activities, and at times only foreign-owned.¹³⁰ Further, zone location was restricted to relatively remote areas or near transport hubs and zones were exclusively developed and operated by government bodies.¹³¹

In recent years, there has been a shift away from EPZs and zone development has moved towards SEZ types with emphasis on physical, strategic, and financial links between the zones and local economies.¹³² It has also been observed that focus has moved away from fiscal incentives to value added services and even more focus is now placed on distinguishing the SEZ through creating an improved investment climate in the zone.¹³³ Whilst many SEZs now avoid the narrow focus of traditional EPZs and opt for multipurpose developments encompassing industrial, commercial, residential, and even tourism activities, others are moving to highly specialized developments focused on specific high-end services like information and communication technology and biotech.¹³⁴ Another notable trend has been the growing importance of zones that are privately owned, developed, or operated as opposed to those by governments.¹³⁵

In terms of challenges faced by SEZs, it has been noted that apart from the challenges associated with a more difficult trade and investment climate, SEZs face other challenges as well, one of them being the new industrial revolution

¹²⁸ FIAS (2008) 13.

¹²⁹ FIAS (2008) 14.

¹³⁰ FIAS (2008) 14.

¹³¹ FIAS (2008) 14.

¹³² Farole T and Akinci G (2011) 7.

¹³³ Farole T and Akinci G (2011) 7.

¹³⁴ Farole T and Akinci G (2011) 7.

¹³⁵ FIAS (2008) 11.

which could erode the importance of low labour costs – the traditional competitive edge of most SEZs.¹³⁶ Policymakers in various jurisdictions are therefore seeking to devise SEZs that will anticipate trends in their targeted industries and adapt accordingly.¹³⁷

As regards global SEZ statistics, different studies have had dramatically varying estimates of the number and types of SEZs worldwide.¹³⁸ In its World Investment Report of 2019, UNCTAD has estimated the number of SEZs around the world to be nearly 5,400, with many more in the pipeline for the coming years.¹³⁹ Despite the variation in numbers that have been reported, the consensus appears to be that the number of SEZs and the number of countries hosting SEZs has grown tremendously from the time the SEZ concept emerged.¹⁴⁰

Inspired by the performance of the first modern EPZ in Shannon, Ireland in 1959, a number of developing countries (mainly in East Asia, Latin America, the Caribbean and to a lesser extent Africa) initiated EPZ programmes.¹⁴¹ In the 1980s, the pace of SEZ development increased and expanded to new regions, including South Asia (Bangladesh, Pakistan), South America, and sub-Saharan Africa (Mauritius).¹⁴² The first privately developed and operated SEZs came on line in the Caribbean and Central America in the 1980s.¹⁴³ Since then, zone development exploded with the emergence of new programmes in the countries of Eastern and Central Europe, the Commonwealth of Independent States.¹⁴⁴

There also emerged SEZs in the Middle East and North Africa (MENA). The number of SEZs in MENA substantially increased within a short period of time.¹⁴⁵ According to the MENA-OECD Stock-taking Report of 2005, there were

¹³⁶ UNCTAD World Investment Report (2019) iv.

¹³⁷ UNCTAD World Investment Report (2019) iv.

¹³⁸ FIAS (2008) 12.

¹³⁹ UNCTAD World Investment Report (2019) iii.

¹⁴⁰ FAS (2008) 7.

¹⁴¹ Jauch H 'Export Processing Zones and the Quest for Sustainable Development: A Southern African perspective' (2003) 2 available at <https://journals.sagepub.com/doi/abs/10.1177/095624780201400109> (accessed 15 June 2018).

¹⁴² FIAS (2008) 23.

¹⁴³ FIAS (2008) 23.

¹⁴⁴ FIAS (2008) 23.

¹⁴⁵ MENA-OECD Investment Programme (2009) 5.

48 functioning SEZs in the MENA region as a whole; with three MENA countries having no SEZs at that time namely Oman, Qatar and Saudi Arabia.¹⁴⁶ The numbers almost doubled from 48 in 2005 to around 89 SEZs in 2009 and, moreover, the three countries that did not have FEZs had set up concrete plans for SEZ development.¹⁴⁷

Sub-Saharan Africa has also witnessed a wave of SEZ programmes.¹⁴⁸ Several African countries¹⁴⁹ launched SEZ programmes in the early 1970s. However, most African countries¹⁵⁰ did not operationalize their programmes until the 1990s or 2000s.¹⁵¹ As of 2014, the majority of countries in Sub-Saharan Africa had active SEZ programmes, and many others were in the process of developing them.¹⁵² The expansion of SEZs in recent years is unprecedented and, even though the African experience with SEZs over the past two decades has been less than spectacular, more SEZs may be developed over the next decade than during the three preceding decades combined.¹⁵³

2.8 Factors that affect the performance of SEZs in general

Factors that affect performance of SEZs are generally categorized into two categories. The first category relates to the setup and design of the overall SEZ programme and this includes the incentives package (both fiscal and regulatory), the requirements imposed on firms to benefit from the incentives, and the organizational set-up of the programme.¹⁵⁴

¹⁴⁶ MENA-OECD Investment Programme (2009) 5.

¹⁴⁷ MENA-OECD Programme 'Stocktaking of Good Practices for Economic Zone Development' available at <http://www.oecd.org/mena/competitiveness/44643581.pdf> (accessed 2 December 2018).

¹⁴⁸ Farole T & Moberg L 'It worked in China, so why not in Africa? The political economy challenge of Special Economic Zones' World Institute for Development Economics Research (WIDER) Working Paper 2014/152 available at <https://www.wider.unu.edu/publication/it-worked-china-so-why-not-africa> (accessed 5 December 2018).

¹⁴⁹ Including Liberia, Mauritius, and Senegal.

¹⁵⁰ Including Malawi.

¹⁵¹ Farole T & Moberg L (2014) 3.

¹⁵² Farole T & Moberg L (2014) 3.

¹⁵³ Farole T & Moberg L (2014) 1.

¹⁵⁴ Competitive Industries and Innovation Programme (CIIP) 'Special Economic Zones: An Operational Review of Their Impact' (2017) 42 available at <https://openknowledge.worldbank.org/handle/10986/29054> (accessed on 17 June 2018).

Fiscal incentives have traditionally been at the core of many SEZ policies with the underlying reasoning being to provide firms operating in SEZs with an advantageous, cost-reducing fiscal environment.¹⁵⁵ Though they vary from country to country and from SEZ to SEZ, fiscal incentives frequently include a mix of exemptions from import duties on machinery or inputs; and reductions or exemptions from various types of tax, including corporate income and value-added tax (VAT).¹⁵⁶ Many SEZ programmes also offer subsidized utilities to companies, through either VAT exemptions or explicit subsidies.¹⁵⁷

Regulatory incentives on the other hand are aimed at, among other things, cutting red tape and simplifying administrative procedures for firms operating in SEZs.¹⁵⁸ In many cases the SEZ authorities are authorised to act as a one-stop shop with the authority to grant all necessary licences and authorisations and oversee regulatory compliance, thereby shielding investors from a time-consuming and sometimes ominous regulatory compliance.¹⁵⁹ The discussions in this thesis focus more on this first category of factors as it is the category that SEZ legal and regulatory frameworks are mostly set to govern.

The second category of factors affecting SEZ performance relates to the SEZ characteristics that are related exclusively to the structure and layout of the SEZ.¹⁶⁰ Such characteristics are generally linked to the dimension of the SEZ, the sectors targeted, the location of the SEZ and the services and infrastructure

¹⁵⁵ Competitive Industries and Innovation Programme (CIIP) 'Special Economic Zones: An Operational Review of Their Impact' (2017) 42 available at <https://openknowledge.worldbank.org/handle/10986/29054> (accessed on 17 June 2018)

¹⁵⁶ Competitive Industries and Innovation Programme (CIIP) 'Special Economic Zones: An Operational Review of Their Impact' (2017) 42 available at <https://openknowledge.worldbank.org/handle/10986/29054> (accessed on 17 June 2018)

¹⁵⁷ Asian Development Bank (ADB) 'Asian Economic Integration Report 2015: How Can Special Economic Zones Catalyze Economic Development?' available at <https://www.adb.org/sites/default/files/publication/177205/asian-economic-integration-report-2015.pdf> (accessed at 18 November 2018).

¹⁵⁸ MENA-OECD Investment Programme (2009) 8.

¹⁵⁹ MENA-OECD Investment Programme (2009) 8. A One-Stop Shop is defined as a single location which provides all the services that are required for a specific activity and is considered to be one of the best strategies to promote foreign direct investment. See Africa Institute of South Africa & Department of Trade and Industry 'Proposed special economic zones: One-Stop-Shop model for South Africa' (2013) available at http://www.dti.gov.za/industrial_development/docs/Consultative_doc.pdf (accessed 23 November 2018).

¹⁶⁰ Competitive Industries and Innovation Programme (CIIP) 'Special Economic Zones: An Operational Review of Their Impact' (2017) 44 available at <https://openknowledge.worldbank.org/handle/10986/29054> (accessed on 17 June 2018)

provided within the SEZ.¹⁶¹ In recent years, there has been a shift in literature and among policy-makers to highlight the importance of these characteristics as opposed to a singular focus on the incentive package provided in the SEZ programme.¹⁶² Furthermore, and in contrast to contextual factors, SEZ characteristics can be influenced and/or adjusted relatively easily and hence it is reasonable to expect that the SEZ-specific characteristics will affect the economic performance of the zone.¹⁶³

2.9 Factors that are said to negatively affect SEZs

In measuring the success or failure of SEZs, studies examine employment, foreign direct investment, exports and production growth in the SEZs as indicators.¹⁶⁴ Such aggregate statistics are then compared to previous trends and to the rest of the country to determine whether the SEZs have succeeded or failed.¹⁶⁵ Various studies have identified factors that lead to poor performance or failure of SEZs. Since SEZ programmes differ in many aspects, one would reasonably expect different failing SEZs to have different causative factors or different combinations of causative factors depending on the circumstances surrounding each SEZ. Identification of such causative factors is key in devising principles and best practices for SEZ development. Moran identifies the following as some of the factors that contribute to failure of SEZs:

- (i) lack of infrastructure and poor worker treatment by quasi-monopolistic employers in the SEZs;
- (ii) overvalued exchange rates;
- (iii) high SEZ wages in comparison to relative productivity;

¹⁶¹ United Nations Conference on Trade and Development (UNCTAD) 'Enhancing the Contribution of Export Processing Zones to the Sustainable Development Goals' (2015) available at https://unctad.org/en/PublicationsLibrary/webdiaepcb2015d5_en.pdf (accessed 24 November 2018).

¹⁶² Competitive Industries and Innovation Programme (CIIP) 'Special Economic Zones: An Operational Review of Their Impact' (2017) 44 available at <https://openknowledge.worldbank.org/handle/10986/29054> (accessed on 17 June 2018)

¹⁶³ Competitive Industries and Innovation Programme (CIIP) 'Special Economic Zones: An Operational Review of Their Impact' (2017) 44 available at <https://openknowledge.worldbank.org/handle/10986/29054> (accessed on 17 June 2018)

¹⁶⁴ Moberg L 'The political economy of special economic zones' (2015) 11 (1) *Journal of Institutional Economics* 171.

¹⁶⁵ Moberg L 'The political economy of special economic zones' (2015) 11 (1) *Journal of Institutional Economics* 171.

- (iv) weak and ineffective investment promotion agencies;
- (v) lack of a favourable doing-business setting within SEZs;
- (vi) lack of a favourable doing-business setting surrounding SEZs and lack of backward integration into the local economy; and
- (vii) lax environmental standards and weak enforcement of environmental regulations.¹⁶⁶

The above-listed factors, which are internal and external to an SEZ programme (and to the zone itself) are said to negatively affect an SEZ's ability to attract investors, create employment, and facilitate firm performance and economic growth.¹⁶⁷ The success or failure of an SEZ can therefore be said to be highly dependent on what happens both within and outside it.¹⁶⁸ It is important that a legal and regulatory framework for SEZs should address the above-discussed factors in order to enhance the performance of the SEZs. The subsequent chapters of this thesis will therefore take into account the stated factors in determining a sound legal and regulatory framework for Malawi SEZs.

2.10 Best practices in development of SEZs

SEZs can be expensive and risky endeavors and therefore require careful planning.¹⁶⁹ Various literature on SEZs contains what are said to be the “best practices” in developing SEZs. The best practices discussed in this chapter are the ones that have been identified as generally accepted best practices and have been commonly recommended by well-known authors on the subject of SEZs as well as international organisations dealing with SEZs.¹⁷⁰ As there

¹⁶⁶ Moran TH (2011) 4.

¹⁶⁷ Competitive Industries and Innovation Programme (CIIP) ‘Special Economic Zones: An Operational Review of Their Impact’ (2017) 41 available at <https://openknowledge.worldbank.org/handle/10986/29054> (accessed on 17 June 2018)

¹⁶⁸ Competitive Industries and Innovation Programme (CIIP) ‘Special Economic Zones: An Operational Review of Their Impact’ (2017) 41 available at <https://openknowledge.worldbank.org/handle/10986/29054> (accessed on 17 June 2018)

¹⁶⁹ Zeng DZ (2016) 2.

¹⁷⁰ See Farole T & Kweka J ‘Institutional Best Practices for Special Economic Zones: An Application to Tanzania’ Africa Trade Policy Notes (2011) 1 available at <http://siteresources.worldbank.org/INTRANETTRADE/Resources/SEZTanzaniaPolicynoteFinal.pdf> (accessed on 17 June 2018). See also MENA-OECD Investment Programme (2009) 10 available

appears to be no empirical evidence or consensus on the said best practices always achieving best results when applied, this thesis will treat the same only as recommendations which countries or institutions wishing to set up SEZ programmes or seeking to reform existing SEZ programmes may consider when planning. Further, SEZs operate in different environments and it would be naïve to expect practices that work well in one environment to work exactly the same way in a different environment. A country would risk being misled if it were to simply adopt any set of the said best practices.

It is on this understanding that Zeng submits that in order for SEZs to be successful, the SEZ programmes must be adapted to the host country's specific situation, and build on its comparative advantages.¹⁷¹ He further states that since economic transformation can take decades, the key is to make the SEZs an integral part of the long term development strategy, taking into account the commercial sustainability, target markets and businesses, growth trajectory, infrastructure availability, skills and technology innovation capability, and environmental sustainability.¹⁷² In this regard, it is important for policy makers to undertake joint actions in order to promote synergies and coordination among the different players.¹⁷³ Policy makers and practitioners both at the central and local levels need to make concerted efforts to: make economic zones effective in attracting quality investments; ensure zones are economically viable and deliver positive externalities, including catalysing economic reforms, facilitating learning, innovation, upgrading, and structural transformation, and ensure the sustainability of economic zones from an institutional, social, and environmental perspective.¹⁷⁴

According to MENA-OECD, a review of international best practices, reveals that policy makers interested in designing new or modifying existing SEZ programmes should focus on six elements namely: the type of zone to be developed; the policy framework; incentive framework; regulatory framework;

at <https://www.oecd.org/mena/competitiveness/44866585.pdf> (accessed on 15 May 2018) (hereafter MENA-OECD Investment Programme (2009)).

¹⁷¹ Zeng DZ (2016) 2.

¹⁷² Zeng DZ (2016) 2.

¹⁷³ Zeng DZ (2016) 2.

¹⁷⁴ Zeng DZ 'Global Experiences with Special Economic Zones – with a Focus on China and Africa' (2015) 3 available at <https://openknowledge.worldbank.org/handle/10986/22400> (accessed on 12 May 2018).

institutional framework; and lastly physical development and management of zones.¹⁷⁵ The six elements are discussed below.

2.10.1 Choice of SEZ type

Determining the type of SEZ to be developed is critical and in choosing the SEZ type, the following two considerations should be taken into account:

- (i) Export Processing Zones vs. Multi-Sectoral Zones: here the argument is that SEZ programmes should not be limited to a narrow set of sectors. Increasing reforms of the traditional EPZ concept into SEZs with a multi-sectoral development approach has been a global trend.¹⁷⁶ The reasoning is that SEZ programmes should target a wide assortment of economic sectors, including commercial and manufacturing activities and professional services (such as warehousing, transshipment, and informatics).¹⁷⁷
- (ii) Public vs. Private Sector Operated Zones: the argument is that greater involvement of the private sector in the development and management of SEZs should be encouraged because it reduces the burden placed on public resources and increases the efficiency of SEZs by allowing them to operate under market mechanisms.¹⁷⁸ International experience shows that a significant number of SEZs that are developed and managed by governments have been less effective than their private counterparts.¹⁷⁹ Consequently, the global trend has been the movement towards SEZs which are privately operated.¹⁸⁰

According to the FIAS Stocktaking Report of 2008, nearly 62% of developing and transition country SEZs worldwide were private sector developed and operated. In the MENA region the proportion stood at approximately 18%. However, examples of a movement toward public-

¹⁷⁵ MENA-OECD Investment Programme (2009) 10.

¹⁷⁶ Zeng (2016) 11.

¹⁷⁷ MENA-OECD Investment Programme (2009) 10.

¹⁷⁸ Moberg L 'The political economy of special economic zones' (2015) 11(1) *Journal of Institutional Economics* 173.

¹⁷⁹ Moberg L 'The political economy of special economic zones' (2015) 11(1) *Journal of Institutional Economics* 173.

¹⁸⁰ MENA-OECD Investment Programme (2009) 7.

private partnership approaches were emerging in the MENA region.¹⁸¹ Generally, commentators recommend the private promotion and management of an SEZ, and suggest that privately run SEZs may be more successful than government run zones.¹⁸²

In order to facilitate private development of SEZs, an appropriate legal, regulatory and institutional framework should be in place based on the following guidelines:

- (a) A legal framework should be developed that clearly outlines selection criteria, incentives and privileges of private SEZ developers and operators.
- (b) Public-private partnership (PPP) frameworks for zone development should be encouraged and the PPP arrangement should be based on a clear definition of rights, responsibilities, obligations and commitments of the private and public sector parties.¹⁸³

2.10.2 Policy framework

It is important that policy frameworks be streamlined across different SEZs and designed to encourage SEZs to compete on the basis of facilities and services rather than competing on the basis of fiscal incentives.¹⁸⁴ The following are said to be guidelines to be considered in developing a policy framework for SEZ programmes:

- (i) Governments should set realistic expectations and conduct a thorough cost/benefit analysis.

¹⁸¹ MENA-OECD Investment Programme (2009) 7.

¹⁸² Brautigam D, Farole T & Xiaoyan T 'China's Investment in African Special Economic Zones: Prospects, Challenges and Opportunities' (2010) *World Bank Economic Premise No. 5* available at <https://openknowledge.worldbank.org> (accessed 13 September 2018).

¹⁸³ MENA-OECD Investment Programme (2009) 11. An illustrative list of different PPP frameworks include: 1. Public provision of off-site infrastructure and facilities (utilities, connections and roads) while private funding is targeted towards on-site infrastructure and facilities; 2. Build Transfer and Operate (BOT) and Build Operate Own (BOO) approaches to on-site and off-site infrastructure and facilities with government guarantees and financial support; 3. Contracting private management for government owned zones or of government zone assets by the private operator (beneficial ownership); 4. Equity shifting arrangements whereby a private contract manager of a government zone can exercise a purchase option once pre-defined performance levels have been reached.

¹⁸⁴ MENA-OECD Investment Programme (2009) 12.

- (ii) Minimum export requirement should be removed in order to maximize the flexibility of the regime and to abide by WTO obligations. The incentive regime applied within the SEZs should be consistent with WTO obligations.
- (iii) SEZs should respect the WTO principle of non-discrimination between foreign and domestic investment projects.
- (iv) Labour regimes should be consistent with international norms including International Labour Organisation (ILO) standards and obligations. In addition, foreign worker employment regimes should be transparent yet discourage excessive dependence on foreign labour at the expense of the domestic labour market.
- (v) Physical development standards and clear criteria for approval of privately and publicly developed SEZs should be put in place and streamlined (this includes zone design, environmental standards, financial and technical track record of the zone development group and minimum equity requirement by the SEZ developer).
- (vi) Indirect exporter benefits (such as duty free access to the SEZs) should be given to firms in the local economy, which supply firms located in the SEZ thereby increasing linkages. Creating backward linkages with the national economy is a major opportunity to foster economic growth and employment in the overall economy.
- (vii) Collaborative relationships should be encouraged between investment projects in the zones and firms and research institutions in the local economy. Encouraging business networks and clusters between zone investments and outside zone investments increases transfers of know-how and skills to the local economy.
- (viii) Private SEZ developers should be allowed to supply utilities services (telecommunications, water/ sewerage, power) to tenants of SEZ estates.¹⁸⁵

¹⁸⁵ MENA-OECD Investment Programme (2009) 12.

2.10.3 Incentive framework

The following are said to be guidelines for the design and implementation of incentive packages in the zone programmes:

- (i) Generous incentive packages (such as blanket tax and duty exemptions) in SEZs need to be monitored and evaluated periodically to ensure they are meeting their intended policy objectives.
- (ii) A common set of incentives and privileges for all zone types in a country is encouraged. This would reduce the problem of competing SEZ regimes that undermine SEZ programmes by ensuring a level playing field between the different SEZs.
- (iii) When using performance based incentives, they should be included within a country's tax code rather than through special legislation. Having too many tax regimes, such as one for SEZs and one for the general economy, may strain resources and the effectiveness of national tax administrations.
- (iv) Encourage the introduction of sunset clauses in instances where tax incentives are offered. Long term commitments create equity problems by discriminating an SEZ programme and go against their "temporary" nature.
- (v) Link fiscal incentives to actual process of capital formation. Fiscal incentives that may have this effect include investment tax credits and duties exemption on capital goods whereas sweeping measures such as tax holidays often encourage tax planning rather than productive investment.¹⁸⁶

2.10.4 Legal and regulatory framework

SEZ laws are a core part of the regulatory framework.¹⁸⁷ A crucial aspect of zone programmes which is often overlooked is the simplification and

¹⁸⁶ MENA-OECD Investment Programme (2009) 12.

¹⁸⁷ UNCTAD World Investment Report (2019) 162.

streamlining of investment approvals, expatriate work permits, granting of import and export licenses as well as accelerated on-site customs inspection procedures and automatic foreign exchange access.¹⁸⁸ The following are said to be guidelines intended to improve and increase the efficiency of the regulatory framework:

- (i) Use of streamlined procedures for business registration (in the form of a simple declarative investment registration system rather than lengthy and complicated investment approval regime) by arranging for applications to be submitted to a single government office that provides the license. Further, instead of specifying eligible activities, a negative list of ineligible activities should be used. All criteria for approval or denial should be objective and made public and a default clause authorizing automatic approval of application if no ruling had been issued within the review period is encouraged.
- (ii) Facilitating provision of secondary permits and authorizations (including permits covering land, building, labour, health and safety matters) by vesting all such authorizations to the relevant zone authority rather having investors deal with individual line ministries and agencies (one-stop shop services).¹⁸⁹

International best practices also recommend that the legal and regulatory environment needs to be trustworthy, transparent and predictable by providing for: standards of protection and investor remedies that are clearly established and provide a satisfactory level of comfort to investors¹⁹⁰; investment promotion and protection agreements with other countries; an adequate and effective dispute resolution system that does not favour one SEZ participant over another and that ensures the cost of pursuing a claim is non-excluding; and proper, reliable, efficient and effective enforcement procedures.¹⁹¹

¹⁸⁸ MENA-OECD Investment Programme (2009) 13.

¹⁸⁹ MENA-OECD Investment Programme (2009) 14.

¹⁹⁰ Such as: no expropriation of property for an improper purpose, combined with a guarantee of adequate and fair monetary compensation; full protection and security for investments; no arbitrary or discriminatory measures with respect to investments; and no selective application of benefits.

¹⁹¹ Webb S & Coleman J 'Factors Contributing to Success of a Special Economic Zone – An overview of International Best Practice in Developing SEZs' (2018) available at www.dlapiper.com (accessed 15 June 2018).

They further recommended that the legal and regulatory framework should consider incorporating global best practice elements such as:

- (i) an independent SEZ regulator;
- (ii) rights and obligations of developer/operator which include rights to lease and build on land; to build infrastructure and utilities; and to provide ancillary services;
- (iii) regulations relating to land use and environmental management which include: clear environmental controls; clear property rights and guarantees; regulator's power to monitor compliance; and guidelines on design and building standards;
- (iv) flexible and efficient labour laws including: respect of ILO norms; hiring and firing without prior administrative authorisation – to promote job creation; flexible employment and compensation arrangements; credible system of resolving employment disputes; transparent foreign worker regime; and unified multiple entry visa/work permit/residency;
- (v) trade facilitation which entails: close cooperation with national authorities; fast-track, on-site customs clearance at SEZ rather than point of entry; freedom of enterprises to sell internally; and
- (vi) efficient dispute settlement mechanisms for SEZ investors including: recourse to binding international investment arbitration; dedicated internal SEZ mechanisms for administrative reviews and other matters.¹⁹²

With regard to structure, it is stated that successful legal and regulatory frameworks for successful SEZs generally consist of three levels of legal instruments namely: an SEZ law (or laws) issued by the highest legislative authority that, in certain areas takes precedence than existing legislation; SEZ regulations issued by the cabinet or relevant minister; and operating procedures issued by the regulator in cooperation with the developer.¹⁹³

¹⁹² Gauthier JP 'Legal and Institutional Frameworks for Special Economic Zones' available at <https://static1.squarespace.com> (accessed 10 November 2018).

¹⁹³ Gauthier JP 'Legal and Institutional Frameworks for Special Economic Zones' available at <https://static1.squarespace.com> (accessed 10 November 2018).

2.10.5 Institutional framework

It is said that a major factor contributing to the success of SEZ programmes is the autonomy and effectiveness of the body charged with overseeing SEZ operations in areas such as staffing, control over budgets, funding, partnership with zone developers, and business facilitation services.¹⁹⁴ Further, a critical aspect in an institutional framework is that public authorities remain engaged in purely regulatory (and well defined) functions and preferably move away from owning, developing or operating zones.¹⁹⁵ This would eliminate any conflict of interest arising from the regulating body having the authority to approve zones and projects and at the same time owning specific zones. The following are some guidelines for the development of institutional frameworks:

- (i) Sufficient autonomy of the SEZ authority particularly over staffing, budgets, spending and policy making should be ensured and be clearly stated in the law.
- (ii) Efficiency of the SEZ authority should be maximized by constituting an independent board that is composed of representatives of all key involved government ministries and private sector representatives, be it the private developers or the investors in the zone.
- (iii) A one-stop shop should be set up by the zone authority in each of the zones providing all approvals and licenses and assisting private developers in establishing the zone and also assisting private investors in establishing their investments in the zone.
- (iv) Non-core functions and services should be outsourced and privatized as much as possible.¹⁹⁶

2.10.6 Physical development and management

The choice of SEZ locations is very important in determining the extent of off-site infrastructure expenditures of the government. Some locations are already situated near ports, roads and are connected to electricity, water and other

¹⁹⁴ MENA-OECD Investment Programme (2009) 14.

¹⁹⁵ Farole T (2011) 183.

¹⁹⁶ MENA-OECD Investment Programme (2009) 14-15.

utilities, thereby minimizing costs to be incurred by public authorities.¹⁹⁷ Allowing the private sector a greater role in the physical development of SEZs would remove a significant financial and resource burden from the public sector.¹⁹⁸

The way in which SEZs are managed is also crucial to their success. Management is enhanced when SEZs are operated on a cost recovery basis, and are customer focused. Nevertheless, if the SEZs are publicly owned and managed, they should still operate on a cost recovery basis, limiting subsidies and charging fees for their services that are based on market prices.

The following are some best practice guidelines for the physical development and management of zones:

- (i) Implementation of land use planning and zoning efforts in defined areas for industrial and commercial development to attract private developers.
- (ii) Developing zone designation criteria in the SEZ law and implementing regulations to ensure that private zones are conveniently located (near population centres and transportation hubs) and minimize off-site infrastructure development costs for public authorities.
- (iii) Establishing a land use planning and infrastructure development unit in the government to ensure adequate planning and support of off-site infrastructure provision.¹⁹⁹

As pointed out earlier in this section, the efficacy of the above-discussed best practices or guidelines in the success of SEZs is context dependent. In some cases, fiscal and non-fiscal incentives have had limited influence in the success of the SEZs.²⁰⁰ They do not seem to have greatly affected the success of SEZs across emerging economies and there is no guarantee that providing such support incentives bears fruit in SEZ dynamism.²⁰¹ In other cases, factors such as the type of operator of the SEZ have had little influence on the success of

¹⁹⁷ MENA-OECD Investment Programme (2009)15.

¹⁹⁸ MENA-OECD Investment Programme (2009)15.

¹⁹⁹ MENA-OECD Investment Programme (2009)15.

²⁰⁰ Zeng DZ (2015) 3.

²⁰¹ Competitive Industries and Innovation Programme (CIIP) 'Special Economic Zones: An Operational Review of Their Impact' (2017) 93 available at <https://openknowledge.worldbank.org/handle/10986/29054> (accessed on 17 June 2018)

SEZs. Therefore, whether a country requires an independent SEZ regulator or a private or a public operator; or whether certain incentives or services are more or less needed in a specific SEZ depends essentially on the precise context in which the SEZ operates.²⁰² Different combinations may be effective in different contexts. Thus, depending on the context, countries may take different paths towards successful SEZs.²⁰³

2.11 SEZs vis-à-vis economy-wide trade and investment reforms

SEZs are normally utilised to support programmes for economy-wide trade, business and investment reforms.²⁰⁴ They are an economic development tool to attract local and foreign investments to the specific zone in an attempt to boost economic growth.²⁰⁵ The overriding consideration for a country seeking to attract investment should be putting in place a healthy enabling environment²⁰⁶ SEZ incentives should supplement a good enabling environment, or be used to compensate for certain concrete shortcomings that cannot be otherwise addressed.²⁰⁷

It is said that in order for SEZs to succeed in achieving their intended policy objectives, they should be used as pilot and demonstrative projects with the aim of encouraging broader economy-wide reforms leading to more employment, greater exports, and increased foreign investment.²⁰⁸ The incentives and advantages that SEZs offer investors often become entrenched and this distorts competition by giving zone residents advantages compared to firms in the rest of the economy for an indefinite period.²⁰⁹ It may also lower the political momentum for reform of the overall business environment, as the

²⁰² Competitive Industries and Innovation Programme (CIIP) 'Special Economic Zones: An Operational Review of Their Impact' (2017) 119 available at <https://openknowledge.worldbank.org/handle/10986/29054> (accessed on 17 June 2018)

²⁰³ Moberg L 'The political economy of special economic zones' (2015) 11 (1) *Journal of Institutional Economics* 184.

²⁰⁴ Farole T (2011) 5.

²⁰⁵ Le Roux N & Schoeman A 'A Comparative Analysis of the Design of Special Economic Zones: The Case of South Africa, Malaysia and Indonesia' (2016) 9 *Journal of Economic and Financial Sciences* 752. Also available at <https://journals.co.za/content/jefs/9/3/EJC198844> (accessed 17 November 2018).

²⁰⁶ MENA-OECD Investment Programme (2009) 9.

²⁰⁷ MENA-OECD Investment Programme (2009) 9.

²⁰⁸ MENA-OECD Investment Programme (2009) 9

²⁰⁹ ASEAN Guidelines for Special Economic Zones Development and Collaboration' adopted by ASEAN Economic Ministers AEM in 2016 available at <https://asean.org/wp-content/uploads/2016/08/ASEAN-Guidelines-on-SEZ-Development.pdf> (accessed 4 December 2018).

option to locate in an SEZ may be sufficient for the private sector players who would otherwise lobby for further reforms.²¹⁰

Therefore, SEZs must not be seen as a substitute for a country's larger trade and investment reform efforts as that would jeopardize their potential success and make governments more complacent with the status quo without acknowledging the need for overall investment policy reform.²¹¹ The success of zones in the long run depends on the overall improvement in the investment and business climate and the extent to which projects in the SEZs are linked to activities in the local economy.

2.12 Conclusion

This chapter has provided an overview of the SEZ concept by discussing the definition of SEZ and the various building blocks that form an SEZ programme. It has also given a summary of the history and evolution of SEZs and has discussed different motivations and approaches to SEZ programmes by different countries.

With regard to types of SEZs, this chapter has noted that EPZs and Single Factory EPZs are deemed to have outlived their usefulness and countries (with Malawi being one of the most recent) are moving away from them. Modern SEZ concepts (such as Comprehensive SEZs, FTZs and SZs) that are wider, have more linkages with the economy and are multi-functional are increasingly being embraced by countries as they are thought to produce better results. Further, SEZs which encourage increased private sector involvement in their development and management are also said to perform better.

The chapter has gone further to analyse what are called the international best practices in development of SEZs and has taken the position that such practices should be considered as only recommendations. This position is taken due to the fact that there is no evidence or consensus that the best practices have always produced positive results in SEZs. Countries seeking to

²¹⁰ 'ASEAN Guidelines for Special Economic Zones Development and Collaboration' adopted by ASEAN Economic Ministers AEM in 2016 available at <https://asean.org/wp-content/uploads/2016/08/ASEAN-Guidelines-on-SEZ-Development.pdf> (accessed 4 December 2018).

²¹¹ MENA-OECD Investment Programme (2009) 9.

set up new SEZs or to reform existing SEZs should not simply adopt the said best practices. Rather, while considering the practices, countries should also be guided by the circumstances prevailing in their territories and devise SEZ frameworks that are suitable for them.

As regards developing legal and regulatory frameworks for SEZs, international best practices that ought to be considered by countries like Malawi include: clear outline of incentives and privileges of SEZ investors; streamlining of procedures for setting up businesses in SEZs; facilitating provision of relevant permits and acquisition of land; provision of adequate dispute resolution mechanisms; allowing for reasonable level of independence of SEZ operators and regulators; and ensuring respect for labour rights in SEZs. The discussion and analysis in the subsequent chapters will examine the current Malawi SEZ regime in light of the stated international best practices.



CHAPTER THREE

ANALYSIS OF THE CURRENT MALAWI SEZ LEGAL AND REGULATORY FRAMEWORK AND LESSONS FROM ZIMBABWE

3.1 Introduction

As discussed in chapter two of this thesis, EPZs are one of the most common types of SEZs.²¹² Similar to a number of other Southern African countries, Malawi established its EPZ programme in the 1990s.²¹³ Until now, Malawi has EPZs as the only type of SEZs in the country. It is only recently that the country began considering setting up other types of SEZs with a multi-sectoral approach.²¹⁴

This chapter will analyse the existing Malawi EPZ law in light of the international best practices relating to SEZ legal and regulatory frameworks. In the analysis, the chapter will examine the current EPZ programme set-up and will identify areas that need improvement (if any). The aim is that as the country develops a legal and regulatory framework for the wider SEZ types, such framework should be sound enough to improve the investment climate and potentially enhance the performance of the contemplated SEZs.

This chapter will also present a brief study on the recently promulgated SEZ legislation which is being implemented in Zimbabwe. Even though at present the author has seen no readily available studies or literature that has assessed the impact of the new SEZ regime on the performance of the Zimbabwean SEZs,²¹⁵ it is thought that Malawi may still draw a few lessons from Zimbabwe's experience in so far as the structuring of an SEZ legal framework that is compliant with international best practices is concerned. The choice of Zimbabwe as a case study is motivated by the desire to learn from experiences of countries in the SADC and COMESA regions. It is also motivated by the fact

²¹² Zeng DZ (2016) 2.

²¹³ Jauch H 'Export Processing Zones and the Quest for Sustainable Development: A Southern African Perspective' (2003) available at <http://ccs.ukzn.ac.za/files/jauch.pdf> (accessed on 15 June 2018). The other governments are Zimbabwe, Namibia and Mozambique.

²¹⁴ In December 2017. See Chinamulungu O 'Special Economic Zones project takes off – MITC' *The Nation Online* 27 December 2017 available at <http://mwnation.com/special-economic-zones-project-takes-off-mitc/> (accessed on 10 May 2018).

²¹⁵ This is the case because implementation of the new legal framework has recently started.

that Malawi and Zimbabwe have for several years had a vibrant trade relationship which would extend to a commitment to share experiences.²¹⁶

3.2 The Export Processing Zones Act: enactment, arrangement of provisions and administration

Malawi EPZs are governed by the Export Processing Zones Act ('EPZ Act')²¹⁷ which came into operation on 25th August 1995.²¹⁸ Since its enactment, the EPZ Act has been amended once in the year 2013.²¹⁹ The EPZ Act generally sets up the legal and regulatory framework for EPZs in Malawi. The EPZ Act is divided into five parts. Part I deals with preliminary issues, particularly citation and definition of terms; Part II provides for the establishment of the EPZ Appraisal Committee; Part III deals with declaration of EPZs and export products as well as applications and issuance of export enterprise certificates; Part IV provides for restrictions relating to businesses carried on in EPZs; Part IVA provides for goods that are deemed to be exported and imported into Malawi; Part IVB stipulates the benefits available to export enterprises²²⁰ operating in SEZs; Part V provides for matters relating to relief from and payment of duty; and lastly Part VI deals with miscellaneous matters such as offences and penalties as well as the making of regulations under the Act.

Section 21 of the EPZ Act empowers the Minister²²¹ to make a wide range of regulations for proper establishment and administration of EPZs including: procedure for application, issuance revocation or cancellation of EPZ certificates; prescribing fees for matters done under the Act or the Regulations; prescribing forms and conditions to be complied with in applications; providing timeframes within which specific obligations shall be carried out; procedures for imposition of penalties by the EPZ Appraisal Committee for breaches of the Act or any Regulations; and providing anything which, under the EPZ Act, may be

²¹⁶ Apart from both countries being members of SADC and COMESA, Malawi and Zimbabwe have also previously entered into bilateral trade agreements. See <https://mitc.mw/trade/index.php/bilateral-agreements-between-malawi-and-zimbabwe.html>. See also <https://edf.mw/index.php/trade-guidance> (both accessed on 27 May 2019)

²¹⁷ Chapter 39:06 of the Laws of Malawi.

²¹⁸ Government Notice No. 94/1995.

²¹⁹ By the Export Processing Zones (Amendment) Act No. 7 of 2013.

²²⁰ An export enterprise is defined in Section 2 of the EPZ Act as a company in respect of which an export enterprise certificate is in force.

²²¹ This is the Malawi Minister responsible for Trade and Industry.

prescribed. Despite these Ministerial powers to make regulations, the Minister has so far only made regulations for application forms and application fees.²²²

There are no specific zones dedicated to export processing in Malawi. Rather, entities are designated the status of EPZs and are located in areas of choice and convenience to the investor.²²³ Thus, going by the Foreign Investment Advisory Service (FIAS) classification, Malawi currently has Single Factory EPZs.²²⁴ Products originating from the EPZs are predominantly for export and the EPZ Act restricts the quantities of products that can be sold locally.²²⁵ Malawi's traditional products such as tobacco, tea, coffee, and cotton are excluded from the EPZ regime.²²⁶ It would appear that the restriction of locally sold quantities and the exclusion of traditional products are deliberate efforts to enhance the production and exportation of diversified products.

3.3 The EPZ Appraisal Committee: composition, powers and functions

The Ministry of Industry and Trade administers the EPZ regime in Malawi assisted by the EPZ Appraisal Committee.²²⁷ The EPZ Appraisal Committee is made up of ten members, with the Secretary for Industry and Trade as the chairperson.²²⁸ Six members of the Committee are *ex-officio* and these are: the Secretary to the Treasury;²²⁹ the Secretary for Economic Planning and Development;²³⁰ the Secretary for Agriculture and Food Security;²³¹ the Secretary for Labour;²³² the Commissioner General of the Malawi Revenue Authority;²³³ and the Chief Immigration Officer.²³⁴ Each of the *ex-officio* members may choose to designate a representative if they cannot personally

²²² Export Processing Zones (Fees and Forms) Regulations. Government Notice No. 96 of 1995.

²²³ Section 8 of the EPZ Act.

²²⁴ FIAS (2008) 16.

²²⁵ Section 15C of the EPZ Act.

²²⁶ Section 9 of the EPZ Act.

²²⁷ Section 3 of the Act.

²²⁸ Section 3 (1) (a) of the Act.

²²⁹ Section 3(1) (b) (i). The Secretary to the Treasury works under the Ministry of Finance.

²³⁰ Section 3(1) (b) (ii). The Secretary for Economic Planning and Development works under the Ministry of Economic Planning and Development. It is noted that currently (according to Cabinet list released on 7th November 2018) of finance and economic planning matters are under one ministry.

²³¹ Section 3(1) (b) (iii).

²³² Section 3(1) (b) (iv).

²³³ Section 3(1) (b) (v).

²³⁴ Section 3(1) (b) (vi).

attend to the business of the Committee.²³⁵ The other three members of the Committee are: the Chief Executive Officer of the Malawi Investment and Trade Centre,²³⁶ one representative of the private sector in Malawi nominated by Malawi Confederation of Chambers of Commerce and Industry and appointed by the Minister,²³⁷ and one representative of the Reserve Bank of Malawi, nominated by the Governor of the Reserve Bank and appointed by the Minister.²³⁸

It is noted that even though the Committee appears to consist of as many relevant stakeholders as possible, it is dominated by representatives of government institutions. Nine of the ten Committee members are representatives of government institutions and even the one private sector representative has to be appointed by the Minister. The Committee's composition demonstrates that Malawi's EPZ programme is to a large extent controlled by the Malawi Government. It would appear there is minimal involvement of the private sector in running the regulatory affairs of SEZs.

The functions of the Committee are provided for in section 7 of the EPZ Act. The Committee is mainly responsible for appraising and reviewing applications for the establishment and operation of EPZs and applications for the production or manufacture of export products. Upon such appraisals and reviews, the Committee makes recommendations regarding the application to the Minister of Trade and Industry. Based on the Committee's recommendations, the Minister then decides whether to issue an export enterprise certificate.²³⁹ Decisions to revoke certificates in cases where an export enterprise has contravened the EPZ Act or any condition attached to an export enterprise certificate are also made by the Minister as the Committee only makes recommendations.²⁴⁰

With regards to declaration of any area of land or factory as an EPZ, the Committee is again only responsible for making recommendations. The Minister has powers to make the declaration on recommendation of the

²³⁵ Section 3 (1) (b) (i) to (vi).

²³⁶ Section 3(1) (c).

²³⁷ Section 3(1) (d). The appointing Minister is the Minister responsible for Industry and Trade.

²³⁸ Section 3(1) (e).

²³⁹ Section 10(1) of the APZ Act.

²⁴⁰ Section 12(1) of the EPZ Act.

Committee.²⁴¹ It is thus clear that the functions of the Committee are very limited and essentially the Committee has no powers to make decisions under the EPZ Act. This further reveals that the Committee, which is purported to regulate and operate Malawi EPZs, lacks independence and the Malawi Government has total control of the Committee.

3.4 Incentives available to enterprises operating under the EPZ Act

3.4.1 Incentive provisions in the EPZ Act

Section 16 of the EPZ Act provides for duty relief and states that where an export enterprise imports or purchases any dutiable goods to be used in a bonded factory²⁴² or EPZ, no duty shall be paid if the goods are transported directly and forthwith to a bonded factory or EPZ and placed under such conditions as the Commissioner-General of the Malawi Revenue Authority may impose. However, removal of goods from a bonded factory or EPZ without authorisation or in contravention of conditions stated in section 17 is a punishable offence.

3.4.2 Reference to incentives in other statutes

The EPZ Act makes reference to incentives in other statutes. Section 15B(1) states that an export enterprise shall be entitled to such benefits as may be specified under: (a) the Taxation Act;²⁴³ (b) the Customs and Excise Act;²⁴⁴ (c) the Value Added Tax Act;²⁴⁵ (d) the Exchange Control Act;²⁴⁶ or any other written law. Section 15B (2) however makes an exception and mentions goods that shall not be imported free of import duty and value added tax by an export enterprise and these are: vehicles not used solely within an EPZ and, in any case, passenger cars or mini buses; fuel for use in generators or boilers; and spare parts for motor vehicles, including tyres.

²⁴¹ Section 8 of the EPZ Act.

²⁴² Defined in Section 2 of the Act as a factory situated in an SEZ.

²⁴³ Chapter 41:01 of the Laws of Malawi.

²⁴⁴ Chapter 42:01 of the Laws of Malawi.

²⁴⁵ Chapter 42:02 of the Laws of Malawi.

²⁴⁶ Chapter 45:01 of the Laws of Malawi.

It is noted that the Exchange Control Act currently does not provide for benefits specific to EPZs. Similarly, an examination of the Customs and Excise Act reveals that there are no benefits specially provided for in relation to EPZs. Under the Value Added Tax Act, one would note that the export of goods and services is categorised as a zero-rated supply, meaning output tax is at zero on the export of goods and services.²⁴⁷ A zero output tax rate would therefore apply to an EPZ enterprise that exports goods and services. However, this would not necessarily be categorised as a benefit specific to EPZs.

The Taxation Act also appears not to contain benefits that accrue to enterprises only by virtue of operating in EPZs. A notable benefit which an EPZ enterprise may qualify for relates to the exemption of income tax for enterprises operating in priority industries.²⁴⁸ In this regard “priority industries” means agro-processing²⁴⁹ or electricity generation, transmission and distribution industries.²⁵⁰ Therefore, an EPZ enterprise engaging in agro-processing may, upon satisfying other specified minimum requirements, apply to the Commissioner General of the Malawi Revenue Authority for priority industry status, upon the granting of which the enterprise would be subject to zero income tax rate.²⁵¹ As pointed out, the application or qualification for, and conferment of, priority industry status is not dependent on whether an entity is in an EPZ or not.

3.5 The EPZ Act vis-à-vis international best practices

3.5.1 Minimal private sector involvement and EPZ Appraisal Committee’s limited powers/autonomy

As noted earlier in this chapter, the EPZ Appraisal Committee is dominated by representatives of government institutions and there is minimal involvement of the private sector in running the regulatory affairs of SEZs. The set-up of the Committee contradicts international best practice which encourages greater involvement of the private sector in the development and management of SEZs in order to reduce the burden placed on public resources and increases the

²⁴⁷ Section 21 of the VAT Act and the Second Schedule to the VAT Act.

²⁴⁸ Regulation 8 of Taxation (Priority Industries) Regulations, 2013.

²⁴⁹ Defined as the process of converting primary or raw agricultural products into consumable commodities. See Regulation 2 of Taxation (Priority Industries) Regulations, 2013.

²⁵⁰ Regulation 2 of Taxation (Priority Industries) Regulations, 2013.

²⁵¹ Regulation 6 of Taxation (Priority Industries) Regulations, 2013.

efficiency of SEZs by allowing them to operate under market mechanisms.²⁵² As it has also been noted, international experience shows that a majority of government developed and managed SEZs have been less effective than their private counterparts.²⁵³ This therefore is one aspect of the EPZ Programme that needs to be considered and improved to such extent as relevant Malawi circumstances permit.

Another matter of concern is the limited powers of the EPZ Appraisal Committee. Apart from its composition, the Committee has no regulatory independence as it has no powers to make decisions on any matters relating to EPZs. One would argue that this lack of autonomy puts the Committee's efficacy in question. Ideally, it would be more efficient if the law gave some powers to the Committee to make decisions (e.g. issuing licenses, approvals etc.) rather than limiting it to only making recommendations to the Minister on essentially every matter concerning the EPZ programme. In addition, the EPZ Act does not provide for funding or budgets of the Committee. By default, the Committee's operations are funded by the government (through the Ministry of Trade and Industry). Again this lack of autonomy goes against the global best practice.

3.5.2 Focus on fiscal incentives and leaving out other critical aspects

The incentives provided for under section 16 of the EPZ Act and even those that could possibly be provided for in the Taxation Act, the Customs and Excise Act, the Value Added Tax Act, and the Exchange Control Act are all fiscal incentives. It has however been observed in Chapter 2 of this thesis that the focus on fiscal incentives tends to turn EPZs into enclaves without much linkage with the local economy.²⁵⁴ This is why most countries have shifted away from fiscal incentives to value added services and more focus is now placed on creating an improved investment climate in the zone.²⁵⁵

²⁵² Moberg L 'The political economy of special economic zones' (2015) 11:1 *Journal of Institutional Economics* 173.

²⁵³ Moberg L 'The political economy of special economic zones' (2015) 11(1) *Journal of Institutional Economics* 173.

²⁵⁴ Zeng DZ (2016) 3.

²⁵⁵ Farole T and Akinci G (2011) 7.

The EPZ Act makes no provision for critical aspects such as simplified and streamlined procedures for business registration, investment approvals, expatriate work permits, granting of import and export licenses, accelerated on-site customs inspection, automatic foreign exchange access, and land acquisition, among others. This means investors have to deal with individual line ministries and agencies in setting up operations in EPZs and this could be inconvenient. Simplified and streamlined procedures could minimise inconveniences and assist in improving investment climate in EPZs.

Simplification and streamlining of procedures work better if all authorisations are vested to the relevant zone authority (one-stop shop services) rather than having investors deal with individual line ministries and agencies.²⁵⁶ This is not possible with the current set up and the limited powers of the EPZ Appraisal Committee. Consideration and reform are therefore required on this aspect.

3.5.3 Practical challenges faced in implementation of the EPZ Act

The inadequacies in the current Malawi EPZ law are reflected in challenges that are encountered in EPZ operations. For instance, while section 16 of the EPZ Act provides for duty relief on imports or purchases of dutiable goods to be used in EPZs, there is uncertainty about the type of goods that qualify for duty relief. This uncertainty arises from the fact that the EPZ Act and the Customs and Excise Act do not have duty free equipment schedules and instead, it would appear such schedules are attached to individual Export Enterprise Certificates.²⁵⁷ This reflects a lack of clear outline of the EPZ incentives and privileges by the EPZ legal and regulatory framework, a situation which is inconsistent with international best practices.²⁵⁸

According to the Ministry of Industry and Trade's paper,²⁵⁹ some EPZ enterprises bemoaned the lack of coordination between the Ministry and the Malawi Revenue Authority (MRA) on which goods are dutiable and which ones

²⁵⁶ MENA-OECD Investment Programme (2009) 14.

²⁵⁷ Ministry of Industry and Trade (2015) 10.

²⁵⁸ MENA-OECD Investment Program (2009) 10 – 11.

²⁵⁹ Ministry of Industry and Trade (2015) 10.

are not. There have been instances where the MRA would refuse to clear duty free equipment on the scheduled list which is attached to certificate.²⁶⁰

Another challenge pertains to inconsistencies in the EPZ corporate tax incentives. Prior to the year 2011, EPZ enterprises had zero corporate tax as one of the fiscal incentives. However, a perusal of the law shows no record of this incentive in the law.²⁶¹ One would assume that the said incentive was at the discretion of the Ministry and was indicated on the Export Enterprise Certificates. In 2011 the Malawi Government implemented a zero deficit budget and incentives such as the zero corporate tax were removed.²⁶² Most EPZ Enterprises felt let down or cheated as their expansion plans were directly related to what EPZ was providing.²⁶³ For most enterprises, it became expensive servicing loans at the same time paying 30 per cent corporate tax. This incident demonstrated a lack of predictability and transparency in the EPZ legal and regulatory framework and partly explains why some enterprises opted not to renew their Export Enterprise Certificates, leading to a decline in the number of EPZ enterprises.

Another challenge that has also been observed by investors relates to acquisition of land and access to utilities. An analysis done by the Ministry showed that enterprises spent at least one year to get a suitable piece of land and a further six to nine months to get utilities (e.g. electricity and water) connected to their EPZ premises.²⁶⁴ Clearly the EPZ regime has no structures in place to facilitate and fast-track these aspects.

It is noted in chapter two of this thesis that international best practice also recommends that the legal and regulatory framework for SEZs should be trustworthy, transparent and predictable by, among other things, providing for effective dispute settlement mechanisms and investor remedies that are clearly

²⁶⁰ Ministry of Industry and Trade (2015) 10.

²⁶¹ E.g. the EPZ Act, the Taxation Act or regulations made thereunder.

²⁶² Ministry of Industry and Trade (2015) 3.

²⁶³ Ministry of Industry and Trade (2015) 10.

²⁶⁴ Ministry of Industry and Trade (2015) 17.

established and provide a satisfactory level of comfort to investors.²⁶⁵ The current EPZ Act makes no special provision for settlement of disputes and this poses further challenges to investors.

It is also noted that international best practice advocates for respect of employee rights and ILO norms in SEZs.²⁶⁶ The EPZ Act is silent on employment issues. Such issues are therefore mainly regulated by the Employment Act²⁶⁷ and the Labour Relations Act²⁶⁸ which generally apply to all employment matters in Malawi and do not appear to make special provision for employment issues in the EPZs.

3.6 Lessons from Zimbabwe's SEZ legal and regulatory framework

Zimbabwe has a Special Economic Zones Act²⁶⁹ which was gazetted and came into force on 1st November 2016. Pursuant to section 57 of the Act, the Special Economic Zones (General) Regulations, 2018 have also been made.²⁷⁰ The Zimbabwe Special Economic Zones Authority, which is mandated to regulate SEZs, has since declared nine SEZs in terms of section 20 of the Act.²⁷¹

The introduction of SEZs in Zimbabwe did not come as a novel concept as the Zimbabwe government had previously come up with EPZs from 1996 to 2006.²⁷² The EPZ initiative is said to have produced mixed results of successes and failures.²⁷³ SEZs have now been introduced with the hope of bringing more positive results which include attracting FDI inflows, generating employment

²⁶⁵ Webb S & Coleman J 'Factors Contributing to Success of a Special Economic Zone – An overview of International Best Practice in Developing SEZs' (2018) available at www.dlapiper.com (accessed 15 June 2018).

²⁶⁶ Gauthier JP 'Legal and Institutional Frameworks for Special Economic Zones' available at <https://static1.squarespace.com> accessed 10 November 2018.

²⁶⁷ Chapter 55:01 of the Laws of Malawi.

²⁶⁸ Chapter 54:01 of the Laws of Malawi.

²⁶⁹ Chapter 14:34 of the Laws of Zimbabwe.

²⁷⁰ Statutory Instrument 154 of 2018.

²⁷¹ See the Declaration of Special Economic Zones – General Notice 660 of 2018

²⁷² Chitambara P 'How to make Special Economic Zones work' *Zimbabwe Independent* 15 September 2017 available at www.theindependent.co.zw (accessed 31 May 2019).

²⁷³ For instance, about 205 companies were established, creating approximately 32, 512 jobs and generating about US\$172 million in terms of cumulative investment and US\$1, 15 billion in terms of export earnings. However, there were concerns over labour and environmental issues, particularly failure to deliver quality employment and living wage as well as high opportunity costs involved. See Chitambara P 'How to make Special Economic Zones work' *Zimbabwe Independent* 15 September 2017 available at www.theindependent.co.zw (accessed 31 May 2019).

and promoting exports.²⁷⁴ Below is a discussion of selected key features of the Zimbabwe SEZ legislation (that are relevant to this study) in light of the international best practices discussed in chapter two of this thesis.

3.6.1 The Zimbabwe Special Economic Zones Authority: composition, powers and functions

Section 3 of the Zimbabwe SEZ Act establishes the Zimbabwe Special Economic Zones Authority, which is a body corporate capable of suing and being sued in its corporate name and, subject to the Act, of performing all acts that body corporates may by law performing. According to section 4 of the Act, the operations of the Authority are controlled and managed by the Zimbabwe Special Economic Zones Board. The Board is required to consist of not more than eleven members, of whom six are appointed from the private sector by the Minister after consultation with the President.²⁷⁵ The six private sector members must each have qualifications, skills, or experience in one of the following areas: (a) law; (b) investment analysis; (c) information technology; (d) accounting; (e) economic; or (f) human resources.²⁷⁶ In addition, one member shall be appointed from each of the ministries responsible for: finance and economic development; economic planning and investment promotion; industry and commerce; and public service, labour and social welfare.²⁷⁷ One member of the Board shall also be appointed from the Office of the President and Cabinet.²⁷⁸ The chief executive officer of the Authority is an *ex-officio* member of the Board.²⁷⁹

The Board's chairperson and the vice-chairperson are appointed by the Minister from the above-stated membership of the Board.²⁸⁰ It would appear that the membership of Zimbabwe Special Economic Zones Board (assuming

²⁷⁴ Chitambara P 'How to make Special Economic Zones work' *Zimbabwe Independent* 15 September 2017 available at www.theindependent.co.zw (accessed 31 May 2019).

²⁷⁵ Section 5 (1) (a) of the Special Economic Zones Act (Chapter 14:34) of the Laws of Zimbabwe.

²⁷⁶ Section 5 (1) (a) of the Special Economic Zones Act (Chapter 14:34) of the Laws of Zimbabwe.

²⁷⁷ Section 5 (1) (b) to (e) of the Special Economic Zones Act (Chapter 14:34) of the Laws of Zimbabwe.

²⁷⁸ Section 5 (1) (f) of the Zimbabwe SEZ Act.

²⁷⁹ Section 5 (1) (g) of the Zimbabwe SEZ Act.

. The chief executive officer of the Zimbabwe Special Economic Zones authority is appointed by the Board in accordance with section 22 of the Act.

²⁸⁰ Section 5 (2). of the Zimbabwe SEZ Act.

all the eleven vacancies are filled) is dominated by representatives of the private sector as compared to government representatives. Thus, there is increased involvement of the private sector in running the regulatory affairs of Zimbabwe SEZs. This state of affairs is consistent with the recommended international best practices.²⁸¹

Section 18 (1) of the Zimbabwe SEZ Act sets out the functions of Zimbabwe SEZ Authority. It states that the functions shall be: (a) to establish SEZs wherein export-oriented industrial activities will take place; (b) to attract foreign direct investment into SEZs; (c) to administer, control and regulate all SEZs; (d) to provide and maintain such services, facilities and structures as are in its opinion necessary or desirable for the efficient operation of any SEZ; (e) to permit customs offices to be established in any SEZ and to provide facilities for that purpose; (f) to ensure the provision of adequate fencing and enclosures to segregate an SEZ from the customs territory, where necessary; (g) to approve and regulate activities which may be carried on in an SEZ; (h) to grant investment licenses for investment in SEZ; (i) to grant permits to developers of SEZ areas for infrastructure development including but not limited to road works, information and communications technology works, and water and electricity works; (j) to constitute a single institution through which applications for the approval of investment in SEZs shall be made and through which all necessary approvals, licences and permits may be granted or issued in respect of approved investments; (k) to monitor and evaluate the implementation of approved investments in SEZs and to submit reports to the Board concerning such investments; and (l) to advise the Minister in all matters relating to investment in SEZ.

For the better exercise of its functions, the Zimbabwe SEZ Authority has powers to do or cause to be done, either by itself or its agents, all or any of the things specified in the Schedule to the Act, either absolutely or conditionally and either solely or jointly with others.²⁸² The stated Schedule outlines the powers of the Authority which include, among several others, powers to:

²⁸¹ Moberg L. L 'The political economy of special economic zones' (2015) 11 (1) *Journal of Institutional Economics* 173.

²⁸² Section 19 of the Zimbabwe SEZ Act.

acquire movable or immovable property; sell, mortgage or pledge any of its assets; construct facilities necessary for its functions and the SEZs; enter into contracts of suretyship or give guarantees in connection with the exercise of its functions; and, with the approval of the Minister, to raise loans or borrow money in connection with its functions.²⁸³

It is observed that the Zimbabwe SEZ Act confers a considerable level of autonomy on the Zimbabwe SEZ Authority. As opposed to merely appraising and reviewing investment applications as is the case with the Malawi EPZ regulator,²⁸⁴ the Zimbabwe SEZ Authority has substantial powers, which include powers to grant licences for investment in SEZs and to approve and regulate activities which may be carried on in the Zimbabwe SEZs. Further, the Zimbabwe SEZ Authority has powers to establish SEZs and this includes powers to declare areas as SEZs.²⁸⁵ The autonomy of the Zimbabwe SEZ Authority also extends to its financial affairs as reflected in the powers to raise loans or borrow money (with the approval of the Minister) required for the performance of its functions. The Authority therefore would not need to always rely on funding from the government for its operations.²⁸⁶ This reflects a relatively high level of independence of the Authority from the government, which is consistent with international best practices.

3.6.2 Involvement of the private sector in different capacities within the SEZ programme and selection criteria for investment applicants

Another notable aspect regarding the Zimbabwe SEZ legislation is that it allows for participation of the private sector in SEZ developer or SEZ investor capacities. According to section 23 of the Zimbabwe SEZ Act, a person wishing to obtain his or her approval to invest in an SEZ or wishing to have his or her business activity approved as an activity in an SEZ area may apply to the Authority. Similarly, a person who wishes to develop an area as an SEZ area in

²⁸³ See the Schedule to the Zimbabwe SEZ Act, made pursuant to section 19 of the Act.

²⁸⁴ Section 7 of the EPZ Act (Chapter 39:06) of the Laws of Malawi.

²⁸⁵ Section 20 of the Zimbabwe SEZ Act and General Notice 660 of 2018.

²⁸⁶ Under section 46 of the Zimbabwe SEZ Act, the general funds of the Authority shall consist of – (a) rents, fees, charges and other income accruing to the Authority from licenses issued, services rendered and activities carried on in SEZs by the Authority; (b) moneys appropriated by Parliament; and (c) such other moneys as may vest in or accrue to the Authority, whether in the course of its operations or otherwise.

which licensed investors can establish or conduct operations may apply to the Authority for approval.²⁸⁷

Outlined in section 25 of the Zimbabwe SEZ Act are items that the Authority shall have regard to in considering applications for SEZ investment licences.²⁸⁸

It would appear the outlined considerations assist the Authority in assessing, among other things, the potential value to be added to the proposed investment of the applicant. As regards the investment selection criteria, Regulation 9 (2) (a) of the Zimbabwe SEZ (General) Regulations, 2018 makes reference to the Finance Act²⁸⁹ which contains additional criteria. Inclusion of selection criteria in SEZ legislation is also encouraged by international best practices.²⁹⁰

3.6.3 The Zimbabwe SEZ Authority as a one-stop shop with streamlined procedures

It has been noted in 3.6.1 above that one of the functions of the Zimbabwe SEZ Authority is to constitute a single institution through which applications for the approval of investment in SEZs shall be made and permits may be granted or issued in respect of approved investments.²⁹¹ In compliance with international best practices, this function enables the Authority to streamline SEZ procedures by acting as a one-stop shop equipped to grant all necessary licences and to oversee regulatory compliance, thereby simplifying administrative procedures and shielding investors from time consuming regulatory compliance procedures.²⁹² The one-stop shop function has since been operationalised and it assists with incorporation of companies, applications for SEZ investment licences, registrations of various tax heads and fiscal incentives, work and residence permits, indigenisation clearance, environmental management certification, acquisition of land licences, acquisition of mining title and other operational permits.²⁹³ These operations are performed in liaison with the

²⁸⁷ Section 24 of the Zimbabwe SEZ Act.

²⁸⁸ Section 25 of the Zimbabwe SEZ Act.

²⁸⁹ Chapter 23:04 of the Laws of Zimbabwe.

²⁹⁰ MENA – OECD Investment Programme (2009) 7. It is however observed that the Zimbabwe SEZ Act does not contain the selection criteria for persons who apply for developer's permits.

²⁹¹ Section 18 (1) (j) of the Zimbabwe SEZ Act.

²⁹² MENA – OECD Investment Programme (2009) 8. See also <http://www.zimsenza.co.zw/investment-guide-procedure/#> (accessed on 30 May 2019).

²⁹³ <https://www.investzim.com/education>

respective ministries and government agencies to facilitate the processes required by investors.

3.6.4 Investment protection and dispute settlement mechanisms

It has been discussed in chapter two of this thesis that ensuring standards of protection and investor remedies that are clearly established and that provide a satisfactory level of comfort to investors is another SEZ international best practice. Protection of investments has been said to include establishment of safeguards against expropriation of property and guaranteeing adequate and fair monetary compensation.²⁹⁴ Further, protection of investments entails putting in place efficient dispute settlement mechanisms for SEZ investors which include: recourse to binding international investment arbitration; dedicated internal SEZ mechanisms for administrative reviews as well as efficient and effective enforcement procedures.²⁹⁵

As part of Zimbabwe's SEZ mechanisms for administrative review, section 34 (1) of the Zimbabwe SEZ Act provides that any person who is aggrieved by a decision of the Authority in terms of Part IV of the Act (which deals with applications for approval of SEZ investment licences/permits, as well as the renewal, suspension or cancellation of the same) may appeal against the decision to the Minister. Upon receiving the appeal, the Minister may within 60 days: (a) confirm, vary or set aside the decision of the Authority; or (b) remit the matter to the Authority for further consideration together with such directions or advice as he or she considers necessary.²⁹⁶

Section 35 of the Zimbabwe SEZ Act is aimed at protecting SEZ investors from having their properties expropriated. It stipulates that no property or interest or right therein of a licensed investor to whom an investment licence has been issued in terms of the Act shall be compulsorily acquired except in accordance

²⁹⁴ Webb S & Coleman J. J 'Factors Contributing to Success of a Special Economic Zone – An overview of International Best Practice in Developing SEZs' (2018) available at www.dlapiper.com (accessed 15 June 2018).

²⁹⁵ Webb S & Coleman J 'Factors Contributing to Success of a Special Economic Zone – An overview of International Best Practice in Developing SEZs' (2018) available at www.dlapiper.com (accessed 15 June 2018).

²⁹⁶ Section 34 (2) of the Zimbabwe SEZ Act.

with a law which complies in all respects with section 71 of the Constitution of the Republic of Zimbabwe.²⁹⁷

It is stated that Zimbabwe's commitment to establishing efficient dispute resolution mechanisms that benefit its investors is demonstrated by the fact that Zimbabwe is a signatory to a number of Investment Protection Agreements.²⁹⁸ The Investment Protection Agreements signed by Zimbabwe include: the Multilateral Investment Guarantee Agency (MIGA); the International Convention on Settlement of Disputes (ICSID); the New York Convention on the Enforcement of Arbitral Awards; and the United Nations Convention on International Trade Law (UNCITRAL).²⁹⁹ Establishment of these dispute resolution mechanisms for the protection and comfort of investors is in line with international best practices.

3.6.5 Special labour law regime for Zimbabwe SEZs

Section 56 (2) of the Zimbabwe SEZ Act requires the Zimbabwe SEZ Authority to, in consultation with the Minister responsible for the administration of the Labour Act,³⁰⁰ provide rules for conditions of service, termination of service, dismissal from service and disciplinary proceedings that apply within every SEZ. This would arguably allow the Authority to put in place SEZ labour laws that are flexible and tailored to suit the needs of the SEZs.³⁰¹ Flexibility of SEZ labour laws is also one of the aspects recommended by international best practices.³⁰² The potential challenge with the Zimbabwe SEZ legislative arrangement in this regard is for the Authority to ensure that whilst the labour laws are flexible, they still conform to the ILO norms.³⁰³

²⁹⁷ Section 71 of Zimbabwe's Constitution of 2013 provides for property rights. According to subsection (3), no person may be compulsorily deprived of their property except where the conditions specified in the section are satisfied. The conditions include, among others: that the deprivation must be in terms of a law of general application; that the deprivation must be necessary for prescribed reasons; and that the acquiring authority must give reasonable notice and pay fair and adequate compensation before the acquisition.

²⁹⁸ <https://www.zimseza.co.zw/investment-guide-procedures/> (accessed on 29 May 2019)

²⁹⁹ <https://www.zimsez.co.zw/investment-guide-procedures/> (accessed on 29 May 2019)

³⁰⁰ Chapter 28:01 of the Laws of Zimbabwe.

³⁰¹ www.zimseza.co.zw/special-economic-zones-act/ (accessed on 29 May 2019).

³⁰² Gauthier JP 'Legal and Institutional Frameworks for Special Economic Zones' available at <https://static1.squarespace.com> (accessed 10 November 2018).

³⁰³ Zimbabwe is a member of the ILO. See <https://www.ilo.org/public/english/standards/relm/country.htm>

3.7 Conclusion

Malawi has had Single Factory EPZs as the only type of SEZs. The EPZs were established in the 1990s and exist up to date, though with a diminished number of investors. As this thesis seeks to determine a sound legal and regulatory framework for the contemplated new Malawi SEZs with a multi-sectoral approach, this chapter has analysed the existing Malawi EPZ law with the aim of identifying areas that need consideration and improvement. The said analysis has considered the current EPZ law in light of the international best practices, particularly those relating to development of SEZ legal and regulatory frameworks.

This chapter has identified the following as areas that need to be considered and improved if the new SEZ legal and regulatory framework is to offer a better investment climate: minimal private sector involvement and then EPZ Appraisal Committee's limited powers/autonomy; focus on fiscal incentives and leaving out other critical aspects such as simplified and streamlined procedures for business registration, investment approvals, expatriate work permits, granting of import and export licenses, accelerated on-site customs inspection, automatic foreign exchange access, and land acquisition; lack of clear outline of the EPZ incentives and privileges by the EPZ legal and regulatory framework; and lack of predictability and transparency in the EPZ legal and regulatory framework.

With the aim of drawing lessons that may potentially assist in shaping the Malawi SEZ legal framework, this chapter has briefly examined selected features of the current Zimbabwe SEZ legislation in light of the identified international best practices. The examination has revealed that Zimbabwe's SEZ legislation has in certain aspects embraced international best practices, particularly with regard to: increased private sector involvement in SEZ regulatory affairs; independence of the SEZ regulator who is conferred with powers and functions to effectively manage SEZ affairs; clarified selection criteria for SEZ investors; streamlined SEZ administrative procedures facilitated by a one – stop shop; reasonable protection of SEZ investment; as well as

flexible labour laws. It is hoped that in developing its new SEZ regime, Malawi can learn from the approach taken by Zimbabwe.

As it has been earlier noted that the success or failure of an SEZ can be highly dependent on what happens both within and outside it,³⁰⁴ the subsequent chapter will examine other legal and economic circumstances prevailing in Malawi that are relevant and are likely to have a bearing on the contemplated new SEZ legal and regulatory framework.



³⁰⁴ Competitive Industries and Innovation Programme (CIIP) 'Special Economic Zones: An Operational Review of Their Impact' (2017) 41 available at <https://openknowledge.worldbank.org/handle/10986/29054> (accessed on 17 June 2018)

CHAPTER FOUR
MALAWI'S LEGAL AND ECONOMIC CIRCUMSTANCES TO BE
CONSIDERED IN DEVELOPING A NEW SEZ LEGAL AND REGULATORY
FRAMEWORK

4.1 Introduction

As discussed in chapter two of this thesis, one of the crucial factors to be borne in mind when developing a new SEZ legal and regulatory framework is that particular legal and economic circumstances prevailing in a country have a significant impact and therefore ought to be taken into account in shaping the new SEZ regime. This chapter will therefore examine legal and economic circumstances relating to Malawi that would be relevant to the contemplated SEZ legal and regulatory framework.

It is recognised that SEZs operate within the wider context of FDI, international and regional trade and domestic policy³⁰⁵ and it is important that in developing national SEZ laws, international law issues that apply to the country should also be considered. Hence, the legal circumstances to be considered in this chapter will include potential overlap between the Malawi's SEZ regulation and Malawi's obligations under international trade law, particularly the World Trade Organisation (WTO) law as well as Regional Trade Agreements (RTAs) to which Malawi is a party. At national level, Malawi's domestic legislation relating to immigration, employment, land acquisition and tax will also be considered.

With regard to economic circumstances, this chapter will briefly highlight the state of the country's infrastructure and the general economic climate in so far as they influence SEZ operations and performance.

4.2 Interface between Malawi's SEZ regime and obligations under WTO law

Malawi became a member of the WTO on 31 May 1995.³⁰⁶ By virtue of its membership, the country assumed certain obligations under multilateral

³⁰⁵ ILO Committee on Employment and Social Policy 'Third Item on Agenda' (2003) 3 available at https://www.ilo.org/public/libdoc/ilo/286/GB.286_esp_3_engl.pdf (accessed 18 February 2019).

³⁰⁶ World Trade Organization (WTO) 'Understanding the WTO: the Organization (Members and Observers)' available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (accessed on 8 March 2019).

agreements concluded under the auspices of the WTO, including the General Agreement on Tariffs and Trade (GATT)³⁰⁷ and the Agreement on Subsidies and Countervailing Measures (ASCM)³⁰⁸. Creskoff and Walkenhorst have observed that although SEZs are not specifically mentioned by name in any of the WTO multilateral agreements, several types of incentives that are typically part of SEZs are subject to disciplines under the WTO, most notably through provisions in the ASCM.³⁰⁹

Incentives provided under SEZ programmes are broadly grouped into the following three categories: (i) measures that appear to be WTO law consistent; (ii) measures that appear to be prohibited or subject to challenge under WTO law; and (iii) measures whose WTO law consistency depends on the facts of the particular case.³¹⁰

Regarding measures that appear WTO law consistent, the ASCM excludes, from the definition of the term 'subsidy', the duty and tax exemptions on goods exported from SEZs.³¹¹ Such exemptions have been one of the core fiscal incentives provided by SEZs in various jurisdictions³¹² and Malawi's EPZs are no exemption.³¹³ The following SEZ-related measures therefore appear to be WTO legal: (i) exemption of exported products from import duties; (ii) exemption of exported products from indirect taxes; (iii) exemption of goods consumed in the production process from import duties and indirect taxes when the end products are exported; (iv) exemption of production waste from import duties and indirect taxes when the waste is exported or discarded; (v) exemption of goods stored in SEZs from duties and indirect taxes; and (vi) non-specific subsidies, including generally applicable tax rates imposed by national,

³⁰⁷ General Agreement on Tariffs and Trade 1994; Annex 1A of the Marrakesh Agreement Establishing the World Trade Organization.

³⁰⁸ Agreement on Subsidies and Countervailing Measures; Annex 1A of the Marrakesh Agreement Establishing the World Trade Organization.

³⁰⁹ Creskoff S & Walkenhorst P 'Implications of WTO Disciplines for Special Economic Zones in Developing Countries' (2009) 4 available at <https://openknowledge.worldbank.org/handle/10986/4089> (accessed on 9 March 2019). See Article 3 of the ASCM.

³¹⁰ Creskoff S & Walkenhorst P 'Implications of WTO Disciplines for Special Economic Zones in Developing Countries' (2009) 4 available at <https://openknowledge.worldbank.org/handle/10986/4089> (accessed on 9 March 2019).

³¹¹ Article 1.1 of the ASCM.

³¹² Creskoff S & Walkenhorst P 'Implications of WTO Disciplines for Special Economic Zones in Developing Countries' (2009) 5 available at <https://openknowledge.worldbank.org/handle/10986/4089> (accessed on 9 March 2019).

³¹³ Section 15B (2) of the EPZ Act.

regional and local government authorities.³¹⁴ It follows, therefore, that the duty relief provided on otherwise dutiable goods imported for use in Malawi EPZ would be deemed WTO consistent.³¹⁵

Examples of SEZ - related measures whose WTO consistency depends on the facts of the particular case include: (i) duty and tax free treatment of production equipment used in SEZs; (ii) provision of materials and components in exchange for compensation that may not reflect full market value; and (iii) Government subsidies for infrastructure development in an SEZ.³¹⁶ Going by these examples, it is noted that Malawi EPZ programme's consistency with WTO law with regard to provision of duty free treatment of production equipment used in EPZs³¹⁷ would depend on the facts of the particular case.³¹⁸

Two prohibited subsidies identified in Article 3 of the ASCM are deemed to be inconsistent with WTO disciplines and these are export subsidies and import substitution or domestic content subsidies.³¹⁹ Export subsidies are those that are contingent in law or in fact upon export performance.³²⁰ Domestic content subsidies are those contingent on the use of domestic goods instead of imports.³²¹ In particular, WTO prohibited government subsidies relating to SEZ programmes include (but are not limited to) the following: (i) a direct subsidy contingent on export performance; (ii) currency retention schemes involving a

³¹⁴ Creskoff S & Walkenhorst P 'Implications of WTO Disciplines for Special Economic Zones in Developing Countries' (2009) 5 available at <https://openknowledge.worldbank.org/handle/10986/4089> (accessed on 9 March 2019).

³¹⁵ See section 16(1) as read with section 15C of the EPZ Act.

³¹⁶ Creskoff S & Walkenhorst P 'Implications of WTO Disciplines for Special Economic Zones in Developing Countries' (2009) 6 available at <https://openknowledge.worldbank.org/handle/10986/4089> (accessed on 9 March 2019).

³¹⁷ Section 16 (2) of the EPZ Act.

³¹⁸ By way of illustration, it has been observed that contractual arrangements regarding production equipment used in an SEZ may determine whether exemptions from duties and taxes for production equipment constitute a prohibited subsidy. For instance, imported production equipment that is leased and that by contract will be exported at the end of the lease may be deemed a "product" exempt from duties and taxes pursuant to Article 1.1 (a) (1) (ii) footnote 1 of the Agreement on Subsidies and Countervailing Measures, whilst production equipment that is purchased and installed as a permanent fixture in the SEZ may not be exempt because it is deemed to be capital equipment, not a "product". It is said that there is no clear precedent regarding this issue and SEZ programmes that exempt production equipment from duties and taxes should be aware of the risk that the measure could be determined to be an export subsidy. See Creskoff S & Walkenhorst P 'Implications of WTO Disciplines for Special Economic Zones in Developing Countries' (2009) 34 available at <https://openknowledge.worldbank.org/handle/10986/4089> (accessed on 9 March 2019)

³¹⁹ Torres R A 'Free Zones and the World Trade Organization Agreement on Subsidies and Countervailing Measures' (2007) 2(5) *Global Trade and Customs Journal* 217.

³²⁰ Article 3.1(a) of the ASCM.

³²¹ Article 3.1(b) of the ASCM.

bonus on exports; (iii) preferential transport and freight charges for export shipments; (iv) provision of domestic products and services for exports at terms more favorable than those for domestic goods; (v) exemption, remission or deferral of direct taxes or social welfare charges if contingent on exports; (vi) allowance of special direct tax deductions for exports above those granted on goods for domestic consumption; (vii) exemption or remission of indirect taxes on exports in excess of those on goods sold for domestic consumption; (viii) exemption, remission or deferral of prior stage cumulative taxes on goods or services used in the production of exported products in excess of products sold for domestic consumption (except for the exemption, remission or deferral of such taxes on "inputs consumed" in the production process); (ix) provision of export credit guarantees or insurance programmes at premium rates inadequate to cover long-term costs; (x) grants of export credits at rates below those which they pay for the funds, or at below market rates, or payment of all or part of the costs of obtaining credit; and (xi) subsidies contingent on the use of domestic over imported goods.³²²

Firms operating in SEZs are often subject to export share requirements, thus, they are required to export at least a certain stated share of their output in order to be eligible to receive the incentives available in SEZs.³²³ Under the Malawi EPZ regime, for instance, Section 15C of the EPZ Act stipulates that quantities of products that EPZ enterprises may sell in Malawi should not exceed percentages prescribed by the EPZ Act or prescribed on the certificate issued under the EPZ Act. This imposition of export share requirements may be deemed to make Malawi EPZ incentives contingent upon export performance, thereby falling in the category of prohibited subsidies under the ASCM.

It is noted, however, that although some incentives (and attendant requirements) under the Malawi EPZ regime may be considered prohibited measures under WTO law, Malawi would be exonerated pursuant to WTO's

³²² Creskoff S & Walkenhorst P 'Implications of WTO Disciplines for Special Economic Zones in Developing Countries' (2009) 5 available at <https://openknowledge.worldbank.org/handle/10986/4089> (accessed on 9 March 2019).

³²³ Defever F, Reyes J D, & Riano A 'Does the Elimination of Export Requirements in Special Economic Zones Affect Export Performance?' (2016) 1 available at https://www.researchgate.net/publication/309667997_Does_the_Elimination_of_Export_Share_Requirements_in_Special_Economic_Zones_affect_Export_Performance_Evidence_from_the_Dominican_Republic/download (accessed on 14 December 2018).

special and differential treatment. This is due to the fact that WTO members that are Least Developed Countries (LDCs) and countries that are listed in Annex VII of the ASCM are currently generally exempt from the disciplines of the ASCM.³²⁴ Since Malawi is a LDC,³²⁵ the ASCM prohibitions discussed above would not apply to the current EPZ regime. The prohibitions would also not apply to any similar incentives that may be offered under the country's new SEZ programme. Therefore, in developing its new SEZ legal and regulatory framework, Malawi may wish to consider the ASCM prohibitions only if there is reasonable anticipation that the country will develop and be reclassified as a Developing Country (DC) in the near or foreseeable future.

4.3 Malawi's SEZ regime and RTAs: SADC, COMESA, TFTA and CFTA

The proliferation of SEZs in recent decades has been paralleled by the development of Regional Trade Agreements (RTAs).³²⁶ A RTA is broadly defined as a treaty between two or more governments that defines the rules of trade for all signatories.³²⁷ It is said that RTAs, just like SEZs, have proliferated in Africa as governments have sought ways to circumvent the developmental limitations associated with small domestic markets.³²⁸ RTAs aim to promote the expansion of trade and economic integration between or among member countries by offering preferential access to certain products through the reduction (but not necessarily elimination) of tariffs.³²⁹

Currently, Malawi is a member of two RTAs namely: the Southern African Development Community (SADC);³³⁰ and the Common Market for Eastern and

³²⁴ Article 27 of the ASCM.

³²⁵ United Nations Committee for Development Policy 'List of Least Developed Countries (as of December 2018)' available at https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf (accessed on 30 December 2018).

³²⁶ Koyama N 'Special Economic Zones in the Context of Regional Integration: Creating Synergies for Trade and Investment' in Farole T & Akinci G 'Special Economic Zones: Progress, Emerging challenges and Future Directions' (2011) 128 available at <http://documents.worldbank.org> (accessed 15 June 2018) (hereafter Koyama N (2011)).

³²⁷ The World Bank 'Regional Trade Agreements' (2018) available at <https://www.worldbank.org/en/topic/regional-integration/brief/regional-trade-agreements> (accessed on 9 March 2019).

³²⁸ Woolfrey S. 'Special Economic Zones and Regional Integration in Africa' (2013) 14 available at <http://www.tralac.org/files/2013/07/S13WP102013-Woolfrey-Special-economic-zones-regional-integration-in-Africa-20130710-fin.pdf> (accessed on 19 January 2019).

³²⁹ Koyama N (2011) 129.

³³⁰ See <https://www.sadc.int/member-states/malawi/> (accessed on 20 June 2019).

Southern Africa (COMESA).³³¹ At present, the country is yet to ratify the Agreement Establishing the African Continental Free Trade Area (AfCFTA)³³² and the Tripartite Free Trade Area Agreement (TFTA).³³³

Koyama has observed that increasing numbers of RTAs, especially since the early 2000s, go beyond the simple agreements on trade and they include rules and measures to create harmonized frameworks of various cross-border policies among participating members.³³⁴ Such rules and measures relate to customs administration, intellectual property, competition policy, technical barriers to trade, sanitary and phytosanitary agreements, government procurement, and investment. In this context, policies regarding SEZs are also referred to in several RTAs such as the East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA).³³⁵

The relationship between RTAs and SEZs is potentially quite complex, as the existence of SEZs in potential RTA member states can create both challenges and potential synergies for RTA initiatives.³³⁶ With regard to synergies, SEZs and RTAs have been argued to be policy tools that promote trade and investment of countries and regions.³³⁷ Typically, successful SEZs generate significant local employment, increase exports, and accelerate economic growth while successful RTAs on the other hand contribute to increased trade among member countries and promote regional integration more broadly.³³⁸ When the two initiatives exist simultaneously, they are said to have the potential to generate significant synergies.³³⁹

Despite SEZs having the potential to facilitate regional synergies, it has been observed that RTAs often face challenges in incorporating SEZs (particularly in the case of traditional EPZs) into their regulatory frameworks due to the fact that although RTAs represent bilateral or multilateral instruments, SEZs are

³³¹ See <https://www.comesa.int/comesa-members-states/> (accessed on 20 June 2019).

³³² See <https://www.tralac.org/resources/by-region/cfta.html> (accessed on 20 June 2019).

³³³ As of April 2019, Malawi's Minister of Foreign Affairs stated that the country was still consulting and would only ratify after concluding the ratifications. See <https://times.mw/comesa-begs-malawi-others-to-ratify-tfta/>

³³⁴ Koyama N (2011) 129.

³³⁵ Koyama N (2011) 133.

³³⁶ Koyama N (2011) 130.

³³⁷ Koyama N (2011) 133.

³³⁸ Koyama N (2011) 133.

³³⁹ Koyama N (2011) 127.

instruments by which an individual country promotes investment and exports potentially in competition with its RTA partners.³⁴⁰ The establishment of RTAs therefore affects the possibilities for zone creation within RTA member states and alters the trading environment in which SEZ enterprises operate.³⁴¹ When SEZ programmes provide enterprises with tariff-related incentives, they trigger various issues in the context of RTAs including, for instance, creating an incentive for “tariff-jumping” – that is, when a foreign firm decides to jump over the tariff wall to avoid trade costs (tariffs).³⁴²

Another fundamental implication of RTAs for SEZ enterprises is that they turn regional export markets into “virtual” domestic markets.³⁴³ Although this creates significant opportunities, for enterprises that are based inside SEZs (particularly those inside traditional EPZs that combine duty-free import and fiscal incentives with restrictions on sales to the domestic market), it may also mean a loss of their privileged position in selling to regional markets vis-à-vis enterprises based outside the zones.³⁴⁴

Yet another potential challenge is that the use of SEZ incentives to attract investment can result in a race to the bottom between neighbouring countries, potentially jeopardising regional integration processes.³⁴⁵ This is considered particularly likely in developing regions such as Sub-Saharan Africa, where attracting foreign investment is generally considered a developmental imperative and where fiscal and other investment incentives are widely used to compensate for the underlying competitiveness shortcomings of SEZs and domestic economies as a whole.³⁴⁶ In practice such incentives are hard to remove and ‘prone to inflation’ as public authorities are pressured to extend and increase the incentives on offer.³⁴⁷ Malawi is located in Sub-Saharan Africa and the likelihood of getting involved in such races to the bottom is high.

³⁴⁰ Koyama N (2011) 127.

³⁴¹ Sergeant J & Matthews L ‘Combining Export Processing Zones and Regional Trade Agreements: Lessons from the Mexican Experience’ (2001) 29(10) *World Development* 1739.

³⁴² Koyama N (2011) 127.

³⁴³ Koyama N (2011) 130.

³⁴⁴ Koyama N (2011) 130.

³⁴⁵ Farole T (2011) 174.

³⁴⁶ Farole T (2011) 261.

³⁴⁷ Farole T (2011) 261.

In instances where a newly established RTA disallows exports from a member country's SEZ to the territory of other RTA member countries, the operation of existing SEZ investors may be adversely affected and this may necessitate a reform of SEZ programmes in member countries to prevent a large loss of investment.³⁴⁸ Notably, it has been argued that exclusion of SEZ investors from taking advantage of RTAs prevents member countries from realizing the full potential of these two trade and investment generating instruments and achieving effective regional integration.³⁴⁹ With the emergence of the Tripartite Free Trade Area (TFTA) and the African Continental Free Trade Area (AfCFTA),³⁵⁰ Malawi will have to consider (if it becomes a member) how these two RTAs will treat SEZs of member countries.

A further issue that arises is that countries (Malawi inclusive) are members of more than one RTA.³⁵¹ Some RTAs are subgroups of larger groups, and many regional trade blocs negotiate a further RTA or Economic Partnership Agreement with another regional bloc.³⁵² One example is the initiative to establish a TFTA between the member states of COMESA, EAC and SADC. Another example is the AU championing the establishment of AfCFTA.³⁵³ These efforts are aimed at achieving greater regional integration. Yet, the efforts are also said to add complexity to trade relationships as each RTA tends to have its own set of rules and regulations which may create contradictions and complexities in managing overlapping relationships. In the case of SEZs, for example, it may be that different RTAs specify a different treatment of SEZs.³⁵⁴

There is a view opposed to the SEZ–RTA synergies which states that as investors typically look at investment incentives (once they have decided on a

³⁴⁸ Koyama N (2011) 128.

³⁴⁹ Koyama N (2011) 128.

³⁵⁰ See the Agreement Establishing a Tripartite Free Trade Area among the Common Market for Eastern and Southern Africa, the East African Community and the Southern African Development Community and the Agreement Establishing the African Continental Free Trade Area, respectively.

³⁵¹ Malawi is currently a member of SADC and COMESA. See <https://www.sadc.int/member-states/malawi/> and <https://www.comesa.int/comesa-members-states/> (accessed on 17 January 2019).

³⁵² Koyama N (2011) 132.

³⁵³ The CFTA was adopted on 21 March 2018. See <https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area> (accessed 27 February 2019). The CFTA has since entered into force on 30 May 2019. See <https://www.tralac.org> (accessed 3 June 2019)

³⁵⁴ Koyama N (2011) 133.

region in which to invest), incentive-based bidding wars at the regional level are unlikely to result in the region as a whole benefiting from significantly higher levels of investment.³⁵⁵ Instead, such bidding wars are a waste of regional resources and may potentially aggravate economic tensions between regional neighbours, thereby jeopardising regional integration processes.³⁵⁶ In this way, SEZ programmes in African countries, like other forms of national investment incentives, could serve to undermine regional integration processes that are motivated, at least partly, by a desire to boost foreign investment in the region.

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There has been a suggestion that in order to fully leverage both SEZs and RTAs, RTA member countries need to take a collaborative approach to harmonise their SEZ programmes.³⁵⁸ Thus, given that significant fiscal and other incentives are common features of SEZ programmes in Sub-Saharan Africa, arguably harmonisation is possible.³⁵⁹ The reasoning is that countries in the region are unlikely to unilaterally abandon their SEZ incentives given the pressure many of their governments are under to attract investment and promote domestic employment and economic growth.³⁶⁰ Similarly, if all their neighbours are offering significant investment incentives as part of their zone packages, it would be illogical for a country in the region to establish its own SEZ programme without offering at least some similar sort of incentives.³⁶¹

The SEZ-RTA challenges as well as the harmonisation efforts discussed above have previously been demonstrated in the African context by the East African Community (EAC).³⁶² As a way of addressing the challenges, the EAC developed regional regulations³⁶³ governing the use of SEZs (particularly

³⁵⁵ Farole T (2011) 182.

³⁵⁶ Woolfrey S. 'Special Economic Zones and Regional Integration in Africa' (2013) 15 available at <http://www.tralac.org/files/2013/07/S13WP102013-Woolfrey-Special-economic-zones-regional-integration-in-Africa-20130710-fin.pdf> (accessed on 19 January 2019).

³⁵⁷ Woolfrey S. 'Special Economic Zones and Regional Integration in Africa' (2013) 15 available at <http://www.tralac.org/files/2013/07/S13WP102013-Woolfrey-Special-economic-zones-regional-integration-in-Africa-20130710-fin.pdf> (accessed on 19 January 2019).

³⁵⁸ Koyama N (2011) 134.

³⁵⁹ Koyama N (2011) 134.

³⁶⁰ Koyama N (2011) 135.

³⁶¹ Koyama N (2011) 135.

³⁶² See Ogeda J R *Legal Implications of Regional Integration Initiatives on Special Economic Zones in Kenya* (unpublished LLM thesis, University of Pretoria, 2016) available at <https://repository.up.ac.za/handle/2263/58737> (accessed on 9 March 2019).

³⁶³ EAC Customs Union Protocol.

EPZs) by its Member States – with the aim to ensure that member states establish EPZs in a uniform fashion and that the process involved are transparent, accountable, fair and predictable.³⁶⁴ Under the EAC regulations, national legislation on EPZs must be aligned with the provisions of the EAC regulations and sales by EPZ enterprises to the EAC market are limited to 20 percent of annual production.³⁶⁵ For purposes of uniformity, EAC member states intend to develop EAC Model Export Processing Zones Operational Manual.³⁶⁶ While the success of the approach taken by the EAC in promoting a unified regional approach to SEZs has not been clearly measured, the EAC experience at least highlights one way in which regional institutions can play a role in facilitating establishment of regional frameworks for the provision of incentives in SEZs, thereby addressing the collective problems associated with the use of national level incentive schemes.³⁶⁷

COMESA has also recognized the SEZ-RTA challenges and has made commitments to harmonise the establishment and operation of SEZs by its Member States. The COMESA Treaty³⁶⁸ provides for ‘free zones’ and defines the term as ‘parts of the territory of a Member State where any goods introduced into that State are considered, in so far as import duties are concerned, as being outside its customs territory or are not subject to any usual customs control’.³⁶⁹ Under Article 64(2) (g) of the COMESA Treaty, Member States undertake (where they have not already done so) to adopt common procedures for the establishment and operation of free zones, free ports, customs supervises factories and export drawbacks. In furtherance of this undertaking, Article 229 of the COMESA Customs Management Regulations³⁷⁰ generally provides that all goods related to a free zone enterprise’s business activities and all capital equipment related thereto are exempt from customs

³⁶⁴ Articles 25 (export promotion schemes), 26 (duty drawback schemes), 27 (tax remission schemes), 29 (export processing zones) 31 (freeports), and 33 (exemption regimes). Annex II to the Protocol also contains the EAC Export Processing Zone Regulations.

³⁶⁵ Article 29 of the EAC Customs Union Protocol.

³⁶⁶ Woolfrey S. ‘Special Economic Zones and Regional Integration in Africa’ (2013) 17 available at <http://www.tralac.org/files/2013/07/S13WP102013-Woolfrey-Special-economic-zones-regional-integration-in-Africa-20130710-fin.pdf> (accessed on 19 January 2019).

³⁶⁷ Farole T (2011) 17.

³⁶⁸ The Common Market for Eastern and Southern Africa Treaty (1994).

³⁶⁹ Article 1 of the Common Market for Eastern and Southern Africa Treaty (1994). As discussed in chapter two of this thesis, a free zone is one of the several types of SEZ. Chapter two has also noted that it is not unusual for the terms “free zone” and SEZ to be used interchangeably.

³⁷⁰ Made under the COMESA Treaty.

duties, as well as import and export licensing requirements, except those licenses required by public order, security, health and related matters. On the basis of these provisions, the current Malawi EPZs are entitled to enjoy the stated benefits under COMESA. The contemplated new SEZs could similarly utilise the stated benefits under COMESA.

However, it appears that except for the above-stated provision on exemption of SEZ goods from customs duties and import/export licences, COMESA's efforts relating to adoption of common procedures for the establishment and operation of SEZs are not as advanced as those of the EAC. Notably, COMESA is yet to adopt regulations that specifically ensure that Member States establish and operate SEZs in a uniform fashion. This means that currently, each COMESA Member State establishes and operates their respective SEZs in their preferred manner. COMESA may therefore need to do more in harmonising the establishment and use of SEZs by its Member States.

This thesis also takes the view that in the absence of initiatives to harmonise the establishment and operation of SEZs in SADC³⁷¹ or in any other RTAs to which Malawi may become a party (e.g. the TFTA and the AfCFTA), Malawi's new SEZ regime will have to deal with or plan for any anticipated SEZ-RTA challenges on its own.

4.4 Setting up of SEZ enterprises and acquisition of land and relevant permits

It has been noted in chapter three of this thesis that the current Malawi EPZ law makes no provision for simplified and streamlined procedures (particularly for foreign investors) relating to registration of businesses, obtaining of investment approvals, obtaining of expatriate work permits, granting of import and export licenses, and land acquisition.³⁷² This lack of provision poses various challenges to investors in practice as oftentimes they have to deal with individual line ministries and agencies in order to set up enterprises and

³⁷¹ Where most governments have established SEZs to attract FDI. See Mugombo V & Mutize M 'Special Economic Zones (SEZs) in Southern African Development Community (SADC)' (2016) 6(4) *Risk Governance and Control: Financial Markets & Institutions* 19.

³⁷² See chapter three, section 3.5.2.

operate in Malawi EPZs. Below is a detailed discussion of the current state of affairs and the feasibility of simplifying and streamlining the stated procedures.

4.4.1 Business registrations and exchange control approvals

There exists the Malawi Investment and Trade Centre Limited (MITC) which is a state-owned company incorporated pursuant to the Investment and Export Promotion Act, 2012 (“IEP Act”). The MITC is mandated to give incentives for foreign investment. Under the IEP Act, a person who intends to invest in a qualifying activity in Malawi and wishes to obtain any investment incentive must apply, in a prescribed manner, to the Chief Executive Officer of MITC for an investment certificate. The term ‘qualifying activity’ is not defined in the IEP Act. However, under section 5 of the IEP Act, MITC accords priority to investment and export promotion in the following sectors: (a) agriculture; (b) agro-processing; (c) fisheries; (d) forestry; (e) manufacturing; (f) mining; (g) tourism; and (h) such other productive sectors as the MITC may from time to time determine with the approval of the Minister of Trade and Industry. Upon receiving the application, the Chief Executive Officer forwards it to MITC’s board of directors and the board decides whether to grant or reject the application.³⁷³

The MITC established a one-stop-shop aimed at assisting investors seeking to apply for investment certificates or intending to invest in a qualifying activity to obtain the certificates or permits expeditiously.³⁷⁴ In practice, the one-stop-shop’s assistance includes facilitating the registration of enterprises for foreign investors in Malawi as well as the obtaining of exchange control approvals and employment or business permits.³⁷⁵ The IEP Act makes no specific mention of investments in Malawi EPZs. The services of MITC’s one-stop-shop appear to be accessible to investors generally, provided their investment is targeted in a sector that is accorded priority by the MITC pursuant to the provisions of the IEP Act. The contemplated new SEZ law could therefore take advantage of the MITC’s one-stop-shop services by making specific provision for prospective

³⁷³ Section 6 (4) of the IEP Act.

³⁷⁴ Pursuant to Section 10 of the IEP Act.

³⁷⁵ See <https://www.mitc.mw> (accessed on 17 June 2018).

SEZ investors to use the existing one-stop-shop in setting up their businesses expeditiously.

4.4.2 Obtaining of BRPs and TEPs

Immigration matters in Malawi are governed by the Immigration Act³⁷⁶ and the Immigration Regulations made under the Act. The Immigration Act stipulates the requirements and procedures for obtaining Business Residence Permits ('BRPs') and Temporary Employment Permits ('TEPs').³⁷⁷ BRPs are issued to persons wishing to reside in Malawi for the purpose of carrying on a business, practicing a profession, or engaging in an occupation, for gain, profit or reward.³⁷⁸ TEPs are issued to persons wishing to reside within an area of Malawi for purposes of engaging in an occupation.³⁷⁹ Foreign investors wishing to reside and set up businesses in Malawi SEZs and expatriates wishing to work in Malawi SEZs would therefore be required to apply for and obtain BRPs and TEPs, respectively.

In applying for a BRP, an applicant is required to submit, among other documents: a business registration certificate or certificate of incorporation in respect of his or her Malawi business entity; business plan or profile; a bank statement with not less than USD 50, 000 account balance (this is the required minimum investment capital); and investment certificate from the MITC.³⁸⁰ TEP applicants are required to submit, among other documents: a covering letter from the entity intending to employ the applicant; original and certified copies of educational certificates; evidence that the post was advertised in local press and curriculum vitae of the local Malawians who applied for the post; proof that interviews took place (if the post was not advertised and no interviews took place, reasons for the same must be furnished); and proof of arrangement of a Malawian understudy.³⁸¹

³⁷⁶ Chapter 15:03 of the Laws of Malawi.

³⁷⁷ Sections 24A and 25 of the Immigration Act and Regulations 24A and 25 of the Immigration Regulations.

³⁷⁸ Section 24A of the Immigration Act.

³⁷⁹ Section 25 of the Immigration Act.

³⁸⁰ Department of Immigration: Application Requirements for Business Residence Permits available at <https://www.immigration.gov.mw/permits/business-residence-permit/> (accessed on 9 March 2019).

³⁸¹ Prescribed Form No. 21 in the Immigration Regulations.

The Department of Immigration and Citizenship Services is responsible for receiving and processing BRP and TEP applications. Upon receipt, the applications are forwarded to the Minister of Homeland Security who has powers to grant or reject the applications.³⁸² In practice, BRP and TEP applications have usually taken long to be processed and granted by the Department of Immigration and Citizenship Services.³⁸³ Some of the application requirements have also been deemed stringent and too involving.³⁸⁴

In an effort to streamline and expedite the application procedures, the MITC's one-stop-shop assists foreign investors with BRP and TEP applications. It is noted that only foreign investors that opt to go through the MITC (mostly for the reason that they intend to invest in a priority sector and to apply for investment incentives) benefit from the one-stop-shop service in relation to BRP and TEP applications. Arguably, an investor wishing to invest in the SEZ would not benefit from the one-stop-shop's assistance (with regard to BRPs and TEPs) if the nature of the intended investment does not fall in a priority sector stipulated under section 5 of the IEP Act. Again, the contemplated new SEZ law can make provision for use of the one-stop-shop services by SEZ investors. Coordination between SEZ authorities and the MITC will be key and the same will have to be adequately provided for or facilitated by the new SEZ law.

4.4.3 Acquisition of land for SEZ investments

Land is a very important resource for most investments, including investments in SEZs.³⁸⁵ In chapter three of this thesis, it has been noted that the current EPZ law contains no provisions facilitating the acquisition of land by investors.³⁸⁶ Thus, there are no specific areas of land designated for EPZs in Malawi and instead enterprises are designated the status of EPZs and are

³⁸² The powers of the Minister are provided for in sections 24A and 25 of the Immigration Act.

³⁸³ For instance, the Policy Statement and New Guidelines for The Issuance and Renewal of (Expatriate) Employment Permits which was issued by the Malawi Government in 1998 underscores the Government's commitment to make TEPs readily available to expatriates and mandates that processing times for TEP applications shall not exceed 40 working days. However, in practice TEPs take significantly longer and face significant bureaucratic delays as files are not digitized and TEPs. See <https://www.state.gov/e/eb/rls/othr/ics/2015/241645.htm> (accessed on 9 March 2019)

³⁸⁴ See <https://www.state.gov/e/eb/rls/othr/ics/2015/241645.htm> (accessed on 9 March 2019)

³⁸⁵ Mukherjee A, Pal P & Deb S et al *Special Economic Zones in India: Status, Issues and Potential* (2016) 28.

³⁸⁶ See chapter three, section 3.5.2.

located in areas of choice and convenience to the investor.³⁸⁷ This entails EPZ investors having to identify and acquire land on their own. The challenge that comes with this lack of facilitation is that most investors, especially those that are foreign, are not able to acquire land within a reasonable time and this delays their setting up of EPZ investments.³⁸⁸ Depending on the type and location of the land identified, investors have had to deal with various procedures and Government agencies to acquire an interest in land.³⁸⁹ Research has shown that investors on average spend at least one year to get a suitable piece of land for their EPZ investments and this is not convenient to investors.³⁹⁰

Recently, there has been a development in Malawi land law which, if fully utilised, can assist in addressing the challenges associated with land acquisition for the contemplated SEZs. A new Land Act of 2016 came into operation on 1st September 2017.³⁹¹ The new Land Act repealed and replaced the old Land Act of 1967.³⁹² The new Land Act provides that land designated for investment purposes shall be identified, published in the *Gazette* and allocated to the MITC which shall create derivative rights to investors in accordance with the IEP Act.³⁹³ The new Land Act further states that the size of the land to be allocated to investors shall be in accordance to land ceilings which the Minister of Lands may, in consultation with the Minister of Trade and Industry, set by notice published in the *Gazette*, based on the type of activity and location of the land.³⁹⁴

It may therefore be said that the provision in the new Land Act recognises the importance of having certain land specially designated for investment purposes. Such provision has the potential to facilitate timely acquisition of land by

³⁸⁷ Section 8 of the EPZ Act.

³⁸⁸ Ministry of Industry and Trade (2015) 16.

³⁸⁹ For instance, in cases where a person who is not a citizen of Malawi intends to purchase title to private land, the person selling the land must firstly advertise the intended sale in Malawi newspapers at least 21 days before the date of sale (specifying the price, location and size of the land). Following the advertisement, the sale occurs only if no person who is a Malawi citizen has made an offer or has been able to purchase the title at a price not lower than the published price. The new Land Act 2016 (section 38) applies for this requirement to advertise, just like the old Land Act provided for the same.

³⁹⁰ Ministry of Industry and Trade (2015) 17.

³⁹¹ Government Notice No. 61 of 2017.

³⁹² Chapter 57:01 of the Laws of Malawi.

³⁹³ Section 11 (1) of the Land Act, 2016.

³⁹⁴ Section 11 (2) of the Land Act, 2016.

investors thereby improving the investment climate in Malawi. Although the provision is for the benefit of all investors in general, it would appear the MITC is planning to have SEZ investors in particular to be among the first beneficiaries. As of the month of December 2017, the MITC stated that as a legal and regulatory framework for new SEZs is being devised, land to pioneer the establishment of the SEZs had already been identified.³⁹⁵ Notably, this identification of land prior to the promulgation of a new SEZ law has been made pursuant to the provisions of the new Land Act. The contemplated SEZ legal and regulatory framework will therefore have to build on this foundation and provide for details of how and what type of derivative rights SEZ investors will acquire in the land allocated to the MITC.

4.5 Labour rights and ILO norms

SEZs have been an important policy instrument for many governments seeking to generate employment.³⁹⁶ International best practices advocate for respect of employee rights and ILO norms in SEZs.³⁹⁷ It has been noted, however, that violation of worker rights, unacceptable health and safety conditions, and failure to abide by official labour regulations remain a feature of many SEZs around the world.³⁹⁸ ILO monitoring documents frequently record violations of norms including: failure to comply with minimum wage law; failure to provide information about wage calculation; excess deductions; excessive payment in-kind; failure to pay on time; and improper calculation of overtime compensation.³⁹⁹ Further violations relate to hours of work including forced overtime, excess overtime, and failure to provide weekly rest.⁴⁰⁰ In an attempt

³⁹⁵ Chinamulungu O 'Special Economic Zones project takes off – MITC' *The Nation Online* 27 December 2017 available at <http://mwnation.com/special-economic-zones-project-takes-off-mitc/> (accessed on 10 May 2018). The said land is located in the cities of Lilongwe (where about 300 hectares of land was identified) and Blantyre (where about 37 hectares of land was identified).

³⁹⁶ Farole T (2011) 17.

³⁹⁷ Gauthier JP 'Legal and Institutional Frameworks for Special Economic Zones' available at <https://static1.squarespace.com> accessed 10 November 2018.

³⁹⁸ See www.workersrights.org (accessed on 16 March 2019). See also ITUC Annual Survey of Violations of Trade Union Rights available at www.solidaritycenter.org (accessed on 16 March 2019).

³⁹⁹ Robertson R, Brown D & Pierre G *et al* 'Globalization, Wages, and the Quality of Jobs: Five Country Studies' (2009) 43 available at <https://openknowledge.worldbank.org/handle/10986/11715> (accessed on 13 March 2019). The ILO monitoring data come from Cambodia, Vietnam, Jordan, and Haiti.

⁴⁰⁰ Tinarwo J - Transforming African Agriculture through Special Economic Zones: Opportunities and Challenges. Also ILO 'Trade Unions and Special Economic Zones in India, Geneva, Switzerland'

to deal with these issues, the ILO Committee on Employment and Social Policy drafted an employment and social policy for EPZs.⁴⁰¹

Malawi is a member State of the ILO and has ratified 29 of the 188 ILO Conventions (including the eight core conventions).⁴⁰² By ratification, Malawi undertakes to abide by the provisions of the conventions and any violation of the same would subject Malawi to ILO scrutiny through the ILO supervisory body, the Committee of Experts on Application of Conventions and Recommendations (CEACR).⁴⁰³ CEACR vigorously publishes breaches of ILO conventions provisions by member states and requires the states to rectify the problem. The requirements to rectify breaches take the form of individual observations, direct requests or general observations, depending on the severity of the breach.⁴⁰⁴ The Malawian government has so far received observations from CEACR relating to ILO Convention 100 concerning equal remuneration; ILO Convention 111 concerning discrimination (employment and occupation); and ILO Convention 138 concerning minimum age.⁴⁰⁵ Direct requests received by Malawi Government include ILO Convention 138 concerning minimum age, ILO Convention 29 concerning forced labour and ILO Convention 105 concerning abolition of labour.⁴⁰⁶

State parties are obliged to adhere to CEACR's recommendations as part of their commitment to the ILO Constitution and principles.⁴⁰⁷ Adherence by member States involves abolishing labour laws that are in breach of ILO Conventions or actively developing labour laws and policies that have inbuilt

(2012) available at http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/ (accessed on 9 July 2018).

⁴⁰¹ The ILO has also made several recommendations regarding labour issues in EPZs such as ILO 'Labour and Social Issues Relating to Export Processing Zones' (Geneva, 1998), TMEPZ/1998; and ILO/UNCTC 'Economic and Social Effects of Multinational Enterprises in Export Processing Zones' (Geneva, ILO, 1988).

⁴⁰² Sikwese R S *Labour Law in Malawi* (2 ed) (2014) 228.

⁴⁰³ Sikwese R S (2014) 228.

⁴⁰⁴ Sikwese R S (2014) 228. The difference between an observation and a direct request is that the former contains fundamental comments on fundamental questions raised on the application of a particular convention by a member State while the latter, on the other hand, usually relate to questions of a more technical nature or of lesser importance or certain requests for information or clarification.

⁴⁰⁵ Sikwese R S (2014) 229.

⁴⁰⁶ Sikwese R S (2014) 229.

⁴⁰⁷ Sikwese R S (2014) 229.

mechanisms to deal with ILO obligations.⁴⁰⁸ The current Malawi labour laws, particularly the Employment Act of 2000 and the Labour Relations Act of 1996 appear to be consistent with Malawi's obligations under the ratified ILO Conventions. The stated labour laws apply to the current Malawi EPZ regime.⁴⁰⁹ There appears to be no available literature recording violations of worker rights or failure to abide by labour regulations specifically in Malawi EPZs. Should the current labour laws continue to apply in the contemplated new SEZ regime, it seems unlikely that issues of ILO conventions non-compliance would be faced by Malawi. However, in the event that the new SEZ regime, in efforts to attract investment, provides for special labour law considerations⁴¹⁰ for SEZs, the same should be done within the precincts of the ILO norms.

4.6 Dispute resolution mechanisms

Chapter two of this study has also demonstrated that international best practice recommends that the legal and regulatory framework for SEZs should be trustworthy, transparent and predictable by, among other things, providing for standards of protection and investor remedies that are clearly established and provide a satisfactory level of comfort to investors.⁴¹¹ This entails putting in place efficient dispute settlement mechanisms for SEZ investors that include: recourse to binding international investment arbitration; dedicated internal SEZ mechanisms for administrative reviews;⁴¹² and proper, reliable, efficient and effective enforcement procedures.⁴¹³

⁴⁰⁸ Sikwese R S (2014) 229.

⁴⁰⁹ The EPZ Act does not provide for special labour law considerations relating to EPZs.

⁴¹⁰ For example: hiring and firing without prior administrative authorisation – to promote job creation; flexible employment and compensation arrangements; transparent foreign worker regime; and unified multiple entry visa/work permit/residency.

⁴¹¹ Such as: no expropriation of property for an improper purpose, combined with a guarantee of adequate and fair monetary compensation; full protection and security for investments; no arbitrary or discriminatory measures with respect to investments; and no selective application of benefits. See chapter two, section 2.10.4.

⁴¹² Gauthier JP 'Legal and Institutional Frameworks for Special Economic Zones' available at <https://static1.squarespace.com> accessed on 10 November 2018.

⁴¹³ Webb S & Coleman J 'Factors Contributing to Success of a Special Economic Zone – An overview of International Best Practice in Developing SEZs' (2018) available at www.dlapiper.com (accessed 15 June 2018).

Malawi's legal system is based on English Common Law, pre-1902 English Statutes of General Application and Acts of Parliament of Malawi.⁴¹⁴ Malawi has an independent judiciary, which consists of the High Court⁴¹⁵ and its subordinate courts. The High Court has original jurisdiction in both civil and criminal matters.⁴¹⁶ Appeals from the High Court lie to the Supreme Court of Appeal. Subordinate courts include Magistrates courts and an Industrial Relations Court. The Industrial Relations Court has jurisdiction to hear labour disputes.⁴¹⁷ Appeals from both the Magistrates courts and the Industrial Relations Court lie to the High Court.⁴¹⁸

The High Court of Malawi has an established mandatory mediation process to promote agreements between parties in disputes before court trials start.⁴¹⁹ It is noted however that the processing of commercial cases has been relatively slow in recent years and the enforcement of judgments continues has been a problem as commercial enforcements are not necessarily given priority by the high Court sheriffs.⁴²⁰ This is one challenge in Malawi's court system that needs to be addressed.

The High Court's overall approach is pro-arbitration and where there is a valid arbitration agreement, the Court will not intervene unless there are compelling reasons.⁴²¹ Malawi arbitration law is not based on the UNCITRAL Model Law. Rather, it is mainly governed by the Constitution⁴²² and the Arbitration Act of 1967.⁴²³ With regard to investment-related arbitration, Malawi is a member of the International Centre for Settlement of Investment Disputes (ICSID) and accepts binding international arbitration of investment disputes between foreign

⁴¹⁴ Miles J, San TF & Shah KR *Arbitration in Africa: A Review of Key Jurisdictions* (2016) 201.

⁴¹⁵ Which has Commercial, Civil, Criminal, Revenue and Family and Probate divisions. See section 6A of the Courts Act (Chapter 3:02 of the Laws of Malawi).

⁴¹⁶ Section 108(1) of the Constitution of the Republic of Malawi, 1994.

⁴¹⁷ Section 110 (2) of the Constitution of the Republic of Malawi, 1994.

⁴¹⁸ Sections 18 and 19 of Courts Act, Chapter 3:02 of the Laws of Malawi.

⁴¹⁹ Order 13 of the Courts (High Court) (Civil Procedure) Rules. Government Notice No. 38 of 2017.

⁴²⁰ Africa Legal Network 'Malawi Investment Guide 2018/2019' (2018) 20 available at <https://www.africalegalnetwork.com/malawi/new-pub/malawi-investment-guide> accessed on 16 March 2019.

⁴²¹ Miles J, San TF & Shah KR *Arbitration in Africa: A Review of Key Jurisdictions* (2016) 201.

⁴²² The Constitution of the Republic of Malawi 1994.

⁴²³ Chapter 6:03 of the Laws of Malawi.

investors and the state if specified in a written contract.⁴²⁴ There have been recent calls for Malawi to review its Arbitration Act of 1967 to improve settlement of investment disputes through arbitration thereby improving the investment climate.⁴²⁵

Apart from recourse to binding international investment arbitration, efficient dispute settlement mechanisms for SEZ investors also require dedicated internal SEZ mechanisms for administrative reviews.⁴²⁶ The current EPZ law makes no provision for such administrative review mechanisms. It is important that the new SEZ law makes adequate provision for dedicated internal SEZ mechanisms for review of administrative decisions taken by SEZ authorities. As Malawi develops the new SEZ regime, the lack of adequate legal provisions for dispute resolution mechanisms such as administrative reviews need to be considered as they have direct effect on the conduciveness of the investment climate in Malawi SEZs.

4.7 Prevailing economic circumstances

There are certain economic circumstances prevailing in Malawi that would be worth highlighting as they would normally influence investors' decisions to invest in a country in general and in SEZs in particular. This study does not aim to make an in-depth analysis of such economic circumstances or to suggest solutions to economic issues. Suffice to mention that in developing a new SEZ legal and regulatory framework, the developers will have to bear these economic circumstances in mind.

Regarding the status of corporate tax for Malawi's EPZs enterprises, prior to the year 2011 the corporate tax rate applied was zero.⁴²⁷ In the year 2011 the Malawi Government abruptly removed the zero corporate tax rate on EPZs and began applying a corporate tax rate of 30 percent which applied to all corporate

⁴²⁴ See <https://icsid.worldbank.org/en/Pages/icsiddocs/List-of-Member-States.aspx> (accessed on 2 March 2019).

⁴²⁵ Mhone K 'Arbitration Law in Malawi and its Implications for the PTA/ SADCC organisations' (1990) 23(2) *The Comparative and International Law Journal of Southern Africa* 234.

⁴²⁶ Gauthier JP 'Legal and Institutional Frameworks for Special Economic Zones' available at <https://static1.squarespace.com> (accessed on 10 November 2018).

⁴²⁷ Ministry of Industry and Trade (2015) 3.

entities incorporated and operating in Malawi.⁴²⁸ This decision is said to have led to a decline in the number of EPZ enterprises. It would appear the 30 percent corporate tax rate still applies to EPZ enterprises up to date. In addition, previous tax breaks for industrial buildings, plants and machinery granted to enterprises in EPZs were reduced from 100 percent to 40 percent and this has also adversely affected the Malawi EPZ investment climate⁴²⁹ Such abrupt changes in EPZ taxation law appear to undermine the certainty and predictability in SEZ laws, which international best practice advocates for.

Poor transport infrastructure (particularly roads and railways) has also been listed as one of the factors that have led to the failure of the Malawi EPZ programme to attract higher levels of Foreign Direct Investment (FDI).⁴³⁰ Further challenges include unreliable supply of water and electricity and foreign currency shortages.

4.8 Conclusion

This chapter has outlined the legal and economic circumstances that ought to be considered when developing a new SEZ regime for Malawi. The analysis conducted in this chapter has shown that while Malawi's obligations under WTO law should be considered, no serious conflicts with WTO law are anticipated in the near future due to Malawi's status as a LDC. The situation is somehow different with regard to Malawi's obligations under RTAs. In this regard, there is potential conflict between RTA obligations and the contemplated SEZ regime. While SEZ-RTA harmonisation by RTA member States has been suggested as a solution to SEZ-RTA conflicts, efforts of such harmonisation are yet to be seen under the TRAs Malawi is currently party to. The country therefore has a task to shape its new SEZ regime in a manner that minimises the stated conflict.

This chapter has also observed that several aspects of Malawi's domestic legislation on immigration, land acquisition and tax need consideration and

⁴²⁸ Ministry of Industry and Trade (2015) 3.

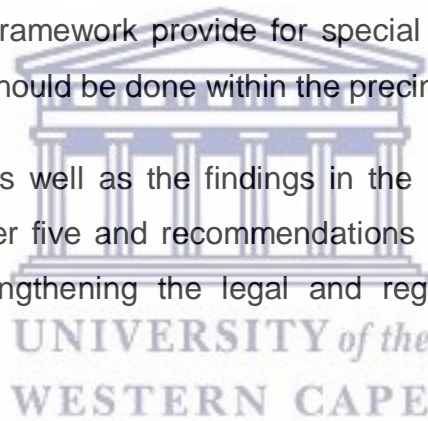
⁴²⁹ Africa Legal Network 'Malawi Investment Guide 2018/2019' (2018)9 available at <https://www.africalegalnetwork.com/malawi/new-pub/malawi-investment-guide> (accessed on 16 March 2019).

⁴³⁰ Ministry of Industry and Trade (2015) 14.

improvements in order to address practical challenges that are encountered by investors in setting up operations in the current EPZ regime. The existing MITC one-stop-shop could be utilised by the new SEZ law to facilitate obtaining of BRPs and TEPs under the immigration laws. With regard to land acquisition, whilst the Land Act of 2016 has taken a positive step towards facilitating acquisition of land rights by investors generally, the new SEZ law could build on the same and stipulate details of the acquisition procedures by SEZ investors in particular. It has also been noted that there currently are no adequate dispute resolution mechanisms, particularly for administrative review of actions taken by SEZ authorities.

With regard to labour laws, the chapter has noted that if the current labour laws continue to apply in the contemplated new SEZ regime, it is unlikely that Malawi will be found to be non-compliant with ILO conventions. However, should the new SEZ regulatory framework provide for special labour law considerations, such considerations should be done within the precincts of the ILO norms.

The above findings as well as the findings in the preceding chapters will be summarised in chapter five and recommendations on the same will be made with the aim of strengthening the legal and regulatory framework for the contemplated SEZs.



CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

Chapter five concludes this thesis and makes recommendations. It is divided into two parts. The first part summarises the findings of this thesis in the preceding chapters. The findings relate to factors that motivate countries to develop SEZs as well as the approaches that are said to be the best practices in developing SEZs around the world. The findings also highlight areas in the current Malawi EPZ regime that will need consideration and improvement when developing a new SEZ regime in order to improve the investment climate and potentially enhance performance of the SEZs. Further, the findings touch on the current legal and economic circumstances prevailing in Malawi that would have a bearing on the intended new SEZ legal and regulatory framework.

The second part of this chapter makes recommendations on how Malawi can formulate a sound legal and regulatory SEZ framework. The recommendations, which are mostly drawn from arguments made in this thesis, are responsive to the challenges that the country has faced with its existing EPZ programme and is likely to face in setting up and running a new SEZ programme. The recommendations are made in the context of the legal and economic circumstances prevailing in Malawi.

5.2 Summary of findings

Over the years Malawi EPZs have not succeeded in attracting FDI as was the intention and there has been a substantial decline in the number of enterprises operating in the EPZs over the years.⁴³¹ Due to EPZs' focus on manufacturing goods for export, stakeholders have argued that the EPZ concept is a narrow and inadequate approach to attracting investment and have proposed the establishment of multi-sectoral SEZs.⁴³² This approach to SEZs will entail

⁴³¹ See chapter one, section 1.1. Ministry of Industry and Trade (2015) 8.

⁴³² See chapter one, section 1.1. Ministry of Industry and Trade (2015) 17.

introducing other types of SEZs covering a wide assortment of economic sectors with the hope that the SEZs will benefit the country's economy.

It has been argued that an effective legal framework is the first of several steps necessary for the development of successful SEZs.⁴³³ The failure of Malawi's EPZs could partly be a result of ineffectiveness or inefficiencies of the country's EPZ law.⁴³⁴ As Malawi contemplates setting up the proposed diverse SEZs, a sound legal and regulatory framework will be one of the key factors that will have a positive impact on the investment climate and consequently the performance of the SEZs.

An analysis of international best practices in SEZ development reveals that the following elements, when engaged in an SEZ programme, are argued to have the potential to strengthen and optimise efficiency of an SEZ legal framework: use of streamlined procedures for business registration; facilitating provision of permits and authorizations (including permits covering land, building, labour, health and safety matters); trustworthiness, transparency and predictability by providing for investor protection and clearly established remedies; adequacy and effectiveness of a dispute resolution system that is fair and that ensures minimum costs of pursuing a claim and effective enforcement procedures.⁴³⁵

Further elements of an SEZ legal and regulatory framework which arguably improve the SEZ business climate for investors include: independence of the SEZ regulator; clear property rights and guarantees; developer/operator rights and obligations including rights to lease and build on land, to build infrastructure and utilities as well as to provide ancillary services; flexible and efficient labour laws including that respect of ILO norms; trade facilitation which entails close cooperation with national authorities and fast-tracking of customs clearance.⁴³⁶

⁴³³ See chapter one, section 1.1. Farole T (2011) 11.

⁴³⁴ See chapter three for full discussion.

⁴³⁵ See chapter two, section 2.10.4. MENA-OECD Investment Programme (2009) 14. See also Webb S & Coleman J 'Factors Contributing to Success of a Special Economic Zone – An overview of International Best Practice in Developing SEZs' (2018) available at www.dlapiper.com (accessed 15 June 2018).

⁴³⁶ See chapter two, section 2.10.4. Gauthier JP 'Legal and Institutional Frameworks for Special Economic Zones' available at <https://static1.squarespace.com> accessed on (10 November 2018).

This study has not come across evidence showing that in countries where the stated international best practices have been implemented, they have consistently produced positive results. This study has therefore taken the position that the said international best practices should only be considered as recommendations which should be employed in light of the circumstances prevailing in Malawi.⁴³⁷

This study's analysis of the current Malawi EPZ regime and its practicalities has found that while the EPZ Act states that SEZ enterprises shall be entitled to such benefits as may be specified under the Taxation Act, the Customs and Excise Act, the Value Added Tax Act, the Exchange Control Act or any other written law, such laws do not expressly and consistently provide for benefits specifically designed for EPZ enterprises.⁴³⁸ There are a few benefits that are expressly provided for in statutes and which nonexclusively apply to EPZs. Such express benefits appear to have had no significant impact on the performance of EPZ enterprises. The study has further found that the EPZ regime's focus appears to have been placed on fiscal incentives rather than creating an improved investment climate in EPZs.⁴³⁹

Whilst international experience shows that a majority of government developed and managed SEZs have been less effective than their private counterparts,⁴⁴⁰ this study observes that there is minimal private sector involvement in the operation of Malawi EPZs and the current purported EPZ regulatory body has very limited powers and autonomy.⁴⁴¹ The current EPZ law also makes no provision for crucial aspects such as simplified and streamlined procedures for business registration, investment approvals, expatriate work permits, granting of import and export licenses, accelerated on-site customs inspection, automatic foreign exchange access, and land acquisition.⁴⁴² This has seen investors having to deal with individual line ministries and agencies in setting up operations in EPZs. A further observation is that despite the EPZ Act giving the

⁴³⁷ See chapter two, section 2.12.

⁴³⁸ See chapter three, section 3.4.2.

⁴³⁹ See chapter three, section 3.5.2.

⁴⁴⁰ Moberg L 'The political economy of special economic zones' (2015) 11(1) *Journal of Institutional Economics* 173.

⁴⁴¹ See chapter three, section 3.5.1.

⁴⁴² See chapter three, section 3.5.2.

Minister powers to make regulations, the Minister (with the exception of regulations for EPZ application forms and fees⁴⁴³) has made no regulations facilitating EPZ operations.⁴⁴⁴

The EPZ Act and the Customs and Excise Act do not have duty free equipment schedules (in respect of imports by EPZ enterprises). Instead, such schedules are attached to individual Export Enterprise Certificates.⁴⁴⁵ This has resulted in lack of coordination between the Ministry of Trade and Industry and the Malawi Revenue Authority (MRA) on which goods are dutiable and which ones are not. Due to the confusion, the MRA has at times refused to clear duty free equipment on the scheduled list which is attached to certificate.⁴⁴⁶ Inconsistencies in application of EPZ corporate tax incentives has also frustrated EPZ enterprises, with others opted to disinvest in EPZs, leading to a decline in the number of EPZ enterprises.⁴⁴⁷

As a case study, this thesis has briefly examined selected features of Zimbabwe's new SEZ legislation. It has been noted that Zimbabwe's SEZ legislation has, in a number of aspects, embraced international best practices particularly with regard to increased private sector involvement in SEZ regulatory affairs; independence of an SEZ regulator who is conferred with powers and functions to effectively manage SEZ affairs; clarified selection criteria for SEZ investors; streamlined SEZ administrative procedures facilitated by a one – stop shop; reasonable protection of SEZ investment; as well as flexible labour laws. Malawi can draw lessons from Zimbabwe's approach to its new SEZ legislation.⁴⁴⁸

With Malawi's current LDC status, the country ought not to be very concerned with the potential overlap between Malawi's SEZ regime and obligations under WTO law. In developing its SEZ legal and regulatory framework, Malawi would need to consider the disciplines of the ASCM relating to incentives offered under the SEZ programmes only if there is anticipation that the country will

⁴⁴³ Export Processing Zones (Fees and Forms) Regulations. Government Notice No. 96 of 1995.

⁴⁴⁴ See chapter three, section 3.2.

⁴⁴⁵ See chapter three, section 3.5.3. Ministry of Industry and Trade (2015) 17.

⁴⁴⁶ See chapter three, section 3.5.3. Ministry of Industry and Trade (2015) 17.

⁴⁴⁷ See chapter three, section 3.5.3. Ministry of Industry and Trade (2015) 10.

⁴⁴⁸ See chapter three, section 3.6.

develop and be reclassified as a Developing Country in the near or foreseeable future⁴⁴⁹.

Malawi is a member of SADC and COMESA. Membership in these RTAs (and potentially other RTAs that are being established e.g. TFTA and AfCFTA) has the potential to pose challenges with regard to development of SEZs. It has been noted that the establishment of RTAs affects the possibilities for zone creation within RTA member states and alters the trading environment in which SEZ enterprises operate.⁴⁵⁰

With regard to International Labour organisation (ILO) norms, the current Malawi labour laws, particularly the Employment Act of 2000 and the Labour Relations Act of 1996 appear to be consistent with Malawi's obligations under the ratified ILO Conventions.⁴⁵¹

Dispute settlement mechanisms for SEZ investors require dedicated internal SEZ mechanisms for administrative reviews, among other things.⁴⁵² The current EPZ law makes no provision for such administrative review mechanisms.⁴⁵³

5.3 Recommendations

In view of the above findings, the study makes the following recommendations that can be employed as tools for developing a sound legal and regulatory framework for SEZs in Malawi:

- (a) In developing their SEZ legal and regulatory framework, Malawi should consider and draw lessons from international best practices that have emerged in the development of SEZs over the years, particularly those relating to legal and regulatory frameworks. The said best practices

⁴⁴⁹ See chapter four, section 4.2.

⁴⁵⁰ See chapter four, section 4.3. Sergeant J & Matthews L 'Combining Export Processing Zones and Regional Trade Agreements: Lessons from the Mexican Experience' (2001) 29 (10) *World Development* 1739.

⁴⁵¹ See chapter four, section 4.5.

⁴⁵² See chapter four, section 4.6. Gauthier JP 'Legal and Institutional Frameworks for Special Economic Zones' available at <https://static1.squarespace.com> (accessed on 10 November 2018).

⁴⁵³ See chapter four, section 4.6.

should however be treated as recommendations and not as a guaranteed blueprint to a sound legal and regulatory framework.

- (b) The mandate of the authority regulating and/or operating the SEZs should not be limited to only making recommendations as is the case presently. The authority should be accorded powers to make decisions on crucial regulatory issues (albeit with proper checks and balances) such as powers to declare areas as SEZs, to grant licences for investment in SEZs and to approve and regulate activities which may be carried out in the SEZs. This will entail the Government to some extent loosening its grip on SEZs operations.
- (c) The SEZ authority should also be accorded reasonable financial autonomy by, for instance, having powers to raise or borrow money required for the performance of its operations.
- (d) The exercise of ministerial powers granted for the making of SEZ regulations under the new SEZ law should be optimised for the benefit of the SEZs. The regulations made should be responsive to the practical needs of SEZ investors and should aim to facilitate SEZ-related processes and procedures such as business registrations, investment approvals, granting of import and export licenses, granting of work permits and land acquisition.
- (e) Malawi should consider increasing the involvement and participation of the private sector in running the operational and regulatory affairs of SEZs. One way of achieving this is to provide for increased private sector representation (possessing relevant skills and qualifications) on the SEZ authority's board as opposed to having more government representation. The role of the private sector should also be clearly laid out in the new SEZ law.
- (f) The primary focus of the new SEZ regime should not only be on providing fiscal incentives but also creating an improved investment climate in the SEZs. Improvement of the investment climate in this regard entails, for instance, adequately providing for simplified and streamlined procedures

for business registration, investment approvals, granting of work permits, granting of import and export licenses, accelerated on-site customs inspection, automatic foreign exchange access and land acquisition.⁴⁵⁴

- (g) The contemplated SEZ law should take advantage of the existing MITC's one-stop-shop services by making provision for prospective SEZ investors to use the one-stop-shop in setting up their businesses and to obtain permits expeditiously.
- (h) The law should clearly state the selection criteria and incentives that apply to SEZ investors for purposes of certainty. Clarity and certainty will work to ensure that there is coordination between the various SEZ stakeholders, for instance the SEZ authority and the Malawi Revenue Authority.
- (i) In the event that the new SEZ regime, in efforts to attract investment, provides for special labour law considerations for SEZs,⁴⁵⁵ the same should be done within the precincts of the ILO norms, particularly those relating to compliance with minimum wage law, payment on time, proper calculation of overtime compensation and provision of weekly rest.
- (j) The challenges relating to Malawi's dispute resolution mechanisms, particularly Malawi's arbitration, should be considered and addressed as they have direct effect on the conduciveness of the investment climate in Malawi. In particular, Malawi should review its Arbitration Act of 1967 and, where necessary, incorporate modern and widely applied international principles of arbitration in order to improve settlement of investment disputes.
- (k) The new SEZ law should make adequate provision for dedicated internal SEZ mechanisms for review of administrative decisions taken by SEZ authorities. For example, the SEZ law can provide for a procedure allowing investors aggrieved with a decision of the SEZ authority to

⁴⁵⁴ MENA-OECD Investment Programme (2009) 13.

⁴⁵⁵ For example: hiring and firing without prior administrative authorisation – to promote job creation; flexible employment and compensation arrangements; transparent foreign worker regime; and unified multiple entry visa/work permit/residency.

appeal against such decision to the Minister of Trade and Industry, who should issue his determination on the appeal within a prescribed time.

An SEZ legal and regulatory framework which addresses the above-listed recommendations would, in the authors' view, be sound enough and capable of improving the investment climate in Malawi SEZs and consequently enhancing performance of the SEZs.

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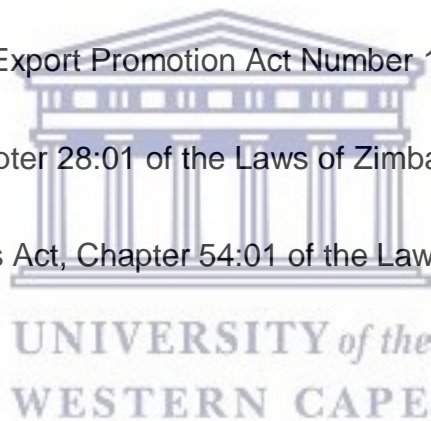
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