

RESEARCH ARTICLE

Evaluating South Africa's Special Economic Zones

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Abstract

Special economic zones (SEZs) can be described as “carved out jurisdictions within the overall jurisdiction of a state in order to introduce different laws and regulations that are usually more trade and investment friendly”. South Africa's SEZs are created under the Special Economic Zones Act 16 of 2014. This article analyses the country's legal framework for SEZs, which legal scholars have thus far only examined from a purely economic perspective. It provides a brief historical overview of industrial development zones, examines the 2014 act and suggests some reforms within the SEZ legislative framework. A comparative analysis is provided by drawing some lessons from BRICS member countries that have a successful record in operationalizing SEZs.

Keywords: special economic zones; industrial development zones; South Africa; one-stop shops; free trade zones; foreign direct investment

Introduction

South Africa's unemployment crisis began long before COVID-19.¹ The country has millions of unskilled, inexperienced workers looking for work in a labour market that drives firms to minimize low-skilled employment and emphasize skill- and capital-intensive activities. These challenges have underscored the imperative for reconceptualizing the current programme for Special Economic Zones (SEZs). While the SEZ programme should not be considered a panacea for South Africa's employment crisis, international evidence suggests that a well-designed legal and policy framework for SEZs has proven to be a remarkable tool for growth and job creation.² In the South African context, appropriately conceptualized SEZs could play a key role in creating the conditions needed for the emergence and growth of low-skilled and labour-intensive industries. Globally, the development of new SEZs has increased dramatically in the last two decades, from 900 zones in 1998 to 5,400 in 2018.³ In Africa, the first SEZ was unveiled in Mauritius in 1970, followed by Ghana and Senegal towards the end of the decade. In 2020, it was reported that that almost 237 zones had been established in 38 of Africa's 54 countries.⁴ In 2012, the South African government adopted an SEZ policy

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1 Even before COVID-19, South Africa's unemployment rate in 2019 was 29.1%: “Unemployment rises slightly in third quarter of 2019” *Stats SA* (29 October 2019), available at <<https://www.statssa.gov.za/?p=12689>> (last accessed 27 April 2023).

2 Countries such as China and India (discussed further below) are prime examples of how an appropriate SEZ legal framework can provide a conducive legal environment for foreign direct investment.

3 *World Investment Report* (2019, UN Publications), chap IV “Special economic zones”, available at: <https://unctad.org/system/files/official-document/WIR2019_CH4.pdf> (last accessed 5 March 2023).

4 *Ibid.*

with the aim of attracting investment, technological advancement and export promotion, and addressing the challenges of the previous industrial development zones (IDZs). The SEZs are seen as a vehicle for generating employment opportunities, promoting export-oriented growth, expanding the manufacturing sector, up-scaling trade and creating additional industrial hubs within the country.⁵

To facilitate the SEZ policy objectives, the government enacted the Special Economic Zones Act 16 of 2014 (SEZ Act), to provide a legal and institutional framework for the development, operation and management of SEZs in South Africa. Even though there are mixed results, there is strong evidence for the claim that solid regulatory frameworks, solid institutions and good governance are critical to the success of any SEZ regime. In general, the legal infrastructure of SEZs should ensure the consistent, transparent and predictable implementation of SEZ policies.⁶ Section 4 of the SEZ Act broadly defines an SEZ as an economic development tool to promote national economic growth and exports by using support measures to attract targeted foreign and domestic investment and technology. The SEZ Act indicates that an SEZ means an area designated as an SEZ under section 23(6).⁷ The SEZ policy also provides a useful definition, defining an SEZ as a geographically designated area of a country set aside for specifically targeted economic activities, which are then supported through special arrangements (which may include laws) and support systems to promote industrial development.⁸ Several discernible points can be extracted from this definition. First, SEZs must be in a delineated geographic area. Secondly, they have specific targeted economic activities that may not necessarily be available to the domestic market and other areas of the country's economy. Thirdly, they have a designated regulatory environment and other non-specified special arrangements, which are conducive to domestic and foreign direct investment. Lastly, they have other support systems to promote industrial development. SEZs have also been described as "carved out jurisdictions within the overall jurisdiction of a state for the purposes of introducing different laws and regulations that are usually more trade and investment friendly".⁹

The SEZ Act allows for the creation of various types of SEZ, including: free ports with a duty-free area adjacent to a port of entry where imported goods may be unloaded for value-adding activities within the SEZ for storage, repackaging or processing, subject to customs procedures;¹⁰ free trade zones with a duty-free area offering storage and distribution facilities for value-adding activities within the SEZ for subsequent export;¹¹ places designated as a port of entry for the control of vessels, aircraft, trains, vehicles, goods and persons entering the Republic;¹² and sector development zones, focused on the development of a specific sector or industry through the facilitation of general or specific industrial infrastructure, incentives, technical and business services primarily for the export market.¹³

SEZs usually offer high-quality infrastructure that supports the activities of the companies and authorities operating within them.¹⁴ SEZ infrastructure usually consists of manufacturing or

5 "Policy on the development of special economic zones in South Africa" (2012, DTIC), available at: <http://www.thedtic.gov.za/wp-content/uploads/Policy_SEZ.pdf> (last accessed 5 March 2023).

6 E Laryea, D Ndonga and B Nyamora "Kenya's experience with SEZs: Legal and policy imperatives" (2020) 28/2 *African Journal of International and Comparative Law* 171 at 172.

7 The minister, after considering the recommendation of the Advisory Board and after consultation with the minister of finance: may designate an area as an SEZ by notice in the *Gazette* with or without conditions; and must issue the applicant with an SEZ licence if the area is so designated.

8 "Policy on the development of SEZs", above at note 5 at 13.

9 L Moberg "The political economy of special economic zones: Lessons for the United States" (2018) 21 *Chapman Law Review* 407 at 408.

10 SEZ Act, sec 24(5)(a).

11 Id, sec 24(5)(b).

12 Id, sec 24(5)(c).

13 Id, sec 24(5)(d).

14 Id, sec 24(2).

industrial parks, as well as transport links that connect the SEZ to its different sources and markets. A well-designed legal and regulatory framework and institutions, as well as good governance, are vital for an SEZ's success. The SEZ's operating procedures should also be practical and responsive to investors' needs. The legal framework should also set out SEZ investment rules, institutional arrangements, fiscal incentives and tax administration, licensing and regulation of business activities, trade facilitation and customs controls, and dispute settlement mechanisms.¹⁵ The effectiveness of the authority responsible for enforcing the legal framework will make or break an SEZ programme. Independent agencies under a board of directors including both public and private sector representatives have a better track record. Finally, good governance and the rule of law, including effective anti-corruption procedures, are crucial.¹⁶

For an SEZ to be successful, policy makers need to work closely with the private sector in the light of changing needs to foster investor confidence by encouraging policy transparency and predictability. According to Farole, the legal and institutional framework governing SEZs is a critical determinant of success because it ensures predictability and eliminates the possibility of policy reversal.¹⁷ The legal and regulatory framework should reduce the administrative burden, cost and time for investing in the SEZ compared with investing in the domestic market. This will lead to increased investment in the SEZ. A one-stop shop, housing all relevant legal and regulatory issues, is usually a common tool for reducing the compliance burden.

Against this background, this article provides a brief overview of the historical development of South Africa's SEZ programme, examining the shortcomings of the previous IDZs. This discussion proffers insights into the thinking that informed the legal and policy choices of the new SEZ programme. It then discusses the transition arrangements from the IDZs to the enactment of the current SEZ Act, before examining the legal, institutional and policy framework of the SEZ programme and suggesting some reforms. Given that South Africa's SEZ programme was inspired by the Chinese use of SEZs, and stronger institutional linkages through BRICS and the Forum on China-Africa Cooperation (FOCAC), the article compares the South African SEZ programme with other BRICS countries from a legal and policy perspective, focusing on the key aspects of the regulatory design of SEZs, such as the ownership structure, incentives provided by the SEZ programme, the governance and institutional structure, one-stop shops and infrastructure development needs. Drawing on evidence from BRICS countries, the article provides some lessons for the successful implementation and operation of SEZs in the South African context. This contribution may also be of significant relevance to policy makers in other African countries.

A brief background to IDZs

The South African government first envisaged the use of SEZs in 2000 when the Department of Trade, Industry and Competition (DTIC) introduced the IDZ programme through the Manufacturing and Development Act 187 of 1993 (MDA) to reposition the country in the world economy. The government designed and licensed four IDZs: Coega, Richards Bay, East London and OR Tambo International Airport. They were established in areas close to international airports and ports and were meant to provide an environment conducive to investment, characterized by less bureaucracy and good quality infrastructure. However, the IDZ programme did not generate the economic growth that had been expected. It was constrained by a criterion that an IDZ must be located adjacent to a seaport or international airport, which restricted the programme from

15 T Farole, C Baissac and J-P Gauthier "Special economic zones: A guidance framework for policymaking" (draft, June 2013), available at: <<https://static1.squarespace.com/static/54d667e5e4b05b179814c788/t/5bc6f862a4222f9ca0735485/1539766376427/Farole-et-al-2013--SEZ+Policy+Framework-FinalDraft.pdf>> (last accessed 5 March 2023).

16 Id at 17.

17 Id at 18.

harnessing the long-term development potential of all regions and thus perpetuated economic marginalization and spatial inequalities in South Africa.¹⁸ Another constraint was inadequate coordination across government agencies. The MDA did not provide a coordination and integration mechanism between stakeholders, with clear roles and responsibilities for each. This became evident in several areas, such as the delays caused by disputes over the availability of land for progressing the Richards Bay and OR Tambo IDZs. With better coordination and collaboration in planning, implementation and management, such areas of contention could have been easily resolved, leading to more efficient delivery of the programme.¹⁹

The IDZ programme did not provide special incentives for foreign investors in the IDZs.²⁰ This resulted in the failure to create industrial enclaves where the environment was conducive for investors, and therefore highlighted the importance of fiscal and other special incentives in creating a more efficient and effective setting for investors. Limited new investment suggested that the programme failed to create investor-friendly environments. Most of the investments were capital-intensive and therefore generated relatively few jobs.²¹ Moreover, ad hoc funding arrangements resulted in IDZs relying on a single stream of on-budget funding from the National Treasury. This model had a weakness, in that it restricted the flexibility to cover the costs of unexpected projects that needed to be established in the zones. Furthermore, this funding model excluded development finance institutions as well as private sector financing, resulting in inadequate funding. The IDZs were funded by all three tiers of government from local, provincial to national level.²² The IDZs' daily operations were funded at the local and provincial government level, while funding for developing the IDZ infrastructure was sourced at the national level and channelled through the DTIC in the form of grants. This position was untenable, because the funding arrangement for IDZs was entirely dependent on government funding for both operational and capital expenditure. This was problematic, as the funding was dispensed on an ad hoc basis and relied on the surplus budget in the successive medium-term expenditure fiscal framework of provincial and national governments. The model focused on the short term and was devoid of certainty for long-term objectives, which made it difficult for a sustainable long-term plan to be developed.²³ The IDZs were publicly owned and operated. In fact, they could not even earn the name SEZ, as there was nothing special about them.²⁴ The lack of quality infrastructure was another challenge that the IDZs had to deal with and SEZs are still facing. While this may be insignificant in attracting investment as similar infrastructure may be found elsewhere, it is pertinent to the South African context because the country is currently facing formidable challenges with public utilities such as water and electricity, which are usually tied to the jurisdiction where a zone is situated. There was no single piece of legislation that was exclusively dedicated to the development, operation and management of IDZs.²⁵

18 W Nyakabawo "The geographic designation of special economic zones" (TIPS working paper, November 2014), available at: <https://www.tips.org.za/files/special_economic_zones_november_2014.pdf> (last accessed 5 March 2023).

19 "Policy on the development of SEZs", above at note 5 at 13.

20 Ibid.

21 C Chinguno "South Africa's experience with special economic zones" (November 2011, Centre for Development and Enterprise), available at: <https://pmg.org.za/files/130522annexure_b2.doc> (last accessed 5 March 2023).

22 "Special economic zones and industrial parks outcomes in respect of investments, economic growth and job creation: Stakeholder engagement; with deputy minister" (National Council of Provinces Committee Trade & Industry, Economic Development, Small Business, Tourism, Employment & Labour meeting, 16 March 2021), available at: <<https://pmg.org.za/committee-meeting/32576/>> (last accessed 5 March 2023).

23 "Policy on the development of SEZs", above at note 5 at 14.

24 Chinguno "South Africa's experience", above at note 21.

25 IDZs in South Africa were constituted under the MDA under the control and purview of the Department of Trade and Industry, which was in charge of the programme's regulation, promotion and review.

The MDA did not sufficiently address the unique requirements of the programme as it was not based on dedicated legislation focusing explicitly on the IDZs' specific requirements.²⁶ Dedicated legislation was essential to address the identified weaknesses of the previous IDZs and establish a good environment in which SEZs could thrive.²⁷ Under the MDA, the IDZs were subsidiaries of private corporations, which were wholly owned by the South African government at national, provincial and local level. Different tiers of government therefore had vested interests in the IDZs' operation, with no private sector involvement in the ownership of the IDZs.²⁸ The MDA did not provide sufficient guidance about the IDZs' governance arrangements. The result is that there was insufficient oversight of the IDZs' strategic plans and operations. Thus, the MDA did not make it possible to clarify institutional arrangements and governance for the IDZs.

Transition into the new SEZ programme

The current SEZ programme is intended to address the design deficiencies of the disappointing IDZ programme. Since the IDZ programme is considered to have failed to generate the anticipated levels of economic development,²⁹ it is important to assess whether the new SEZ programme will be able to fulfil its intended objectives. In 2007, the IDZ programme was reviewed and revised into what is now called the SEZ programme, with more inclusive and diverse regional development needs and contexts. The IDZ revision was also motivated by new national economic policies: the New Growth Path and the Industrial Policy Action Plan, which collectively "outline the Government's industrial agenda, the critical jobs drivers, prioritized industrial sectors and a range of interventions required to accelerate economic growth, create jobs, fight poverty and underdevelopment".³⁰ Developments in the global economy, such as the formation of BRICS and increased global competition for foreign direct investment (FDI), were other factors guiding the revision.³¹ After the review of the IDZ programme, the DTIC developed a policy framework for SEZs in South Africa in 2012. This policy framework provided for a smooth transition from the IDZ regime into an expanded SEZ regime. As a result, from 9 February 2016 all existing IDZs became SEZs and were incorporated into the new SEZ programme, and new SEZs could only be established in accordance with the SEZ Act. This was mainly done to enable the development of diverse types of SEZs in accordance with changing national economic development priorities as well as regional development needs and contexts.³²

Under section 39(2) of the SEZ Act, any designation of an IDZ under the IDZ Regulations which was in force immediately before the 2014 SEZ Act came into operation remained in force and was regarded as a designation of a SEZ under the new legislation. Any IDZ operator permit issued under the IDZ regulations, which was in force immediately before the act came into operation, remained in force and was regarded as a SEZ operator permit issued under the new SEZ Act.³³ Any IDZ enterprise approved to be located in an IDZ under the IDZ regulations was regarded as a business approved to be located in a SEZ under the new act, provided that it complied with the criteria in section 24(4) and section 38(3) and (5) of the new act. Notwithstanding subsections 39(2), (3) and (4), any IDZ operator had to ensure that the IDZ complied with the framework regulating

26 "Policy on the development of SEZs", above at note 5 at 13.

27 *Ibid.*

28 *Id.* at 12.

29 *What if South Africa Had A Special Economic Zone That Was Actually Special?* (Centre for Development and Enterprise, May 2021), available at: <<https://www.cde.org.za/wp-content/uploads/2021/05/What-if-South-Africa-had-a-special-economic-zone-that-was-actually-special-1.pdf>> (last accessed 27 April 2023).

30 "Policy on the development of SEZs", above at note 5 at 12.

31 *Ibid.*

32 *Id.* at 14.

33 SEZ Act, sec 39(3).

SEZs under the SEZ Act, within three years after the act came into force.³⁴ Any application for the designation of an IDZ or the issuing of an operator permit under the IDZ regulations, which had not been finalized before the SEZ Act came into operation, had to be dealt with as an application under the SEZ Act.³⁵ The smooth transition from the IDZ to the SEZ programme is thus clear. The following section examines the legal framework for South Africa's SEZs in more detail.

Legal and institutional regime for SEZs

The South African government launched the SEZ programme in 2012 and passed the SEZ Act in 2014 to establish SEZs as a useful tool to support the implementation of the Industrial Policy Action Plan and promote beneficiation and industrial development.³⁶ Section 2 of the SEZ Act stipulates that the objects of the act are to: determine SEZ policy and strategy; establish the Advisory Board; establish the SEZ fund to support the development of SEZs; provide for the designation, promotion, development, operation and management of SEZs, and regulatory measures and incentives for SEZs in order to attract domestic and FDI; and establish a single point of contact or one-stop shop that delivers the required government services to businesses operating in the SEZs. This means that the SEZ regime is aimed at providing incentives in respect of the ease of setting up, investment and investor protection, a simplified tax regime, proper SEZ governance, and a one-stop shop or single point of contact to minimize red tape in handling investments by reducing the time it takes to register an investment and issue the necessary permit to enable the investor to start operations. The threat of bureaucracy seems apparent from the objectives of the SEZ Act, especially with the involvement of various government authorities and agencies in setting up an investment. The SEZ Act also provides an exhaustive list of SEZ purposes, ranging from facilitating industrialization and innovation, to encouraging beneficiation, to regional development and support for small businesses.³⁷ When lawmakers list every possible aim in an act, it usually means they are unable to agree on priorities. The objectives of the SEZs must set out precisely what role SEZs should play, which industries will be targeted and how the specific challenges faced by those industries should be addressed.

The SEZ Advisory Board is established under section 7 of the SEZ Act. The minister of trade, industry and competition is empowered to appoint Advisory Board members.³⁸ This differs from the route taken by other jurisdictions, such as India, where the central government appoints the SEZ Board of Approval.³⁹ Notably, the SEZ Act grants unfettered powers to the minister by not describing the circumstances under which the minister may dismiss an Advisory Board member. The SEZ Act prescribes a five-year period of tenure for Advisory Board members, with an option of renewal.⁴⁰ The act is silent on whether Advisory Board members would be granted functional immunity from court proceedings for omissions or actions committed within the course and scope of their functions, and in respect of the role of the previous IDZ Advisory Board regarding the newly established SEZs. The extensive involvement of government representatives is immediately apparent from the membership of the Advisory Board, which includes: one representative of the DTIC; one representative of the South African Revenue Services; one representative of the National Treasury; one representative of the department responsible for public enterprises; one representative of Transnet; one representative of Eskom; one representative of the Industrial Development Corporation; three persons, representing organized business, labour and civil society respectively, appointed on the basis of their knowledge and experience relevant to, and involvement

34 *Id.*, sec 39(5).

35 *Id.*, sec 39(6).

36 "Policy on the development of SEZs", above at note 5 at 14.

37 SEZ Act, sec 4(a)–(g).

38 *Id.*, sec 7.

39 SEZ Act 28 of 2005 (India) (Indian SEZ Act), sec 8(2)(a)–(h).

40 SEZ Act, sec 8(1)(a)–(b).

in, SEZs; as well as five independent persons appointed on the basis of their knowledge, experience and expertise relevant to SEZs.⁴¹

The extensive involvement of government representatives on the Advisory Board presents a risk of political interference in the design, development and operations of South Africa's SEZs, and shows a lack of sufficient autonomy for SEZs to deliver on their mandate. However, one could argue that the involvement of the heads of the relevant state departments, but not the ministers responsible for those departments, reduces that risk. The bottom line is that the SEZ Advisory Board is dominated by government officials and there is no position that has been set aside for the private sector. The result is that the private sector has no voice, consultation or influence in the running of the SEZs. Moreover, there is no direct mechanism for participation by private developers and investors in the SEZ programme. A better option could have been to establish an independent corporate entity as a juristic person with perpetual succession capable of suing and being sued, entering contracts, borrowing or receiving money, and having its own funds. The principal advantage of such a body could have been to insulate its functioning from political interference and it would be an independent entity separate from political powers. Jurisdictions such as India and Kenya provide for such an independent authority. For instance, the Indian SEZ Act provides that "the special economic Zone authority shall be a body corporate, having perpetual succession and a common seal, with the power subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, to contract and shall be by the said name sue and be sued".⁴² Likewise, the Kenyan SEZ Act establishes its SEZ authority as an independent corporate entity with power to enter into contracts, acquire and dispose of movable and immovable property and with the capability of being sued and to sue.⁴³ The drafters of the South African SEZ Act should have learnt from these examples and established an independent institution or authority over the country's SEZ programme instead of an Advisory Board.

South Africa's SEZ Act sets out the functions of the Advisory Board, including: advising the minister on policy and strategy in order to promote, develop, operate and manage the SEZs; monitoring the implementation of SEZ policy and strategy and reporting annually to the minister on the implementation of that policy and strategy; considering applications for the designation of new SEZs, and recommending to the minister whether or not to approve such applications and grant SEZ licences; considering applications for operator permits and recommending to the minister whether or not to approve such applications, with or without any conditions; liaising with SEZ boards and operators on the implementation of strategic plans; reporting in the prescribed manner to the minister on progress relating to the development of SEZs; advising the minister on minimum norms and standards required for the provision of a one-stop shop in a SEZ; advising the minister on initiatives to market SEZs; and assessing and reviewing the success of SEZs in achieving the purposes referred to in section 4 of the SEZ Act.⁴⁴ Thus, the SEZ Advisory Board operates as an agency, reporting through a line ministry, specifically the DTIC. While this approach does provide some level of independence since the Advisory Board is not a department within the DTIC, its links with a line ministry appear to make it more difficult for the agency to act with authority and to coordinate effectively across ministries, departments and agencies.

Notably, the South African legal framework for SEZs does not address the issue of whether the SEZ Advisory Board would be more effective under the existing reporting line ministry of the DTIC or through central government in the president's office; as the role of SEZs broadens beyond export promotion, it requires more political will and resources beyond the scope of the ministry in the DTIC. This article recommends that the South African government considers making the

41 *Id.*, sec 7(i).

42 Indian SEZ Act, sec 31(2).

43 SEZ Act 2015 (Kenya) (Kenyan SEZ Act), sec 10(1) and (2)(a)–(e).

44 SEZ Act, sec 11(a)–(j).

Advisory Board report to the president, as suggested by international best practice. This could facilitate speedy decision making and implementation. This is suggested because best practice indicates that a regulator is more effective when its board reports to the highest possible level of government, which ideally means through central government like the presidency or prime minister rather than a line ministry. This reporting relationship is critical to ensure that the regulator has sufficient authority and autonomy, and is in a strong position to coordinate actions across ministries, departments and agencies.⁴⁵ The SEZ Act requires the Advisory Board to advise the minister of trade, industry and competition on initiatives to market SEZs.⁴⁶ While this marketing function may be carried out by the government's investment promotion agency, ideally it is experienced private developers (often with a network of multinational clients across a range of industries to which they can market opportunities in the SEZs) that can properly carry out this function. In this regard, section 6(1) establishes the national marketing strategy, which is run by the SEZ Advisory Board to promote SEZs.

A national or provincial government, municipality, public entity, municipal entity or public-private partnership, acting alone or jointly and intending to operate a business as a SEZ, may apply to the minister of trade, industry and competition in the form and prescribed manner for the specified area to be designated as a SEZ.⁴⁷ The SEZ Act empowers the Advisory Board to consider an SEZ application, to recommend to the minister whether or not to approve the application and to issue a licence to a successful applicant.⁴⁸ An application must demonstrate that the designation of the area as an SEZ will advance the national government's industrial development objectives. It must also specify the extent to which the designation: seeks to achieve the objects and purposes of the SEZ Act; is consistent with national laws and policies; and complies with any other prescribed criteria.⁴⁹ In addition, the applicant must have access to sufficient financial resources and expertise for the development, operation, management and administration of an SEZ, must submit to the minister a comprehensive feasibility study and indicate the extent to which it owns or controls the area to be considered as an SEZ.⁵⁰ In the case of a public-private partnership, the applicant must indicate the ownership structure through the submission of a shareholders' agreement, indicating shareholdings and their percentages, and requirements for the transfer of shares and for the distribution of assets upon liquidation or deregistration.⁵¹

As indicated by the failure of the IDZ programme, the availability of funding for the development, support and operation of an SEZ is one of the key determinants of success. However, things have not yet changed and the current SEZ programme is still impacted by funding challenges. For example, the Coega SEZ is currently affected by a lack of funding for upgrading and maintaining legacy infrastructure and the challenges of securing funding for technical skills training, such as learnerships, apprenticeships and other accredited interventions. This is because the SEZ remains largely funded by the DTIC through the SEZ Fund for Capital Projects, the provincial government and self-funded generated revenue for operational expenses. The South African government is already reported to have reduced its funding to the Coega SEZ.⁵² At the root of this problem is the legal framework that regulates the SEZ funding model. The SEZ Act provides that, "the

45 The SEZ programmes in the Dominican Republic, Kenya and Senegal, for example, report directly to the president. Similarly in Bangladesh, the programme reports to the prime minister.

46 SEZ Act, sec 11(i).

47 Id, sec 23(1).

48 Id, secs 11(c) and 23(4).

49 Id, sec 23(1).

50 Id, sec 23(3)(b).

51 Id, sec 23(3)(a).

52 M Phiri and S Manchishi "Special economic zones in South Africa: White elephants and latent drives of growth and employment? A case of Zambia and South Africa" (UN University WIDER working paper 160/2020), available at: <<https://www.wider.unu.edu/publication/special-economic-zones-southern-africa-white-elephants-or-latent-drivers-growth-and>> (last accessed 5 March 2023).

Minister may, with the concurrence of the Minister of Finance, from money voted by Parliament as part of the appropriation of the department, establish a Special Economic Zones Fund to support the promotion and development of SEZs".⁵³ It further states that, "[t]he Minister may, with the concurrence of the Minister of Finance, make regulations regarding the additional source of money for the fund, and the administration, management and criteria for distribution of money from the Fund".⁵⁴ Thus the SEZ Act establishes an SEZ fund that is intended to support, promote and develop an SEZ. The fund is voted for in Parliament as part of the DTIC appropriation. The fund is therefore administered by the DTIC, which establishes an adjudication committee to evaluate funding applications. The fund is then distributed for infrastructure development, skills development, feasibility studies, business incubation, business development and performance improvement. While this provision is innovative, concerns may still be raised that the funding is sourced only from the government fiscus, which differs from international best practice where the private sector is involved in both the development and funding of SEZs.⁵⁵ It is submitted that the SEZ Act should be amended to permit explicitly funding from various sources, including a clear role for the private sector, instead of limiting funding to the government SEZ Fund. This is because South Africa is a cash-strapped developing country currently facing limited resources, including for example power outages from Eskom. International best practice suggests that SEZs can be profitably operated by the private sector with private sector funding, which can reduce the burden that SEZs place on government resources.⁵⁶

Looking at India's experiences, the Indian SEZ Act provides that "the Central Government may, after due appropriation made by Parliament by law in its behalf, make to every Authority by way of grants and loans or such sums of money as that government may think fit for being utilized for the purposes of this Act".⁵⁷ However, it is important to recognize that India's position is not comparable to that of South Africa because India permits government, fully private or joint sector ownership of SEZs.⁵⁸ The Indian SEZ Act further stipulates that an "SEZ may be established under this Act, either jointly or severally by the Central Government, State Government, or any person for manufacture of goods or rendering services or for both or as a Free Trade and Warehousing Zone".⁵⁹ Section 2 of the Indian SEZ Act defines a "person" to include: an individual, whether resident within or outside India; a Hindu undivided family; a co-operative society; a company, whether incorporated within or outside India; a firm; a proprietary concern; an association of persons or body of individuals, whether incorporated or not; a local authority; a trust; or any other entity as may be notified by the central government; or any agency, office or branch owned or controlled by any of the above. This means that the burden of developing, operating and administrative expenses for SEZs does not lie solely with the Indian government, which differs from the position in South Africa.⁶⁰

A thorough examination of the South African SEZ programme shows that the SEZ Act is frustratingly silent, or at best cryptic, on key matters relating to the protection of investors. These issues include: dispute resolution procedures such as commercial arbitration; immigration procedures; details of special preferential tax treatment promised for certain classes of enterprises; tariffs on consumer imports into the SEZs; rights accessible to SEZs including the full protection of property rights against all risks of nationalization or expropriation; and foreign exchange regulation.

53 SEZ Act, sec 20(1).

54 *Id.*, sec 20(2).

55 Farole, Baissac and Gauthier "Special economic zones", above at note 15.

56 F Bost "Special economic zones: Methodological issues and definitions" (2009) 26/2 *Transnational Corporations* 141, available at: <https://unctad.org/system/files/official-document/diaeia2019d2a7_en.pdf> (last accessed 5 March 2023).

57 Indian SEZ Act 2005, sec 35.

58 *Id.*, sec 3(1).

59 *Ibid.*

60 P Sampat "Special economic zones in India" (2008) 43 *Economic and Political Weekly* 28.

Protection of property against nationalization and expropriation should concern foreign investors since the law relating to expropriation continues to evolve in South Africa, particularly so with Parliament's stated intention of amending section 25 of the South African Constitution to permit the expropriation of land without compensation.⁶¹ This is because investors may be reluctant to invest in a jurisdiction where their property may be expropriated. It is important to improve the regulatory regime to protect investors from expropriation.⁶² Kenyan legislation, for instance, enumerates several rights accessible to investors in the SEZs, including the full protection of property from all risks of nationalization or expropriation.⁶³ The SEZ Act should also aim to be sustainable from an environmental and social perspective in respect of how it is developed and operated. This is particularly significant in South Africa especially with the ongoing case of the Musino-Makhado SEZ, which is reported to be environmentally destructive, threatening the livelihoods of communities and lacking public participation. At the time of writing, the Herd Nature Reserve, Living Limpopo and the Centre for Applied Legal Studies, represented by All Rise Attorneys for Climate and Environmental Justice, had launched a review application in the High Court in Polokwane. These organizations are asking the court to review and set aside an environmental authorization relating to the major development site of the Musina-Makhado SEZ, due to its impact and the large number of community members who may be adversely affected if the project proceeds.⁶⁴

The South African SEZ Act should provide for repatriation of capital and profits without any foreign exchange impediments, and protection for investors' intellectual property rights. A closely related issue is the provision of full protection and security for investors' property. As South Africa's experience of deadly riots and mass-looting in July 2021 indicates, the SEZ Act should also be amended to provide for the defence and security of SEZs' perimeter fences, which should be the responsibility of the national government in coordination with the country's military. Military forces sent by the national government for the purpose of defence should not interfere in the internal affairs of any of the SEZs and expenditure for these military forces should be borne by the national government. Moreover, the SEZ Act does not address how to safeguard against the issues of low wages and hazardous working conditions experienced in countries like China. It also does not state whether trade unions are allowed to function within SEZs nor whether the national minimum wage will apply.⁶⁵ This is important because, despite their ability to generate employment, at least initially the reason for the success of SEZs in countries like China was the low cost of labour and lack of trade union representation for employees in SEZ companies. Migrants' access to education, public services, and social security in urban areas tended to be limited, and working conditions often involved long working hours, health and safety risks, and contractual uncertainties.⁶⁶ These conditions gave rise to labour disputes, strikes, protests and even workers' suicides. Gender discrimination continues in some zones, especially in respect of unequal pay, inadequate rights during pregnancy and forced dismissal when women reach the fourth month

61 "Amendment of section 25 of the Constitution" (Parliament of the Republic of South Africa, Ad Hoc Committee on Amending Section 25 of the Constitution), available at: <<https://www.parliament.gov.za/project-event-details/285>> (last accessed 5 March 2023).

62 *Doing Business 2020: Comparing Business Regulation in 190 Economies* (World Bank Group, 2020), available at: <<https://documents1.worldbank.org/curated/en/688761571934946384/pdf/Doing-Business-2020-Comparing-Business-Regulation-in-190-Economies.pdf>> (last accessed 5 March 2023).

63 Kenyan SEZ Act, sec 34.

64 L-A Bruce "Civil society challenges Musina-Mukhado Special Economic Zone" (joint release by the Centre for Applied Legal Studies, Living Limpopo and All Rise Attorneys for Climate and Environmental Justice, 10 January 2023), available at: <<https://www.wits.ac.za/news/sources/cals-news/2023/civil-society-challenges-musina-makhado-special-economic-zone.html>> (last accessed 5 March 2023).

65 *Ibid.*

66 S Gopalakrishnan "Negative aspects of special economic zones in China" (2007) 47 *Economic and Political Weekly* 1491 at 1493.

of pregnancy.⁶⁷ To deal with these and other challenges, the SEZ Act could explicitly provide that the South African labour legislative framework, such as the Basic Conditions of Employment Act,⁶⁸ will be applicable within the SEZs. The country should institute a special mechanism for dialogue and dispute resolution of labour issues.

In the same vein, the SEZ Act should be amended to set out a resolution mechanism for any dispute that arises between an SEZ entity and the Advisory Board or government. A limit of 30 days could be set for the parties to find a solution through negotiation and mutual agreement. The dispute resolution mechanism should be facilitated by a mediator. The DTIC should maintain a list of qualified mediators of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment and who are willing and able to serve as mediators. If mediation fails, the parties should be able to approach a competent court to adjudicate the dispute as a civil matter. The provincial government in which the SEZ is located may, with the concurrence of the judge president of the High Court of that province, designate one or more courts to try all civil suits arising in SEZs.

Comparison with BRICS member countries

The South African government has considered that the emergence of trade networks anchored in the global South (particularly in markets such as China, India and Brazil) and changing economic and political dynamics globally may open new opportunities for trade and investment in African countries, for which SEZs have the potential to play an important supporting role.⁶⁹ As indicated, developments in the global economy such as the formation of BRICS and increased global competition for FDI, and the modest performance of the IDZ programme were the main factors that guided the adoption of the SEZ Act.⁷⁰ In 2014 the then minister of trade, industry and competition, Rob Davies, rebranded and restructured South Africa's ailing IDZs through new legislation that brought the IDZs into line with the Chinese Shenzhen model.⁷¹ Moreover, South Africa plays a critical leadership role in representing the African continent in two important blocs of the Global South: BRICS and FOCAC. The Chinese government has prioritized the Belt and Road initiatives in conjunction with the African Union (AU) and in coordination with South Africa; most importantly, SEZs are part of its international development assistance programme in the Global South.

China's model of integration with the African agenda can be traced back to the formation of FOCAC in Beijing in 2000. In the first meeting of FOCAC's Ministerial Conference in that year, China committed to share with African countries its experiences of investment promotion strategies and SEZ management.⁷² By 2014, significant discussions on African industrialization were central to the AU's Agenda 2063. In 2015, the UN Development Programme and International Poverty Reduction Centre in China stated that the Declaration of FOCAC's Johannesburg Summit and the FOCAC Johannesburg Action Plan adopted in December 2015 sent clear signals for strengthened collaboration on SEZs in Africa, including through China's establishment of a China-Africa Production Capacity Cooperation Fund, with an initial pledge of USD 10 billion. Some Chinese research indicates that SEZs can play a significant role and be an important vehicle for the relocation of Chinese manufacturing activities to Africa, especially in areas such as labour-intensive

67 Ibid.

68 Basic Conditions of Employment Act 75 of 1997.

69 T Farole *Special Economic Zones in Africa: Comparing Performance and Learning from Global Experience* (2011, World Bank Group), available at: <<https://openknowledge.worldbank.org/handle/10986/2268>> (last accessed 5 March 2023).

70 "Policy on the development of SEZs", above at note 5 at 14.

71 Ibid.

72 "If Africa builds nests, will the birds come? Comparative study on special economic zones in Africa and China" (UNDP working paper series No 6/2015), available at: <<https://www.undp.org/sites/g/files/zskgke326/files/migration/cn/UNDP-CH-Comparative-Study-on-SEZs-in-Africa-and-China---ENG.pdf>> (last accessed 5 March 2023).

industries including textiles, manufacturing and leather goods processing.⁷³ By 2006, the Chinese Ministry of Commerce had established SEZs in Zambia, Egypt, Nigeria, Ethiopia and Mauritius. Notably, these SEZs were developed as both state-owned and private enterprises.⁷⁴

Considering this background, this article now offers a comparative analysis of SEZs in BRICS countries. A comparative analysis is useful to understand better South Africa's approach to the design and features of SEZs and to determine whether its new SEZ programme is internationally competitive and comparable with similar programmes, especially those in BRICS countries. The comparison extends to key aspects in the regulatory design of SEZs as found in the SEZ Act, including: the governance and ownership structure of SEZs; incentives offered to investors; the establishment of one-stop shops, and infrastructure development.

SEZs have contributed significantly to economic development in China, including boosting the national domestic product, and attracting FDI, exports and new technologies. Indeed, China has been a forerunner since World War II in developing SEZs, with their establishment in Shenzhen and elsewhere.⁷⁵ Countrywide, SEZs have been reported to have contributed 22 per cent of China's GDP, 45 per cent of total national FDI and 60 per cent of exports, and generated more than 30 million jobs.⁷⁶ As a result, many countries, including South Africa, have looked to China and the classic story of Shenzhen. India was also among the first countries to establish export processing zones (EPZs), with the first developed in the western port city of Kandla in 1965. Over the next three decades another seven EPZs were established in various regions. The EPZs promised investors factory space, pre-established infrastructure (electricity, water, roads etc), exemptions from tariffs and tax concessions. However, by 1990 the share of EPZ exports had stagnated and it became evident that the zones had failed to spur development, owing to several factors including poor infrastructure, rigid government laws, locational disadvantages and long delays in obtaining permits. In 2000 the government of India sought to introduce an SEZ scheme modelled on China's, after a delegation of Indian politicians visited China and noted the programme's success. The SEZ scheme was formally introduced as part of the Export and Import policy 2000–01, aimed at boosting exports. The developments called for the conversion of all existing EPZs into SEZs, with three greenfield SEZs becoming operational by 2004. To provide substantial impetus to the policy, the government enacted India's SEZ Act in 2005 and provided several lucrative incentives that were not available under the earlier scheme.

Brazil's government has also recognized SEZs and EPZs as policy instruments that can create a conducive business environment, create jobs, strengthen competition, reduce inequalities and boost regional socio-economic development. EPZs aimed to attract foreign investment, create added value for exports and increase competitiveness in foreign markets. The first EPZ was launched in 1988. As of September 2021, 25 EPZ projects had been authorized, 19 were fully operational and others were at different stages of operationalization, across 18 Brazilian states.⁷⁷

73 B Crane, C Albeecht and KM Duffin "China's special economic zones: An analysis of policy to reduce regional disparities" (2018) 5 *Regional Studies, Regional Science* 98 at 102.

74 "If Africa builds nests", above at note 72 at 12.

75 J Chaisse and G Dimitropoulos "Special economic zones international economic law: Towards unilateral economic law" (2021) 24 *Journal of International Economic Law* 234.

76 DZ Zeng "China's special economic zones and industrial clusters: Success and challenges" (27 April 2011) *World Bank Blogs*, available at: <<https://blogs.worldbank.org/developmenttalk/china-s-special-economic-zones-and-industrial-clusters-success-and-challenges>> (last accessed 27 April 2023).

77 F Litvay "What changed with Brazil's export processing zones reform" (27 September 2021, Adrianople Group), available at: <<https://www.adrianoplegroup.com/post/what-changed-with-brazils-export-processing-zones-reform>> (last accessed 5 March 2023).

Ownership of SEZs

The main SEZs in China are state-owned and controlled. Corporate SEZs exist as a special type of SEZ. They permit joint venture ownership of an SEZ. Under the Chinese's regulation on SEZs, "companies and enterprises should open factories and set up enterprises and other establishments with their own investment or in joint ventures with our side".⁷⁸ This means that China does permit a special type of SEZ that is privately owned, a lesson that South Africa should have followed.⁷⁹ The establishment of Russian SEZs emanates from a large-scale federal project mainly aimed at attracting FDI and Russian investment in selected industries, such as shipbuilding, tourism, high-tech sectors of the economy and import substituting industries. Russian SEZs are entirely owned by the state.⁸⁰ India permits government or fully private and joint sector ownership of SEZs.⁸¹ The underlying rationale is to offer both international private developers and Indian developers a fair share in the development of SEZs. The Indian government foresaw that the private sector would play a critical role as the main driver behind establishing SEZs. The Brazilian exclusive economic zones can be government owned or wholly owned by the private sector.⁸²

In Russia, SEZ territories are seen to offer a special regime for business activity and the possibility for a free customs zone.⁸³ President Putin signed a decree, the Federal Law on the Establishment of Special Economic Zones (SEZs) in the Russian Federation,⁸⁴ which envisioned four types of SEZs: industrial, innovation, tourism, and port and logistics zones. The Russian federal government created a public organization in the form of a joint-stock company based in Moscow (the headquarters of the SEZs' administration) with subsidiaries across the country, so-called "managing companies" that are responsible for establishing and developing their projects in different regions.⁸⁵ The Brazilian legal framework provides for the creation of EPZs by federal, state or local government or at the request of private parties. Previously, EPZs could only be established by the federal government.⁸⁶ According to article 10 of Brazil's Law 11.508, private zones may be privately owned and managed by boards without state participation if the private company owns the zone.

The previous South African IDZ regime did not allow for SEZs to be solely in private ownership. Under section 23(1) of the SEZ Act, SEZ ownership vests in the national, provincial or local government. However, unlike under the previous IDZ regime, a public-private partnership arrangement can now be made between the South African government and the private sector.⁸⁷ This means that a public-private partnership and not only the government can apply to the minister for a specific area to be designated as an SEZ.⁸⁸ The South African government could consider amending the act also to permit purely privately owned SEZs. The trend in SEZ developments

78 Regulation on Special Economic Zones in Guangdong Province 1980, art 1.

79 T Farole and L Moburg "Special economic zones in Africa: Political economy challenges and solutions" in J Page and F Tarp (eds) *The Practice of Industrial Policy: Government-Business Coordination in Africa and East Asia* (2017, Oxford University Press) 234, available at: <<https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780198796954.001.0001/acprof-9780198796954-chapter-12>> (last accessed 5 March 2023).

80 Z Kuznetsov and O Kuznetsova "The success and failure of the Russian SEZs: Some policy lessons" (2019) 26/2 *Transnational Corporations* 117, available at: <https://unctad.org/system/files/official-document/diaeia2019d2a6_en.pdf> (last accessed 5 March 2023).

81 Indian SEZ Act, sec 3(1).

82 G Castilhos "Special economic zones in Brazil: The Manaus Free Trade Zones" (2016), available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2801920> (last accessed 5 March 2023).

83 A Tarasova et al "Some aspect [sic] of legal regulation of special economic zones in Russia" (2019), available at: <https://www.shs-conferences.org/articles/shsconf/pdf/2019/12/shsconf_eurasia2019_04003.pdf> (last accessed 5 March 2023).

84 Federal Law No 116.

85 S Sosnovskikh "Industrial clusters in Russia: The development of special economic zones and industrial parks" (2017) 3 *Russian Journal of Economics* 184.

86 Law 11.508 (2007), art 9.

87 SEZ Act, art 23(1).

88 Id, sec 23(2).

globally over many years has shown the increasing importance of economic zones that are owned, developed or operated by the private sector.⁸⁹ This would encourage private sector-led development and growth in the country, and ensure that a maximum proportion of risk associated with SEZ development and operation is borne by the private sector.⁹⁰ International experience shows that the private sector brings a level of credibility and a network of potential investors to locate in an SEZ, and private sector SEZs tend to command higher prices from end-users and attract higher value-added activities.

SEZ incentives

In China, there are various incentives to business owners that operate out of SEZs. First are the tax benefits, especially those aimed at foreign investors. One of the most famous tax benefits is the elimination of corporate tax on losses, meaning that there is no tax to pay if no profit is generated.⁹¹ Once a company does start to generate a profit, then there are reduced tax rates until five years from the start of profitability. Many SEZs have lower income tax rates: as low as 15 per cent in the Hong Kong SEZ, compared with a rate as high as 33 per cent in mainland China.⁹² With China's economy being incredibly reliant on exports, their regulations are also aimed at encouraging exports, including companies being able to export goods duty-free, as well as being exempt from local taxes in certain industries. The benefits of these SEZs in China can be seen directly in the development of well-established economic zones. For example, after being designated as one of the first SEZs, Shenzhen grew from a small village to a city with a population of more than 10 million within a few decades.⁹³

The Indian experience is different. The Indian EPZ scheme had originally granted investors a tax holiday of three years on all corporate profits. However, a review committee (The Tandon Committee) established in 1980⁹⁴ found that it was difficult for units to earn profits within the first one or two years of establishment.⁹⁵ It recommended a ten-year tax holiday. Initially, the Indian government only partially followed the recommendation by redesigning the scheme to allow a five-year tax holiday; investors could choose five consecutive years within their first eight years of establishment. These changes did not seem to be sufficiently attractive to investors. The SEZ scheme modified the tax incentive by allowing a 15-year variable tax holiday period. Business operations that commenced after 1 April 2006 were granted a 100 per cent tax holiday for the first five years, followed by a 50 per cent tax exemption for the next five years and, finally, a tax exemption of 50 per cent of reinvested export profits for the following five years.⁹⁶ The tax

89 N le Roux and A Schoeman "A comparative analysis of the special economic zones: The case of South Africa, Malaysia and Indonesia" (2016) 3 *Journal of Economic and Financial Sciences* 749 at 761.

90 J-P Gauthier "Special economic zones in practice: The role of government and of the private sector in initiating, funding, delivering and managing SEZs" (2011, Centre for Development and Enterprise), available at: <https://pmg.org.za/files/130522cdeannexure_b3.doc> (last accessed 5 March 2023).

91 "Special economic zones in China (SEZs): Characteristics and benefits" (Intrepid sourcing), available at: <<https://intrepid sourcing.com/trade-wiki/special-economic-zones-sezs-characteristics-benefits/#~:text=The%20Benefits%20of%20Special%20Economic%20Zones%20in%20China,-There%20are%20various&text=Firstly%20and%20most%20famously%20are,not%20have%20to%20pay%20taxes>> (last accessed 5 March 2023).

92 Ibid.

93 Ibid.

94 "Tandon Committee report on working capital: Norms and recommendations", available at: <<https://www.mbaknol.com/business-finance/tandon-committee-report-on-working-capital-norms-and-recommendations/>> (last accessed 5 March 2023).

95 MM Manoharan "An evaluation of the working of the export processing zones in India: A case study with reference to the Cochin Export Processing Zone" (thesis submitted to Cochin University of Science and Technology, 1996), available at: <<https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.861.7365&rep=rep1&type=pdf>> (last accessed 5 March 2023).

96 Laryea, Ndonga and Nyamora "Kenya's experience with SEZs", above at note 6 at 177.

incentives offered for SEZ developers, as well as businesses intending to operate within SEZs, involve provisions that explicitly alter several other pieces of existing legislation, including the Banking Regulation Act, the Income Tax Act, the Insurance Act and the Stamp Duties Act.⁹⁷ The main requirement that firms must meet to receive these benefits is the maintenance of a positive net foreign earning position during each of the tax assessment periods covered. In addition, firms operating within SEZs do not need licences to import capital goods or raw materials, and they can start joint ventures with up to 100 per cent FDI without the need for investment approval (except in certain cases, such as armament manufacturing or the production of alcoholic drinks and tobacco products).⁹⁸

Brazil provides tax incentives for raw materials, immediate goods, packaging materials used for the production of final goods for export, capital goods used for the production of goods for export, and for acquiring assets either domestically or abroad. To qualify for tax incentives, companies must be active in industrial activities, with a minimum of 80 per cent of production for export; if selling to the domestic market, all taxes are applied as usual.⁹⁹ The Russian government also provides a wide range of tax incentives to attract investors and stimulate their activities in state-supported industries and regions, including: tax incentives, deferred and instalment tax, tax rate reductions, peculiarities in the formation of tax base, as well as investment tax credits. Tax benefits for SEZ residents in the Russian Federation are represented by a reduction in taxes on organizations' property, land and transport; VAT benefits are provided for residents of port zones. According to the Organization for Economic Cooperation and Development, tax benefits are the most common means of supporting SEZ residents, since they do not require direct spending of budgetary funds.¹⁰⁰

Companies operating in South Africa's SEZs benefit from many rights and incentives. Laws are designed to make it easy to run a business. Incentives offered in South Africa to investors and entities operating within SEZs include a corporate tax rate of 15 per cent,¹⁰¹ which is applicable for ten years, subject to review after five years. The adoption of this conservative approach implies that the South African government is testing this corporate tax regime. The justification for this approach is that the corporate tax rate has been subject to abuse by foreign investors who set up firms to benefit from the tax holidays, only to cease trading after the expiry of the grace period. Other incentives provided to investors and entities operating within SEZs under the South African legal framework is a building tax deduction of 10 per cent, duty-free and VAT exemptions, and employment tax incentives. SEZ incentives apply to greenfield investments¹⁰² located in SEZs as well as expansions to brownfield investments.¹⁰³ The use of incentive packages is a common international practice for attracting foreign or domestic direct investment.¹⁰⁴

97 Sampat "Special economic zones in India" above at note 60 at 29.

98 Ibid.

99 "Leveraging a new generation of industrial parks and zones for inclusive and sustainable development: Strategic framework" (2018, UN Industrial Development Organization), available at: <https://hub.unido.org/sites/default/files/publications/UNIDO_Strategic%20Framework_WEB.pdf> (last accessed 27 April 2023).

100 V Komleva, OI Belyaeva and E Tsepilova "Tax incentives in special economic zones: Russian and foreign experience" (paper for 34th IBIMA Conference, Madrid, Spain, 2019), available at: <https://www.researchgate.net/publication/342304304_TAX_INCENTIVES_IN_SPECIAL_ECONOMIC_ZONES_RUSSIAN_AND_FOREIGN_EXPERIENCE> (last accessed 5 March 2023).

101 Income Tax Act 58 (1962), sec 12R(2).

102 A greenfield investment refers to a type of FDI where a company establishes operations in a foreign country.

103 Brownfield investment is a type of FDI where a company invests in an existing facility to start its operations in a foreign country.

104 "Policy on the development of SEZs", above at note 5 at 21.

Governance and institutional arrangements

In China, the governance and institutional arrangement is set out in article 24 of the regulation of the People's Republic of China on SEZs.¹⁰⁵ This provision brought SEZs directly under the control of local provincial committees, thereby enabling them to enjoy a vast number of powers in the administration, management, promotion and maintenance of SEZs.¹⁰⁶ For instance, Shenzhen was brought under the administration of the Guangdong Provincial Committee. Similar offices were set up in Shantou, Zuhai and Xiamen. In India, the final authority for the establishment of an SEZ, as well as approval and authorization for the developer to operate the SEZ, lies with the central government.¹⁰⁷ The Guangdong Provincial Committee enjoyed certain jurisdictional powers in the administration of its SEZ, including the power to: formulate and implement development plans; examine and approve investors' various investment projects; register industrial and commercial enterprises; deal with land allotment; facilitate and coordinate working relations among banking, insurance, taxation, customs, frontier inspection, postal and telecommunications and other organizations; administer labour-specific issues, like providing the required labour force to enterprises and protecting the legitimate rights and interest of workers; and maintain law and order.¹⁰⁸

The Brazilian EPZ regime is coordinated by the National Council for Export Processing Zones, which comprises the minister of economy as the chair, the chief of staff of the Brazilian president, and representatives of the ministry of economy and from national integration and environment.¹⁰⁹ In Russia, the government of the Russian Federation together with the regions of the Russian Federation are responsible for managing SEZs.¹¹⁰ In South Africa, the Ministry of Trade, Industry and Competition Commission is the highest authority in the SEZ structure. South Africa's SEZ Act permits private sector representatives on the SEZ Advisory Board, as recommended by international best practice; the SEZ Advisory Board reports to the minister of trade, industry and competition.¹¹¹

Single-window clearance

After many years of experiments, the provisions for Shenzhen Urban Planning were adopted in China in 1998. This local legislation was the first in China formally to establish a three-tiered process for land use planning and development control, with the central emphasis on the middle tier: the zoning regulations. To support the implementation of the provisions, the Shenzhen government established a one-stop shop to process all land transactions and development procedures in one location. Since 2015, China began to set up the so-called Cross-Border E-commerce (CBEC) pilot zones or cities, starting with Hangzhou. By May 2020, China has opened 105 CBEC pilot zones, covering almost all provinces except Tibet. Most zones are actually whole cities, generally located in coastal regions like Shanghai, while Beijing is an inland city. Compared with a traditional SEZ, such a zone requires much better digital infrastructure (connectivity and cyber security) to support the private digital platform (e-WTP). While this is an innovative approach, the truly "smart city", "intelligent city" or "borderless zone" is yet to come, where AI, 3D and the Internet of Things are fully imbedded in production and services, and production and business activities are fully integrated with cities and eco-development concepts. Instead of building a zone, maybe it is more accurate to say a "future city" is being developed. Such zones are now rapidly emerging

105 Regulation on SEZs in Guangdong, art 24.

106 Ibid.

107 Indian SEZ Act, sec 3(8).

108 Regulation on SEZs in Guangdong, arts 7–11.

109 "Leveraging a new generation", above at note 99 at 27.

110 See website of Association of Clusters, Technology Parks and SEZ of Russia, available at: <<https://akitrf.ru/en/>> (last accessed 27 April 2023).

111 SEZ Act, sec 23(4)(b) and (5).

in China.¹¹² In India, one of the shortcomings of the Indian EPZ scheme is that it lacked a central authority within the individual zones that could offer administrative clearance to the respective unit operators.¹¹³ The boards of the various zones lacked the power to grant clearances and only acted as advisory bodies, with unit operators being required seek clearance from the Ministry of Commerce and the Secretariat of Industrial Approvals.¹¹⁴ This was excessively bureaucratic and inefficient. The SEZ scheme resolved this bureaucratic hassle, by constituting an approval committee at zone level. The committee has power to authorize various clearances, including: approving the import or procurement of goods from a domestic tariff area or from outside India; and approving, modifying or rejecting proposals for establishing units for manufacturing, rendering services, warehousing or trading in the SEZ. The committee is also charged with monitoring the utilization of goods or services, or warehousing or trading within the zone.¹¹⁵

The Indian SEZ Act is advertised by the Indian government as a single-window clearance mechanism in which responsibility for promoting and ensuring the orderly development of the SEZ is assigned to the Board of Approval (BoA) within the Ministry of Commerce and Industry.¹¹⁶ The BoA was constituted by the central government and exercises its powers under the Indian SEZ Act. The BoA has 19 members¹¹⁷ and makes its decisions by consensus. The BoA comprises various joint secretaries and other officials from several ministries, including the Ministries of Commerce, Economy, Science and Technology, Home Affairs, Defence, Environment, Law, Overseas Affairs, Urban Development and Finance, as well as a nominee of the state government concerned, and a professor at the Indian Institute of Management or the Indian Institute of Foreign Trade. This central government institution is the major authority for applications and approvals regarding the establishment of SEZs. It has the power to approve, reject or modify proposals for the establishment of SEZs. The BoA informs central government of any approvals, which in turn grants formal approval to the developer through a letter of approval within 30 days.¹¹⁸ The letter is valid for three years, during which the developer must take all necessary steps to ensure implementation of the approved proposal.

Applications to establish an SEZ are, not surprisingly, a complicated affair, involving an array of certifications and various forms of proof of intent and competency. However, the approval process takes place via a “single window”: the BoA.¹¹⁹ Although in theory it is possible to submit an application directly to the BoA, in practice firms seeking to establish an SEZ choose to route their applications through the state government in whose jurisdiction the SEZ will be located; without the support of the relevant state government, a proposed SEZ has little chance of becoming reality. The BoA operates under a fairly transparent set of guidelines: the relevant documents are available on the ministry’s dedicated SEZ website, although, as with other government processes, prospects for success rely on the applicant’s grasp of unwritten rules and mastery of political influence.¹²⁰

Brazil has brought together government agencies and bypassed its bureaucratic system by installing one-stop shops called Poupatempo (TimeSaver) across the country. More than 400 kinds of services are provided by 68 different agencies in the Poupatempo shops, which have been fully

112 DZ Zeng “The past, present, and future of special economic zones and their impact” (2021) 24 *Journal of International Economic Law* 259 at 264.

113 A Aggarwal “Export processing zones in India: Analysis of the export performance” (Indian Council for Research on International Economic Relations working paper No 148, November 2004), available at: <<https://icrier.org/pdf/wp148.pdf>> (last accessed 5 March 2023).

114 Laryea, Ndonga and Nyamora “Kenya’s experience with SEZs”, above at note 6 at 182.

115 Ibid.

116 A Raheem “Impact of special economic zone on human development and poverty reduction: An Indian experience” (2011) 7 *International Journal of Multidisciplinary Research* 199 at 215.

117 Indian SEZ Act, sec 8.

118 Id, sec 3.

119 Sampat “Special economic zones in India” above at note 60 at 29.

120 Ibid.

equipped with e-government portals through a partnership with Intel and AMD.¹²¹ In Russia, the government makes provision for one-stop shop mechanisms. The SEZ management companies in SEZs provide a one-stop shop approach so that potential investors and current residents can receive their final documents at a predetermined time with no requirement to communicate directly with the officials concerning the approval and issue of the documents.¹²²

The South African government aims to establish a one-stop shop in each of the country's SEZs to be a focal point of contact with relevant government departments, and has a long-term ambition to establish an online facility to manage all SEZ registration, licensing and permits. Since 2015, InvestSA one-stop shops have been launched throughout the country, including in Gauteng, the Western Cape and Kwa-Zulu Natal.¹²³ Officials of the one-stop shops are responsible for ensuring a drastic reduction in bureaucracy and red tape for investors.¹²⁴ Notably, under the IDZ regime, the MDA did not provide for a dedicated single point of contact. As a result, the IDZ regime was characterized by a long approval process. This was demonstrated by the period it took to obtain an operator's permit once the IDZ had been designated.¹²⁵ Under section 2(f) of the SEZ Act, the South African government is required to establish a single point of contact that delivers the required government services to businesses operating in SEZs to enable them to lodge applications with, and receive information from, various government authorities and agencies. With the Fourth Industrial Revolution and the emergence of digital technologies, countries have also begun to harness these new technologies to build more futuristic zones. One important change is the increased use of digitized zone services, such as registration, licensing and other one-stop shop services.¹²⁶ The fully automated customs service allows parties involved in trade and transport to lodge standardized information, mainly electronically, with a single entry point to fulfil all import-, export- and transit-related regulatory requirements, thus making customs clearance much faster and more accurate. New technologies will also make zones more efficient, greener and less labour-intensive.¹²⁷ The establishment of an online facility will be hugely beneficial for South Africa, as investors will not have to approach different one-stop shops within the SEZs and all applications can be lodged online.

Improved infrastructure

In China, the significance of planning and infrastructure development was aptly recognized and given special attention in the promotion of SEZs. For instance, in Shenzhen, a two-tier planning process was put in place. First, a Shenzhen Social and Economic Development Plan was formulated to deal with the different issues related to population, migration and related issues. Secondly, a master plan was formulated in each of the zones to address issues related to land use and physical infrastructure. These were quite essential in the case of Chinese SEZs because, unlike EPZs in other

121 "Brazil sets up chain of one-stop 'timesaver' shops for government" (11 April 2017) *Apolitical*, available at: <<https://apolitical.co/solution-articles/en/brazil-sets-chain-one-stop-timesaver-shops-government>> (last accessed 5 March 2023).

122 *Russian Special Economic Zones: Business Navigator 2019* (Association for the Development of Clusters and Technology Parks of Russia, 2020), available at: <https://akitrf.ru/upload/Russian_Special_Economic_Zones_Business_Navigator_2019_eng.pdf> (last accessed 5 March 2023).

123 "InvestSA one stop shop re-launched" (KPMG tax alert, April 2018), available at: <<https://home.kpmg/content/dam/kpmg/xx/pdf/2018/04/tnf-south-africa2-apr24-2018.pdf>> (last accessed 5 March 2023).

124 "Invest SA one-stop shop: Briefing by the Department of Trade, Industry and Competition" (April 2016), available at: <<https://pmg.org.za/committee-meeting/22411/>> (last accessed 5 March 2023).

125 C Dube, W Matsika and G Chiwunze "Special economic zones in southern Africa: Is success influenced by design attributes" (UN University WIDER working paper 2020/61), available at: <<https://www.econstor.eu/bitstream/10419/229285/1/wp2020-061.pdf>> (last accessed 5 March 2023).

126 Zeng "The past, present, and future", above at note 112 at 264.

127 *Ibid.*

countries, Chinese SEZs were established in populated regions.¹²⁸ Thus, there was a clear need for careful planning and implementation of the infrastructure required for industrial establishments and also for human settlement. In the whole process of promoting infrastructure, and thereby attracting foreign investors to SEZs, the Chinese followed the proverb, “Build a nest first; birds will follow later”.¹²⁹ Thus, they not only assured better industrial and urban infrastructure but also undertook proactive steps to bring those about. It must be noted that Chinese policy-makers did not stop with spelling out the need to promote infrastructure facilities in each zone; rather, meticulous attention was paid to zone-wise allocation of responsibility for each of the tasks involved in building infrastructure.¹³⁰ Under article 5 of the Rules of the Guangdong Provincial Committee, respective municipal governments were assigned the legislative power to take appropriate steps to ensure the provision of infrastructure at the zonal level. For instance, the Guangdong Provincial Committee was held responsible for the development of infrastructure facilities in the Guangdong region. Wherever necessary, foreign companies were allowed to participate in developing infrastructure facilities. A distinct feature of the Chinese SEZ policy is its well thought-out plan for mobilizing resources needed for the development and maintenance of infrastructure facilities within each zone.¹³¹ To resolve the infrastructure problem facing not only South Africa but African countries in general, in the recent FOCAC policy plan (2022–24), the Chinese government committed itself to contribute to Africa’s infrastructure development following the principles of extensive consultation, joint contribution, shared benefits, no-harm and harmony. It has also committed to support Chinese enterprises by contributing to the improvement and development of Africa’s infrastructure with advanced equipment, technologies, standards and services, promoting connectivity and providing innovative financing, and has also offered to undertake ten connectivity assistance projects for Africa.

One of the key factors that prevented Indian EPZs from performing well was the lack of infrastructure. Most of the EPZs lacked the infrastructural facilities to support and promote the economic activities being carried out within them. When planning for the SEZs, the Indian government, through the Indian SEZ Act, made provision for the establishment or allocation of certain infrastructural facilities within zones. These included the establishment of an offshore banking unit and international financial services centre in each SEZ.¹³² Each SEZ established by the central government will also have an SEZ authority vested with developing new infrastructure in the zone.¹³³

In Brazil, the main limiting factors are the existing infrastructure and the geographical positioning of the existing zones, which may or may not be conducive to efficient world trade. Eliminating these limiting factors would require significant investment in infrastructure, including ports and electricity generation. However, the new zone designation criteria make the process of establishing zones in more favourable sites substantially easier.¹³⁴ In Russia, the federal authorities attempted to establish free economic zones in the early 1990s, but the overwhelming majority of the zones did not operate because there was no budget to invest in the zone infrastructure because of the desperate economic situation. Currently, the preferential regime for investors in Russia is based on generally accepted approaches including infrastructure construction for investment projects.¹³⁵ Importantly,

128 Ibid.

129 Ibid.

130 Ibid.

131 Ibid.

132 Indian SEZ Act, sec 17.

133 R Shashi Kumar “SEZs in India: Concept, objectives and strategies” (paper presented at the national seminar on SEZs organized by Sri Adichunchanagiri College of Arts, Commerce and Science, Karnataka, 12 September 2008), available at: <<https://www.gtap.agecon.purdue.edu/resources/download/4103.pdf>> (last accessed 5 March 2023).

134 Litvay “What changed”, above at note 77.

135 Kuznetsov and Kuznetsova “The success and failure”, above at note 80 at 134.

the Russian experience has shown that it is not always necessary to invest public funds in infrastructure. In recent years, SEZ projects in which the infrastructure is built at the expense of private investors have been quite successful, while the state only provides tax and customs benefits.¹³⁶ The challenge for the previous South African IDZs related to the quality of infrastructure. For an SEZ to be successful, it has to offer world class, globally competitive infrastructure in order to provide leverage for foreign investors.¹³⁷ Although this may be insignificant in attracting investment as similar infrastructure may be found elsewhere, it is pertinent to the South African context because public utilities, such as water and electricity (which are usually tied to the jurisdiction where the zone is situated), currently face formidable challenges. This has posed a daunting challenge to the zones' principle of enclivity, which has proved difficult to create and sustain in South Africa.

Conclusion

This article has traced the historical development of SEZs in South Africa. Its main objective was to compare the key aspects of the new SEZ programme in South Africa with those of other BRICS countries, since the development of formations like BRICS and FOCAC was the main impetus behind South Africa's adoption of its SEZ programme. The scheme is an attempt by the government to re-invigorate economic development through a more extensive SEZ programme after the IDZ programme was considered to have failed. In comparing SEZ experiences from BRICS countries, this article has observed that one important way to compensate for the institutional weaknesses often prevalent in governments of states experiencing fragile situations, is to include the private sector in the SEZ design and implementation process. The private sector can play an important role in developing and managing SEZs in South Africa. For this reason, this article recommends that a purely private party should be allowed to undertake the process of developing and designing SEZs. Private sector involvement should be comprehensive, and could include strategy, development, financing, operation and administration of key aspects of the regulatory regime. The article recommends that an independent and politically insulated entity is established to be responsible for the administration of the SEZ programme, reporting directly to the president, rather than a mere Advisory Board. Creating an attractive business environment, including efficient public services such as a one-stop shop for the zones, is equally important. Instead of focusing largely on fiscal incentives and tax holidays, the SEZ programme should strive to provide an environment conducive to business. For this to happen, significant amendments will have to be made to South Africa's SEZ legislation.

In particular, the SEZ Act should clarify: how the establishment of an SEZ board will improve SEZ governance; the precise role envisioned for the private sector in the designation, development and management of zones; the division of labour between zone boards, the minister of trade and industry and the zone operator; and the legal regime and incentives underpinning the SEZ programme and dispute resolution mechanism in the event of a dispute between the investor and the government. There are worrying signs, however, that the government has already failed to incorporate fully the lessons from both local and international experience in its new SEZ programme. This is because the legislative framework for SEZs does not guarantee the safety of any investment against expropriation, restrictions or discrimination. Important lessons that should be heeded in the development of a new SEZ programme include the need to introduce measures that incentivize new investment, and the importance of infrastructure and infrastructural service provision and trade facilitation measures to ensure the global competitiveness of local SEZs. If

136 Id at 133.

137 "Policy on the development of SEZs", above at note 5 at 23.

these lessons are heeded and a sufficiently clear legal and regulatory framework is re-examined, the SEZs could play a significant role in promoting employment and economic growth in South Africa. If not, then the new SEZ programme is unlikely to prove any more successful than the old IDZ one.

Competing interests. None