



Analysis of the Special Economic Zones Act, 2015

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Background

The Government has put emphasis on attracting Foreign Direct Investment (FDI) and fast tracking implementation of the economic pillar under the Vision 2030 through the overhaul of legislation which impact the ease of doing business. One of the key initiatives is the promotion of Special Economic Zones, a recognition that Export Processing Zones have not had the expected impact on the economy.

The President assented to the Special Economic Zone Act, 2015 (SEZ Act) on 11 September 2015 and the Act was subsequently published on 15 September 2015.

The SEZ Act comes into operation on 15 December 2015, upon the expiry of 90 days from the date of its publication. The Cabinet Secretary for Industrialization is expected to publish within 180 days from the coming into force of the Act, regulations governing the licensing and operation of SEZs.

The SEZ regime provides incentives touching on ease of setting up, investment and investor protection, simplified tax regime, and favourable labor regulations among others. Below is a brief analysis of the Act.

SALIENT FEATURES OF THE ACT

Purpose of the SEZ Act

The purpose of the Act is to promote and facilitate investment by global and local investors by promoting an enabling environment for such investments. Establishment of an SEZ

An SEZ has to be established in a designated geographical area to be gazetted by the Cabinet Secretary for Industrialization.

Licences to be issued under the Act

The SEZ Act provides for the following licences to be issued under the Act:

1. Operator Licence - corporate entity engaged in the management of a special economic zone.

2. Developer Licence - corporate entity engaged in developing and operating a special economic zone.
3. Enterprise Licence - corporate entity carrying out business in a special economic zone

Types of Special Economic Zones

Areas declared as a special economic zones may be designated as a single sector or multiple sector special economic zones and can cover the following sectors:

- **Agricultural Zone:** SEZ to facilitate agricultural sector and relates activities and services.
- **Business Processing Outsourcing (BPO):** SEZ to provide outsourcing services such as back office support services in human resources, finance, accounting, and procurement among others.
- **Business Service Park:** SEZ to facilitate provision of services to regional headquarters, BPOs, call centres, management consulting, advisory services and other associated services.
- **Freeport Zone:** A designated area at the port where goods introduced there are regarded to be outside the customs territory (EAC Countries).
- **Free Trade Zone:** A customs controlled area where goods are off-loaded for transshipment, storage and may include bulk breaking, repacking, sorting, mixing, trading or other forms of handling excluding manufacturing and processing.
- **Industrial park:** A zone with integrated infrastructure to facilitate manufacturing and processing industries.
- **Information Communication Technology park:** A zone to facilitate ICT sector, its services and related activities.
- **Livestock zone:** A zone where livestock marshalling and inspection, livestock feeding or fattening, abattoir and refrigeration, deboning, value addition, manufacture of veterinary products and other related activities are carried out.
- **Science and Technology Park:** A zone to facilitate the science and technology sector.
- **Tourism and recreation Centre:** A zone to facilitate tourism and recreation sector.

Special Economic Zones Authority

The SEZ will be governed by the Special Economic Zones Authority (Authority) whose roles shall be:

- Reviewing applications and granting licenses to SEZ developers, operators and enterprises.
- Promoting and marketing SEZs to potential developers, operators and other investors.
- Implementing policies and programmes of the Government.
- Identifying, mapping and availing to developers and operators the areas of land to be designated as SEZ.
- Determining investment criteria and threshold.
- Administering a one-stop centre through which SEZ enterprise can channel all their applications for permits, approvals, licences and facilities not handled directly by the authority; among others

Trading in SEZ goods and services

Goods and services produced in a SEZ can be exported out of the country, sold within Kenya as though imported from outside (subject to customs requirements) or be used within the SEZ for the manufacture of other goods or provision of other services.

Qualification to be an SEZ developer/enterprise

An SEZ developer/enterprise is expected to meet the following requirements before registration:

- Be incorporated in Kenya;
- Have financial capacity and technical expertise to carry-out the SEZ proposed operations;
- Own or lease land or premise within SEZ;
- Engage in any activity eligible to be undertaken by an SEZ;
- Should not have a negative impact on the environment or engage in activities that are a threat to national security.

Benefits of operating in an SEZ

The Act provides for various benefits such as:

1. Tax exemption
An SEZ enterprise, developer and operator shall be granted exemption from all taxes and duties payable under the Excise Duty Act, Income Tax Act, East Africa Community Customs Management Act and the Value Added Tax Act on all SEZ transactions.
2. Other exemption

SEZ enterprises, developers and operators shall also enjoy exemptions from;

- Stamp Duty on execution of instruments relating to business activities of the SEZ
- Provisions Foreign Investments and Protection Act;
- The provisions of the Statistics Act;
- Payment of advertisement fees and business service permit fees levied by County Governments;
- General liquor licence and hotel liquor licence under the Alcoholic Drinks Control Act, 2010;
- Manufacturing licence under the Tea Act;
- Licence to trade in unwrought precious metals;

- Filming licence;
- Rent or tenancy controls; and
- Any other exemption as may be granted by the Act through a Gazette notice.

3. Work permits

SEZ shall be allowed to have expatriates and obtain work permits for up to 20% of the total workforce, with additional work permits available on request.

4. Other benefits

- Protection of property against nationalization and expropriation;
- Repatriation of capital and profits without any foreign exchange impediments; and
- Protection of intellectual property.

Dispute Resolution

The SEZ Act has set out a dispute resolution mechanisms, for any dispute that may arise between an SEZ entity and the Authority or Government.

The timelines for dispute resolution is 30 days for negotiations and mutual agreement. Where the dispute is not resolved, the parties shall submit the issue to arbitration within 14 days. Penalties

The SEZ Act provides for a stiff penalty of **KShs 20,000,000** or imprisonment for up to three years or both and forfeiture of goods for any person found violating the provisions of the Act.

Conclusion

As with all new legislations, there are areas that need to be modified to address conflicts with other laws. An example is a conflict between the SEZ Act and the Income Tax Act (ITA) on the taxation of SEZ developers and enterprises. The SEZ exempts the developers and enterprises from income tax but under the ITA, the developers and enterprises are subject to tax at the rate of 10% for the first 10 years and 15% for the subsequent years.

Lastly, it is not clear what the fate of the export processing zones will be under the new dispensation. When the SEZ Bill was first mooted in 2012, the intention was to replace the export processing zones legislation with the SEZ Act. The SEZ significantly enhanced incentives even for manufacturing entities and will spell the death knell for the export processing zones if the two regimes are not harmonized.

The SEZs regime provides a platform through which Kenya can attract FDI. It also marks a departure from the emphasis in previous years on the promotion of manufacturing as the sole engine of growth. The SEZ regime seeks to promote retail and wholesale trade, back office services, tourism and ICT, together with manufacturing as the engines of growth into the future. This regime, will give impetus to the growing attraction of Kenya as a head office for international organizations seeking to set-up operations in the region.

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