

A later version of this paper appeared in:

[2018] 1 (9) *The Gravitass Review of Business and Property Law* 31

Investing in Free Zones in Nigeria:

An Examination of its Governance and Operational Framework*

Abstract

The free zone scheme is fairly common around the world especially within the so-called less industrialized economies. However, the free zone framework has been shrouded in myths and has also not yielded expected industrialization outcomes for the developing economies like Nigeria. This paper interrogates the legal, regulatory, fiscal and financial framework of free zones schemes in Nigeria. It adopts both descriptive and explanatory methodologies; in providing conceptual clarification for the zone construct, the paper describes and explains the operational realities surrounding free zone management and governance within the country. It finds that the free zones in Nigeria, however labeled, are uniquely designed and applied legal cum policy enclaves whose legislative and regulatory regime are still riddled in with needless ambiguities. Following the said finding and towards realizing investment growth and sustainable development for both the investment hubs and other areas within the host country the article proposes a few policy reforms and regulatory amendments to zone governance and operations in Nigeria.

Keywords: Free Zone, Capital Repatriation, Governance, Investment, Nigeria, Operations

1. BACKGROUND

Towards the attainment of industrialization amongst the less developed countries of the world, many countries of the world have adopted two major investment strategies viz: the import-substitution mechanism and the export-oriented strategy.¹ The concept of free zones is one of the flexible policy designs associated with the latter. There are different free zone models with varying features. The models include, but not limited to: Free Industrial Zones, (FIZs), Free Trade Zones (FTZs), Export Processing Zones (EPZs), Customs Free Zones (CFZs), Free Economic Zones (FEZs), Special Economic Zones (SEZs), industrial zones or parks and many others.

The free zone conception is not new to corporate Nigeria. Nigeria's first export processing zone was set up in Calabar in the late eighties. However, there appears to be lots of misunderstanding (if not outright ignorance) surrounding the concept, its workings within the Nigerian business climate and the significance of applicable regulators in the sector.² This article seeks to provide explanation required towards making participant investors appreciate the *raison d'être* for designing free zones and ensuring participating individuals or companies take full advantage of the scheme.

2. CONCEPTUAL CLARIFICATION

At a very basic and simplified level, a *free zone* is a part of the territory of a country where any goods introduced are generally regarded, insofar as import duties and taxes are concerned, as being outside the customs territory.³ In other words, all other business areas outside the free zone where usual custom rules, tax laws and other regulations are otherwise applicable may be called *customs territory* of such country.

¹ J Amado, 'Free Industrial Zones: Law and Industrial Development in the New International Division of Labor' [1989] 11 (1) *U. Pa. J. Int'l Bus. L.* 82. (Hereinafter simply 'Amado FIZs'). Amada explained that import-substitution generally consists of the protection of local industries supplying the local market with manufactured goods which in the past were imported while export-oriented strategies focus on the promotion of industries that orient a substantial part of their production to foreign market.

² See the statement credited to the Managing Director of the Nigeria Export Processing Zone Authority (NEPZA), Mr Emmanuel Jime on the occasion of the visit of **eminent Benue sons in politics and the professions paid him a courtesy call in his office** available online at <http://www.nepza.gov.ng/index.php/news/item/5-nigerians-yet-to-understand-free-trade-zones-concept-jime>, last accessed 21st January, 2018.

³ World Customs Organization (1999) "*Specific Annex D: Customs Warehouses and Free Zones*", *International Convention on the Simplification and Harmonization of Customs Procedures (Revised Kyoto Convention)*, available online at http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/conventions/pf_revised_kyoto_conv/~/_link.aspx?id=9415CF3F04D44BB1A62B44853A63AAC1&z=z last accessed 20th October, 2017.

The first FTZ was said to have been introduced first in the United States of America in 1934⁴ and its principal promoter, Congressman Emanuel Celler, described a FTZ as:

“... an isolated, enclosed and policed area in or adjacent to a port of entry, furnished with the necessary facilities for lading or unloading, for supplying fuel and ship stores for storing goods and for reshipping them by land and water-an area within which goods may be landed, stored, mixed, blended, repacked, manufactured, and reshipped without payment of duties and without the intervention of customs officials.”⁵

According to Amado,⁶ the Organization for Economic Cooperation and Development (OECD) had defined an FIZ as an administratively and sometimes geographically designated area enjoying special status allowing for the free import of equipment and other materials to be used in the manufacture of goods earmarked for export; the special status generally involves favourable legal provisions and regulations creating incentives for foreign investments.

The MENA-OECD Investment Programme defined FEZs as ring-fenced enclaves exempt from national import and export duties and/or formally operating outside the customs area of their host country.⁷ FEZs are usually designed to allow the location or operation of internationally-oriented parts of business operations outside a nation’s customs area. On the other hand, EPZs can be defined as industrial zones with special incentives set up to attract foreign investors, in which imported materials undergo some degree of processing before being re-exported.⁸

It should be noted that the flexibility of the zone concept is also appreciable from the emergence of relatively new forms of zones usually called *sub-zones*. The sub-zones⁹ are tailor-made regimes for companies wishing to utilize the zone concept but unable to relocate to an existing zone.¹⁰ Sub-zones are marked differently from the main zones in that the former is accessible for use by only one firm, which simply designates the part of its facilities which will comprise the sub-zone.¹¹

Research¹² has shown that most of these investment havens, in time past, took the basic form of *free ports*; that is, customs free areas within seaports offering little more than warehousing and trade facilities and that over time, some free ports developed into customs-free zones in which light

⁴ Foreign Trade Zones Act of 1934, Pub. L. No. 73-397, 48 Stat. 998 (codified as amended at 19 U.S.C. §§ 81a-81u (1982)).

⁵ Amado FIZs, above note 1 at 85 citing Bader, *Jurisdictional Uncertainty: The American Foreign Trade Zone*, 8 N.C. J. INT’L L. & COM. REG. 239, 240 (1983).

⁶ Amado FIZs, above note 1 at 82 citing A. BASILE & D. GERMIDIS, *INVESTING IN FREE EXPORT PROCESSING ZONES* 20 (1984).

⁷ MENA-OECD Investment Programme: Incentives and Free Zones in the MENA Region: A Preliminary Stocktaking -Working Group 2, available online at <https://www.oecd.org/mena/competitiveness/36086747.pdf> last accessed 20th October, 2017. (Hereinafter simply cited as ‘MENA-OECD’).

⁸ P Muchlinski, *Multinational Enterprises and the Law* (Oxford, Oxford University Press, 2nd edn, 2007) 226. It should be quickly added by the paper that the export orientation of zones, especially of FIZs or EPZs is not an invariable rule. Sometimes, zones are import (rather than export) oriented such as the case of Colombia. See Amado FIZs, above note 1 at 88.

⁹ The sub-zone concept was said to have first been developed in the United States of America. See generally D Atkins and Schwidetzky, ‘Foreign-Trade Zones: Sub-Zones, State Taxation and State Legislation’ (1979) 8 DEN. J. INT’L L. & POL’Y 445, 448.

¹⁰ Amado FIZs, above note 1 at 88 and 89.

¹¹ *Id.*

¹² MENA-OECD above note 6 at 5; see also Amado FIZs, above note 1 at 84 and 86.

manufacturing and other processing took place.¹³ Further, the earlier definitional attempts of EPZs and FIZs show that they had started as upgrades to customs free zones towards encouraging more complicated manufacturing operations of imported materials for the purpose of re-export. However, with the evolution of imported materials now including high-tech electronic data involving complex processing and handling, EPZ and FIZs appear to have, in turn, metamorphosed into SEZs such that not only customs exemptions would be enjoyed in zones but also an entirely separate legal and regulatory environment from the rest of the host economy.¹⁴

From the foregoing, overlaps in characteristic features of the free zone models are clearly inevitable. This paper submits that these varying free zone models can all be said to amount to policy enclaves, designed for industrial development, but flexibly labeled differently and laced with interrelated levels of investment incentives and regulatory framework as may be deemed expedient at any point in time from one jurisdiction to the other. In other words, while free ports or FTZs are not primarily designed to encourage manufacturing or export-oriented processing, there is however nothing within the concept of free zone preventing such manufacturing activities even within the free ports or FTZs.¹⁵ Therefore, regardless of any fine lines of distinction from one model to the other, this article simply adopts the nomenclature *zone*¹⁶ to represent all the investments hubs. Of course, specific reference may be required and will be made to a particular zone model where such clear distinction is otherwise required in the course of this article.

The article is divided into 9 sections. The 1st section offers a brief background information. Section 2 provides conceptual clarification of free zones around the world. In the next section, the legal and regulatory framework of zones in Nigeria is highlighted. The 4th section not only describes the process of delineating an enclave as a zone but also highlights reasons why such delineation may be important not only to the host country but also the investors. The section also explained the registration procedure to obtain licenses to operate in any zone in Nigeria. Section 5 discusses the incentive regime of the zones while the role of the zone regulator is captured in the 6th section. Thereafter, the relationship existing between Nigeria Export Processing Zones Authority (NEPZA) and the Oil and Gas Export Free Zone Authority (OGEFZA) as co-regulators *vis-à-vis* their enabling laws are examined in section 7. While section 8 identifies certain operational challenges within the free zone concept and makes recommendations towards addressing them, the article concludes in section 9.

¹³ The origins of free ports, on the other hand, have been traced to the time of the Phoenician merchants, when attacks and arbitrary taxation forced traders to seek protection in Mediterranean ports such as Tyre, Carthage, and Utica, which offered safe passage of goods. A similar system was adopted by the Greek city-states in Chalcis and Piraeus, where special stockades were implemented. See Amado FIZs, above note 1 at 84.

¹⁴ Id.

¹⁵ For instance, by a 1950 act, the first FTZ in the USA was redesigned to allow manufacturing activities. See Amado FIZs above note 1 at 85.

¹⁶ Under the Nigeria Export Processing Zones Decree (No. 63, 1992) which repealed the Nigeria Export Processing Zones Decree (No. 34, 1991), the scheme appear to revolve around 'export processing zone', but a critical look at the regulatory, fiscal and financial incentives associated with the model shows a lot of overlap with other models mentioned above. It is comforting therefore that the enabling instrument subsequently simply refers to the export processing zones as 'zones'.

3. LEGAL AND REGULATORY FRAMEWORK

The following are the essential laws, rules and regulations governing business operations and the administration of free zones in Nigeria. The list, it must be said, is far from being exhaustive. There are other applicable subsidiary instruments such as directives, guidelines, tariff schedules amongst others, usually made pursuant to existing primary legislations. The essential governing legal and regulatory framework therefore includes:

- a. Nigeria Export Processing Zones Decree No. 63 1992;¹⁷
- b. Investment Procedures, Regulations and Operational Guidelines for Free Zones in Nigeria 2004;¹⁸
- c. Guidelines for Banking Operations in the Free Zones in Nigeria 2016;¹⁹
- d. Oil and Gas Export Free Zone Act 1996;²⁰
- e. All laws in the customs territory of Nigeria, to the extent not expressly excluded or otherwise modified in application by the Minister of Trade and Investment pursuant to the provisions of the Act.²¹

4. DELINEATION OF A ZONE AND ESTABLISHING AN ENTERPRISE IN A ZONE

Further to discussions under the background, zones are (generally offshore) policy enclaves, ring-fenced, delineated as such pursuant to an executive order by the relevant authority. In Nigeria, the President, Commander-in-Chief of the Armed Forces is vested with the power to, upon the recommendation of NEPZA, designate such area as he thinks fit to be an EPZ.²² Such area designated by the President may be promoted under NEPZA's supervision as either a private zone,²³ or a public zone,²⁴ or a hybrid, that is,

¹⁷ This may also be identified as Nigeria Export Processing Zones Act, Cap. N107 Laws of the Federation, 2004 (hereinafter simply the 'Act'). The Act establishes the Nigeria Export Processing Zones Authority (NEPZA) with the statutory remit to manage, control and coordinate all activities and operations within the zones. See section 4 of the Act.

¹⁸ This is hereinafter simply called the '2004 NEPZA Regulations'. The 2004 NEPZA Regulations is somewhat a generic secondary legislation applicable to all zones in terms of administration and management. The usual industry practice however, is that promoters of each zone ensures it gets NEPZA to issue a set of rules, investment procedures and operational guidelines which will specifically govern that particular zone. NEPZA's powers to make or issue such regulations are traceable to sections 10 (4) and 27 of the Act and the regulations become operational upon their publication in relevant Federal Government of Nigeria official gazette. Therefore, as instances, Snake Island Integrated Free Zone has its own specific regulation called the Snake Island Integrated Free Zone Regulation 2012; Lekki Free Zone has the Lekki Free Trade Zone Regulations 2012; amongst other examples. Expectedly, whenever there is any conflict between the provisions of the generic 2004 NEPZA Regulations and the provisions of the zone-specific regulations, these zone-specific regulations are usually designed to override.

¹⁹ This is a Central Bank of Nigeria approved document to guide banking operations and allied matters or activities in zones in Nigeria. Specifically, the guidelines provide details of regulatory and supervisory requirements necessary to promote efficient and sustainable banking services in zones in Nigeria.

²⁰ Hereinafter simply the 'OGEFZA Act'. It establishes the Oil and Gas Export Free Zone Authority (OGEFZA) with the statutory mandate to manage and control operations within the Onne /Ikpokiri area of Rivers State. See section 1(1) of the OGEFZA Act. It must be admitted; this legislation is *sui-generis*. While its general intentment appears to make it applicable only to export of oil and gas within Onne/Ikpokiri, a specific section of the same law otherwise suggests oil and gas activities in other zones within the host country (Nigeria) might as well fall within its remit. In other not to disrupt the general flow of this article, arguments surrounding this point will be better developed in section 6 of this article.

²¹ See sections 24 (1), (2) and 21 (1) (b) of the Act.

²² Section 1 (1) of the Act.

²³ Such promoters usually seek and obtain a *developer license* from NEPZA. A developer license is granted by NEPZA to either a public, private entity or a combination of the two for the establishment, operation and management of a Free Zone in Nigeria under its supervision, monitoring and regulation. See Part 4 of the 2004 NEPZA Regulation. Examples of private zones are the Snake Island Integrated Free Zone, LADOL Free Zone, amongst others.

²⁴ *Id.* An example of a public zone is the Lekki Free Zone, Lagos.

combining both private and public promoters. In practical terms, any executive order designating an area as a zone will specify the limits of the area designated and ascribe a name to the zone.²⁵ NEPZA may, from time to time, by order, amend, vary or add to the limits of a zone or change the name of a zone.²⁶

4.1 Reasons for Delineation of Zones

As earlier mentioned, the free zone scheme has become such a flexible concept that so many reasons may be ascribed to its existence in many jurisdictions around the world. As there are a number of reasons why host countries would delineate an area as a zone, so are there many factors why investors would consider participating in the zone scheme. Further, depending on the perspective from which it is examined, the zone concept may mean or be used differently ranging from a developed country viewpoint to less-industrialized economy; from a domestic player's (investor) perspective to foreign investors' angle. A rich account of these reasons from different perspectives may be found in Amado's award-winning work.²⁷ A few of them are however highlighted below:

- a. Export-Promotion Objectives;
- b. Foreign Exchange Generation;
- c. Employment Objectives;
- d. Attraction of Foreign Investment;
- e. Vertical Integration;
- f. Special Incentive Measure;
- g. Dual Economy Operation
- h. Access to Low-Cost Labour;
- i. Duty-Free Imports Regime
- j. Exploitation of Natural Resources;
- k. Industrialization Objectives;
- l. Regional Development;
- m. Export Industries Deregulation;
- n. "Open Market" Policy Testing;
- o. Political Objectives;
- p. Access to Markets;
- q. Home Market Competitiveness.

4.2 Licensing Regime in Zones

²⁵ Section 1 (3) of the Act.

²⁶ Section 1 (4) of the Act.

²⁷ Amado FIZs, above note 1 at 96 to 101.

By virtue of community reading of sections 9, 10, 13 and 14 of the Act, only NEPZA-duly-authorized²⁸ entity or individual may enter into any zone or carry out an approved activity²⁹ in the zone. The authority to enter the zones and/or carry out approved activities is usually expressed by means of licenses. There are therefore different kinds of licenses which may be sought and obtained in the zone viz.³⁰

- a. Free Zone Developers Licence;
- b. Free Zone Enterprise Licence;
- c. Export Processing Factory/Export Processing Farm Licence.

A Free Zone Developers License is granted to either a public, private entity or a combination of the two for the establishment, operation and management of a Free Zone in Nigeria under the supervision, monitoring and regulation by the NEPZA. A Free Zone Enterprise License is granted for an enterprise to undertake an approved activity within a Free Zone.³¹ This is the licence largely described in section 10 of the Act. An Export Processing Factory/Export Processing Farm License is granted to an export oriented manufacturing enterprise of farm located in the customs territory which has the capacity to export over 75% of its production.³²

From the foregoing, it seems these different license types may actually be obtained and operated by different entities within the same zone. A designated zone will surely have a zone developer and/or manager (promoter) who usually constitute the representative of NEPZA within such zone in terms of administration, management and supervision.³³ Again, there may be two or more entities holding developer licenses within the same zone especially where the zone is clearly demarcated into different areas and assigned to respective promoters (developers). Therefore, a public zone with a public promoter (for instance a state government) could operate and develop a zone alongside a private promoter (private business concern). Further, it is not very clear if there is any legal prescription forestalling the holding of a developer license and an enterprise license (or should I add, even an export processing factory license) at the same time by an entity or through subsidiary or affiliate company. Invariably, this would mean that within a group of companies for instance, the holder of the developer or

²⁸ NEPZA may carry out its function by itself or through any individual or entity with delegated authority to so do. See section 4 (h) of the Act. In practice, zones usually have administrators and managers (with appropriate license regime from NEPZA) who represent NEPZA within the specific zones. In other words, by means of specific regulations guiding any particular zones, NEPZA usually delegates its administrative and management powers to such zone Managers or administrators, subject to NEPZA's supervision.

²⁹ The list of approved activities permissible under the Act is presently not exhaustive. NEPZA may increase the list. Approved Activities as presently contained in the Third Schedule of the Act include: manufacturing of goods for export; warehousing freight forwarding and customs clearance; handling of duty free goods (transshipment, sorting, marketing, packaging, *et cetera*; banking, stock exchange and other financial services; insurance and reinsurance; import of goods for special services, exhibitions and publicity; international commercial arbitration services; activities relating to integrated zones amongst others deemed appropriate by NEPZA.

³⁰ See Part 4 of the 2004 NEPZA Regulations.

³¹ *Id.*

³² *Id.*

³³ In practice, zone promoters ensure that the regulation governing their respective zones are designed in such a way that NEPZA delegates most of its statutory powers to administer, manager or supervise activities within the zone to such promoters or their subsidiary companies.

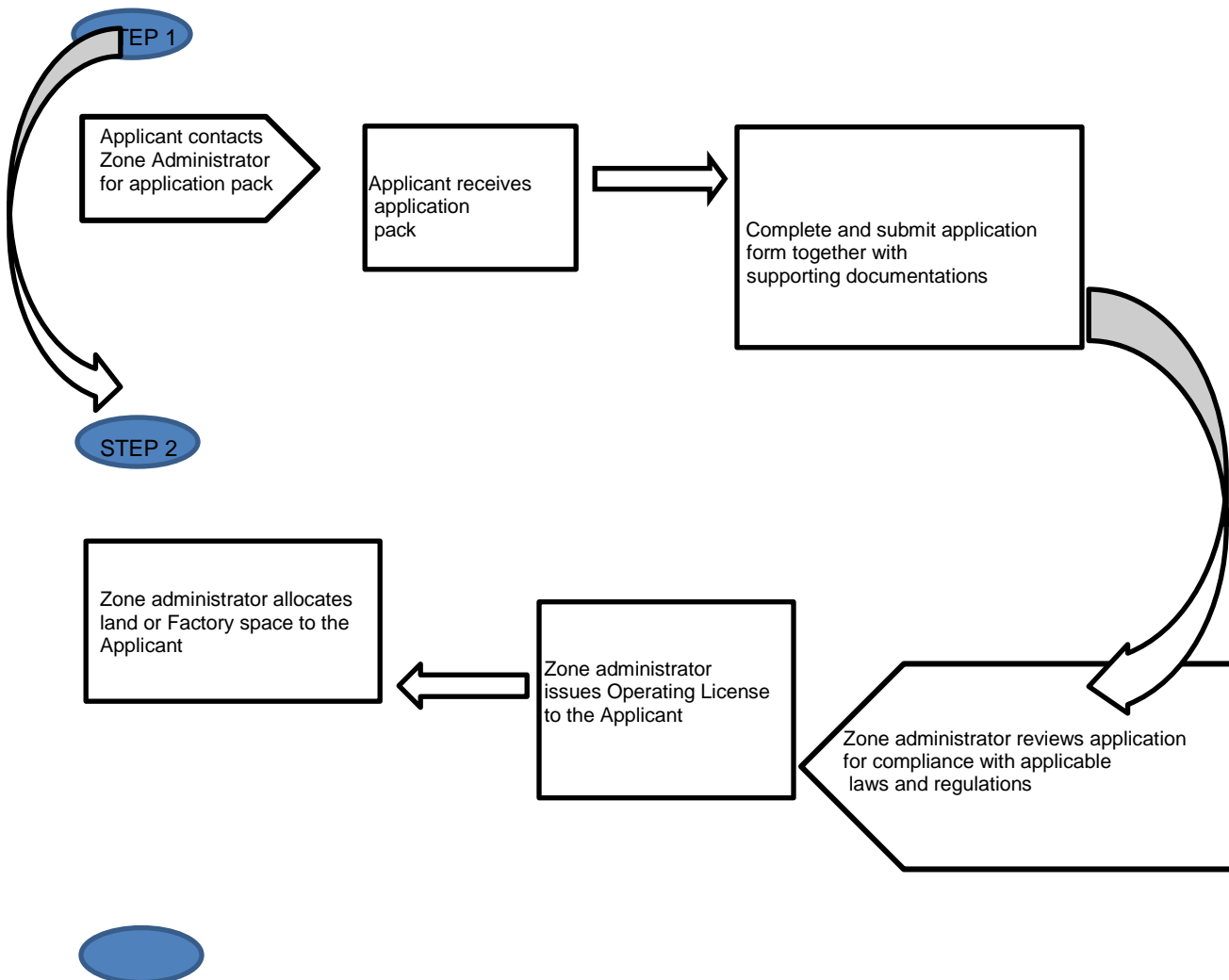
management license (and automatically being the representative of NEPZA in the zone with delegated supervisory powers) could have sister companies holding either enterprise licenses or export processing factory license at the same. The operational regulatory imbalances and uncertainties this situation brings to the zone governance and administration in Nigeria is better imagined. In the paper's view, this would create room for cases where the actors (investors) within the zone scheme also control entities with government-delegated regulatory powers. This is definitely an area within the legal framework and licensing regime requiring some modifications and clarity.

As a result of its importance to investors and due to certain myths surrounding the establishment of enterprises within the category of the second license highlighted above, some further discussions should ensue. Establishing a free zone enterprise and obtaining relevant license from NEPZA involves a company registration procedure. The registration of a business concern or an entity as an enterprise in the zone usually concludes with the issuance and delivery of a certificate of registration to the relevant promoters and marked by the insertion of the acronym *FZE* (meaning Free Zone Enterprise) as a suffix to the registered company name. For instance, *Amodu Nigeria Limited* as a registered entity in the customs territory would likely end up (if it so submits such name for registration in the zone) with *Amodu Nigeria (Limited) FZE* upon conclusion of the registration exercise. It is perhaps important to draw attention to certain clarifications at this juncture. First, it would be observed that the word *limited* in the above example is kept in parenthesis. This is to confirm that an entity who is already registered in the customs territory and who has decided to set up within a free zone and obtain an enterprise license may actually choose to retain its status name in the customs territory as either a limited liability company or a public company and at the same time take on the new status name of a free zone enterprise. It is therefore not surprising at all that *Nigerdock Nigeria Plc* (a registered entity in the Nigerian customs territory appears to have chosen to retain its status name thereat and became *Nigerdock Nigeria Plc FZE* in within the Snake Island Integrated Free Zone, Apapa, Lagos, Nigeria. Secondly, it is also important to note that obtaining an enterprise license for instance within the zone and acquiring the new status of an FZE equates registration as a *company* within the customs territory.³⁴ Therefore, the paper submits that a FZE who has no registered counterpart within the customs territory of Nigeria may enter such customs territory and carry on business without violating the provisions of section 54 of the Companies and Allied Matters Act, Cap C20, Laws of the Federation of Nigeria, 2004. It should quickly be added however that it will constitute an abuse of the free zone scheme for an entity to refuse registration in the customs territory only to choose the simplified free zone registration procedure within the host state of Nigeria for the purpose of carrying on business in the customs territory and not within the zone. There appears possible but should be discouraged.

4.3 Free Zone Enterprise Registration Procedure

³⁴ See generally, Part 5 of the 2004 NEPZA Regulations.

But what exactly is the registration procedure in the zones? This would slightly vary from one zone to the other. However, because of the element of having NEPZA as the applicable regulator in *most* of the zones, there appears to have been some convergence in the registration procedures overtime. An attempt has been made to represent such procedures in the three steps below:



STEP 3

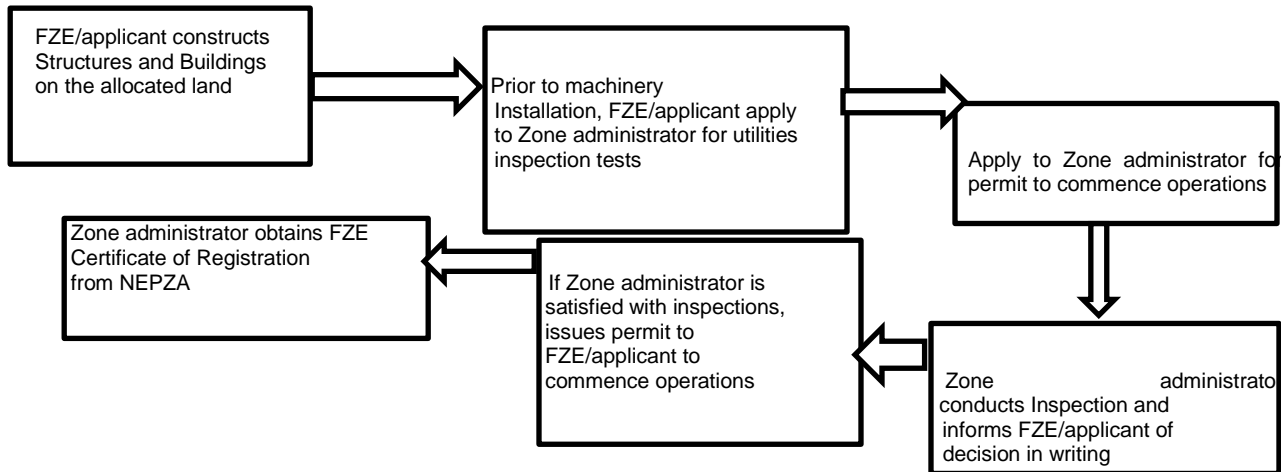


Figure 1 – Registration Procedures for Free Zones in Nigeria

4.4 Documentation Usually Required to Register an FZE

In the process of registration, the following documents are also usually required.

- a. Application letter to NEPZA for registration from the sponsor/promoter/applicant (individual or corporate) through zone administrator;
- b. Particulars of directors as in the prescribed form; This should be accompanied with:
 - i. Copy of Photo Identification of each Director
 - ii. Two Passport Photographs of each Director
 - iii. Consent Letter Signed by each Director
- c. Statement of Share Capital and Returns on Allotment;
- d. Declaration by solicitor of compliance with NEPZA requirements;
- e. Notice of Situation/Change of registered address;
- f. Three (3) copies of promoter’s board resolution authorising setting up of the FZE;
- g. Three (3) copies of promoter’s board resolution appointing directors of the FZE;
- h. Memorandum and Articles of Association of the FZE;
- i. The registered address of the FZE;
- j. Environmental Impact Assessment Report;
- k. Three (3) copies of the Feasibility Report.

5. THE INCENTIVE REGIME IN ZONES

There are various incentives applicable and/or administered in zones in Nigeria. There are regulatory, fiscal and financial incentives. Before going into specific details of benefits, it is important to note that the list of incentives is not exhaustive; while NEPZA may procure the design of further incentives in addition to any existing ones,³⁵ promoters of individual zone (whether private or public) may also design financial or infrastructural benefits towards attracting specific kinds of investors or investments to the zone. Therefore, the list below will combine both incentives approved by NEPZA as contained in legal instruments and other quasi-incentives which may be peculiar to some specific ones. An attempt has been made to so indicate such zone-specific quasi-incentives.

- a. All registration costs and related administration fees will be borne by zone administrator;³⁶
- b. Exemption from all federal, state and local government taxes, levies, duties and foreign exchange regulations;
- c. Exemption from import or export licenses to import or export goods into and out of the Zone;
- d. 100% remittance of profits and dividends to investors;
- e. 100% repatriation of foreign capital investment at any time;
- f. 100% single-member foreign ownership of business allowed;
- g. Services and goods produced from the zone can be supplied to the domestic customs territory and the global market;
- h. 0% rent and other charges for land use in the zone;³⁷
- i. Duty free and tax free import of raw materials, stock, equipment, machinery and spare parts into the zone;
- j. Onsite clearance of goods by the Nigeria Customs Service;
- k. Unrestricted foreign managers allowed upon securing necessary entry permits;
- l. Deployment of specially trained security officers to the zone for protection of personnel and assets;³⁸
- m. Limited or no government interferences in business operations as Zone Administrators interface directly with NEPZA and other government agencies on behalf of registered FZEs;
- n. Limited or no community disturbances and related issues as Zone Administrators resolve all issues in conjunction with NEPZA and relevant government agencies;
- o. Close proximity and easy access to the open sea or airport;³⁹
- p. Nigeria Port Authority services;
- q. Nigeria Immigration Services;
- r. Free Zone vehicle registration.

³⁵ Section 4 (g) of the Act.

³⁶ This is applicable in the Dangote area of the Lekki Free Zone.

³⁷ *Id.*

³⁸ This is something common to almost all zones in Nigeria, especially the Snake Island Integrated Free Zone and Dangote area of the Lekki Free Zone. The security of investors, their personnel and assets is usually at the highest level obtainable and definitely better than obtainable in the host country.

³⁹ *Id.*

It is reassuring to note that most of the above highlighted incentives have been recently confirmed in the *Compendium of Investment Incentives in Nigeria* issued on the 31st day of October, 2017 and as jointly authored by the one-stop investment agency in the Nigeria, Nigerian Investment Promotion Commission (NIPC); and the Federal Inland Revenue Service (FIRS).

6. THE REGULATOR (S)

The Act establishes NEPZA as a one stop-shop regulator for all zones created within its framework.⁴⁰ The regulator is expected to shield investors (registered free zone enterprises and other actors within the zone) from time-consuming or otherwise onerous compliance issues with other government agencies in the customs territory. NEPZA is a body corporate, with perpetual succession and a common seal and may sue and be sued in its corporate name and is capable of acquiring, holding, or disposing of any property movable or immovable for the purpose of carrying out its functions.⁴¹ Its functions include:

- a. the administration and management of all the zones;
- b. the approval of development plans in respect to infrastructures, administrative buildings, promotion of zones;
- c. the provision and maintenance of services and facilities;
- d. the establishment of customs, police, immigration and similar posts in the Zones;
- e. the supervision and co-ordination of the functions of various public sector and private sector organizations operating within the zones and resolving any dispute that may arise amongst them;
- f. the resolution of trade disputes between employers and employees in the zone in consultation with the Federal Ministry of Employment, Labour and Productivity.

7. THE NATIONAL ASSEMBLY, NEPZA AND OGEFZA

There are presently two related bills pending before the Senate Committee on Trade and Investment viz:

- a. the NEPZA-sponsored 'Nigeria Industrial Development and Zones Commission Bill 2016',⁴² and
- b. the OGEFZA-sponsored 'Amendment to the 1996 Oil and Gas Export Free Zone Act'.

By its provisions, the main thrust of the NEPZA-sponsored bill is the dissolution of both NEPZA and OGEFZA by repealing their respective enabling instruments and instead constitute one (1) agency of government to manage all free zone related matters in the country. The mischief which this bill seeks to

⁴⁰ See section 2 of the Act.

⁴¹ Section 2 (2) of the Act.

⁴² The author participated in a public hearing at the Senate whereby NEPZA made presentation about the bill but observed the presented bill was instead titled *Nigeria Special Economic Zones Authority Bill 2016* showing some difference from the version earlier made available to stakeholders.

correct lies in section 5 (2) of the OGEFZA Act. By virtue of the provisions of the OGEFZA Act, OGEFZA was given similar regulatory functions over free zone enterprises as NEPZA, especially in relation to the Export Free Zone established at Onne /Ikpokiri area of Rivers State.⁴³ It is perhaps pertinent to reproduce the provision below:

“The Authority (OGEFZA) shall have power to take over and perform such other functions hitherto performed by the Nigerian Export Processing Zones Authority as they relate to the export of oil and gas from any of the Nigerian Export Processing Zones established by the Nigerian Export Processing Zones Act 1992”.⁴⁴

Elaborating on the mischief once again, the above provision has constituted a veritable source of confusion, ambiguity and uncertainty in terms of the roles and relationship between OGEFZA and NEPZA as regulators of zones and registered enterprises especially in cases of enterprises involved in oil and gas export activities outside the Onne/Ikpokiri area of Rivers State.⁴⁵ The question has been, whether OGEFZA can lawfully (within the ambits of the OGEFZA Act) claim jurisdiction and Authority over free zone enterprises outside Onne (in Lagos for instance) whether or not involved in oil and gas export?

The paper wishes to note that NEPZA’s argument seems fair and reasonable towards avoiding ambiguities and confusions by proposing the repeal of the provisions of the OGEFZA Act and the Act and engendering an overarching new regulator which may present the opportunity to resolve these ambiguities and uncertainties. In this light, the Nigerian legislature may want to seek further consultations within the industry towards proceeding with the passage of the NEPZA-sponsored Nigeria Industrial Development and Zones Commission Bill 2016 or Nigeria Special Economic Zones Authority Bill 2016 as it may otherwise be known.

In respect of the second bill before the Senate, OGEFZA is seeking to ‘Amend the Oil and Gas Export Free Zone Authority Act CAP 05 LFN 2011 with a View to Provide for the Designation and Establishment of Oil and Gas Free Zones and Subzones in Nigeria and for Related Matter’.

To start with, there appears to be some uncertainties as the bill seems to have incorrectly claimed that there was an amendment in 2011 which varied the provisions of the OGEFZA Act. There had only been proposals in the past for amendments and there has never been an actual amendment of the OGEFZA Act through any formal legislative process.

Further, while a few reasons can be given to support the view that NEPZA should be kept distinct and separate from OGEFZA (i.e. maintaining two regulators in the area of free zone management in Nigeria⁴⁶) especially to ensure that specialized attention is given to free zone management in an industry which remains the highest contributor to the country’s GDP, there is no doubt however, this will only add

⁴³ See section 1 (1) of the Act

⁴⁴ All emphasis ours.

⁴⁵ There is an on-going case instituted against OGEFZA by some NEPZA registered licensees and enterprises (such as LADOL Free Zone and Snake Island Integrated Free Zone Management Company) challenging the jurisdiction of OGEFZA outside Onne/Ikpokiri and/or that they are involved in export of oil and gas.

⁴⁶ It should be reiterated that this is the position of OGEFZA but which NEPZA does not support.

on to the already existing confusion, duplicity of agency functions, ambiguities and uncertainties in free zone administration, management and governance in Nigeria.

By way of an example, the bill contains provisions using phrases such as 'oil and gas free zone and sub-zones', 'oil and gas related cargo', 'oil and gas export' without a corresponding, clear and unambiguous definition of 'oil and gas operations' .

Further, the Nigerian Ports Authority (NPA) together with other stakeholders at the public hearing expressed concerns in relation to section 10 of the bill which provides:

"In consideration of the substantial investment in Oil and Gas Free Zones, all Oil and Gas related cargoes must be handled only at approved Oil and Gas concessioned ports, however, investors are free to choose ports of discharge of their cargoes within the designated terminals at Onne, Warri, and Calabar ports".

From the above, apart from the tendencies of the above provisions towards monopoly and effects on signed concession agreements which the Federal Government of Nigerian has with many ports operators, the NPA specifically noted during one of the public hearings before the Senate that designation of some cargoes as 'oil and gas related cargoes' which permeates the amendment bill proposed by OGEFZA is strange to NPA, its operations and therefore a recipe for further confusion in the industry.

It must be said that there are many law abiding responsible corporate citizens in Nigeria and beyond who will always comply with all laws and regulations applicable in their line of operations. However, ambiguities and uncertainties in regulatory and enforcement framework remains a fundamental factor considered by investors in making investment in any industry or economy. While free zone schemes have succeeded in many jurisdictions especially in the Middle-East with the evolution of modern policy enclaves to drive industrialization,⁴⁷ many other free zone schemes have and will fail to realize their potentials as in the case in Nigeria if the framework is not rid of avoidable ambiguities and unnecessary duplications of roles and functions.

Business legislations are made for good governance and towards correcting existing mischiefs and providing clarity on any ambiguous areas in business operations. I believe that the Senate Committee on Trade and Investment is already on the right track by its wide stakeholder consultations before the passage of the proposed bills in respect of the management and/or regulation of free zones and industrial clusters in the country.

8. CHALLENGES AND RECOMMENDATIONS FOR ZONE GOVERNANCE AND MANAGEMENT IN NIGERIA

⁴⁷ See Dubai Internet City, Dubai Industrial City, Dubai Health Care City, Dubai Media City, Knowledge Village, Dubai Multi Commodities Centre et cetera.

Perhaps the major challenge is that already discussed above in section six above. The ambiguity in the enabling laws appears to be the most challenging deterrent to a robust and economically viable zone system in Nigeria

It would appear there are other challenges also relating to ambiguities and uncertainties. For instance, there is the issue of application of personal income tax legislation to operations in the zone. Some have argued that section 8 of the Act only grants tax exemption to free zone enterprises (registered companies in the zone) and not to individual employees working for the FZEs in the zone. This is a fair and reasonable argument. However, there is nothing in the legal and regulatory framework of zones in Nigeria (and one might add, even tax legislations in Nigeria) confirming that employees primarily working and permanently resident in a zone should not have its personal income tax exempted.⁴⁸ This argument is against the background that zones are designed in such a way as to have financial institutions, hospitals, restaurants, and other basic utilities and infrastructures within them to restrict or limit interaction with the customs territory. Moreover, there is nothing strange about granting company and personal income tax exemptions to enterprises and their employees in free zones as done in other jurisdictions already.⁴⁹ Therefore, by way of recommendation for regulatory reforms, relevant enabling zone legislation in Nigeria may be amended to expressly stipulate that personal income earned by employees of FZEs who are permanently resident in the zones should also be exempted from tax. It is the author's view that this may further encourage infrastructural development within the zones whereby hospitals, good road network, banks, reliable electricity supply and other facilities are speedily developed by the promoters of individual zones.

This leads discussions to the other challenge associated with free zone administration in Nigeria in terms of the under-developed infrastructure and enabling environment for investment to thrive. While it is settled that zones are created to increase export earnings, generate employment opportunities, improve training and skills for workforce, transfer modern production technology amongst others, all these may however not be realizable no matter the level or number of regulatory incentives granted if the so-called quasi-incentives (i.e. necessary infrastructure, banking facilities, hospitals, roads, and schools) are not put in place by the government in conjunction with the promoters of the zones.

Further, there is need to carefully create incentives around the free zone scheme. Nigeria must ensure that core labour standards, environmental requirements, and corporate responsibility obligations applicable in the customs territory are maintained within the zones to forestall cases of far-reaching stark differences between the rest of the host country and the zone.

⁴⁸ This is against the backdrop of the underlying residency rule governing personal income taxation in Nigeria. See section 2 of the Personal Income Tax Act Cap P8, Laws of the Federation of Nigeria 2004; see also its amendment in 2011 by the Personal Income Tax (Amendment) Act, 2011.

⁴⁹ In Free Economic Zones in Algeria, Egypt, Kuwait, UAE, Yemen, all corporate and private income taxes are exempted. In some Special Economic Zones such as in Egypt and Jordan, fiscal incentive is given such that very minimum and low personal income taxes are paid. See generally, MENA-OECD above note 7.

9. CONCLUSION

This article conceptually clarifies the free zone structure, operations, administration and governance within the Nigerian business climate. It confirms that zones, however described or labeled, are flexible policy enclaves construed by legal fiction to be separate from other parts of the host country, but with interrelated legal, regulatory and fiscal incentives towards attaining industrialization. Further, and against popular conception within corporate Nigeria, the article described free zones as offshore policy enclaves with unique regulatory and legislative agenda beyond tax exemptions. Apart from identifying specific rules, laws and regulations applicable to zone administration and management in Nigeria, the article also underscores the interaction of the legislative framework in the zone with other legislations in the customs area of the host country. Towards facilitating better investment decision for investors, the paper streamlines the registration procedure for establishing free zone companies or enterprises (FZEs) to carry out approved activities within the zones in Nigeria. The article also highlighted a few uncertainties in the licensing regimes within the zone operation and governance in Nigeria. In the end, the article contributed to the debate about the co-existence of NEPZA and OGEFZA as regulators of free zone activities in Nigeria. The paper notes the negative impact of any ambiguities and uncertainties in the Nigerian free zone scheme and made recommendations removing avoidable bottlenecks bedeviling smooth zone operations and towards ensuring the instrumentality of the zone concept to achieving industrial development within the zones and in the host state alike.