

Existing SADC Legal Instruments on Movement of Natural Persons

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Presentation Outline

1. Existing SADC Legal Instruments – Movement of Natural Persons
2. Protocol on Facilitation of Movement of Natural Persons
3. Protocol on Trade in Services
4. Member States GATS Commitments
5. Example of Immigration Law Reforms - Botswana
6. Conclusion

EXISTING LEGAL INSTRUMENTS

1. Draft Protocol on the Facilitation of Movement of persons, signed in 2005, not in force
 2. SADC Protocol on Trade in Services, signed in 2012, not in force
- ❖ To support and promote the efforts of the African Union in encouraging free movement of persons in African Regional Economic Communities as a stepping stone towards free movement of persons in an eventual African Economic Community;

EXISTING LEGAL INSTRUMENTS

- ❖ Article 5.(2)(d) of the SADC Treaty requires SADC to develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the Region generally, among Member States
- ❖ Article 10(3) of the SADC Treaty mandates the Summit to adopt legal instruments for the implementation of the provisions of the Treaty

DRAFT PROTOCOL ON THE FACILITATION OF MOVEMENT OF PERSONS

Overall Objective

To develop policies aimed at the progressive elimination of obstacles to the movement of persons of the Region generally into and within the territories of State Parties.

Specific Objectives

- ❖ entry, for a lawful purpose and without a visa, into the territory of another State Party
- ❖ for a maximum period of ninety (90) days per year for bona fide visit and in accordance with the laws of the State Party concerned;
- ❖ permanent and temporary residence in the territory of another State Party;
- ❖ And establishment of oneself and working in the territory of another State Party

PROTOCOL ON TRADE IN SERVICES

- ❖ A framework agreement on measures affecting trade in services in the SADC Region and defined as the supply of services in the 4 modes of supply- Cross Border, Consumption abroad, Commercial Presence and **Movement of a natural Person**
- ❖ **Measures by Member States that includes:**
 - ✓ Rules, regulations, procedures, administrative actions, decisions etc
 - ✓ Covering purchase, payment or use of services, access and use of services, presence through commercial and **presence of a natural person**

ARTICLE 17-TEMPORARY MOVEMENT OF NATURAL PERSONS

- ❖ Nothing in this Protocol shall prevent a State Party from applying its laws, regulations and requirements regarding entry and stay, work, labour conditions, and establishment of natural persons provided that, in so doing, it does not apply them in a manner as to nullify or impair the benefits accruing to another State Party under the terms of a specific provision or specific market access or national treatment commitment under this Protocol.
- ❖ This Protocol shall not extend to measures affecting natural persons seeking or taking employment in the labour market of a State Party or confer a right of access to the labour market of another State Party.

TIS

The TiS does NOT cover:

- ❖ natural persons seeking access to the employment market
- ❖ measures regarding citizenship, residence or employment on a permanent basis
- ❖ Governments are free to regulate entry and temporary stay, provided these measures do not nullify or impair the commitments

MODE 4- MOVEMENT OF NATURAL PERSONS

- ❖ One of the four ways through which services can be supplied internationally.
- ❖ Otherwise known as **Mode 4** - covers natural persons who are either service suppliers (such as independent professionals) or who work for a service supplier and who are present in another Member to supply a service.

PROTOCOL ON TRADE IN SERVICES

- ❖ Temporary movement of Persons -to provide a service
 - intra-corporate transferees(ICT)
 - business visitors,
 - independent professionals
 - contractual services suppliers
- ❖ national schedules of commitments
- ❖ Mutual recognition (academic, professional qualification and licenses) to be negotiated not later than 2 years of entry into force of the Protocol

INTRA-CORPORATE TRANSFEREES(ICT)

- ❖ executives, managers, specialists
- ❖ working within a juridical person established in the territory of a Member State
- ❖ temporarily transferred in the context of the supply of a service through commercial presence (either through a branch, subsidiary or affiliate) in the territory of another Member

SCHEDULES OF COMMITMENTS

- Each MS is required to have a schedule of commitment
- It identify the services sector, sub sector or activities subject to MA & NT obligations and limitations attached
- It is an undertaking by MS to provide MA& NT on the terms and conditions specified in the schedule
- The necessary indication to be entered in the 4 Modes of Supply
- **Focus Mode 4- Movement of Natural Person**
- MS are free to select any sector/subsector to make binding commitments

A snapshot of Mode 4 commitments by SADC MS

- ❖ Governed by horizontal commitments
- ❖ Positive listing of measures:
 - ❖ “Unbound except ...”
- ❖ Absence of full liberalization
- ❖ Access only for those with high-level of training and expertise, often as intra-corporate transferees

Angola

- **Hotels**
- Unbound, except for measures affecting senior managers and specialists with knowledge essential for the provision of the service.

DRC

- ❖ Unbound, except for measures affecting the entry and temporary stay, for a period of one year, which may be extended, without requirement of the economic need test, of natural persons in the following categories:
 - ✓ -senior executives
 - ✓ -specialists who possess knowledge essential for the provision of the service concerned

LESOTHO

- ❖ Automatic entry and work permit is granted for up to 4 expatriate senior executives and specialized skill personnel in accordance with relevant provisions in the Laws of Lesotho.
- ❖ **Approval is required for any additional expatriate workers beyond the automatic level.**
- ❖ **Enterprises must also provide for training in higher skills for the locals to enable them to assume specialized roles.**

MALAWI

- ❖ Unbound except for measures concerning the entry and temporary stay of natural persons employed in management and expert jobs for the implementation of foreign investment
- ❖ The employment of such persons shall be agreed upon by the contracting parties and approved by the Ministry of Home Affairs

ZIMBABWE

- ❖ Unbound, except for measures concerning the entry and temporary stay of intra-corporate transfer of executive and senior managerial personnel and except for specialists, subject to lack of availability in the local labour market

Namibia

- ❖ the entry and residence of foreign natural persons (service providers) are subject to Namibia's Immigrations Control Act of 1993 and labour laws.
- ❖ In accordance with Namibian legislation, the employment of foreign natural persons for implementation of the foreign investment shall be agreed upon by the contracting parties and be subject to approval by the Namibian Government, and such personnel shall be employed in management and expert jobs only.

Zambia

- ❖ Unbound except for measures concerning the entry and temporary stay of natural persons employed in management and expert jobs for the implementation of foreign investment.
- ❖ The employment of such persons shall be agreed upon by the contracting parties and approved by the Ministry of Home Affairs.
- ❖ **Enterprises must also provide for training in higher skills for Zambians to enable them to assume specialized roles.**

Tanzania

- ❖ Unbound except for measures concerning senior managers that possess skills not available in Tanzania

South Africa

- Unbound, except for the temporary presence for a period of up to three years, unless otherwise specified, without requiring compliance with an economic needs test, of the following categories of natural persons providing services
- **A. Services Salespersons** - natural persons not based in South Africa and acquiring no remuneration from a source located within South Africa, who are engaged in activities related to representing a services provider for the purpose of negotiating for the sale of the services of that provider, without engaging in making direct sales to the general public or supplying services. Temporary presence for Services Salespersons is limited to a ninety-day period.

South Africa

- **B. Intra-corporate Transferees** – natural persons of the following categories who have been employed by a juridical person that provides services within South Africa through a branch, subsidiary, or affiliate established in South Africa and who have been in the prior employ of the juridical person outside South Africa for a period of not less than one year immediately preceding the date of application for admission:

South Africa

- **Executives** - natural persons within the organization who primarily direct the management of the organization or establish goals and policies for the organization or a major component or function of the organization, exercise wide latitude in decision-making, and receive only general supervision or direction from higher-level executives, the board of directors, or stockholders of the business

South Africa

- **Managers** - natural persons within an organization who primarily direct the organization, or a department or subdivision of the organization, supervise and control the work of other supervisory, professional or managerial employees, have the authority to hire and fire or recommend hiring, firing, or other personnel actions and exercise discretionary authority over day-to-day operations at a senior

South Africa

- **Specialists** - natural persons within an organization who possess knowledge at an advanced level of continued expertise and who possess proprietary knowledge of the organization's product, service, research equipment, techniques, or management.

South Africa

- **Professionals** - natural persons who are engaged, as part of a services contract negotiated by a juridical person of another Member in the activity at a professional level in a profession set out in Part II, provided such persons possess the necessary academic credentials and professional qualifications, which have been duly recognised, where appropriate, by the professional association in South Africa.

South Africa

C. Personnel Engaged in Establishment - natural persons who have been employed by a juridical person for a period of longer than one year immediately preceding the date of application for admission and who occupy a managerial or executive position and are entering South Africa for the purpose of establishing a commercial presence on behalf of the juridical person.

FOREINGN INVESTORS KICKED OUT AS BOTSWANA CLOSES FOR BUSINESS,

Sunday Standard ,29-10-2012

- ❖ Public officers bungle work and resident permit system
- ❖ New system makes it more difficult to work or do business in Botswana than anywhere in the world
- ❖ Foreign investors kicked out, business close down, thousands of jobs on the line
- ❖ New Investors closed out and foreign investors jittery as Botswana rolls back welcome mat

Immigration Reforms

- ❖ “Government is being forced to take emergency action to stop the ongoing mass exodus of foreign investors and save thousands of jobs following a flawed attempt to tighten the country’s immigration system, which has sent a wrong message that Botswana is unwelcoming and closed for business

Point Based System

- ❖ Introduced by the Ministry of Labour and Immigration – to manage its immigration system
- ❖ The system makes it more difficult to qualify for a work and residence permit in Botswana than anywhere in the world
- ❖ Under PBS, the more skills a foreigner has and the more those skills are in demand in Botswana, then the more points they will score and the more likely they will be allowed to work or do business in Botswana

Point Based System

- ❖ Currently the highest pass mark for countries using the system is 63 %(UK)
- ❖ Botswana pass mark is at 75%, making it more difficult for skilled workers, investors to stay in Botswana than in the UK, although the UK has more skilled manpower compared to Botswana.
- ❖ As a result more skilled workers suddenly find themselves unqualified to work and do business in Botswana

Success Stories: Immigration Reforms Make Botswana More Attractive to Investors 01 February 2013, USAID TRADE HUB

- ❖ On February 1, 2013, Botswana lowered the cut-off point for new work and residence permits from **75% to 60%** and to 50% for renewal applications in response to requests from the private sector. This makes the points-based system (PBS) for permits more responsive to the needs of prospective investors to be able to mobilize skills and experience not already available in the country.
- ❖ The Trade Hub, which initially assisted the government to come up with the PBS, facilitated the consultations between the government and private sector that led to the adoption of these reforms.

PBS

- ❖ In its efforts for diversify the Botswana economy away from its dependence on minerals, the government of Botswana is actively courting investors in productive sector and taking several steps to transform the business enabling environment to facilitate effective private sector operations.

PBS

- In April 2012, Botswana introduced a pilot PBS in response to recommendations in a paper commissioned by the Trade Hub. The introduction of the PBS however resulted in high **rejection rates for permit applications**. The Trade Hub then partnered with the Botswana Investment and Trade Centre (BITC) to organize a consultative workshop bringing together over 200 participants from the private and public sector, to discuss proposals to improve the PBS.

Following these consultations, the Government agreed **to lower the cut-off point for permits and to automatically grant permits to investors recommended by BITC and other investment institutions.**

PBS

- The reforms are expected to make it easier and more transparent to obtain work and residence permits thus encouraging investment into the country.

According to Mrs. Sethembile Dube, Executive Director of Botswana Exporters and Manufacturers Association (BEMA), the revised PBS comes at the **"right time to restore public trust in the immigration law and controls"**. She noted that it has improved the way investors perceive Botswana, resulting in increased investor confidence in the country.

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