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Social Security for Skilled Professionals from the Perspectives of GATS, the CFTA and African Free Trade and Trade in Service Agreements

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Outline

- Background
- WTO and GATS
- The Africa Continental Free Trade Agreement (AfCTA)
- AU Protocol on Trade in Services
- AU Protocol on Free Movement of Persons
- SADC
- Conclusions

Background

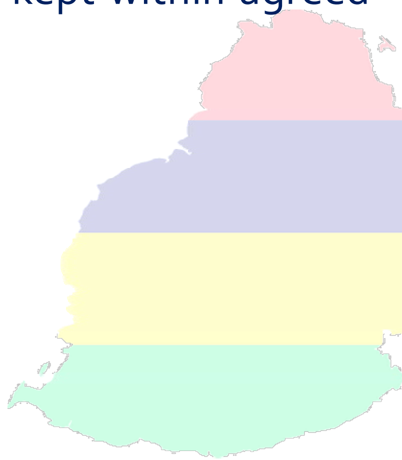
- Typically, those affected include skilled professionals, business persons, investors, intra-corporate transferees, etc.
- Relevance of this theme?
  - (1) "Dichotomy" between trade, on the one hand and, on the other hand, labour relations & social protection regulatory regimes
  - (2) Many of those who migrate in the context of trade and trade in services –
    - Are not workers/employees and therefore not covered by the mainline international and regional labour and (often also not) social protection instruments
    - Often do so on a short-term basis
- Of critical importance are free trade and trade in services agreements, in particular the WTO's GATS and similar instruments world-wide

WTO and GATS

- The World Trade Organisation (WTO) is the only international body dealing with the rules of trade between nations. Its most important tasks include, among others:
  - Increasing trade liberalisation internationally and helping trade flow as freely as possible, providing information on trade rules and assuring transparency in trade;
  - Serving as a forum for trade negotiations

- The core of the WTO is its negotiated and signed agreements, which have been consented to by the majority of the world's trading nations and, typically, have been ratified by their parliaments.

- One of these agreements is the General Agreement on Trade in Services (GATS), which is a multilateral agreement negotiated in the Uruguay Round, coming into effect in 1995. WTO agreements, such as GATS, are contracts intended to bind governments in order to ensure that trade policies are kept within agreed limits, thereby forming the basis for international commerce. GATS' objectives include:
  - Creating a credible and reliable system of international trade rules;
  - Ensuring fair and equitable treatment of all participants (principle of non-discrimination);
  - Stimulating economic activity through guaranteed policy bindings; and
  - Promoting trade and development through progressive trade liberalisation



GATS

- GATS therefore aims to liberalise trade in services under conditions of transparency and progressive liberalisation

- ‘Services’ include any service in any sector except services supplied ‘in the exercise of governmental authority’, defined as ‘any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers’

- Otherwise, government measures affecting trade in services are covered by GATS

- GATS covers four different modes of supply; of particular importance for current purposes is GATS Mode IV, i.e. –
  - The presence of natural persons is the supply of a service by a service supplier of one member, through presence of natural persons of a member in the territory of any other member, such as non-nationals working abroad in terms of a consultancy agreement

GATS

- Two core principles are of particular importance:
  - Operation of the **Most Favoured Nation (MFN) rule**, which requires of a WTO member state to grant equal treatment to services and service suppliers of different member states
  - Impact of the obligation imposed on member states to give effect to the **National Treatment Principle** – member states must accord to services and service suppliers treatment no less favourable than they accord to their like services and service suppliers

- However, GATS foresees substantial flexibility:
  - Each WTO Member is required to submit a schedule of commitments; minimum sector coverage and levels of liberalisation are not specified
  - WTO Members are free to attach limitations in their schedules
  - Although all services are covered other than services provided in the 'exercise of governmental authority', a Member does not assume any obligations in non-committed sectors and modes in relation to two key trade-policy parameters: market access and national treatment

GATS

- Some social security implications flowing from GATS – the following have been suggested (e.g., Yeates (2005)):
  - **Introducing a private element** in social security provisioning? - opening up the supply of social security services to competition from outside the country concerned may have a significant impact
  - Bilateral agreements containing **different provisions for different member states**?
  - The operation of the **national treatment obligation may assist a temporary skilled migrant worker who contributes** to the host country social security system: he/she may be entitled to equal treatment with nationals

The AfCFTA and its objectives

- "The creation of the Continental Free Trade Area is an opportunity to shift the mindset that a liberalised sector takes away the right to regulate, and *rather appreciate that well-regulated integrated services sectors on the continent can improve services for consumers, and contribute to development*" (Hope, 2018)
- Create single continental market for goods and services
- Free movement of business persons and investments
- Facilitate the establishment of a (Continental) Customs Union
- Expanded intra-African trade through better harmonisation and coordination of trade liberalisation and facilitation across Africa
- Maximise opportunities for scale production, continental market access and better reallocation of resources

Extraordinary Summit on the African Continental Free Trade Area

- The AfCFTA will be the world's largest free trade area since the formation of the World Trade Organisation

- 44 out of 55 AU Member States signed the consolidated text of the Agreement; will enter into force once 22 Member States have ratified the Agreement

- Kigali Declaration signed by 47 members

- 30 Member States signed the Protocol on Free Movement of Persons

- Protocol on Trade in Services, among others, recommended for adoption

AU Protocol on Trade in Services

- Aims to create a single services market through progressive liberalisation
- Eliminates barriers to trade in services across the continent
- Covers all services in any sector
  - Except *services supplied in the exercise of governmental authority*
    - These are services not supplied for commercial purposes or in competition with one or more service suppliers
- Links with GATS a specific objective – " … to pursue services trade liberalisation in line with Article V of the GATS by expanding the depth and scope of liberalisation and increasing, improving and developing the export of services, while fully preserving the right to regulate and to introduce new regulations"

AU Protocol on Trade in Services: Core principles

- Schedule of Specific Commitments to be finalised
- MFN rule
  - "Each state party shall, upon entry into force, accord immediately and unconditionally to services and service suppliers of any other state party treatment no less favourable than that it accords to like services and service suppliers *of any Third Party*"
  - A state party may maintain a measure inconsistent with this, provided listed in the "MFN exemption list" (annexed to the Protocol)
  - State parties to review this list regularly
- National Treatment Principle
  - In all sectors inscribed in the schedule, and subject to any listed conditions and qualifications, each state party is expected to accord to services and service suppliers of any other state party treatment no less favourable than that accorded to *its own like services and service suppliers*, subject to the conditions and qualifications agreed and specified in its Schedule of Specific Commitments
- Progressive liberalisation
  - Progressive elimination of the adverse effects of measures on trade in services as a means of providing effective market access / boosting intra-African trade in services
- Mutual recognition of education or experience obtained, licenses or certifications granted

AU Protocol on Free Movement of Persons

- Aims include:
  - To facilitate the implementation of the Treaty Establishing the African Economic Community (AEC)
  - To provide for the progressive implementation of free movement of persons, right of residence and right of establishment in Africa
- Right to seek and accept employment without discrimination in any other Member State (in accordance with its laws and policies)
- Right of "establishment" includes the right to set up a business, trade, profession and vocation in the territory of the host Member State and right to conduct economic activity as a self-employed person
- Accompanied by Draft Implementation Roadmap (with an indicative deadline of 2023 for implementation)

Social security benefits

- Article 19: "State Parties shall, through bilateral, regional or continental arrangements, facilitate the portability of social security benefits to nationals of another Member State residing or established in that Member State"
- Immigration policies and labour laws (including regulations relating to the employment of non-nationals) must be harmonised and laws, policies and procedures relating to social security must be reconsidered
- Variable geometry emphasised – i.e. the implementation of any provision of the Protocol at different speed and time
- Draft Implementation Roadmap provides as follows:
  - Social security benefits to be made available to workers from other Member States
  - Regional integration and collaboration of social security schemes in Member States promoted
  - Portability of benefits provided for: "Establish mechanisms for workers from other Member States to access their social security benefits in their own countries and in other Member States."

SADC

- Freedom of movement principle in SADC is weakly developed:
  - The SADC Treaty does not regulate the matter conclusively, but merely requires of 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 5(2)(d))
- Also, nationality discrimination is not outlawed: the principle of non-discrimination contained in Article 6(2) is a closed list, and does not include the prohibition of discrimination based on nationality or citizenship.
- Draft Protocol on the Facilitation of Movement of Persons (2006) does not guarantee freedom of movement in any way which is potentially significant for purposes of enhancing the social security position of intra-SADC migrants
  - The reason is that this instrument does recognize visa free travel for up to ninety days, but renders the right to residence and establishment (in the occupational sense of the word) subject to *restrictions contained in national laws*
  - "Freeing up flows of goods and capital while simultaneously trying to shut down the movement of people makes limited economic sense." (Crush, Williams and Peberdy, 2005)

SADC: Free Trade Protocol

- SADC Free Trade Protocol (adopted 1996, in force 2000) – its objectives include, among others (Art 2):
  - To further liberalize intra-regional trade in goods and services on the basis of fair, mutually equitable and beneficial trade arrangements, complemented by Protocols in other areas
  - To establish a Free Trade Area in the SADC Region.

- The Protocol contains among others the following principles –
  - Most Favoured Nation (MFN) treatment (Art 28)
  - National Treatment, in relation to traded goods (Art 11)

- Regarding trade in services, the Protocol stipulates (Art 23):
  - Member States recognize the importance of trade in services for the development of the economies of SADC countries, and
  - Member States shall adopt policies and implement measures in accordance with their obligations on terms of the WTO's General Agreement on Trade in Services (GATS), with a view to liberalizing their services sector within the Community

SADC: Protocol on Trade in Services

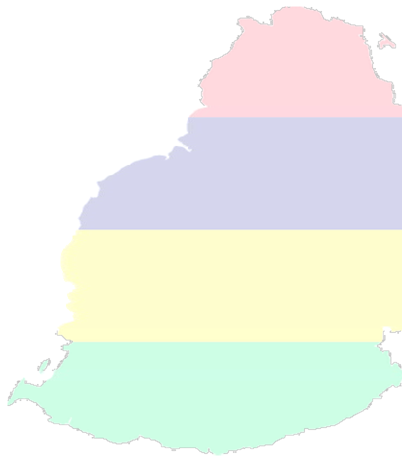
- Adopted in 2012

- Objectives include, among others (Art 2):
  - To progressively liberalise intra-regional trade in services on the basis of equity, balance and mutual benefit with the objective of achieving the elimination of substantially all discrimination between State Parties and a liberal trading framework for trade in services with a view to creating a single market for trade in services
  - To ensure consistency between liberalisation of trade in services and the various Protocols in specific services sectors
  - Pursue services trade liberalisation, while fully preserving the right to regulate and to introduce new regulations

- The Protocol acknowledges the operation of the MFN and National Treatment principles (Arts 4 and 15), and of the rights and obligations of SADC Member States under the WTO's GATS rules

SADC: Accelerated Programme for Economic Integration (APEI)

- With the assistance of the World Bank so far, five SADC countries (Malawi, Mauritius, Mozambique, Seychelles and Zambia) have embarked on an "Accelerated Programme for Economic Integration" (APEI)
  - Their objectives are to enhance their competitive edge, harness foreign investment, create employment opportunities and foster higher economic growth
  - Essentially the objective is to improve the standard of living of the population of these countries (Treebhoohun, 2015)
- To achieve these objectives five pillars have been identified:
  - Improvement of business regulatory environment
  - Elimination of barriers to trade in goods
  - Promotion of trade in services
  - Improvement in trade facilitation
  - Peer to peer learning and capacity building
- Social security implications of this initiative have yet to develop



SADC: Other instruments

- The Code on Social Security (2007) in the SADC (2007) stipulates that SADC Member States should work towards the free movement of persons; and that immigration controls should be progressively reduced (Art 17.1)
- The Code and the SADC Protocol on Employment and Labour (2014) do not distinguish between categories of migrant workers and require, among others, equal treatment, participation in the social security schemes of the host country, portability of social security benefits, aggregation of insurance periods and the maintenance of acquired rights and benefits
- While these provisions are also applicable to self-employed migrant workers (according to the Code), the may, however, not be applicable to all categories of business persons traditionally covered under trade in services agreements

Tripartite

- Tripartite (COMESA-EAC-SADC) Free Trade Area (TFTA) Agreement signed by 21 member countries in 2015
- Requires 14 ratifications to enter into force
  - So far, only Egypt and Uganda have both signed and ratified the Agreement.
- Delayed negotiations
- No serious attention to social security position of persons migrating to and within the Tripartite
  - No focus on portability and social security coordination too
  - Absence of reference to social security-related matters in foundational documentation

Social security arrangements and the Tripartite

- Could be developed – Memorandum of Understanding on the Tripartite refers specifically to the "development of programmes to enhance movement of persons, labour and services across the region" as an area of cooperation
- But emphasis is on free movement of business persons only, not movement of persons / labour
- Social and economic development is one of the general objectives of the Tripartite Free Trade Area
- It is therefore clear that significant work remains –
  - Firstly, to incorporate social security coordination and benefits portability within the framework of Tripartite negotiations, and
  - Secondly, to extend the discussion on the underlying free movement regime beyond business persons to include workers as well

Conclusions:

- Exemption of contributing to the social security system of the host country, in the event that the temporary skilled migrant contributes to the system of the home country (nowadays increasingly regulated via either bilateral social security agreements and/or via posted workers regulatory instruments)
- Repayment/reimbursement of social security contributions once the skilled professional returns to their home country
- Adoption of appropriate international standards to provide appropriate coverage

Conclusions:

- There is indeed need for a more principled approach – in particular, access of skilled professionals to social security benefits, should not merely be seen as being subject to trade law and policy or, for that matter, migration law and policy:
  - "… [W]e suggest that there would be ample reasons to identify within our cross-border mobility matrix an area of migration characterised by the 'provision of predominantly personal work or services' where the element of capital, in the form of tangible or intangible assets for the performance of that work or service, is only marginal or ancillary. We argue that this family of cross-border human mobility processes should become the object of separate and specific bilateral, plurilateral and multilateral negotiations with the view of regulating and promoting free movement across countries and regions of the world on the basis of the principle of equal treatment between home workers and migrant workers (bar perhaps for particularly short postings where the integration of the migrant worker in the fabric of the host economy of society is neither necessary nor possible), and the respect for international labour standards. In a way, we suggest a progressive assimilation of these processes to the rules currently shaping the migration of workers, and the decoupling of this broad category from the element of duration of the provision." Engblom *et al* (2016) 88-89.

Conclusions:

- There is indeed a need, also in Africa, to reconcile the provisions of free movement protocols, as well as social protection protocols, with those of free trade and trade in services arrangements

- It is suggested that the (social security) provisions of the AU Protocol on Free Movement of Persons may be of particular assistance in this regard

Conclusions: CFTA Services in Trade Protocol - the importance of positive listing

- GATS positive listing approach likely to be followed: "Each country will nominate the specific services sectors in which they intend to liberalise trade, as well as any restrictions in that sector" (Hope, 2018)
- Member states should ensure that an integrated approach to services trade is taken, both internally in member states, and intra-regionally (Hope, 2018)
- This requires bold commitments and a positive audit of sectors (identifying which sectors specifically need "protection") (Hope, 2018)
- Sectors should be listed and exemptions scheduled where necessary (Hope, 2018)
- This will result in expanded service provision from within the continent in future and attainment of the SDGs through improved intra-Africa goods, trade and services liberalisation and the movement of business persons (Viljoen, 2018)