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Submission for a General Comment on the Convention on Migrant Workers and the Global Compact for Migration

Towards a Systemic Interpretation of the GCM in Light of Trade Agreements and Bilateral Labor Migration Agreements under ICMWR

The Global Compact for Migration, which stands as the "first intergovernmental agreement prepared under the auspices of the United Nations, to cover all dimensions of international migration in a holistic and comprehensive manner",[i] commits states to implement its non-legally binding, but mutually exchanged commitments "consistent with [their] rights and obligations under international law" and to attain "policy coherence".[ii] Out of this comprehensive" and "integrated" approach (Objective 23), one would expect the GCM to expressly engage with human mobility in WTO/GATS mode 4 and in preferential trade agreements (PTAs) and with admission schemes under bilateral (labor) migration agreements (BLAs, BLMAs) .

Whereas Objective 23 of the GCM refers concluding bilateral, regional and multilateral partnerships "in line with international law", there is a commitment to "develop", "facilitate", "review and revise" bilateral labor migration agreements in Objective 5, but the temporary movement of persons (TMNP) under trade agreements is not very detailed. By failing to engage with the TMNP under trade agreements and expressly including these into its coverage, the GCM misses out on an opportunity and a necessity of reviewing such human mobility from the viewpoint of its 'guiding principles', which are human rights, core labor standards, due process and rule of law.

Certainly, some annexes or chapters on TMNP in recent PTAs subject that mobility to transparency obligations and the right to information, to wage parity obligations and upholding core labor standards, nonetheless, these provisions are most of the time not directly applicable to individuals seeking redress on those grounds. Having trade agreements specifically be reviewed and monitored through the UN review mechanism for the GCM, would have offered an additional check on trade agreements and the movement of persons liberalized therein.

Aside this gap, an explicit commitment requiring states to ensure policy coherence or even, a systemic legal interpretation, which, beyond the plain meaning of the text of the agreement were to require a contextual analysis of that said BLA or trade agreement in light of relevant international legal norms, including, the ILO standards, the ICRMW. The only instance, where the GCM calls for mutually coherent interpretation refers to the GCM's relationship to the Agenda 2030 in paragraph 39.[1] Falling outside the international cooperation framework of the GCM, both bilateral labor migration and trade agreements fail to be captured by the GCM commitments reflecting the latest legal developments and best practices. Instead, these agreements continue to co-exist in the shadow of the GCM soft law. However, introducing a duty of interpreting the GCM systemically through the ICRMW and its

[1] "commit to promote the mutually reinforcing nature between the Global Compact and existing international legal and policy frameworks, by aligning the implementation of this Global Compact with such frameworks, particularly the 2030 Agenda for Sustainable Development as well as the Addis Ababa Action Agenda, and their recognition that migration and sustainable development are multidimensional and interdependent."

General Comments, could close this gap and bring bilateral migration agreements and trade agreements back into the UN system. This is what this legal brief is suggesting to provide for:

1) Categories of Migrant Workers and Service Providing Natural Persons

The ICMWR defines self-employed (Art. 63), seasonal (58), itinerant (59), project-tied (61) and specified-employment workers (60), along much of the same categories, which states typically have liberalized in the WTO/GATS mode 4 and PTAs, and bilateral labor migration agreements (Carzaniga 2009; Jacobson 2011). On the other hand, the GCM's objective 5 on diversifying and expanding legal pathways falls short of breaking down the commitments of states to improving the mobility across borders for any specific category of workers or type of employment. Objective 5 of the GCM aims to "develop" and "facilitate" bilateral pathways, but paragraph c on "reviewing and revising"[2] existing options and pathways only refers to the need for improving the "skills matching",[3] and does not call for states to commit to enhance the human rights record of existing BLAs, (para. 15 (f) GCM) nor to improving wage and working conditions according to ILO standards, nor to enhancing the gender-sensitivity, as called for by para. 15(g) GCM or the development potential by introducing categories of skills in the lower spectrum, traineeships and skill transfer options.

To improve the legal security and the predictability, it is suggested that the ICMWR along with PTAs, and GATS mode 4 inform the GCM. It is suggested, that the IMRF of the GCM look into the categories of the ICMWR and even those of WTO/GATS mode 4, since many states have ratified the former multilateral agreement and are legally bound to open services (not labor) markets to the temporary movement of such professionals, and workers, regardless of skill levels. Secondly, the GCM could refer to new categories of foreign workers, with a focus on the medium- to lower skill spectrum, as recently introduced in different mega-regional and comprehensive trade and economic partnership agreements, including graduate trainees, instructors, installers and maintainers, also because some of these categories address gender gaps (instructors, domestic workers, caregivers, nurses, therapists, hairdressers) and because trade agreements, mostly in Asia have modelled for gender-sensitive or even, responsive provisions, including the admission of spouses, skills-testing as opposed to recognition (Hennebry et al. 2022, Wickramsekara 2018; Panizzon and Singh 2020). Here, the GCM's guiding principle of gender-sensitive commitments could be drawn upon to improve the gender dimension of migrant

[2] (c) Review and revise existing options and pathways for regular migration, with a view to optimizing skills- matching in labour markets and addressing demographic realities and development challenges and opportunities, in accordance with local and national labour market demands and skills supply, in consultation with the private sector and other relevant stakeholders;

[3] (a) Develop human rights-based and gender-responsive bilateral, regional and multilateral labour mobility agreements with sector-specific standard terms of employment in cooperation with relevant stakeholders, drawing on relevant International Labour Organization (ILO) standards, guidelines and principles, in compliance with international human rights and labour law; (b) Facilitate regional and cross-regional labour mobility through international and bilateral cooperation arrangements, such as free movement regimes, visa liberalization or multiple-country visas, and labour mobility cooperation frameworks, in accordance with national priorities, local market needs and skills supply;

workers, whose movement is either liberalized in a BLA or a PTA. For example, France's BLMAs with Senegal, Burkina Faso, Tunisia, Gabon, Congo have a gender ratio in terms of jobs and professions listed for citizens from these countries that is tilted towards male workers, including technicians, IT workers, maintainers, installers, and only the one with Senegal listing two occupations in the medical/caretaking category (Jolivel 2019; Panizzon 2022).

2) Expedited visa and work permit application procedures

In many ways, the ICMRW, but also the WTO/GATS commitments are more specific in terms of steps to be taken to liberalize the admission of foreign workers than the GCM—eliminating economic needs tests, lifting numerical quotas, fast-tracking visa application procedures, extending permits of stay or work and introducing renewals or multiple entry visa or trade-specific visa (APEC business card). Many preferential trade agreements (PTAs) have made GATS-plus and GATS-extra advances over transparency and information requirements relating to visa, work permit and other relevant national immigration laws. Some introduce a reciprocal duty to provide information on the modification or entry into force of immigration laws within a certain timeline (6 months after entry into force of FTA; AANZFTA art. 8; 160days for CETA, Chapter 10), to inform about changes in immigration laws directly affecting TMNP (90 days Art. 8 AANZFTA), or, to establish a contact point, which merges visa application with information duties in a single administrative entity (Switzerland-China FTA and CETA Annex 10-A – List of contact points of the EU Member States and 10.5 for Canada).

GCM Objective 6 on fair and ethical recruitment is quite far-reaching, but unlike many PTAs, does not introduce a wage parity requirement for migrant workers in relation to nationals as many mode 4 trade in services commitments under PTAs do. Hence, we suggest that also for interpreting Objective of the GCM, a coherent and systemic approach will need to take into account the ICMWR read in conjunction with relevant provisions from PTAs and GATS mode 4 commitments.

3) Regularizations

Regularizations are a "policy response . . . to provide legal status to irregular migrants, despite their unlawful entry or stay,"[iii] such that at the EU level, there is a "blanket ban on mass regularizations." National programs for collective, one-off regularizations of migrants, either in specific sectors of the economy or more universally remains an exclusive Member State competence, such that the EU is tolerating such national practices, as it has not yet succeeded to adopt a unified law and policy either banning or encouraging mass regularizations.

In a hitherto single, bilateral migration agreement, France provided for a regularization of Senegalese citizens, unlawfully staying in France. Through an amendment of the agreement on the joint management of migration of 2006 in 2008, an Art. 42 was added, providing for a possibility by France to exceptionally admit, any Senegalese who has entered irregularly or overstayed their visa and work permit, but who can prove a job offer or a firm promise of potential employment. It is still unsettled, despite court practice to the contrary, if Art. 42 can be

qualified as a legal entitlement that confers an individual right for Senegalese upon showing proof of an employment contract or a promise of employment (promesse d'embauche) for one of the professions listed in the Annex to the AJM as 'in need' in France, and upon presentation of an individual hardship application (which must include a clean criminal record). Examples such as this show, that bilateral (labor) migration agreements must be read and interpreted carefully, so as to assess whether or not they might be conferring rights and obligations upon individuals, which can be reviewed before courts.

French court practice has watered down the scope of Art. 42 by introducing a wider margin of discretion for the French prefects deciding on the individual cases, resulting in the overruling of the majority of applications for regularization of status. Even if Art. 42 is not one of the typical one-off regularization programs, which applies across-the-board and automatically to all Senegalese in irregular stays in France, it has the potential to conflict with GCM's Objective 7 establishing pathways to regularisation, "on a case-by case basis and with clear and transparent criteria".

Cases from other BLAs/BMAs conferring a regularization option must thus be carefully assessed under the GCM. ILO Conventions 97 (1947) & 143 (1975) provide for regularization within BLAs. The Zero Draft Plus 5 March 2018 of the GCM had been more progressive and forthcoming towards mass regularization.[iv] In addition, during the COVID-19 pandemic, the Committee for the Protection of the Rights of All Migrant Workers and Members of their Families of the United Nations & UN Special Rapporteur on the human rights of migrants developed a **Joint** Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants, 26 May 2020, which read 12. Promote the regularization of irregular migrants or undocumented migrants. This includes the adoption of other regular avenues for migrants in a vulnerable situation, measures to allow extensions of work visas and other appropriate measures to reduce the challenges faced by migrants and their families due to the closure of businesses to ensure the continued protection of their human rights".

In sum, this suggested content for the general comment, provide that the GCMs labor migration relevant provisions, including objectives 5, 6, 17 must be interpreted systemically, by ensuring mutually coherent meaning between the ICMWR, ILO core labor standards and relevant provisions from WTO/GATS mode 4 commitments and from PTAs, where relevant, from BLAs. Such a systemic interpretation will ensure policy coherence, alignment with relevant international law (para. 39 GCM) and a whole-of-society approach (para. 15 (j) GCM). The GCM's call for comprehensiveness must not be mistaken with the quest for coherence. Whereas comprehensive solutions mean arranging different policies and norms within a single unit, it does not imply a normative decision on prioritization or ranking of these, which, in the case of migrant workers' rights, wage equality, skills and credentials recognition, has a legal impact. Coherence, on the other hand, relates to interlinking through legal interpretation, different sources of norms, including analysing in a mutually supportive way, the provisions of the ICMWR with the GCM and with relevant trade and bilateral labor migration agreements. In view to guarantee a gender-sensitive, human-rights-based review of existing BLAs, BLMAs, PTAs under the GCM and the ICMWR, a coherent interpretation must be sought ought.

Selected references

Battistella, Graziano Labour Migration in Asia and the Role of Bilateral Migration Agreements. In: Panizzon, M., Zürcher, G., Fornalé, E. (eds) The Palgrave Handbook of International Labour Migration. Palgrave Macmillan, London, 2015, pp.299-325.

Bobeva Daniela & Jean- Pierre Garson, Overview of Bilateral Agreements and Other Forms of Labour Recruitment, in Migration for Employment: Bilateral Agreements at a Crossroads 11 (2004).

Carzaniga, A. (2009). A warmer welcome? Access for natural persons under PTAs. In: Opening Markets for Trade in Services, Juan Marchetti and Martin Roy (eds.), Cambridge University Press.

Chilton, Adam and Woda, Bartosz. "The expanding universe of bilateral labor agreements" Theoretical Inquiries in Law, vol. 23, no. 2, 2022, pp. 1-64. https://doi.org/10.1515/til-2022-0010

Cholewinski, Ryszard, Evaluating Bilateral Labour Migration Agreements in the Light of Human and Labour Rights, in The Palgrave Handbook

Global Coalition on Migration and Friedrich-Ebert-Foundation, Spotlight Report on Migration, 2022, pp. 7, 23, 25.

Hennebry, Jenna L., Piper, Nicola, KC, Hari and Williams, Kira. "Bilateral labor agreements as migration governance tools: An analysis from a gender lens" Theoretical Inquiries in Law, vol. 23, no. 2, 2022, pp. 184-204. https://doi.org/10.1515/til-2022-0015

Hinterberger, Kevin Fredy, A Multi-Level Governance Approach to Residence Rights of Migrants and Irregular Residence in the EU, European Journal of Migration and Law, 2, 2019, pp. 182-204.

Howe, Joanna & Rosemary Owens (2016). Temporary Labor Migration in the Global Era: The Regulatory Challenges, in Temporary Labor Migration in the Global Era: The Regulatory Challenge.

ICMPD, (2009) Study on practices in the area of regularisation of illegally staying third-country nationals in the Member States of the EU (REGINE) Final Report.

Jacobsson, J. (2015). GATS Mode 4 and Labour Mobility: The Significance of Employment Market Access. In: The Palgrave Handbook of International Labour Migration Marion Panizzon, Gottfried Zürcher, Elisa Fornalé (eds.), Palgrave Macmillan.

Jolivel, Audrey Negotiating Labor Migration, A Comparison of French and Spanish Bilateral Labor Migration Agreements with France 8-9 (Forum Internazionale ed Europeo di Ricerche sull'Immigrazione, Working Paper, 2014).

Martin, Philip, Low-Skilled Labour Migration and Free Trade Agreement, in The Palgrave Handbook of International Labour Migration: Law and Policy Perspectives 205, 205-06 (Marion Panizzon et al. eds., 2015).

O'Steen, Brianna, Bilateral labor agreements and the migration of Filipinos: An instrumental variable approach, IZA Journal of Development and Migration, vol.12, no.1, 2021.

Panizzon, Marion. "Adjudicating labor mobility under France's agreements on the joint management of migration flows: How courts politicize bilateral migration diplomacy" Theoretical Inquiries in Law, vol. 23, no. 2, 2022, pp. 326-373. https://doi.org/10.1515/til-2022-0021.

Panizzon, M. and Singh, H. (2020). *Upping the Ante: The Movement of Natural Persons (Mode 4) and Non-Services Migration in EU and Asian PTAs.* In: Hoffmann, Rhea Tamara; Krajewski, Markus (Hg.) Coherence and Divergence in Services Trade Law. European Yearbook of International Economic Law / Special Issue (S. 139-168). Cham, Switzerland: Springer International Publishing 10.1007/978-3-030-46955-9_7

Pauwelyn, J., Nguyen, T., and Kamal, K., 2020. Visa and Asylum, in: The Handbook of Deep Trade Agreements, Adityta Mattoo et al. (eds.), The World Bank.

Saez, Sebastian, (2013). Let Workers Move: Using Bilateral Labor Agreements to Increase Trade in Services, The World Bank, Washington DC. 2011.

UN Network on Migration, ILO and IOM, Guidance on Bilateral Labor Migration Agreements, ILO February 2022

Wickramasekara, Piyasiri, Bilateral Agreements and Memoranda of Understanding on Migration of Low Skilled Workers 17 (2015)

Zvezda Vankova, Poland and Bulgaria's bilateral agreements with Eastern partnership countries in the context of circular migration, European Journal of Social Security, 2018 20(2), pp. 188-203.

[i] Office of the UN High Commissioner for Human Rights, *Global Compact for Safe, Orderly and Regular Migration (GCM)*, available at: https://www.ohchr.org/en/migration/global-compact-safe-orderly-and-regular-migration-gcm.

[ii] Global Compact for Migration, para 41: “emphasize that the Global Compact is to be implemented in a manner that is consistent with our rights and obligations under international law”.
[iii] Art. 6(4) Directive 2008/115; see also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Common Immigration Policy for Europe: Principles, actions, and tools, Com (2008) 394/4, where the EU Commission argues that “[i]ndiscriminate large-scale mass regularisations [sic] of immigrants in an illegal situation do not constitute a lasting and effective tool for migration management and should be prevented. In a similar vein, the European Parliament warns that “en masse regularisation of illegal immigrants should be a one-off event since such a measure does not resolve the real underlying problems”; see EP, Committee on Civil Liberties, Justice and Home Affairs, 17 September 2007, Report on policy priorities in the fight against illegal immigration of third-country nationals (2006/2250(INI)), Rapporteur: Javier Moreno Sánchez, para. 58.
[iv] Global Compact for Migration, Zero Draft Plus, 5 March 2018, Objective 16(g) Facilitate access to regularization options as a means to promote migrants’ integration into society and fully harness their contributions to sustainable development, as well as to reduce the stigmas that may be associated with irregular status.