to last a few months, the negotiations have taken almost two years, and the MOU has yet to be finalized. While the two governments have agreed to guarantee a weekly day off and that migrant domestic workers may hold onto their passports, there has been disagreement on providing a minimum wage and regulations on recruitment fees.

In the meantime, as Indonesia has attempted to use the freeze to increase its bargaining power, Malaysian recruiters have simply turned to domestic workers from Cambodia. The number of Cambodian domestic workers in Malaysia jumped from 10,000 to more than 40,000 in just a year and a half. These workers are at especially high risk of abuse due to the limited access to information and abusive practices during recruitment in Cambodia, and to deeper cultural differences and language barriers in Malaysia.

So we have a typical case of a ''race to the bottom,'' in which governments that attempt to increase protections for their workers lose out on jobs. There have been similar patterns in other countries. For example, Saudi Arabia suspended recruitment from the Philippines after complaining that the hiring requirements were too onerous. These included a $400 per month minimum wage and a description of the size of house the domestic worker was being recruited to clean. Instead, Saudi Arabia announced a new plan to recruit from Bangladesh, where there are almost no protections in place.

Bilateralism has not been successful in providing minimum protections for migrant domestic workers, due in part to the marginalization of these workers under national laws and the intense competition for jobs between labor-sending countries. Multilateral frameworks will be a much more important avenue to pursue in order to provide basic protections for migrant domestic workers.

One of the most interesting developments is a potential International Labor Organization (ILO) Convention on Decent Work for Domestic Workers which would, for the first time, provide global labor standards on domestic work. This has particular relevance for regulation of migrant labor given that domestic work is dominated by migrants around the world.

The proposed convention will head into its final negotiations in June 2011. The draft text tackles issues such as international cooperation, oversight of recruitment agencies, terms of repatriation, social security, and access to redress. Unlike some of the international migrant conventions, particularly the MWC, this treaty has an enormous amount of momentum and government support. Given that a labor treaty is less politicized than an explicitly migration-focused treaty, this is turning out to be a strategic route for improving human rights protections for migrant domestic workers.

Bilateralism and Multilateralism in International Migration Law

By Jürgen Bast[*]

My remarks concern issues of access, i.e., the laws governing the entry, stay, and return of foreigners. It seems quite natural here to speak about the GATS and its Mode 4 regarding the movement of natural persons providing services under this WTO agreement. The GATS is essentially the only multilateral hard law dealing with the access of labor migrants.[1] The extent to which a right to market access implies a right to territorial admission will be addressed shortly.

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[1] *See generally* Marion Panizzon, *Bilateral Migration Agreements and the GATS: Sharing Responsibility Versus Reciprocity,* 5 J. Migration & Refugee Issues 70 (2009).

Broadly speaking, I will argue in support of bilateralism in labor migration. Immigration does not exhaust itself as an economic phenomenon driven by market forces. It involves issues of foreign policy, cultural identities, migrants' human rights, and, at times, security concerns. There is no point in arguing about which perspective on immigration is right or wrong. On the contrary, legal instruments for the governance of migration should allow for balancing the competing considerations and the variable perceptions of migration they represent.[2] My suggestion is that bilateral agreements could be a useful tool for enabling such ''multiperspectivity,'' even if it comes at the cost of granting preferential market access, i.e., discrimination of certain nationals that would not be justified under the principle of MFN treatment.

The *Sevince* Case

To make my point, I would like to tell you the story of Mr. Sevince. He gave his name to a case decided in 1990 by the Court of Justice of the European Union (then still called the European Communities).[3] The *Sevince* judgment triggered a series of ECJ cases developing the basic rights of Turkish workers residing in the EU. The case law concerns the Ankara Agreement, a so-called association agreement concluded between the EU and its member states on the one hand, and Turkey on the other hand.[4] For the purpose of my talk, I will refer to the Ankara Agreement as a bilateral treaty, treating its mixed ''EU bench'' as a single entity and the ECJ as a ''domestic'' court.[5]

Mr. Sevince, a Turkish national, was admitted to the Netherlands as the spouse of another Turkish national. When some years later the relationship ended, the Dutch authorities refused an extension of his residence permit. Mr. Sevince challenged the decision before a Dutch administrative court, which in turn referred the case to the ECJ for a preliminary ruling. Mr. Sevince invoked Decision No 1/80 of the Association Council, a joint decisionmaking body of the contracting parties to the Ankara Agreement.[6] Under the terms of Decision No 1/80, Mr. Sevince had acquired unrestricted access to the Dutch labor market. In his view, this right to employment entailed a right of sojourn in the Netherlands. His argument was straightforward: without a right to stay, any right to work would be meaningless.

Let me put this argument in its historical perspective to demonstrate where the opposing view of the Dutch government and others has its roots. Association agreements resemble a much older type of international treaty that formed a backbone element of the first period of globalization in the late nineteenth century. These bilateral agreements were called treaties on establishment or, in the American context, treaties of friendship, commerce, and navigation.[7] In such treaties, the contracting parties mutually assured the privileged treatment of

[2] For a detailed version of the argument, see Jürgen Bast, Aufenthaltsrecht und Migrationssteuerung 67–116 (2011).

[3] Case C-192/89, Judgment of 20 September 1990, S. Z. Sevince v Staatssecretaris van Justitie, [1990] European Court Reports I-3461.

[4] Agreement Establishing an Association Between the European Economic Community and Turkey, [1964] Official Journal 217/3687.

[5] *Cf.* Adam Łazkowski, *Enhanced Multilateralism and Enhanced Bilateralism*, 45 Common Mkt. L. Rev. 1433 (2008).

[6] *See* Bernd Martenczuk, *Decisions of Bodies Established by International Agreements and the Community Legal Order, in* The European Union and the International Legal Order: Discord or Harmony? 141 (Vincent Kronenberger ed., 2001).

[7] *See* Andreas Paulus, *Treaties of Friendship, Commerce and Navigation, in* Max Planck Encyclopedia of Public International Law (Rüdiger Wolfrum ed., online edition).

the nationals of the other party, including (almost) free market access and a right of establishment in the territory of the other party. Typically, such a treaty included an MFN clause providing for automatic multilateralization of the benefits laid down in the network of bilateral treaties—much like today's global network of bilateral investment treaties (BITs).[8] However, the treaties on establishment have had only a limited impact on immigration law and practice. According to the prevailing view at the time, the market access clauses were only applicable under the conditions set in national immigration law. Thus, the sovereign right to admit or expel foreigners was not considered to be limited by norms of international law.[9] The police power of the state to expel unwanted aliens was virtually unrestricted, including expulsions on economic grounds.

With regard to Mr. Sevince, the traditional answer of the ECJ would have been: ''The Dutch authorities have acted lawfully because market access does not entail a right to entry or stay.'' However, the court sided with Mr. Sevince and accepted the notion of an implied right of sojourn. This right may only be withdrawn under the conditions set out in Decision No 1/80 itself, i.e., on non-economic grounds of public policy. In other words, the Dutch authorities must not expel Mr. Sevince unless he is a genuine threat to public order, security, or health. As the court explained, Decision No 1/80 forms part of an overall commitment of the EU and its member states gradually to establish free movement of Turkish workers in the EU (and eventually to pave the way for the accession of Turkey to the club). Recognizing a directly effective right of sojourn was meant to enforce that commitment toward Turkey. It is not by chance that the Ankara Agreement does not include an MFN clause. In short, foreign policy trumps other considerations of migration governance.

An Immigration Law Carve-Out Under the GATS?

GATS Mode 4 may be seen as a modern-day multilateral successor to the old treaties on establishment, albeit with a more confined scope. A Turkish worker like Mr. Sevince would only fall under the GATS when involved in the cross-border provision of services, i.e., while employed by a foreign company active in the service industry.[10] The actual scope of the GATS is further limited by the fact that Mode 4 covers only temporary movements. Moreover, the level of liberalization in Mode 4 as it results from the present schedules of specific commitments is fairly low.[11] However, given its model character for a future multilateral migration regime, it is quite consequential to ask: Is there a general ''immigration law carve-out'' in world trade law, just like the old days, or does the *Sevince* rationale apply to the GATS, as well?

The wording of the relevant GATS Annex on the Movement of Natural Persons provides for a rather ambiguous answer. Its fourth paragraph reads: ''The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory . . . .'' That clearly sounds like the *ancien régime*: controlling cross-border movements is permitted, including visa requirements that do not follow an MFN rule. On the other hand, the second clause of the paragraph adds a qualification: ''provided

[8] *Cf.* Stephan W. Schill, The Multilateralization of International Investment Law (2009).

[9] For a contemporary voice, see Alfred von Overbeck, Niederlassungsfreiheit und Ausweisungsrecht 86–89 (1907).

[10] William T. Worster, *Conflicts Between United States Immigration Law and the General Agreement on Trade in Services,* 42 Texas Int'l L.J. 55, 64 (2006).

[11] *See* Antonia Carzaniga, *The GATS, Mode 4, and Pattern of Commitments, in* Moving People to Deliver Services 21 (Aaditya Mattoo & Antonia Carzaniga eds., 2003).

that such measures are not applied in a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.'' According to the latter rule, exercising the police power of the state must not frustrate any market access commitments made under international law. Taken together, the meaning of the provision is not entirely clear. A reasonable construction would be that states are free to control their borders, but visas for service providers must not be refused on grounds of economic policy.[12] So, in effect, WTO law comes very close to a *Sevince* rationale.

Conclusions

There are two lessons to be learned from the *Sevince* case in view of the policy choice between bilateralism and multilateralism in international migration law. First, market access commitments may, when adjudicated by an activist court, turn out to be a powerful source of enforceable rights to territorial admission. Second, bilateral agreements allow for a specific arrangement of the concurrent perspectives on migration—in the instant case, to establish a privileged partnership between the EU and Turkey. In that light, GATS is hardly a perfect framework for the governance of labor migration. With its econo-centric approach, it does not provide for a regulatory framework in which the concurrent perspectives on migration could be balanced. At the same time, it precludes the ex post facto coupling of perspectives on the level of the individual WTO members, due to its strong judicial enforcement mechanism. Located at the intersection of trade and migration, GATS Mode 4 delineates precisely that subsection of immigration where states must be ready to accept an economic approach to prevail over other considerations, such as cultural identities or foreign policy.

Yet, in most people's eyes, only a small fraction of migration processes should be governed by a purely economic rationale. That militates for a strict and narrow reading of the terms of GATS. Beyond the narrowly defined space where the principles of trade and migration are in consonance—a space usually filled by high-skilled migrants—there is a strong case in favor of a bilateral approach. After all, the elephant in the room is neither bilateralism nor multilateralism, but unilateral restrictionism. Bilateralism may help political communities get past a stubborn ''no'' to any further liberalization in the international movement of persons. Bilateralism may help states parties agree on the terms of commitments for semi-skilled and low-skilled labor migration, commitments that they were not ready to make under a source-country neutral approach within a multilateral framework.

Highly Skilled Immigration: The New Frontier of International Labor Migration

By Ayelet Shachar[*]

The rise and spread of the global race for talent is one of the most significant developments in international labor migration in the past few decades. Yet it has received only scant attention in academic circles despite its growing prominence in the real world of law and policymaking. Across the globe, countries are vying to outbid one another in an effort to attract highly skilled migrants with extraordinary talent. In this global race for talent, governments have come to realize that their exclusive control over the assignment of membership

[12] Jürgen Bast, *Annex on Movement of Natural Persons, in* Max Planck Commentaries on World Trade Law, WTO—Trade in Services 591 (Rüdiger Wolfrum et al. eds., 2008).

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