ADJUDICATING LABOR MOBILITY UNDER FRANCE'S AGREEMENTS ON THE JOINT MANAGEMENT OF MIGRATION FLOWS: HOW COURTS POLITICIZE BILATERAL MIGRATION DIPLOMACY

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France's agreements on the joint management of migration flows (AJMs) figure centrally within studies of bilateral migration agreements. With their origins in friendship and navigation treaties of the late 19th century, the AJMs are successors to the postcolonial, circular mobility conventions of the 1960s, and are uniquely positioned for periodizing the evolution of bilaterally negotiated labor mobilities. Nonetheless, due to the European Union's reluctance to embrace mass regularization and the EU Member States' legislative powers over labor markets, they have time and again scotched France's ambition to leverage preferential labor market entries in exchange for more cooperation over irregular migration. Through documents and statistical data analysis, this Article studies the case of Senegal's negotiation of additional pathways to France for its lower-skilled workers. At the center is France's administrative court of appeals, which has confirmed the broad margin of discretion over Art. 42 in the AJM between France and Senegal. This jurisprudence has decoupled the automatic linkage between a job listed under duress in France under the Annex to the AJM and the entitlement to exceptional admission. We argue that France's courts have removed a privilege of Senegalese workers, which has re-politicized France's migration diplomacy with Senegal. At the same time, retention of the prefectorial discretionary power has levelled the playing field among West and North African countries that have concluded similar bilateral agreements with France. This Article adds to the research on bilateral migration agreements by proposing a multilevel legal analysis, which studies AJMs in the context of France's common law, EU labor and return directives, and the multilateral of WTO/GATS liberalization.

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> "It was you that broke the new wood, now is a time for carving.We have one sap and one root— Let there be commerce between us."
> Ezra Pound, the Pact, 1916.

Introduction

It is a recurrent tradition in migration studies to criticize bilateral migration agreements (BLAs) for what they are: package deals concluded at the expense of migrants and their families, whose labor, while benefitting host country economies, is sold out under market value. In this Article, we take a legal analytical perspective to explore whether this negativity associated with BLAs is justified.

Throughout his empirical mapping of BLAs, Wickramasekara[1] improved the quality of legal inquiry by distinguishing first- from second-generation templates. Whereas a chronological classifier may prove useful for surveying BLAs worldwide, this study of France's AJMs reveals that synchronicity, rather than inter-temporality, is the more helpful marker for understanding their pivotal role in the rise and fall of BLAs between Europe and West and North African countries. Consequently, we equally draw on Martin,[2] who builds on Bobeva and Garson,[3] for the juxtaposition between "macro" and "micro" BLAs, because the simultaneity is helpful in comparing BLAs deployed bilaterally, by individual EU Member States, with the EU cooperation frameworks and partnerships with migrant sending countries. This overlap between BLAs in Europe is symptomatic of the legislative powers over labor migration in Art. 79:5 of the European Union's constitutive treaty. It materializes in an external dimension of EU migration policy that uses very similar instruments, e.g., the EU mobility partnerships for cooperation with third countries, to those deployed by individual, often frontline EU Member States in the same migration corridor. It's a constantly evolving situation, as the Union progressively asserts more legislative powers over labor migration. This "agreement duplicity", has been researched

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1 *See* Piyasiri Wickramasekara, Bilateral Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review 17 (ILO 2015); *see also* Joanna Howe & Rosemary Owens, *Temporary Labor Migration in the Global Era: The Regulatory Challenges*, *in* Temporary Labor Migration in the Global Era: The Regulatory Challenge 1, 1-22 (Joanna Howe & Rosemary Owens eds., 2016).

2 *See* Philip Martin, *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). Martin demonstrates that most bilateral migration agreements, which have multiple goals, offer small-scale "micro" channels of labor market admission, if at all. He contrasts these micro programs to "programs with the limited goal of filling vacant jobs," i.e., "macro" programs for the temporary movement of workers, like the guestworker programs of post-WWII in Europe, which are "generally much larger than programs that have multiple migration and development goals," such as the agreements of Spain or France with West African countries, which "admit legal migrant workers if migrant sending governments accept the return of unauthorized foreigners and cooperate with efforts to reduce illegal migration."

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

elsewhere[4] such that this Article will only briefly touch upon it under Parts III and IV to explain the adjudicated outcome and the impact of judicial review on the authenticity of France's AJM and its attempt to depoliticize migration diplomacy towards West and North African countries (Part X).

Already in colonial and postcolonial (1940-70) times, the "micro"-level agreements designed to recruit seasonal workers on a sector-specific basis to fill the post-WWII labor shortages in agriculture, fisheries, and construction were quite different from the circular mobility schemes linking France, Portugal or Spain to their West and North African counterparts. Whereas the former preserve the remnants of a *ius peregrinandi*,[5] e.g., the pre- and postcolonial circular mobility among European-educated political elites in key professions, the latter drew political criticism due to temporary stays becoming permanent, such that forced returns became inevitable and the entire range of readmission agreements has come into being.[6]

Successively, in Europe a third type of BLA was instituted, which, unlike the one-directional "micro" recruitment schemes, ascribes an additional function to liberalizing labor migration, which is not driven by the marketization of foreign labor. Rather, the provision of pathways for migrants to train or work in Europe is used to leverage the sending country to curb irregular migration into Europe.[7] Given this dual role that labor migration is asked to fulfill in the contemporary BLAs of France and Spain, they qualify under the abovementioned "macro" schemes. Meanwhile, in South Asia, host states are requesting labor from the Gulf countries, but without insisting on the abovementioned return obligations, such that Asia's first-generation BLAs coexist alongside the "macro" second-generation templates, the only difference being that Asia's guestworker schemes today, unlike earlier guestworker schemes, abide by the ILO core labor standards of fair and ethical employment and worker treatment. Setting aside the key labor standard issue, they are seen as a win-win deal for both the sending and receiving countries.[8] Conversely, contemporary BLAs of European countries with North and West African countries are more lopsided in that they cater to the host country's interests in curbing irregular migration. In this context, as discussed below, the mantra of conditionality between migrant work and efforts to minimize irregular migration has become a key operational feature, as Parts I and II show. Further, it has re-politicized bilateral migration diplomacy,

4 *See* Meng-Hsuan Chou & Marie Gibert, *The EU-Senegal Mobility Partnership: From Launch to Suspension and Negotiation Failure*, 8 J. Contemp. Eur. Rsch. 408 (2012).

5 *See* Thomas Spijkerboer, *International Migration Law and Coloniality*, Verfassungsblog.de (Jan. 28, 2022), https://verfassungsblog.de/international-migration-law-and-coloniality.

6 For an overview of the genesis of France's bilateral labor migration agreements, see generally Audrey Jolivel, *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).

7 *See* Ryszard Cholewinski, *Evaluating Bilateral Labour Migration Agreements in the Light of Human and Labour Rights*, *in* The Palgrave Handbook, *supra* note 2, at 231. *See also* Wickramasekara, supra note 1.

8 Piyasiri Wickramasekara, *Labour Migration in South Asia: A Review of Issues, Policies and Practices* (ILO, Int'l Migration Paper No. 108, 2010).

despite the efforts to design one-size-fits-all agreements as a technocratic cover-up for mitigating the underlying deep divides between sending and host countries.

Beyond the definitional quandaries surrounding BLAs and their compromised accessibility in public records, they are virtually absent from the global cooperation frameworks of the Agenda 2030 or the GCM, even if reports provided by governments and non-state actors to the International Migration Review Forum 2022 have pulled BLAs out of Pandora's box.[9] In scholarship, BLAs populate an equally small niche as the object of research by labor economists, legal scholars, and scholars of migration and international relations.[10]

A literature review of second-generation BLAs in Europe reveals three research strands. The first consists of political economic analysis into a preselected group of key representative templates, i.e., those of France, Spain and Switzerland, which has been enhanced by empirical fieldwork to decipher the power relations and interest representation during the consultation and negotiation phases. Methodologically, a majority of international relations scholars study the resurgence of BLAs in Europe to understand why different BLAs concurrently or asynchronously cluster around a migrant-sending country or region. These temporalities tell us why certain negotiations fail and others prevail, and what such outcomes tell us about the power asymmetries governing European-African migration diplomacy.[11] Among such studies, Senegal and Morocco stand out as central, because both countries showcase a degree of scalar and actor complexity, sufficient for a comprehensive and comparative analysis of why BLAs succeed. The track record includes aborted talks and failed negotiations for Switzerland with Senegal,[12] for the EU with Senegal,[13]

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9 *See, e.g.*, U.N. Network on Migration, ILO and IOM, Guidance on Bilateral Labor Migration Agreements (2022); *see also* Global Coalition on Migration & Friedrich-Ebert-Foundation, Spotlight Report on Migration 7, 23, 25 (2022).

10 Graziano Battistella, *Labour Migration in Asia and the Role of Bilateral Migration Agreements*, *in* The Palgrave Handbook, *supra* note 2, at 299; Bobeva & Garson, *supra* note 3; Adam S. Chilton & Eric Posner, *Why Countries Sign Bilateral Labor Agreements* (Coase-Sandor Working Paper Series L. & Econ., No. 807, 2017); Ryszard Cholewinski, *Evaluating Bilateral Migration Agreements in Light of Human and Labour Rights*, *in* The Palgrave Handbook, *supra* note 2, at 231; Thomas Cottier & Charlotte Sieber-Gasser, *Labour Migration, Trade and Investment: From Fragmentation to Coherence*, *in* The Palgrave Handbook, *supra* note 2, at 41; Brianna O'Steen, *Bilateral Labor Agreements and the Migration of Filipinos: An Instrumental Variable Approach*, 12 IZA J. Dev. & Migration 2 (2021); Let Workers Move: Using Bilateral Labor Agreements to Increase Trade in Services (Sebastian Saez ed., 2011); Zvezda Vankova, *Poland and Bulgaria's Bilateral Agreements with Eastern Partnership Countries in the Context of Circular Migration*, 20 Eur. J. Soc. Sec. 188 (2018).

11 Jolivel, *supra* note 6; Natasja Reslow & Maarten Vink, *Three-Level Games in EU External Migration Policy: Negotiating Mobility Partnerships in West Africa*, 53 J. Common Mkt. Stud. 857 (2015).

12 *See* Rahel Kunz & Julia Maisenbacher, *Beyond Conditionality Versus Cooperation: Power and Resistance in the Case of EU Mobility Partnerships and Swiss Migration Partnerships*, 1 Migration Stud. 196 (2013). *See also* Odile Rittener et al., *Swiss Migration Partnerships: A Paradigm Shift*, *in* Multilayered Migration Governance: The Promise of Partnership 249 (Rahel Kunz et al. eds., 2011); Marion Panizzon, *Partenariats migratoires suisses et accords de coopération migratoire: gestion ou gouvernance des migrations internationales?*, Jusletter (June 24, 2013), https://jusletter.weblaw.ch/juslissues/2013/715/_11417.html__ONCE.

13 *See* Sandra Lavenex & Rachel Stucky, *'Partnering' for Migration in EU External Relations*, *in* Multilayered Migration Governance, *supra* note 12, at 116.

but then again an AJM of France with Senegal,[14] but none with Morocco.[15] These studies therefore dispel the notion that a sending country's government operates as a unified entity and resists signing an AJM because of the border securitization and return issues alone. Rather, the reality is more complex, insofar as there may be divides within a sending country's government about how to cultivate the working relationship with the diaspora abroad (Senegal, Mali, Nigeria).[16]

A second strand of research into BLAs in Europe situates a country, e.g., Morocco,[17] Senegal,[18] Nigeria, or a region (West Africa),[19] within the EU external dimension of migration and asylum policies and uses regime theory to investigate whether France's, Spain's or Italy's BLAs undercut or complement the European Union's attempt to negotiate across-the-board templates with migrant-sending countries in Africa.[20] Such studies explain how a division of competence between the EU and Member States explains why a parallelism might persist between EU partnership and cooperation tools and Member State's BLAs ("three-level games").[21] Drawing on country-focused studies provides the backbone to this legal analysis of France's AJMs with West and North African countries (Parts II and III).

A third and emerging strand of research discusses how the sending countries perceive and make meaning of BLAs and migration partnerships, and how their reception of cooperation frameworks changes the narrative at the global level of cooperation on migration.[22]

This study builds on regime theory approaches to BLAs, but adopts a legal reading of France's AJMs, which makes it possible to assess their compliance with the multilateral WTO/GATS trade agreements and the EU-level directives.[23] We single out a specific issue, the exceptional admission of Senegalese, who are staying in the country unlawfully, but might fall under an amnesty if their current job satisfies France's labor market needs under Art. 42 of the 2008 amendment to the

14 *See* Tine van Criekinge, *The EU-Africa Migration Partnership: A Case Study of the EU's Migration Dialogue with Ghana and Senegal* (EUI Migration Working Group, 2010).

15 *See* Fanny Tittel-Mosser, *Reversed Conditionality in EU External Migration Policy: The Case of Morocco*, 14 J. Contemp. Eur. Rsch. 349 (2018).

16 *See* Jason Gagnon & David Khoudour-Casteras, Tackling the Policy Challenges of Migration: Regulation, Integration, Development 145 (2011).

17 *See* Fanny Tittel-Mosser, Implementing EU Mobility Partnerships: Putting Soft Law into Practice (2021).

18 *See* Jolivel, *supra* note 6; *see also* Chou & Gibert, *supra* note 4.

19 Omar N. Cham & Ilke Adam, *The Politicization and Framing of Migration in West Africa: Transition to Democracy as a Game Changer?*, Territory, Pol., Gov't (forthcoming).

20 *See* Fanny Tittel-Mosser, *Mobility Partnerships: A Tool for the Externalisation of EU Migration Policy? A Comparative Study of Morocco and Cape Verde*, *in* Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis 238 (Sergio Carrera et al. eds., 2019).

21 *See* Reslow & Vink, *supra* note 11.

22 *See* Lanre OIkuteyijo, *The Impact of European Union Migration Policies on Irregular Migration in Sub-Saharan Africa*, *in* Territoriality and Migration in the E.U. Neighbourhood 97 (Margaret Walton-Roberts & Jenna Hennebry eds., 2014); *see also* Ilke Adam et al., *West African Interests in (EU) Migration Policy: Balancing Domestic Priorities with External Incentives*, 46 J. Ethnic & Migration Stud. 3101 (2020).

23 *See* Nastasja Reslow, *Deciding on EU External Migration Policy: The Member States and the Mobility Partnerships*, 34 J. Eur. Integration 223 (2012).

Senegal-France AJM. From a legal methodological angle, we seek to understand why France's courts' review of labor migration pathways changes how deeply politicized the implementation of the AJM turns out to be and in whose favor.

To conduct a comprehensive document analysis of the nine agreements' negotiated outcomes, we first map the preparatory materials presented to the French National Assembly and the Senate, where publicly available. This is followed by a review of materials issued by NGO/CSOs in France. Third, we compare the public records to the multilevel legal framework, composed of France's CESEDA, TFEU, EU labor market and return directives, EU Mobility Partnerships (EU MPs)[24] and EU readmission agreements (EURAs).[25] Finally, the document analysis is augmented by a summary mapping of all French administrative court of appeals cases involving the Senegal-France AJM up to the cutoff date of May 15, 2022.

This first-time investigation into the judiciary's interpretation of BLAs in France reveals how unique France's AJM with Senegal is among the second-generation BLAs in Europe and, at the same time, makes it possible to evaluate more comprehensively the implementation record of the France-Senegal AJM (Part X). In so doing, we draw on regime theory approaches to situate the AJM within the EU migration policy concept of conditionality (Part I) and its evaluation in different EU policy frameworks (Part IV) to discuss the impact of such "tactical issue linkage" on the role that labor mobility plays in the France-Senegal AJM (Parts VII and VIII). We evaluate to what extent conditionality hampers legally accurate compliance with EU/WTO law, but find that regional and multilateral obligations (Part VI) might contribute to depoliticizing the AJM.

I. Theoretical Background: Conditionality and De-Politicization

De-politicization implies the delegation of decision-making authority one level removed from government, to an expert, an NGO/CSO, or multilevel governance. The notion originates in Hannah Arendt's[26] *Crises of the Republic* and her concept of bureaucracy as "rule by nobody."[27] De-politicization has been criticized as "elitist" and "technocratic," therefore lacking democratic control and legitimacy.[28] The process of "de-politicizing" a policy field relates to multilevel or transnational governance, because it implies moving an issue area away from the exclusivity of government

24 For an overview of how France and Senegal used policy incoherence in a proposed EU MP to withdraw from it, while at the same time concluding an AJM, *see* Chou & Gibert, *supra* note 4.

25 *See* Marion Panizzon, *Readmission Agreements of EU Member States: A Case for EU Subsidiarity or Dualism?*, 13 Refugee Surv. Q. 101 (2012).

26 Guido Niccolò Barbi, *The Depoliticization of the Political: An Arendtian Account of Expertise in Politics*, 70 Raisons Politiques 75 (2018).

27 Hannah Arendt, Crises of the Republic 137 (1972); Hannah Arendt, Denktagebuch: 1950-1973 451 (2002).

28 Claudia Landwehr, *Depoliticization, Repoliticization, and Deliberative Systems*, *in* Anti-Politics, Depoliticization, and Governance 49 (Paul Fawcett et al. eds., 2017).

authority to a more collaborative form of engagement, either involving non-state actors or devolving it entirely to another level or entrusting another entity with the task.[29] Under multilevel governance, states seek to manage risk, e.g., the risk of unsuccessful reintegration of return migrants (see co-development, in Part XX above) or the assimilation of migrants in the host society.[30]

However, in de-politicization, unlike in governance, a negative connotation attaches to the process since de-politicizing gives states an incentive to "gloss-over" a conflict.[31] In France's AJM, co-development or training for return or labor migration quotas reverberates with the fight against irregular migration. If Art. 42 AJM grants regularization, something that France could easily do unilaterally, without engaging with Senegal in a bilateral agreement on the question of whom to regularize, the fact that France and Senegal agree to condition that amnesty on jobs listed in Annex IV, to a certain degree implies a technocratic approach to this amnesty—where the French government cannot singlehandedly decide who is entitled to the amnesty; the fact of codification in the Annex means the introduction of a certain automatic linkage, which Senegal at least considered given, while France is of the view that its prefects retain a level of discretion to annul or reject the regularization of a Senegalese who qualifies for a job listed under the Annex.

The EU is often pictured as embodying de-politicization, since its decisions are taken through an intricate system of multilevel governance and are often devolved to experts. Migration scholars have used the term to depict how the negotiations over the Global Compact for Safe, Orderly and Regular Migration (GCM) have to some extent de-politicized international migration law, because endorsement of the GCM implied agreeing on a common language, much of which had "glossed" over contentious issues, so as to enable the IOM, which had been a contentious player in global migration governance as it draws legitimacy from expert-based mandates to work in an unbiased, de-politicized environment so as to "make migration work for all."

Regime theory approaches to BLAs repeatedly look into,[32] why migrant host countries in Europe include labor migration in their cooperation strategy towards countries of origin and transit in Africa and the Middle East.[33] For IL scholars, regime theory can contribute to explaining the role of "conditionality," also known as the "more-for-more approach" that links otherwise unrelated issue areas to one

29 Tiziana Caponio & Michael Jones-Correa, *Theorising Migration Policy in Multilevel States: The Multilevel Governance Perspective*, 44 J. Ethnic & Migration Stud. 1995 (2018).

30 Sarah Spencer, *Multi-level Governance of an Intractable Policy Problem: Migrants with Irregular Status in Europe*, 44 J. Ethnic & Migration Stud. 2034 (2018).

31 *See* Antoine Pécoud, *Narrating an Ideal Migration World? An Analysis of the Global Compact for Safe, Orderly and Regular Migration,* 42 Third World Q. 16 (2021).

32 *See, e.g.*, Aderanti Adepoju, *The Challenge of Labour Migration Flows between West Africa and the Maghreb* (Int'l Lab. Off. Int'l Migration Papers, Paper No. 84E, 2006). *See also* Aderanti Adepoju, *Trends in International Migration in and from Africa*, *in* International Migration: Prospects and Policies in a Global Market 59 (Douglas M. Massey & J. Edward Taylor eds., 2004) [hereinafter Adepoju, *Trends in International Migration*].

33 *See* Adam et al., *supra* note 22. *See also* Aderanti Adepoju et al., *Europe's Migration Agreements with Migrant-Sending Countries in the Global South: A Critical Review*, 48 Int'l Migration 42 (2010).

another in an effort to leverage a negative outcome against a positive benefit. Within conditionality, labor migration "leverage" stands alongside other "positive" tools, like trade preferences, development cooperation, humanitarian visas, the fight against irregular migration, and the efforts to minimize the drivers of irregular migration, human trafficking and smuggling.[34]

Conditionality is a concept that the EU Global Approach to Migration and Mobility (GAMM) proposed in 2012 as an indispensable policy tool for the EU to engage in ever closer cooperation with third countries on migration.[35] Similarly, the 'more-for-more approach' has shaped the successive EU-third country cooperation frameworks, several of which single out labor migration as a key "benefit" for triggering source country cooperation (pillar 1 of GAMM and pillar 4 of the European Agenda on Migration).[36] In the New Pact on Migration and Asylum (2020), conditionality stood out as a mantra of the EU's external dimension of migration and asylum policy,[37] e.g., the Migration Partnership Framework (MPF) of 7 June 2016. Around 2020, conditionality was dropped and replaced bya "fresh start," which promises "comprehensiveness" and agreements that are "mutually beneficial" and "tailor-made" rather than "one-size-fits-all." [38]

Despite the outlook for a less lopsided EU migration policy, however, scholars disqualify the EU New Pact's "paradigm shift" to conditionality as rhetoric rather than reality. It seems that behind the EU's quest for all-encompassing EU compacts[39] and partnerships with third countries, which implies "something for everyone to like or dislike,"[40] the EU is unabashedly continuing to pursue the unholy alliance of human mobility/labor migration offered in exchange for control-oriented commitments. Nowhere is this more evident than under the new EU Talent Partnership, which initiated sector-specific traineeships with a high level of non-state actor involvement to realize mutually beneficial labor migration; however, since the trainee's return

34 *See* Marie Godin et al., *Internal (In)Coherence in European Migration Policies* (MIGNEX Background Paper, 2021), https://www.mignex.org/d092.

35 *See* Paula García Andrade, *The Duty of Cooperation in the External Dimension of the EU Migration Policy*, *in* External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes 299 (Sergio Carrera et al. eds., 2018).

36 *See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A European Agenda on Migration*, at 14, COM (2015) 240 final (May 13, 2015). The other benefits are combatting the drivers, securing borders and saving lives, and a strong asylum policy.

37 *See id.* at 18.

38 *See* Sergio Carrera et al., *The External Dimensions of EU Migration and Asylum Policies in Times of Crisis*, *in* Constitutionalising the External Dimensions, *supra* note 20, at 1. *See also* Clare Castillejo, *The EU Migration Partnership Framework: Time for a Rethink?* (Ger. Dev. Inst., Discussion Paper No. 28, 2017); *see also* Luisa Faustini-Torres, *Another Nexus? Exploring Narratives on the Linkage Between EU External Migration Policies and the Democratization of the Southern Mediterranean Neighbourhood*, 8 Compar. Migration Stud. no. 9, 2020.

39 Paula García Andrade, *EU Cooperation on Migration with Partner Countries Within the New Pact: New Instruments for a New Paradigm? EU Immigration and Asylum Law and Policy*, EU Immigr. & Asylum L. & Pol'y Blog (Dec. 8, 2020), https://eumigrationlawblog.eu/eu-cooperation-on-migration-with-partner-countries-within-the-new-pact-new-instruments-for-a-new-paradigm/.

40 *See* Kathleen Newland, *Global Governance of Migration 2.0: What Lies Ahead?* 7-8 (Migration Pol'y Inst., Pol'y Brief No. 8, 2019).

home, despite the "soft landing" promised by the EU, is nonetheless an obligation and not an option, conditionality is back on track.[41]

In a more recent line of EU legal study, Diaz et al. (2021) point to how conditionality links EU mobility partnerships to EU readmission agreements and inevitably implies a ranking of policy interests, which prioritizes security, borders and visas (and thus favors host country needs) over development, diaspora relations, labor market access, skills circulation and human rights.[42] Such hierarchization is further fostered by "one-size-fits all" templates that force sending countries to either sign onto such informal migration and mobility partnerships, or to be left in the lurch.[43] In consequence, several African countries, including Senegal and Nigeria, see the bilateral avenue, because of its more 'differentiated' agreement design and content, as the more profitable. In turn, with the 23 September 2020 New Pact on Asylum and Migration, the EU eventually dropped its 'more-for-more' conditionality and promoted a 'fresh look' involving a softer, incremental, more cautious approach of 'comprehensive,' 'balanced' and 'tailor-made' patterns,[44] yet critics remain unconvinced that conditionality is once and for all buried.[45] Several authors have framed the genesis of the conditionality principle in EU migration and asylum law and policy as a broader manifestation of the 'partnership principle' in international migration management. Among the findings, yet often sidelined from the main discussions, are lessons drawn from BLAs and the role of labor migration therein.

This contribution is different, because it carries out a multilevel and chronological legal inquiry into the BLAs of France. Whereas the design remains relevant as a line of research, this Article proposes judicial review as the new frontline of legal study of BLAs. A particular position is given to the study of the Senegal-France AJM of 2008, beause the AJM with Senegal is the first to have been reviewed by an administrative court of appeals (CAA).[46]

The hypothesis is that the elasticity with which courts in France adjudicate labor market access quotas ultimately tests the BLA for its acclaimed pro-development purposes and its capacity to depoliticize Europe's migration law towards West and North Africa. Uncovering the interpretative practice of the judges reveals the degree of plasticity during the implementation phase and for whom that judicial *telos* tolls.

In addition, the view through the eyes of the judiciary closes a gap in empirical studies on how the executive branch of government—France's immigration services

41 *See* Marion Panizzon, *Franco-African Pacts on Migration: Bilateralism Revisited in Multilayered Migration Governance*, *in* Multilayered Migration Governance, *supra* note 12, at 207.

42 *See* Diaz Sundberg et al., *Return Sponsorships in the EU's New Pact on Migration and Asylum: High Stakes, Low Gains*, 23 Eur. J. Migration & L. 219 (2021).

43 *See* Paula Andrade, *EU Cooperation with Third Countries within the New Pact on Migration and Asylum: New Instruments for a 'Change of Paradigm'?*, *in* Reforming the Common European Asylum System 223 (Daniel Thym & Odysseus Academic Network eds., 2022).

44 Sergio Carrera, *Whose Pact? The Cognitive Dimensions of the New EU Pact on Migration and Asylum* (CEPS Pol'y Insights, 2020).

45 *See* Faustini-Torres, *supra* note 38. *See also* Andrade, *supra* note 39.

46 *Admission exceptionnelle, titre de séjour salarié et accord Franco-Sénégalais*, LexCase Avocats, https://www.lexcase-immigration.com/accord-franco-senegalais (last visited Feb. 23, 2022); CAA Marseille, 2ème ch., May 21, 2015, 14MA01087; Marseille, 2ème ch., May 21, 2015, 14MA00526.

with their counterparts in Senegal—manages the AJM on a day-to-day basis, and contributes to further individualizing and highlighting the singularity of the Senegalese case.[47]

Mouthaan suggests that the France-Senegal AJM is applied by the ministries that get to decide on the annual number of regularizations that France grants and, if that fails, Senegalese are admitted on humanitarian grounds. We found otherwise, however, namely that the judiciary in France is clamping down on the AJM's negotiated outcome, e.g., the Art. 42 admission on exceptional, including humanitarian, grounds or economic necessity due to a labor shortage in France (see Parts VIII, IX and X).

In this Article, we first ask whether the AJMs modify France's Code for Entry and Residence of Foreigners and Asylum Law, CESEDA (*Code de l'Entrée et du Séjour des Etrangers et du Droit d'Asile*), by privileging Senegalese workers in terms of the skill levels admitted or eliminating certain admission criteria (Parts VII-VIII). Second, we ask to what extent the AJM complements EU labor market directives on researchers, students, ICT workers, and Blue Card and seasonal workers (Part V). Third, we discuss whether the more favorable treatment granted to Senegalese staying unlawfully in France, but with an offer of a job listed as under duress, amounts to the type of one-off regularization that is discouraged by the EU Return Directive 2008/115/EC,[48] in addition to clashing with Art. 2 most-favored nation treatment (MFN) of the General Agreement on Trade in Services (GATS) (see Part VI).

II. The Rise and Decline of Bilateral Labor Migration Agreements (BLAs) in Europe

Following the "steady increase" of BLAs through the 1950s and their unprecedented proliferation since 1991 with the opening of Europe's eastern borders,[49] the "revival" of bilateral migration agreements between countries of origin and destination[50] peaked in the 2005-2009 period, possibly as a result of the Cayucos crisis in 2005-2006[51] and the fuller integration of Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine via EU Mobility Partnerships (EU MPs) and Deep and Comprehensive Free

47 *See* Melissa Mouthaan, *Unpacking Domestic Preferences in the Policy-'Receiving' State: The EU's Migration Cooperation with Senegal and Ghana*, 7 Compar. Migration Stud. no. 35, 2019.

48 *See* Directive 2008/115, of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 2008 O.J (L 348) 98.

49 *See* Int'l Org. for Migration, *Illustration of Multilateral, Regional and Bilateral Cooperative Arrangements in the Management of Migration*, *in* Migration and International Legal Norms 305, 307 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003).

50 *See* Int'l Org. for Migration, Africa Migration Report: Challenging the Narrative 30 (2020). With 30,000 recorded crossings, the crisis peaked in 2006, but since then crossings have remained level at 1,000. *See also* Int'l Lab. Off., *Bilateral Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review* (Research Brief, 2014), https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/genericdocument/wcms_357389.pdf.

51 *See* Adepoju, *Trends in International Migration*, *supra* note 32, at 75.

Trade Agreements (DFCTAs), both of which contain labor mobility clauses. In the 1960s, France, as a pioneer of BLAs with African countries, sought to organize the "historical and cultural" ties with the Francophone African elites through circular migration.[52] A postcolonial wave of agreements emerged that, according to scholars, mirrored the intra-African cyclical mobility, which gathered momentum once education became freely available and export-based trade to Europe took off.[53] Such demand-driven circular mobility schemes were later joined by supply-side driven recruitment of lower-skilled workers, opening the door to a first set of agreements on 'free movement' between France and states of West and North Africa.[54] In 1974, however, France officially announced the end of any circular mobility regime with its Francophone partners, also due to deeper integration in the EU single market, which required the removal of many privileges.

In the aftermath of the Arab Spring in 2011, European countries with BLAs with African nations halted their bilateral pursuit, possibly committing instead to the EU external migration and asylum policy's four pillars for "organizing" human mobility: preventing and reducing irregular migration, strengthening the synergies between migration and development, and increasing international protection and asylum pathways under the GAMM (2011)[55] and its EU Mobility Partnerships, the Common Agendas on Migration and Mobility, and the chapters on mode 4 temporary movement of natural persons as service suppliers in the DCFTAs.[56]

At the 2015 Valetta summit, Jean-Claude Juncker, then President of the EU Commission (2014-2019), announced his five-point immigration plan of 2014, which put cooperation with third countries under the spotlight of EU external migration and asylum policy in what became the 2015 EU Agenda on Migration. That Agenda shifts the GAMM paradigm of migration as part of development cooperation towards cumulative efforts to propagate EU-wide readmission agreements (EURAs), often coupled with soft-law EU Mobility Partnerships (EU MPs) as the leverage.[57] While this

52 *See* Jolivel, *supra* note 6, at 23-5.

53 *See* Adepoju, *Trends in International Migration*, *supra* note 32.

54 *Id*.

55 *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions The Global Approach to Migration and Mobility*, COM (2011) 743 final (Nov. 18, 2011). EU tools provide pre-departure training to exchange programs on education (Georgia, Armenia, Azerbaijan), an emphasis on validation and recognition of academic and professional qualifications (Georgia, Armenia, Moldova, Tunisia Jordan), improved mobility for students and researchers (Tunisia, Moldova), and if a refugee context is involved, capacity-building on asylum reception (EU Partnerships with Belorussia) is added.

56 *See* Evgeniya Plotnikova, *The Role of Bilateral Agreements in the Regulation of Health Worker Migration*, *in* Health Professional Mobility in a Changing Europe 325 (James Buchan et al. eds., 2014).

57 *See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A European Agenda on Migration*, COM (2015) 240 final (May 13, 2015); *Communication from the Commission to the European Parliament and to the Council EU Action Plan on return*, at 14, COM (2015) 453 final (Sept. 9, 2015); Paula García Andrade et al., EU Cooperation with Third Countries in the Field of Migration 39 (2015). Regarding trade in particular, the Commission suggests exploring the possibility of linking the conclusion of free trade agreements or the granting of preferential treatment in parallel to the conclusion of a European Readmission Agreement (EURA).

cumulative strategy worked for countries of Eastern Europe, which were expecting rapid accession to the single market, the EU's step-by-step approach unsurprisingly failed to incentivize African neighbors in the same way, at least those that were offered no prospect of acceding to the EU market in a deeper way.

Around that time, as a result of the Syrian war, cheap refugee labor became available for transit zones in the Levant region/Eastern Mediterranean (Lebanon, Jordan, Egypt), amounting to a new refugee labor export-based economy.[58] Hence the focus of EU-third country cooperation on migration somehow shifted again, under the EU Migration Partnership Facility (MPF) 2016-2019, to countries affected by refugee intakes.

While the "disadvantage" of the early BLAs was their "single-issue" nature,[59] the second-generation templates are haunted by their complex issue-linkage, also labelled "more-for-more," required for combating irregular migration. As Betts writes, the "range of bilateral partnerships has generally focused on enhancing and inducing migration management capacity in the most significant countries of origin and in transit countries for irregular migration to Europe."[60] In the late 1990s, there was a resurgence of BLAs among countries in Europe bordering the Mediterranean, with the "objective of ensuring the repatriation of irregular workers in exchange for a fixed number of yearly entry permits."[61] This finding has been corroborated by Chilton et al. in this Volume.[62]

Then, in the post-Syrian refugee context, a third-generation of BLAs has emerged in Europe,[63] amongst which figure France's AJMs, the EU Compacts coming out of the refugee context, and the sectoral, tailor-made venues projected out of the EU's Agenda on Migration and the Mobility Partnership Facility (2018), including the two EU-led pilot labor migration programs (PALIM for North Africa, and THAMM for Egypt, Morocco and Tunisia).[64] With 155 states endorsing the GCM of December 10, 2018 and the adoption on September 23, 2020 of the EU Pact on Migration and Asylum,[65] host countries in Europe and elsewhere have been urged to open more "pathways" for legal migration. Consequently, since 2018, various "labor migration pilot projects" have come into play, including the project-based PALIM between Belgium and Morocco (2019-21) funded by the EU's Pilot Projects

58 *See* Adam et al., *supra* note 22. *See also* Temporary Labour Migration in the Global Era, *supra* note 1.

59 *See* Sherry Stephenson & Gary Hufbauer, *Increasing Labour Mobility: Options for Developing Countries*, *in* International Trade in Services: New Trends and Opportunities for Developing Countries 29, 61 (Olivier Cattaneo et al. eds., 2010).

60 *Id.*

61 *Cf.* Graziano Battistella, *Labour Migration in Asia and the Role of Bilateral Migration Agreements*, *in* The Palgrave Handbook, *supra* note 2, at 231.

62 Adam Chilton & Bartosz Woda, *The Expanding Universe of Bilateral Labor Agreements*, 23 Theoretical Inquiries L. 1 (2022).

63 *See* Wickramasekara, *supra* note 1.

64 *Supporting Regular Labour Migration and Mobility between North Africa and Europe*, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), https://www.giz.de/en/worldwide/92649.html (last visited May 31, 2022).

65 *See* Resolution on New Avenues for Legal Labour Migration, Eur. Parl. Doc. P9 TA 0260 (2021).

on Legal Migration.[66] Without affecting the federated division of competences between the EU and Member States regarding labor migration, such incubators have not yet been exposed to the same degree of politically charged conditionality as the BLAs of France, Italy or Spain with North and West African countries, which are haunted by tensions, but then again, they do not admit workers across a comparably broad spectrum of skills nor on such an open-ended basis as their legally binding counterparts.

The EU Talent Partnership of July 11, 2021—which was born out of the EU New Pact of 2020 and the Global Skills Partnership under Objective 18 of the GCM, the former having been proposed by the Sutherland Report 2017 that preceded the GCM's series of zero drafts—proposes three benchmarks for bilateral engagement: 1) being tailor-made and flexible; 2) comprehensiveness through broad issue-linkage; and 3) change of paradigm (away from conditionality).[67] One such Talent partnership, the EU 'MATCH,' which is implemented by the IOM for 'hiring African talent' from Senegal and Nigeria to match labor market needs in Belgium, Italy, the Netherlands, and Luxembourg, offers upskilling and training at no cost for the employers in Europe and continues in the tradition of voluntary return.[68] Whereas an in-depth comparison of France's BLAs with EU pilot labor mobility programs and the EU Talent Partnerships is beyond the scope of this study, there is evidence that the EU has learned certain lessons from the mixed reviews the BLAs of some Member States have received from sending countries in North and West Africa.

Inversely, an under-researched issue in this context is how widely the French administration's reading of provisions under the AJM (see Parts VII-IX below) can be directly traced back to the EU's solidifying its external dimension of labor migration policy, including through joint EU actions and programs towards West Africa. This invariably heightens the stakes for any EU Member State, like France, to raise the ante by producing an even better "matching" of skills and talents or an even higher quota for admission or regularization. A counter-reaction has been for countries like France to discontinue competing against EU-level actions and to thus deactivate certain provisions in its BLAs with West African countries, including the regularization of Senegalese unlawfully staying in France (Part V) below).

At the same time, France's disinclination to modify its BLAs with West African states since around 2011 can be explained by the EU's further carving out more legislative labor market competence under Art. 79 TFEU, as a way of nibbling at the concurrent power it shares with the Member States. A third factor may be the fact that certain countries, like Senegal, are diversifying away from cultivating an exclusive postcolonial relationship with France and consequently pursuing an out-

66 *See, e.g.*, *Completed Action: Pilot Project Addressing Labour Shortages through Innovative Labour Migration Models (PALIM)*, Migration P'ship Facility, https://www.migrationpartnershipfacility.eu/what-we-do/actions-pilot-projects/pilot-project-addressing-labour-shortages-through-innovative-labour-migration-models-palim (last visited Oct. 11, 2021).

67 *The EU Talent Partnerships* (Solidar Briefing Paper No. 101, 2021)

68 *Match*, belgium.iom.int, https://belgium.iom.int/match (last visited May 31, 2022).

migration policy of seeking other destinations and host countries for their citizens than France, e.g., Spain, Italy.[69]

Studying the AJMs' lifecycle in the context of global and EU migration politics and law continues to be an essential ingredient for any research that aims to improve the good governance record of BLAs. In this Article, the focus of fieldwork is on French legislative texts and court decisions. In the next Part we first frame the evolution of AJMs.

III. Periodizing France's AJMs within Bilateral Migration Agreements in Europe

Tracing the evolution of any type of bilateral agreement—including free trade and economic partnership, investment, social security, visa relaxation, readmission or labor migration—benefits from a chronological approach.[70] For the purposes of this Article, we draw on the definition of "second-generation agreements" coined by Chaloff, which he used for agreements that Italy signed with Tunisia (15 May 2000) and Algeria (1997) on seasonal workers after it had signed a readmission agreement with these countries, and who finds that "[a]ny agreement on migration signed after a readmission agreement is considered to be a second-generation agreement."[71]

France designed its second-generation migration agreements in the wake of its immigration law reform of 2006/07.[72] After postwar reconstruction came to a halt with the oil crisis of the 1970s, France stopped its preferential recruitment of labor from West Africa and its former colonies in 1974 and introduced visa schemes to close its borders.[73] Since the 1980s, the 1950s guestworker agreements have generally been recognized as having failed to manage the risk of temporary migration turning into permanent migration.[74] Around this time, a policy of "mastering migration" was

69 Hein de Hass, *Irregular Migration from West Africa to the Maghreb and the European Union: An Overview of Recent Trends* 30 (Int'l Org. for Migration Rsch. Series, Paper No. 32, 2008). Senegal stands out as a country that has broken away from colonial migration patterns and where a substantial increase and diversification in migration to (southern) Europe (and the U.S.) has taken place.

70 I copy the ILO's definition of BLAs, "bilateral labour migration agreements," defined in Int'l Lab. Off., *Bilateral Agreements on Labour Migration*, *in* Report IV: Addressing Governance Challenges in a Changing Labour Migration Landscape 32, ¶68 (2017) (in the scope of legally binding agreements (BLAs and other agreements) and MoUs, the ILO includes cross-border labor migration, sector-based schemes, seasonal worker agreements and trainee agreements, but also MRAs with labor mobility provisions or FTAs with mode 4 chapters).

71 *See* Jonathan Chaloff, *From Labour Emigration to Labour Recruitment: The Case of Italy*, *in* Migration for Employment, *supra* note 3, at 55, 57.

72 For an account of "first-generation" migration agreements concluded by France, see generally Henri de Lary, *Bilateral Labour Agreements Concluded by France*, *in* Migration for Employment, *supra* note 3, at 43.

73 *See* Org. for Sec. & Coop. in Eur., Int'l Org. for Migration & ILO, Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination 179, 182 (2006) (referring to an OECD study of 2004). *See also* Philip Martin et al., *Migration Outcomes of Guest Worker and Free Trade Regimes: The Case of Mexico-US Migration*, *in* Managing Migration, Time for a New International Regime 137 (Bimal Ghosh ed., 2000).

74 *See* Stephen Castles, *Guestworkers in Europe: A Resurrection?*, 40 Int'l Migration Rev. 741, 741 (2006).

conceived to limit family reunification, and for the first time, a return component was attached to the templates.[75] As part of this policy, and in light of the rise of irregular migration flows in the 1980s and 1990s, France came up with a new type of agreement, the so-called agreements relating to vocational training. Rather than skilling for admission, these agreements offered vocational training for adult migrants who had overstayed their temporary visas but voluntarily agreed to return. Their training-for-return stands as one of the first examples of issue linkage and depenalization of return migration in Europe.

During the 1990s, France started to meet its rising demand for high-skilled foreign labor by retaining young professionals—followed later by the skills and talent card, France's equivalent of the EU Blue Card.[76] Family reunification was excluded, as the young professionals, who had to be between 18 and 35 years of age, were not allowed to move their spouses and children to France (Article 65 Senegal-France). To alleviate concerns over a brain drain, France limited stays to 3 and 12 months, and work experience was conditional upon finding employment in an establishment connected with healthcare, social services, agriculture, artisanship, industrial or commercial business, hence sectors exposed to human capital deficiencies in France. Incidentally, the skill upgrade needed to coincide with skills and professional experience lacking in the worker's country of origin. The intention of the agreements on young professionals was to improve the workers' career prospects for their eventual return back home in an effort to incentivize voluntary returns, an intention replicated today under the EU MATCH program 2020-23, whereby under the label of a "soft landing" workers from Senegal and Nigeria are recruited to fill shortages for companies in the ICT sectors in Europe, with the objective of return (see Table 1 below).[77]

Given that in 2019, the largest proportion (41%) of the immigrant population in France were born on the African continent,[78] France's two Conventions on Co-development, the first between France and Senegal (25 May 2000),[79] and the second with Mali (21 December 2000), were initiated with the objective of delegating responsibility for migration and development away from the central government to local authorities and immigrant associations.[80]

Co-development is a form of multi-level governance built around a multi-stakeholder approach, whereby the central state collaborates with CSO/NGOs to

75 *See* Martin, *supra* note 2.

76 *See* Jolivel, *supra* note 6, at 23-4.

77 *Id*. *See also* Panizzon, *supra* note 25.

78 *L'essentiel sur . . . les immigrés et les étrangers*, The Nat'l Inst. of Stat. & Econ. Stud. (Mar. 1, 2022), https://www.insee.fr/fr/statistiques/3633212.

79 *See* Convention on co-development between the Government of the French Republic and the Government of the Republic of Senegal, Fr.-Sen., May 25, 2000, 2129 U.N.T.S 205. *See also* Michel Terrot, Report on Behalf of the Commission on Foreign Affairs on the Draft Laws Concerning the Approbation by the Senate of the Laws Authorizing the Ratification of the Agreements on Concerted Migration Management between the French Government and Benin, Congo and Senegal, Fr. Nat'l Assembly Doc. No. 1471, at 28 (Feb. 17, 2009).

80 *See* Convention on Development between the Government of the French Republic and the Government of the Republic of Mali, Fr.-Mali, Dec. 21, 2000, 2418 U.N.T.S 331.

better manage the migrants' (re-)integration into the socioeconomic fabric of a host society or the country of origin.[81]

It was due to the strong pressure exerted by the important Malian diaspora in France on their government back home in Mali, not to threaten the lifeline which remittance flows signify for entire neighborhoods and regions in Mali[82] like Keyes, that France had to shift the optic away from readmissions towards regularizing the stay of Malian in France, an issue that led to the abortion of the talks on an earlier bilateral migration and readmission agreement.[83]

For that reason, co-development, which was originally designed by Samuel Nair in 1997, was expanded to open up opportunities for professional training and education of citizens from Mali and Senegal[84] working in France, but with a view to facilitating their sustainable return home.[85]

Consequently, co-development became Europe's first attempt at reaching a balanced exchange of interests between a migrant source and a destination country. It pioneered the whole-of-society approach of involving non-state actors, including diaspora organizations, private companies, immigrant associations, and education centers, as accomplices in France's migration control and temporary migration policies by co-funding the diaspora integration and re-integration projects. In 2007, co-development was moved to the new Ministry of Immigration, Integration, National Identity and Solidarity Development established by Nicolas Sarkozy. France's MIIIDS relabeled it as "solidarity development" and it was given a control-oriented function, which was operationalized by the French central government reasserting control. Solidarity as opposed to co-development diluted the previous stakes of multi-stakeholder involvement[86] and return became inextricably linked to labor migration, paving the way for France's AJMs.[87] From that point onwards, France's

81 *Cf.* Margit Fauser, *Co-development as Transnational Governance: An Analysis of the Engagement of Local Authorities and Migrant Organisations*, 40 Madrid J. Ethnic & Migration Stud. 1060 (2014). *See* van Criekinge, *supra* note 14.

82 *See* Djibonding Dembele, *Le Mali et la Migration Irrégulière* 9-10 (Robert Schuman Cen. for Advanced Stud., CARIM Notes d'Analyse et de Synthèse No. 39, 2010).

83 *See* Sadio Soukuna, *L'État malien entre négociations et résistances dans la formulation de politiques sur les migrations*, 51 Anthropologie & Développement 69 (2020).

84 Sami Naïr, Rapport de bilan et d'orientation sur la politique de codéveloppement liée aux flux migratoires (Dec. 1, 1997); Christophe Daum, *Migration, retour, non-retour et changement social dans le pays d'origine*, *in* Migrations internationales de retour et pays d'origine 157 (Véronique Petit ed., 2007).

85 David Khoudour-Castéras, *Les enjeux de la politique française de développement solidaire*, 8 Regards croisés sur l'économie 190, 193 (2010) ("An immigrant in France can contribute to the financing of a project launched by a friend or a relative who stayed at home by using part of her savings as a bank guarantee. Besides, the program provides technical support to entrepreneurs, initially through a feasibility study, then by following the project during its first year. It is also noteworthy that PMIE advises immigrants willing to invest in France by enabling them to set up their project and to find funding, or by offering specific formation. Between 20 and 30 projects are financed each year by the program, and around one third of them (six to ten) materialize as an actual business.") (Trans. by Author).

86 *See* Marion Panizzon, *France's Codevelopment Program: Financial and Fiscal Incentives to Promote Diaspora Entrepreneurship and Transfers*, *in* Diaspora for Development in Africa 183 (Sonia Plaza & Dilip Ratha eds., 2011).

87 *See* Terrot, *supra* note 79.

different co-development conventions were criticized as providing an "alibi" for restrictive immigration policies,[88] It was even rumored that Mali's consulates abroad would receive payments from France if they cooperated in returning their citizens who had been unlawfully staying in France.[89]

Consequently, France was unable to conclude further co-development conventions and had to come up with a new treaty design, resulting in the new agreements on "concerted migration management" (AJMs).[90] In the context of the abovementioned 2006/07 immigration law reform under the guidance of Nicolas Sarkozy,[91] then Minister of the Interior, France in 2006 began its proliferation strategy with regard to AJMs.[92] As conceived by Brice Hortefeux, who was Minister of the Interior in 2009-11, the AJMs are built upon three "indissolubly" interlinked prongs ("*volets*"), which are securitization (readmission of undocumented nationals, police cooperation, border control, dismantling of trafficking networks, the fight against falsified documents), legal migration (circulation, visas, work immigration, residency of students) and solidarity development.[93]

Conditionality kept its place also in the AJMs, but France stepped up its "more-for-more approach" by aggrandizing the legal pathway through labor migration in three ways, discussed in detail in Part I: first, by offering minimum admission benchmarks and quotas on work permits under the work permit categories established by the CESEDA; second, by granting preferential extension and renewal periods for work permits; and third, controversially, by including a regularization program for Senegalese in irregular stays in France.[94] Through these positive leverages, France motivated Senegal and other partner countries in West and North Africa to sign onto the "obligation" (to readmit nationals and third country nationals (TCNs)).[95] Around this time, the Cayucos crisis[96] off the Senegalese, Gambian and Mauritanian coastlines prompted the first ever interceptions-at-sea by the European Coast Guard

88 *See* Christophe Courtin, *Le codéveloppement: un alibi pour des politiques migratoires restrictives*, 68 Revue française de science politique 43 (2007).

89 On involving the diaspora for source country development, see generally Hein de Haas, Engaging Diasporas: How Governments and Development Agencies Can Support Diaspora Involvement in the Development of Origin Countries 67-70 (2006).

90 The official French translation is "joint management of immigration flows and partnership development"—"joint" and "consolidated" not having the exact same meaning—since the English translation instills more of a "partnership approach" to the AJM than the official French.

91 *See* Meng Hsuan Chou & Nicolas Baygert, *The 2006 French Immigration and Integration Law: Europeanisation of Nicolas Sarkozy's Presidential Keystone?* (Oxford Univ. Ctr. Migration Pol'y Soc'y, Working Paper, Paper No. 45, 2007).

92 The MIIINDS, the French Ministry in charge of French migration policy, was dissolved during the Sarkozy government's ministerial reallocations of 14 November 2010. However, its mandate continues to exist almost unaltered and was put under the auspices of the Ministry of the Interior, headed by Brice Hortefeux.

93 *See* La Cimade, Document d'Analyse: Les Accords Relatifs à la Gestion Concertée des Flux Migratoires et au Co-développement 2 (2009) [hereinafter CIMADE].

94 *See* Panizzon, *supra* note 86, at 211-12.

95 *See generally* Oreva Olakpe, *The Evolution of EU-Africa Migration Partnerships: Lessons in Transnational Migration Governance* (Ryerson Ctr. Immigr. & Settlement, Working Paper, Paper No. 2020/13, 2020) for a discussion of negative and positive (more-for-more) conditionality in the AJMs.

96 *See* Faustini-Torres, *supra* note 38.

and Border Agency, FRONTEX, in the territorial waters of countries like Senegal, willing to accommodate FRONTEX operations. It is in this context that France and Senegal signed a first AJM (in 2006), which both countries later amended (2008), possibly to reward Senegal for cooperating with FRONTEX by adding the clause on the exceptional regularization of Senegalese in irregular stays in France, who are able to show proof of a job offer or employment, described below in Parts V and IX, and Table 1 below.

Some ascribe a positive record to AJMs, which have been opening more pathways to a working experience in France and hence contribute to developing the country of origin.[97] Others criticize the weight accorded to the second pillar of security issues, which also is vested with more financial resources than labor migration and development cooperation.[98] Through the AJMs, France was able to reduce migration for family reunification, which, as Table 1 shows, accounts for the largest share of West African migration to France, unlawful entries not being taken into account. In 2009 Eric Besson, then France's Minster of the Interior, reported to the French National Assembly a reduction of flows by 12%. Given that the major AJMs were already in place by then, the reduced inflows or their replacement by labor migration could be credited to them. [99]

As "macro'-level BLAs, AJMs are multifunctional, such that they offer room for negotiating tradeoffs in return for obtaining guarantees on readmission.[100] Concurrently, the EU was deploying a similar multifunctional setting to incentivize the African partners to engage in the EU's border securitization missions off the West African coast, a cooperation which was "monetized" towards the African partners through traineeships, capacity-building in various fields, including diaspora relations, migration management and asylum. As the EU stepped up its efforts, countries like France saw their negotiating space dwindle, which ultimately explains why France in 2008, two years after signing its BLA with Senegal, added the regularization program, as one such "positive conditionality."

Yet in the period prior to the Syrian war and the EU Migration Partnership Framework, for countries like Senegal, Congo or Nigeria, the privileges obtained bilaterally from France and Spain were higher, and the, liberalized labor, trade, and development aid flows were less drastically subordinated to readmission and return cooperation than when negotiating with the EU.[101] Due to the refusal by the EU and its Member States to extend the concessions of an EU association or a DCFTA to African countries, even if they are considered a "closer neighborhood" similarly to the Eastern partnership, the only bargaining chip was to ask for openings for more

97 *See* OIkuteyijo, *supra* note 22.

98 *See* CIMADE, *supra* note 93.

99 Lionel Luca, Report on Behalf of the Commission on Foreign Affairs on the Draft Laws Concerning the Approbation by the Senate of the Laws Authorizing the Ratification of the Agreements on Concerted Migration Management between the French Government and Burkina Faso and Cape Verde, Fr. Nat'l Assembly Doc. No. 2434 (Apr. 6, 2010).

100 *See* Panizzon, *supra* note 25, 101-33, at 105.

101 *Cf.* Chou & Gibert, *supra* note 4.

lawful migration into Europe, through quotas or relaxed admission criteria—both demands over which the EU, under Art. 79 TFEU, has no exclusive competence.

Since the EU's primary channels for levering cooperation with African countries, at the forefront the CAMM and the Mobility Partnerships, were suffering from its incomplete competence over labor migration, development assistance and diaspora relations (Art. 4, 208 TFEU), it comes as no surprise that the politically most acceptable solution for the governments of countries such as Tunisia, Senegal, and Cameroon were the bilateral avenues, for example with France in the AJMs.[102]

Between 2006 and 2013 France concluded 13 migration-related agreements, including those on the mobility of young professionals and professionals. Of these, seven qualify as "classic" versions and were concluded with Benin,[103] Burkina Faso,[104] Cape Verde,[105] Congo,[106] Gabon,[107] Senegal,[108] and Tunisia.[109] These seven "classic" templates are composed of the three chapters: the fight against irregular migration, labor migration, and solidarity development.[110] With the exception of

102 *Cf.* OIkuteyijo, *supra* note 22.

103 Agreement between the Government of the French Republic and the Government of the Republic of Benin on joint management of migration flows and co-development (with annexes), Fr.-Benin, Nov. 28, 2007, 2663 U.N.T.S 175 (entered into force Mar. 1, 2010).

104 Loi 2011-7 du 3 janvier 2011 autorisant l'approbation de l'accord entre le Gouvernement de la République française et le Gouvernement du Burkina Faso relatif à la gestion concertée des flux migratoires et au développement solidaire [Law 2011-7, Jan. 3, 2011, authorizing the ratification of the agreement between the Government of the French Republic and the Government of Burkina Faso relating to the concerted management of migratory flows and solidarity development], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 4, 2011, p. 235.

105 Loi 2011-6 du 3 janvier 2011 autorisant l'approbation de l'accord entre le Gouvernement de la République française et le Gouvernement de la République du Cap-Vert relatif à la gestion concertée des flux migratoires et au développement solidaire [Law 2011-6, Jan. 3, 2011, authorizing the ratification of the agreement between the Government of the French Republic and the Government of the Republic of Cabo Verde relating to the concerted management of migratory flows and solidarity development], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 4, 2011, p. 234.

106 Agreement between the Government of the French Republic and the Government of the Republic of Congo on joint management of migration flows and co-development (with annexes), Fr.-Congo, Oct. 25, 2007, 2614 U.N.T.S 21 (entered into force Aug. 1, 2009).

107 Loi 2008-569 du 19 juin 2008 autorisant l'approbation de l'accord entre le Gouvernement de la République française et le Gouvernement de la République gabonaise relatif à la gestion concertée des flux migratoires et au codéveloppement [Law 2008-569, June 19, 2008, authorizing the ratification of the agreement between the Government of the French Republic and the Government of the Gabonese Republic relating on the concerted management of migratory flows and co-development], Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 19, 2008, p. 9946.

108 Loi 2009-585 du 25 mai 2009 autorisant l'approbation de l'accord relatif à la gestion concertée des flux migratoires entre le Gouvernement de la République française et le Gouvernement de la République du Sénégal et de son avenant [Law 2009-585, May 25, 2009, authorizing the ratification of the agreement relating to concerted management of migratory flows between the Government of the French Republic and the Government of the Republic of Senegal and its amendment], Journal Officiel de la République Française [J.O.] [Official Gazette of France], May 26, 2009, p. 8707.

109 Framework Agreement on the concerted management of migration and joint development between the Government of the French Republic and the Government of the Republic of Tunisia (with protocols), Fr.-Tunis., Apr. 28, 2008, 2614 U.N.T.S 151 (entered into force July 1, 2009).

110 *See* Catherine Tasca, Report by Mrs Catherine Tasca, Senator to the Commission on Foreign Affairs on the Projected Laws Requiring the Approbation of the Agreements on Concerted Migration Management between France and Benin, Congo, Senegal and Tunisia,

the agreement with Tunisia, none of the AJMs modify earlier bilateral agreements with France (see Table 1).[111]

Four of these 13 migration agreements are "light" versions because they leave out the readmission clause and other obligations to combat irregular migration.[112] France has also signed labor migration agreements for highly-skilled workers with three countries, Russia (27 November 2009), Mauritius (23 September 2008) and Georgia (12 November 2013), which qualify as a "super-light" version due to the absence of chapters on readmissions and solidarity development aid.[113] Under negotiation were further AJMs with Algeria, Egypt, and Equatorial Guinea.[114] The conclusion of agreements with Haiti, the Philippines, Morocco, and Mauritania, which signaled an interest, was also being discussed.[115] The negotiations with Congo-DRC and Guinea-Conakry have been suspended due to political instability.

No agreement could be reached with Mali, which refused to sign onto a new AJM due to a clash with France over the number of Malians unlawfully staying in France, which it wanted to have regularized at 4-5,000, while France was only ready to offer 1,500.[116] Mali and France have an agreement "in the area of migration" from May 29, 1998, the purpose of which was to create a Franco-Malian committee on migration.[117] Similarly, the AJM with Cameroon, which was to be a "classic" one like those with Senegal, Benin or Burkina Faso, was signed on May 21, 2009, but to this day the parliament in Cameroon has refused to start the ratification process, possibly

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Fr. S. Doc. No. 129 (Dec. 10, 2008) (on the draft laws concerning the adoption by the Senate of the laws authorizing the ratification of the agreements on concerted migration management between the French Government and Senegal, the Commission on Foreign Affairs). The AJMs are publicly available on at least three different sources. Whereas the French government posts them only once, they have been ratified by the French Parliament on *Les accords bilatéraux*, Ministère de l'Intérieur, https://www.immigration.interieur.gouv.fr/Europe-et-International/Les-accords-bilateraux (last visited Feb. 23, 2022). The NGO GISTI (Groupe d'Information et de Soutien des Immigrés) publishes the texts once they have been signed, if and when it has succeeded in accessing the texts. GISTI, *Accords bilatéraux*, gisti.org, http://www.gisti.org/spip.php?rubrique135 (last visited Nov. 12, 2021).

111 *See* Yves Breem, Immigration et Présence Etrangère en France en 2011 8 (2011).

112 France signed 'light' migration agreements with, e.g., Mauritius and Russia, *see infra* note 180. Loi 2013-242 du 25 mars 2013 autorisant l'approbation de l'accord entre le Gouvernement de la République française et le Gouvernement du Monténégro relatif à la mobilité des jeunes [Law 2013-242, March 25, 2013, authorizing the ratification of the agreement between the Government of the French Republic and the Government of the Montenegro relating to the mobility of young people], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 26, 2013, p. 5058; Loi 2013-241 du 25 mars 2013 autorisant l'approbation de l'accord entre le Gouvernement de la République française et le Gouvernement de la République de Serbie relatif à la mobilité des jeunes [Law 2013-241, March 25, 2013, authorizing the ratification of the agreement between the Government of the French Republic and the Government of the Republic of Serbia relating to the mobility of young people], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 26, 2013, p. 5054.

113 *See Les accords bilatéraux*, *supra* note 110.

114 *See* Eur. Migration Network, Annual Policy Report 2009 46 (2010).

115 *See* CIMADE, *supra* note 93, at 3.

116 *See* Moustapha Lô Diatta, *L'évolution des accords bilatéraux sur les travailleurs migrants*, 135 J. Droit Int'l 101 (2008).

117 Convention on the movement and sojourn of persons between the Government of the French Republic and the Government of the Republic of Mali, Fr.-Mali., Sept 26, 1994, 1980 U.N.T.S 205 (entered into force May 1, 1996).

due to similar reluctance by France to add a provision to regularize the admission to stay for Cameroonian citizens. Nonetheless, France until 2010 aggressively pursued a policy of multiplying the number of such agreements,[118] which, in light of a disappointing implementation record, it recently stopped.[119]

It is difficult to establish whether signing onto an AJM or not affects migration flows into France. In 2019, Mali, which has no AJM with France, ranked eighth among countries with the highest economic migration into France, having been ranked only slightly lower, in ninth place, in 2008 and in 2015, which kept Mali above Senegal in 2018 and 2019. Similarly, Morocco, despite lacking an AJM, figures in first place in both the 2015 and 2018 French census for economic migration to France. Irregular economic migration from Mali and Morocco may run high because in the case of those countries, unlike Senegal, which has an AJM, no readmissions can be effectuated.[120]

Even if not stated officially, France's proposal of such one-size-fits-all labor market admission categories could not dispel the concerns of its Mediterranean neighbors[121] that France's AJMs were deliberately designed as a first step toward a unified EU solution.[122] It is not surprising that AJMs were given the cold shoulder by former colonies, in particular those that had been benefiting from far-reaching preferences in terms of access, which they risked losing by signing an AJM (see Tunisia, below).[123]

IV. Predesigned Package Deals—How Much of a Negotiated Output in an AJM?

The purpose of post-9/11 "second-generation migration agreements" is to achieve issue linkage between migration-specific (visa, readmission, border security, anti-smuggling/trafficking) and related policies (trade, investment, education) broad enough to incentivize a source country to sign onto politically sensitive issues, which it would otherwise on a standalone basis resist, including forced returns, border screenings or detention of its citizens abroad, but where leveraging through positive incentives might bring about a change.[124] For such linkages to work, the source and host countries ideally should each have a whole-of-government approach (WOGA) in place domestically, whereby the different ministries and departments representing different migration thematic areas consolidate their relative differences

118 *See* Terrot, *supra* note 79.
119 *See* Eur. Migration Network, *supra* note 114.
120 *See Les accords bilatéraux*, *supra* note 110, at 29.
121 *See* Chou & Gibert, *supra* note 4.
122 *See* Reslow, *supra* note 23.
123 *See* Marion Panizzon, *To What Extent Do Bilateral Migration Agreements Contribute to Development in Source Countries? An Analysis of France's Migration Pacts*, *in* Let Workers Move, *supra* note 10, at 85.
124 *See* Micheline van Riemsdijk & Marion Panizzon, *A Collective Commitment to Improving Cooperation on Migration: Analysis of a Thematic Consultation Session for the Global Compact for Migration*, Third World Q. (forthcoming 2022).

over which areas ought to be prioritized before the offer is put up for negotiation with the partner country.[125] In the case of Senegal, under President Wade, the WOGA approach failed, such that Senegal was unable to present an internally unified position for its negotiations over an EU mobility partnership.[126] Senegalese interests were also overlooked by France, which then imposed its predesigned, one-directional template in 2006. Only in 2008 did Senegal put forward requests, including for regularizations, which led to the successful amending of the 2006 AJM and resulted in a more bidirectional outcome.[127] In reality, several governments in West Africa resist the WOGA approach consciously, in an attempt to play the card of *policy incoherence* back to the EU or the host country.[128] At other times, due to the internal political divide triggered by rival diasporas, the projected AJM never came to fruition (Mali, Nigeria), or France may have succeeded in glossing over differences by imposing an AJM as a working solution, but the implementation of the AJM is now at risk (Senegal).[129]

How deeply a partner country is implicated in implementing the AJM *post*-negotiations depends on the power of the "*comité de suivi*" or "*commission mixte*," a steering committee composed of equal numbers of representatives of France and the partner country:[130] The binational steering committees oversee implementation, which to some embodies technocratic migration management immune to political

125 WOGA figures as one out of several cross-cutting and interdependent guiding principles under paragraph 14 of the 2018 Global Compact for Safe, Orderly and Regular Migration alongside rule of law and due process, sovereignty, international cooperation, sustainable development, gender-responsive and child-sensitive policies and the whole-of-society approach (WOSA). For how African countries implement the WOGA, see Adam et al., *supra* note 22; *see also* on WOGA and WOSA, J. Kevin Appleby, *Implementation of the Global Compact on Safe, Orderly, and Regular Migration: A Whole-of-Society Approach*, 8 J. Migration & Hum. Sec. 214 (2020).

126 *See* van Criekinge, *supra* note 14.

127 *See* Maguemati Wabgou, *Governance of Migration in Senegal: The Role of Government in Formulating Migration Policies*, *in* International Migration and National Development in Sub-Saharan Africa: Viewpoints and Policy Initiatives in the Countries of Origin 141, 149 (Aderanti Adepoju et al. eds., 2007).

128 *See* Gagnon & Khoudour-Casteras, *supra* note 16, at 145.

129 *See Immigration: la France peine à signer de nouveaux accords de gestion des flux*, Le Point (Apr. 18, 2012), https://www.lepoint.fr/societe/immigration-la-france-peine-a-signer-de-nouveaux-accords-de-gestion-des-flux-18-04-2012-1452627_23.php; *see also* Antoine Pécoud, *Narrating an Ideal Migration World? An Analysis of the Global Compact for Safe, Orderly and Regular Migration*, 42 Third World Q. 16 (2021), for how treaties, agreements, and informal arrangements in international cooperation on migration "gloss over" differences and conflict to be able to create a working solution, including how the GCM defined a common narrative which served to gloss over differences between the Global North and South so as to enable the IOM to work.

130 Most AJMs, such as those with Cameroon (Art. 18), Gabon (Art. 7), Senegal (final provisions), Tunisia (Art. 3 of the framework agreement) and Mauritius (Art. 4), establish a joint steering committee tasked with monitoring their implementation. Such a steering committee is primarily seen in those AJMs, where there is strong political will from both sides to ensure the successful implementation of the AJM. For Senegal, see *supra* note 108. For Burkina Faso, see *supra* note 104. For Tunisia, see *supra* note 109. For Congo, see *supra* note 106. For Benin, see *supra* note 103. For Cape Verde, see *supra* note 105. For Cameroon, see *Loi 2011-423 du 20 avril 2011 autorisant l'approbation de l'accord entre le Gouvernement de la République française et le Gouvernement de la République du Cameroun instituant un partenariat de défense* [Law 2011-423, Apr. 4, 2011, authorizing the ratification of the agreement between the Government of the French Republic and the Government of the Republic of Cameroon

processes.[131] Nonetheless, several of these binational committees, e.g., with Benin, Senegal and Tunisia, are vested with greater responsibility: e.g., monitoring the "use of the co-development funding," proposing adjustments to the AJM, or, as in the case of the Franco-Béninois committee, deciding on annual admission quotas.[132] In addition, certain AJMs feature a "migration observatory," which is an inter-ministerial committee in the partner country, which France funds to observe and closely track migratory flows in the sub-region, ultimately to inform France about fluctuations in the volumes of TCNs in the sending country, which is relevant for readmissions. In sum, some AJM's, despite their aspiration to be a one-size-fits-all template,[133] as Wabgou has shown for Senegal and France,[134] reveal imbalanced negotiated outcomes.[135]

Hirschman in his "rhetoric of reaction" of 1991 observed that one's policy choice can *jeopardize* a goal, be *futile* in the effort to induce change, or *perverse* in the sense of producing the exact opposite of the intended effect.[136] Through our case study of the France-Senegal AJM of 2006 after its amendment in 2008, we hypothesize that AJMs "jeopardize" the centerpiece of France's "*immigration choisie*," which is to recruit skilled and talented professionals in line with the EU labor market directives' strategy. The AJMs have plugged the loopholes in the EU labor market directives, in particular as it offers access to lower-skilled workers and training possibilities for young professionals in France.

In the following, I discuss whether the privileges the AJM foresees in terms of labor migration circumvent the EU's six labor market directives, undercut the EU Return directive's efforts to ban mass regularizations in Europe, and challenge the WTO/GATS most-favored-nation treatment, at least when natural persons move temporarily to France as part of a cross-border supply of services.

V. Coherence: Complementing The EU Labor Market Directives and the EU Return Directive

In this Part, three areas of convergence between the AJMs and EU law are discussed: complementing the EU labor market directives and filling in where the Union's competence over labor is missing, e.g. in lower skills; realizing, if only implicitly, a precursor to EU-wide readmission agreements and EU mobility partnerships, as

establishing a defense partnership], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Apr. 21, 2011, p. 7033.

131 *See* Jürgen Bast, Aufenthaltsrecht und Migrationssteuerung 10-12 (2011).

132 The France-Cameroon AJM Art. 18; The France-Congo AJM; The France-Gabon AJM Art. 7; The France-Senegal AJM Art. 18, Art. 1 are rather weak committees. *See supra* notes 130, 106-08.

133 Panizzon, *supra* note 25.

134 *See* Wabgou, *supra* note 127.

135 *See generally* Nicola Piper & Laura Foley, *Global Partnerships in Governing Labour Migration: The Uneasy Relationship Between the ILO and IOM in the Promotion of Decent Work for Migrants*, 1 Glob. Pub. Pol'y & Governance 256 (2021) (regarding negotiating migration outcomes).

136 *See* Albert O. Hirschman, Rhetoric of Reaction (1991).

well as, since 2021, EU skills partnerships; and third, implementing or aligning with the EU Return directive over the question of regularization.

On the first point, labor migration is one of the four strategic lines of the Global Approach to Migration (GAM) of 2005 and its successor, the Global Approach to Migration and Mobility (GAMM) of 2012,[137] but at the same time figures as the most controversial area of EU migration law, since the Union's incomplete competence under Art. 79 TFEU[138] protects the Member States' residual competence to "determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed" (TFEU).[139] There are currently six EU labor market directives that lay down "conditions of entry and residence" (Art. 79:2(a) TFEU) regarding access to skills and talents through the Blue Card directive for seasonal workers, ICT workers, researchers and students from third countries. In addition to those categories, the AJMs recognize categories outside those harmonized by the EU's six labor market directives—for occupations that the European Parliament (EP) in 2021 listed as "most in need," and where the Member States retain a competence. For France there is a 'temporary or salaried worker admission,' which is open to TCNs, but only regarding jobs in need in France, which mostly covers lower-skilled occupations, with two exceptions. In the AJM, the jobs in need are listed in an annex. In the case of Senegal, there is an exception: Senegal successfully negotiated with France to have jobs listed, which are of "export interest" to Senegal. Another interesting feature is that among the jobs which the EP lists as most in need are "street- and related sales and service workers (28%), food preparation assistants (20%), cleaners and helpers (17 %), and agriculture, forestry and fishery laborers (17%),"[140] but almost none of these jobs figure in France's AJMs with African countries. Third, France's court practice has scarcely allowed the regularization of the status of Senegalese workers in lower-end jobs, including as salespersons in food or clothing shops, even if some of these jobs were listed in Annex IV. These findings aside, a legal question of compliance arises in relation to Art. 79 TFEU, which is whether an AJM is allowed to treat TCNs from a country bilaterally linked to France more favorably than TCNs whose cross-border movement to Europe has not been liberalized by a bilateral migration agreement. Put differently, does Art. 79 TFEU, read in conjunction with Art. II GATS (see Part VI), establish most-favored-nation treatment of TCNs with respect to their entry and stay in an EU Member State. One inference can be made from para. 1 Art. 79 TFEU, which calls for the effective management of migration flows and the fair treatment of TCNs: even though there is no explicit prohibition of discriminatory

137 *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Global Approach to Migration and Mobility*, COM (2011) 743 final (Nov. 18, 2011); Conclusions on the Global Approach to Migration and Mobility, European Council (May 3, 2012).

138 Consolidated Version of the Treaty on the Functioning of the European Union art. 79, June 7, 2016, 2019 O.J. (C 202) 49 [hereinafter TFEU].

139 *See* Eur. Parl. Research Serv., Legal Migration Policy and Law: European Added-value Assessment 27 (2021).

140 *Id.* at 19.

treatment of TCNs in EU law, there is a suggestion that MFN treatment with respect to their entry, stay, regularization, return and admission to the categories of Blue Card workers, seasonal workers, ICT workers, and researchers would call for nondiscriminatory treatment of any TCN regardless of a BLA, except for categories of work that remain under Member States' competence.

On the second point, the AJMs by their very design establish a trilateral issue linkage, which is also found embedded in the EU GAMM, which the Union operationalizes through EU readmission agreements (EURA), EU mobility partnerships, common dialogues, the EU Compacts and, recently, the pilot labor migration schemes and the EU skills partnerships. [141] Like other bilateral labor migration agreements in Europe, foremost those of Spain, AJMs can serve to prepare a sending country to conclude an EURA,[142] and have even been described as a first step towards EU MPs.[143] Whereas Chou and Gibert assert that France's strategy of "Europeanization à la carte" may have stalled the successful conclusion of an EU MP with Senegal,[144] inversely Tittel-Mosser has suggested that the EU MP stalled the negotiations over France's AJM with Morocco, not the other way around.[145] Even if BLAs do not figure expressly in the European Agenda on Migration of 13 May 2015,[146] nor in the New EU Agenda on Asylum,[147] France's AJMs are precursors to the "global" approach" to migration, which the 2018 Global Compact for Migration further promotes,[148] while the EU New Pact on Migration encourages Member States to experiment with bilateral labor migration projects[149] and participate in legal migration pilots,[150] but also in the EU-wide Talent Partnerships and the Skills Agenda for Europe.[151] Under

141 *See* Presidency Conclusions, Brussels European Council (Dec. 16, 2003). The "Global Approach to Migration" (GAM) is a strategy adopted by the European Council in 2005, which was first applied as "priority actions focusing on Africa and the Mediterranean," strengthened in 2006 and expanded in 2007 to eastern and southeastern regions neighboring the European Union, and to a lesser extent to the Middle East and Asia, and further strengthened in 2008. The EU GAM works by encouraging EU Member States to seek a more balanced but comprehensive sharing of responsibilities with migrant source countries relating to the three dimensions of migration: legal (labor) migration, combating irregular migration, and strengthening the ties between migration and development by engaging source countries in all-inclusive and fair migration partnerships.

142 *See* Panizzon, *supra* note 25.

143 *See* Reslow, *supra* note 23.

144 *See* Chou & Gibert, *supra* note 4, at 420, 423.

145 *See* Tittel-Mosser, *supra* note 17.

146 *See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A European Agenda on Migration*, COM (2015) 0240 final (May 13, 2015).

147 *See* Ministère de l'immigration, de l'intégration, de l'identité nationale et du développement solidaire, The Essentials on Economic Migration 15 (2010) [hereinafter MIIINDS].

148 *See* CIMADE, *supra* note 93.

149 *See* Michael Clemens et al., Promoting New Kinds of Legal Labor Migration Pathways between Europe and Africa (2019).

150 Eight Member States are currently involved in six such projects with Egypt, Morocco, Tunisia, Nigeria, and Senegal. Key themes include mobility for ICT experts, opportunities for study and traineeships in Europe, and boosting the capacity of third countries to manage migration and support reintegration.

151 *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions European Skills Agenda for sustainable competitiveness, social fairness and resilience*, COM (2020) 274 final (July 1, 2020).

this most recent EU external migration policy framework, the legal pathways target preselection and training, since this is where the EU does not step on Member States' competence on labor market admission under Art. 79:5 TFEU.[152] These EU-wide labor migration pilots, illustrated by JLMP, THAMM, and PALIM,[153] increase the rate of mutual recognition of formal and informally acquired skills and other qualifications (e.g., Obj. 18 GCM), and replicate many of the features of France's AJMs. For example, the MATCH with Senegal and Nigeria offers similar training opportunities as France has in place in AJMs or in the agreements for young professionals, since both France and the EU are investing in training-for-return, and not only at lower skill levels.[154] The difference is that AJMs are legally binding and subject to judicial interpretation by the courts, introducing a level of predictability that is missing from the soft-law EU schemes. Another difference is that the AJMs' funding structure is intergovernmental, whereas the EU pilot labor migration programs are only partially state-led, since they are co-funded and co-implemented by a conglomerate composed of host governments, the ILO and IOM, along with Italy, Belgium, Luxembourg and the Netherlands, including different chambers of commerce and decentralized regional governance units, including West Flanders and the Piedmont in Italy.[155] In that sense, the AJMs are comparable to government-to-government circular migration schemes, including Spain's with Colombia, the Dutch Blue Birds towards Indonesia and South Africa, the Japan-Philippines economic partnership agreement's chapter on nurses and caregivers,[156] or the two German models, one with Tunisia and the other to recruit nurses from Georgia.

Finally, the AJMs are open-ended and therefore neither limited in time nor experimental, which is another element that distinguishes them from the EU pilots THAMM and PALIM as well as the MATCH, the latter concluded under the EU Skills Partnerships, which are time-bound: the annual level of mobility is in the range of 70-100 people moving to Europe, as opposed to the France-Tunisia AJM, with openings for up to 7100, or Senegal-France, with openings "at least for 1000" persons per year (see Table 1 below). However, the EU schemes actually identify specific individuals as potential labor migrants or talents through a three-phase,

152 *See* Resolution on New Avenues for Legal Labor Migration, Eur. Parl. Doc. (2020/2010(INI)) ¶25 (2021). Paragraph 25 suggests that a wider migration dialogue, for instance through regular summits between the EU and multiple third countries, could facilitate meeting the needs of the EU labor markets and the development of balanced partnerships, including on the initiative of businesses and civil society, which can help prepare for the integration of TCNs into the labor market of the country of destination and can enhance the sustainable transfer of acquired skills between countries of origin and destination; it further emphasizes that inspiration can be found in existing skills-based agreements on the development of talent partnerships that allow the destination country to be directly involved in shaping the skill sets of TCNs potentially interested in migrating to the EU, including by establishing training facilities and programs for third countries, and addresses the need for transparency of partnerships with third countries, including by involving social partners.

153 Prac. Network for Eur. Dev. Coop., Development and Labor Mobility: Session 4 (2020).

154 *See* Panizzon, *supra* note 123.

155 *Match*, eea.iom.int, https://eea.iom.int/match-hiring-african-talents (last visited May 31, 2022).

156 *See, e.g.*, Marion Panizzon & Harjodh Singh, *Upping the Ante: The Movement of Natural Persons (Mode 4) and Non-Services Migration in EU and Asian PTAs*, *in* Coherence and Divergence in Services Trade Law 139 (Rhea Tamara Hoffmann & Markus Krajewski eds., 2020).

competitive selection procedure for the EU labor markets, and train them in skills and language capacities, which is followed by a final step of recruitment by individual companies and businesses.

A third and critical compliance issue plays out between the AJMs and Art. 6(4) of the EU Return Directive 2008/115/EC,[157] which discourages mass regularizations even if they are tolerated. Instead, Member States have two options, either to remove the irregular migrant or to grant stay on individual hardship. By 2013, only 16 Member States had such regularization options in place, which shows that the policy priority remains aimed at removal.[158]

Regularizations are a "policy response . . . to provide legal status to irregular migrants, despite their unlawful entry or stay,"[159] such that at the Union level, there is a "blanket ban on mass regularizations"[160] a stance which France's presidency advocating for the EU New Pact on Migration and Asylum reiterated by removing the option of mass regularization and replacing it with individual hardship applications instead, the former to guarantee that Spain remains on board.[161] As Hinterberger has argued, national programs for collective, one-off regularizations of migrants, either in specific sectors of the economy or more universally, remain an exclusive Member State competence, such that the Union is tolerating such national practices, as it has not yet succeeded to adopt a unified law and policy either banning or encouraging mass regularizations.[162]

Regularization is contested because of its 'rewarding' character, which can create a 'pull effect' on would-be migrants in sending countries. Within the free movement area of the EU, regularization programs are particularly feared for

157 Directive 2008/115 of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 2008 O.J (L 348) 98 at art. 6(4). Member States may at any moment decide to grant an autonomous residence permit or other authorization offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued.

158 *See* Markus Gonzalez Beilfuss & Julia Koopmans, *Legal Pathways to Regularisation of Illegally Staying Migrants in EU Member States* 11 (ADMiGOV, 2009).

159 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 Sept. 2007, Report on policy priorities in the fight against illegal immigration of third-country nationals (2006/2250(INI)), Rapporteur: Javier Moreno Sánchez, at para. 58.

160 ICMPD, REGINE Regularisations in Europe: Study on Practices in the Area of Regularisation of Illegally Staying Third-country Nationals in the Member States of the European Union 115 (Final Report, 2009).

161 *Cf.* Karen Brick, *Regularizations in the EU, The Contentious Tool* (Migration Pol'y Inst., Insight, Dec. 2011).

162 Kevin Fredy Hinterberger, *A Multi-Level Governance Approach to Residence Rights of Migrants and Irregular Residence in the EU*, 20 Eur. J. Migration & L. 182 (2018).

unfolding unwanted secondary movements to other EU Member States.[163] At the same time, the benefits to the individual migrant and to the host society—namely, integrating migrants into the socioeconomic fabric and institutions, including access to education, healthcare, and social security, coupled with the tax revenue from migrants' work—can outweigh the risks.[164]

Senegal obtained a commitment from France that its citizens unlawfully staying in France could legalize their status through an amendment of the AJM of 2006 in 2008, which added Art. 42, providing for a possibility for 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.[165] Neither can Art. 42 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) by the person concerned before the French Prefect of the respective French *département*. Art. 42 stands as a regularization program in terms of the EU definition because it is unlimited in time and motivated by an economic logic as opposed to the humanitarian rationale.

In the "*Circulaire Valls*" by the Ministry of the Interior of November 28, 2012,[166] Senegal along with Tunisia, Morocco, Algeria and Nigeria are ranked as the top five countries for being issued a return decision in 2019; hence it comes as no surprise that the "*Circulaire Valls*" allows for an exceptional admission for stay.[167] Unfortunately, it is only for Tunisian and Algerian workers, based on their "old" prerogatives under the circular mobility schemes of 1968 and 1988, respectively, that the "*Circulaire Valls*" provide a clear-cut amnesty. The executive decree by the French Minister of the Interior, Manuel Valls, fails to refer to Art. 42 of the AJM with Senegal and thus misses the opportunity to clarify the role of this ambiguous provision within French immigration law.[168]

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163 *See* ICMPD, *supra* note 160, at 115.

164 Albert Kraler, *Regularisations—An Instrument to Reduce Vulnerability, Social Exclusion and Exploitation of Migrants in an Irregular Situation in Employment?* (Eur. Fundamental Rts. Agency, Working Paper, 2006).

165 Erik R. Vickstrom, Pathways and Consequences of Legal Irregularity, Senegalese Migrants in France, Italy and Spain (2018).

166 Circulaire INTK1229185C du 28 novembre 2012 relative aux conditions d'examen des demandes d'admission au séjour déposées par des ressortissants étrangers en situation irrégulière dans le cadre des dispositions du code de l'entrée et du séjour des étrangers et du droit d'asile [Bulletin INTK1229185C, Nov. 28, 2012, relating to the conditions for examining applications for admission to residence submitted by foreign nationals in an irregular situation within the framework of the provisions of the code for the entry and residence of foreigners and the right to asylum], https://www.legifrance.gouv.fr/download/pdf/circ?id=44486 [hereinafter Bulletin INTK1229185C]; Markus González Beilfuss & Julia Koopmans, Legal Pathways to Regularisation of Illegally Staying Migrants in EU Member States (2021).

167 Eur. Parl. Research Serv., The Return Directive 2008/115/EC: European Implementation Assessment 48 (2020).

168 Bulletin INTK1229185C, *supra* note 166

Even if levels of return to Senegal are low, at 9% of all international immigrants returning after a 15 year period abroad (Nigeria 3%, Burkina Faso 25%),[169] French court practice (see Part X) 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.

Behind the French courts' narrow interpretation of Art. 42 lies another rationale, perhaps Please insert linked to France's effort to comply with the EU Return Directive, which allows for case-by-case regularizations but discourages collective ones—whether nationality-driven or sector-specific. Even if Art. 42 is not a typical one-off regularization program, which apply automatically to all Senegalese in irregular stays in France, it has the potential to conflict with EU law and the GCM's Objective 7 establishing pathways to regularization, "on a case-by-case basis and with clear and transparent criteria."

During the COVID-19 pandemic, to be sure, different European countries introduced time-limited regularization programs for undocumented migrants working insert on the frontline, which were tolerated under EU law, as COVID-19 decrees and emergency orders. Unlike Senegal's AJM with France, they were motivated by public health, in an emergency situation, and they were time-limited. Even then, however, Portugal's Order n.º 3863-B/2020 of 27 March 2020,[170] which applies to any undocumented foreign national, regardless of occupation or employment, as long as the person had applied for status by 18 March 2020 (state of emergency declaration),[171] was deemed more in line With the EU Return Directive Art. 9(4) of the ILO Convention 143 and ILO Recommendation 151,[172] than the more discriminatory Italian Relaunch decree of 13 March 2020, which is limited to those employed in agriculture, fishery, caretaking or domestic work who entered before 8 March 2020 and can show proof of sponsorship by an employer.[173]

Following this intra-European comparison, one could say that Art. 42 of the AJM with Senegal is more exposed to criticism as diverging from EU and ILO norms, because it follows in the logic of Italy's sectoral regularization, which discriminates against those workers in irregular stays who have a "non-listed" profession that is not in economic demand.

The fact that no other AJM has introduced the regularization option of Art. 42 implies that there might have been concerns with the legality of that provision

169 *See* Dilip Ratha et al., Leveraging Migration for Africa: Remittances, Skills, and Investments (2011).

170 Despacho n.º 3863-B/2020 de 27 de março [Order no. 3863-B/2020], https://dre.pt/dre/detalhe/despacho/3863-b-2020-130835082 (Port.).

171 In Portugal, third-country nationals "only need to prove that they have a pending case at SEF as of 18 March 2020." This proof works to safeguard their stay in Portugal as one of being legal during the period of 27 of March until 30 of June 2020, "and can be presented in the various public services to access the relevant rights."

172 Int'l Lab. Conf., 87th Sess., General Survey on the reports on the Migration for Employment Convention Revised) (No. 97), and Recommendation (Revised) (No. 86), 1949, and the Migrant Workers (Supplementary Provisions) Convention (No. 143), and Recommendation (No. 151), 1975, at ch. 4.

173 Decreto legge 19 maggio 2020, n.34, G.U. May 19, 2020, n.128 (It.)

in the Senegal-France AJM. Today, in light of the Global Compact for Migration, Art. 42 might indeed be inconsistent with Objective 7 of the negotiated outcome, tolerating individual hardship cases[174], unlike its precursor Objective 16(g) of the Zero Draft Plus, which had encouraged collective, across the board regularization.[175] Yet with up to 13% of frontline workers in the COVID-19 pandemic being irregular migrants,[176] the risk of their exploitation by employers is high,[177] which could soften the stance against regularizations. Indeed, already in 2015, the Commission in the EU Agenda on Migration and Asylum offered dialogue and peer evaluation among EU Member States over labor markets and regularizations, in particular if some were being affected by policies of the others.[178] It seems that a shift in the debate towards a more beneficial view on the socioeconomic benefits of amnesties, has been triggered by the pandemic, one which could trickle down to the French administrative courts' interpretation of Art. 42 of the France-Senegal AJM and reopen the pathway to regularizations, as we discuss below in Part X.

VI. Admissions, Bilaterally Negotiated: More favorable than France's CESEDA And Exempted from GATS Most-Favored-Nation Clause?

France's AJMs offer more favorable terms of labor market access than French immigration law. The preferential treatment occurs in five ways: first, the agreements offer quotas in the seven categories of admission, which the new French immigration law of 2006/07 extends: to salaried workers (employees), temporary workers, intra-corporate transferees, young professionals, students, skilled and talented seasonal workers.[179] Second, the agreements grant the country partnering with France in an

174 Rep. of the Secretary-General on Migration, *Making migration work for all*, ¶¶36-41, U.N. Doc. A/72/643 (Dec. 12, 2012). The UN Secretary General made the point that mass regularizations should be considered as a valid policy option, because they are a less risky alternative in terms of human costs to voluntary and forced returns, *see also* Gonzalez Beilfuss & Koopmanns, *supra* note 159, at 4. The argument about human lives was also the one used by the government of Senegal when renegotiating the AJM of 2006 with France, which led to the insertion of the regularization clause in Art. 42; clearly for Senegal, higher access quotas under the existing work permit system failed to compensate for the Senegalese government taking back its citizens being returned by France due to irregular status in France; instead, Senegal wanted guarantees that its citizens in irregular stays could access the right to remain in France or be tolerated in France, as a 'give-back' for cooperating with France on returning others, in particular those who would not qualify for a job or job offer on the list to remain in France on economic grounds.

175 *Zero Draft Plus*, refugeesmigrants.un.org, https://refugeesmigrants.un.org/zero-draft-plus (last visited June 11, 2022) (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").

176 *See* Marion Panizzon, *COVID-19 was a Big Test for UN Initiatives*, Open Democracy Blogpost (Feb. 2, 2021), https://www.opendemocracy.net/en/pandemic-border/covid-19-was-big-test-un-migration-initiatives-did-they-succeed.

177 *See* Eur. Parl. Research Serv., *supra* note 139.

178 *See* Gonzalez Beilfuss & Koopmanns, *supra* note 158, at 11.

179 *See* Eur. Migration Network, *supra* note 114, at 13.

AJM the right to add occupations to the list of 30 shortage occupations applicable to third countries. Being on the list simplifies the admission procedures by eliminating the economic needs test (ENT), such that a citizen from that country is offered the job even if a French or EU citizen is available. Third, legal migration is facilitated by extensions and renewals of temporary work and residence permits. Fourth, the agreements create a new admission category, young professionals, which common law had not foreseen.[180] Fifth, the agreements provide for special visa categories.

The preferences, which France's AJMs establish in relation to French common law, raise issues of compatibility with the most-favored-nation (MFN) treatment under Art. 2 of the GATS, which provides that a commitment on the temporary movement of natural persons must be extended across-the-board to all 153 WTO Members and not just to select countries, unless an exemption from the MFN has been entered into in 1994 or if WTO Members have entered into a labor market integration agreement, which under Art. Vbis GATS requires all citizens subject to that agreement to move without quota or worker permits and would exempt the parties from granting the benefits to all other WTO Members. France's GATS Art. 2 exemption applies to the countries of Francophone Africa, Algeria, Switzerland, and Romania.[181] The question for WTO law is whether within the Art. II GATS 1994 MFN exemption, which France had entered towards professionals from "francophone African countries, Algeria, Switzerland and Romania,"[182] France under GATS could have privileged, at least during the 10-year time-limitation of that exemption (1994-2004), natural persons from certain countries, like Senegal, over others. This question was not discussed at the WTO, apart from the issue that France's AJMs continue a preferential system of admission for nationals beyond the duration of the GATS Art. II exemption. Here, Adlung and Carzaniga (2009) have noted that most bilateral labor migration agreements have somehow gone unnoticed by Art. II MFN exemptions and many WTO Members missed out on enlisting BLAs back in 1994.

Given BLAs' key social and economic functions "to attenuate domestic shortages in socially important services, including old-age care," the authors advocate for WTO Members to refrain from challenging them under the WTO dispute settlement mechanism as a violation of MFN if three commonly agreed criteria are maintained: first that the agreement be open to other third countries, second that it not affect other modes of delivering services, and last that it not "constitute a means of arbitrary or unjustifiable discrimination between countries . . . or a disguised restriction on trade

180 *Id.* at 17.

181 *See* Final List of Article II GATS (MFN) Exemptions, *European Communities and their Member States*, at 9, WTO Doc GATS/EL/31 (Apr. 15, 1994). France has entered such an MFN exemption towards francophone Africa, so that the additional professions listed as shortage occupations in France's new AJMs with francophone African countries, and for which no individual economic necessity tests are required, will be consistent in terms of WTO law.

182 *See id.* ("Facilitation of access procedures in France for the exercise of certain services activities and professions by natural and legal persons of certain third countries").

in services."[183] In that sense, BLAs seem like a customary international migration law exception to the MFN, which is accepted by the majority of UN Members; the IMRF for the Global Compact on Migration in May 2022 addressed the issue of BLAs more explicitly than the GCM final text, and the IMRF has also put BLAs in a transparent relationship to the WTO rules and trade agreements for the first time.

France's AJMs did not deliberately aim to work around the GATS MFN obligation by taking care to specifically carve-out non-services workers, so as to avoid creating a legal conflict with the EU's schedule of specific commitments in mode 4. Instead, the categories of workers targeted by the AJMs mix non-service workers, including seasonal agricultural workers, and service-delivering professions, and target categories that fall under the EU labor market directives for Blue Card, researchers, students, seasonal workers and ICTs, categories which benefit from EU equal treatment in relation to EU nationals for family members, social security entitlements, and post-employment benefits, as opposed to the temporary or salaried workers for whom France's CESEDA retains full power and for whom the EU benefits above are not available.[184]

Another issue as regards WTO law is the admissibility of quotas as market access barriers, something that the WTO Secretariat has repeatedly denied. In the following three Parts, we discuss how the AJMs create privileged pathways in the sense of facilitating admission for stay under labor migration as compared to how the CESEDA admits foreign labor from third countries into France in three ways: through benchmarks and quotas for categories of admission that exist under national law, by extending and renewing periods of stay, and by adding jobs to the list of shortage occupations for which the economic needs test has been eliminated.

VII. Benchmarks or Maximum Quotas?

Quotas are minimum benchmarks or maximum quotas, the former of which, in the case of AJMs, prevent brain drain or, inversely, in low-skill categories, correct the high-skill bias of most legal pathways.[185] The WTO Secretariat has been critical of

183 *See* Rudolf Adlung & Antonia Carzaniga, *MFN Exceptions under the General Agreement on Trade in Services: Grandfathers Striving for Immortality?*, 12 J. Int'l Econ. L. 357 (2009).

184 *See* Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, 2004 O.J. (L 16) 46, art. 11(3)(b); *see also* Eur. Comm'n, Analytical Report on the Legal Situation of Third-country Workers in the EU as Compared to EU Mobile Workers 50 (2018).

185 The admission card for young professionals features the following quotas: Benin (Art. 8, annual cap at 200) Congo (Art. 2, annual cap at 100), Cameroon (Art. 2.2, annual cap at 250) and Mauritius (Art. 2, annual cap at 200), and Russia (annual cap at 500); *see supra* notes 101, 104 & 128 for a complete reference to the AJMs; for Russia and Mauritius, *see respectively* Décret 2011-450 du 22 avril 2011 portant publication de l'accord entre le Gouvernement de la République française et le Gouvernement de la Fédération de Russie sur les migrations professionnelles (ensemble six annexes), signé à Rambouillet le 27 novembre 2009 [Decree 2011-585, Apr. 22, 2011, publishing the agreement between the Government of the French Republic and the Government of the Russian Federation on professional migration (with six annexes), signed in Rambouillet on Nov. 27, 2009], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Apr. 27, 2011, p. 7317; Décret 2010-1114 du 22 septembre 2010

quotas listed by WTO Members in the GATS Mode 4 category of services supply, due to their protectionist quality. In addition, they have been criticized by employers for requiring a "high level of regulation and bureaucracy," and often as a government measure that fails to mirror the real-time economy of "fluctuating labor demands."[186] Numerical caps are, furthermore, detrimental to human development because the quota (and the economic needs test (ENT) for that matter) leaves out crucial capacities such as age, working experience, linguistic capacities, intercultural communication capabilities, soft skills and the degree of integration, which are relevant competences in today's increasingly agile labor markets.[187] In that the AJMs use both quotas and benchmarks, they reflect the diverging negotiating powers and dynamics among the different West and North African countries towards France (see Table 1 below).

For Gabon and Senegal, the minimum benchmark on the skill and talent residence permit is indicative, meaning it serves as a rough average and implies that France is not under an obligation to grant more than the number indicated in the AJM and may grant less. Contrarily, in France's agreements with Benin, Congo, Cameroon, Mauritius, and Tunisia,[188] as Tasca notes, given the failure of the skills and talent card generally (of the 336 permits granted in 2008—out of a projected 2000 permits annually—36 went to Tunisia, 1 to Senegal, 3 to Benin, and none to Congo), the AJM is indicative of an "objective to be attained" rather than a ceiling.[189] Overall, the quotas that France grants through the AJMs correspond to or are lower, but in no case higher, than the actual volumes of migration flow from that country towards France (see Table 1 below).[190] For example, the actual number of Tunisians entering France legally per year stands at 9800 (2007),[191] whereas the AJM with Tunisia of 28 April 2008 grants overall access on labor migration pathways for 7100, disaggregated by quotas for young professionals at 1500 per year (Art. 2.3.1.), for intra corporate transferees at 100 per year (Art. 2.3.1.), for skilled and talented workers at 1500 per year (Art. 2.3.2.), for employees at 3500 per year (Art. 2.3.3.), and for seasonal workers at 2500 per year (Art. 2.3.4.).[192] For Senegal, the AJM stipulates "at least 1000" entries for temporary and salaried workers, a minimum benchmark. Since the numbers of Senegalese entering France lawfully per year amounted to 4000 in

portant publication de l'accord entre le Gouvernement de la République française et le Gouvernement de la République de Maurice relatif au séjour et à la migration circulaire de professionnels (ensemble deux annexes), signé à Paris le 23 septembre 2008 [Decree 2010-1114, Sept. 22, 2010, publishing the agreement between the Government of the French Republic and the Government of the Republic of Mauritius relating to the residence and circular migration of professionals (together two annexes), signed in Paris on Sept. 23, 2008], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Sept. 24, 2010, p. 17330.

186 *See* Int'l Org. for Migration, World Migration Report 14 (2010).

187 *See* Sylvie Sarolea, *Legal Migration in the "New Pact": Modesty or Unease in the Berlaymont?*, EU Migration L. Blog (Feb. 21, 2021), https://eumigrationlawblog.eu/legal-migration-in-the-new-pact-modesty-or-unease-in-the-berlaymont.

188 *See* Terrot, *supra* note 79, at 14.

189 Tasca, *supra* note 110.

190 *Id.*

191 *Id.*

192 *Id.* The same can be said of the quotas with Cameroon, which are limited for salaried workers at 750 per year.

2006 and 2007, they were criticized as being of "symbolic character," "a weak reward in exchange for cooperation on irregular migrations."[193]

Table 1: France, agreements on the joint management of migration disaggregated by number of admissions under a category of permit as compared to the actual volume of admissions into France

Partner country AJM ratified	**entries, annual AJM**	**entries AJM total**	**entries 2007/2008**	**entries 2009**
Benin, 2010	200 young prof., 150 skills & talents	450	**795** (2007)[194]	125 salaried workers 30 temporary 2 ICTS 2 skills and talents[195]
Burkina Faso, 2011	100 young prof, 100 skills & talents, 500 salaried	700	**586** (2008)[196]	
Cameroon 2009, not ratified	250 young prof., 200 skills & talents, 750 salaried	1200	**4442** (2007): 2637 family reunification 882 students 99 professionals 74 circular migration[197]	
Cap Verde, 2011	100 young prof, 100 skills & talents, 500 salaried	700	**609** (2007): 209 family reunification 291 students 12 professionals[198]	
Congo, 2007	100 young prof.& 150 skills & talents	250	140 salaried workers 39 temporary workers[199]	104 salaried 7 temporary workers 4 ICTs 2 skills and talents [200]

193 *See* Adepoju et al., *supra* note 33.

194 Tasca, *supra* note 110.

195 Catherine Tasca, Report on behalf of the Committee on Foreign Affairs on the Bills Adopted by the National Assembly, authorizing the approval of the agreements on concerted management of migratory flows and solidarity development between France and Cape Verde, and Burkina Faso, Fr. S. Doc. No. 75 (Oct. 27, 2010).

196 Luca, *supra* note 99.

197 André Schneider, Report on behalf of the Committee on Foreign Affairs on the Bills Adopted by the National Assembly, authorizing the approval of the agreements on concerted management of migratory flows and solidarity development between France and Cameroon, Fr. S. Doc. No. 2995 (Dec. 1, 2010).

198 Luca, *supra* note 99.

199 Tasca, *supra* note 195.

200 *Id.*

Partner country AJM ratified	entries, annual AJM	entries AJM total	entries 2007/2008	entries 2009
Gabon, 2009	100 young prof 150 skills & talents	250[201]	830 students (2007) 23 family reunification 85 French spouse 10 work[202]	
Senegal, 2006, avenant 2008	at least 1000 temporary workers & regularization	more than 1000	163 salaried workers (2007)[203] 601 salaried workers (2008) 2054 family reunification 1552 students	701 salaried workers, 76 temporary workers 4 ICTs[204]
Tunisia, 2009	1000 young prof., 100 intl exchange, at least 1000 skills & talents, at least 3500 salaried, at least 2500 seasonal workers	7100	342 professionals 6436 family reunification 2220 students and interns (2007)[205]	884 salaried workers 337 temporary workers 922 seasonal workers 45 skills and talents 180 students[206]

201 Patrick Balkany, Report on behalf of the Committee on Foreign Affairs on the Bills Adopted by the National Assembly, authorizing the approval of the agreements on concerted management of migratory flows and solidarity development between France and Gabon, Fr. S. Doc. No. 776 (Apr. 2, 2008).

202 Catherine Tasca, Report on behalf of the Committee on Foreign Affairs on the Bills Adopted by the National Assembly, authorizing the approval of the agreements on concerted management of migratory flows and solidarity development between France and Gabon, Fr. S. Doc. No. 367 (June 3, 2008).

203 Tasca, *supra* note 195.

204 *Id*.

205 *Id*. at 108.

206 *Id*. at 186.

VIII. Eliminating the Economic Needs Test for Additional Occupations

Next to quotas, a second way in which the AJMs privilege admission for work over the criteria established by the CESEDA is to list additional occupations as exempt from an economic needs test (ENT). France established two lists to fast-track entry for occupations experiencing a shortage of workers, one with 30 occupations applicable towards all TCNs, including 6 occupations that are nationally in duress, namely 1) assessment and accounting control executives, 2) software designers, 3) computing experts, 4) construction technical studies managers, 5) construction supervisors and 6) site foremen, and 24 occupations which are open on a regionally determined basis. For nationals from Bulgaria and Romania subject to a work permit during the transitional period (2007-2014), a list of 150 applies.[207] A third type of occupational shortage list is determined not by decree, but by bilaterally negotiated annexes to the AJM—the one with Senegal lists 108 professions, with Tunisia 78, with Congo 15, and with Benin 16.[208] As the EMN Report for France notes, "the aim of the agreements . . . is to make it easier for employees and temporary workers to obtain residence permits, by determining, for each country, a number of occupations for which the employment situation cannot be used to oppose residency."[209] For the listed professions, the ENT (under a textual reading, modified by French courts, see below) is eliminated, with the result that the French prefects in theory no longer have the discretionary power to assess the economic situation before admitting the worker. At the same time, the employer no longer needs to screen for French or EU nationals before engaging a migrant from those countries, hence they benefit from a legal situation that is close to a *right to* a work permit.[210]

As Ward notes, "the decision to grant additional preferential access concretizes the migration-development nexus."[211] However, a closer look at the Gabon-France AJM reveals that those additional jobs listed are precarious in Gabon, since the Gabonese economy does not "produce" many IT specialists, insurance experts, legal counsels in insurance matters, commercial banking specialists, or technical maintenance officers.[212] In fact, the list of 30 occupations contains mostly skilled professions, whereas the list of 150 occupations is more varied in terms of skill levels

207 *See* Arrêté du 18 janvier 2008 relatif à la délivrance, sans opposition de la situation de l'emploi, des autorisations de travail aux ressortissants des Etats de l'Union européenne soumis à des dispositions transitoires [Order of January 18, 2008 relating to the issuing, without opposition to the employment situation, of work permits to nationals of European Union States subject to transitional provisions], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 20, 2008, p. 1046.

208 *See* Terrot, *supra* note 79.

209 *See* Eur. Migration Network, *supra* note 114, at 33. *See also* CIMADE, *supra* note 93.

210 *Id.* at 20.

211 *See* Natasha Ward, *Facilitating the Temporary Movement of Natural Persons: Economic Partnership Agreements Versus Bilateral Migration Agreements and Mobility Partnerships*, *in* Multilayered Migration Governance, *supra* note 12, at 143, 157.

212 *See* CIMADE, *supra* note 93, at 6.

and includes lower skilled occupations.[213] If the jobs listed match but few out of the 30 occupations, the chances are high that the sending country has had a say in the bilateral negotiations over level of skills and jobs open to its citizens.[214]

If the occupations added are abundant in the country of origin and not necessarily in duress in France, the AJM has a clear pro-development function. Inversely, if the jobs listed in the AJM match the occupations listed under France's 30 occupations open to all TCNs, the conclusion is that the sending country's bargaining power in negotiating labor market openings for its citizens was low—as in the case of the AJMs with Benin and Gabon, which listed computer technicians, insurance, bank and financial services officers, heads of public services, and heads of construction consortiums, all jobs requiring technical skills with a medium to high level of professional experience, which most of the surplus workforce in Gabon and Benin lack.[215] As Tasca notes for 2008, the levels of recruitment under the Senegal, Gabon, and Congo AJMs remained below the projected benchmarks and the perception by the sending country of the AJM's labor migration pathways remains "ambivalent"—torn between considering the AJM a handmaiden to France's "*immigration choisie*" context and thus associated with high-skilled migration and the fear of losing talent to France, but on the other hand, recognizing that most AJMs towards Africa respond to migratory pressure, because they set up jobs on the list of shortage occupations that figure at the lower end of the skill spectrum as well.[216]

IX. Extensions and Renewals of Temporary Permits of Stay

Aside from quotas, and a relaxed or eliminated economic needs test (ENT), a final privilege that bilateral agreements like the AJMs can offer with respect to national immigration law is to expand the duration of permits of stay or to offer to renew them more frequently than under national law.

If the French census for 2019 suggests that student migration (roughly 90,006) closely matched family reunification (90,089) for the first time, the AJMs' privileged period of stay for students from Francophone African countries likely contributed to it, since of the 8 top countries, Tunisia and Senegal, both with extant AJMs, rank closely with Morocco, China, Algeria, Tunisia, India, the U.S., Senegal, Cote d'Ivoire, South Korea and Brazil.[217] The AJMs with Benin, Congo, Gabon, Cameroon, Cape Verde and Tunisia have extended the duration of the temporary residence authorization for students, who are engaged in their first professional activity abroad after their studies, which in common law is valid for 6 months and nonrenewable.[218]

213 *See* Eur. Migration Network, *supra* note 114, at 20-1.
214 *Id*.
215 *See* Int'l Org. for Migration & GIP Int'l, Migration au Bénin: Profil national 2011 (2015).
216 Tasca, *supra* note 110.
217 *See Les accords bilatéraux*, *supra* note 110, at 30.
218 *See* Eur. Migration Network, *supra* note 114, at 18. *See also* MIIINDS, *supra* note 147, at 7.

In the case of students from Tunisia and Benin, the temporary 6-month residency permit is renewable once, in the case of students from Gabon and Congo, the permit is issued for a period of 9 months and is nonrenewable; and for students from Congo and Cape Verde it is renewable once. Another extension relates to the skills and talents residence permit: for Tunisia, Burkina Faso, Cameroon and Mauritius, France extended the validity of this card for up to 6 years, whereas the agreements with Benin, Congo and Senegal are consistent with the common law duration of 3 years.[219] France's new AJMs also relax the eligibility criteria for the skills and talents residence permit over the criteria established by its common law (CESEDA).[220] Art. 323 AJM applies to any Senegalese with managerial or executive functions, without the candidate having to go through the individual assessment procedure.

In sum, the AJMs reveal a mixed record of implementation, with Tunisia and Senegal showcasing higher numbers of admissions under the work-related categories. In both cases, then, the AJM has had the desired effect of rebalancing labor migration with respect to student and family reunification migration, though its record on irregular migration remains unclear. As regards Congo and Benin, however, the numbers of admissions are lower and lower than pre-AJM. [221]

X. Judicial Review of the Franco-Senegalese AJM by France's Courts of Administrative Appeal

Since 2015, several *courts d'appel administrative* (CAAs) have received complaints by Senegalese workers claiming their right to be regularized under Art. 42 of the AJM of 2008 on exceptional admission grounds, either humanitarian (family and private life, Art. 8 ECHR) or pertaining to employment in a profession listed in Annex IV of the AJM as facing a shortage in France's labor market.[222] Judicial review is considered one constitutive element of the rule of law and due process.[223] A function of judicial review of an AJM is an asset that many BLAs lack, and not only because most of their provisions are not addressed to the individual migrant and are not precise and clear enough as to create rights and obligations in regard to which individuals can request a judicial review. In that sense the Senegalese-French AJM of 2008 is quite exceptional. In Art. 313-314 the CESEDA provides a

219 *See* MIIINDS, *supra* note 147, at 5.

220 *See* Ward, *supra* note 211.

221 Tasca, *supra* note 195.

222 Art. 3 France-Senegal Avenant of 25 February 2008 modifying Art. 4 of the France-Senegal Accord of 23 September 2006 (entry into force Aug. 1, 2009). Return to their country of origin of nationals in an irregular situation and exceptional admission to stay: Paragraph 42 of the Agreement is amended as follows:—The second paragraph is replaced by the following provisions: ". . . A Senegalese national in an irregular situation in France *may benefit, under French law,* from exceptional admission residence resulting in the issue of a temporary residence permit bearing:—either the words "employee" if he exercises one of the professions mentioned in the list appearing in appendix IV of the Agreement and *has an offer of employment contract* . . ." (italics added), *see supra* note 108.]

223 *See* Pablo Ceriani Cernadas, *European Migration Control in the African Territory: The Omission of the Extraterritorial Character of Human Rights Obligations*, 10 SUR—Int'l J. Hum. Rts. 179 (2009).

regularization option, motivated by labor market shortages, whereby the Prefect of a French *Département* decides, based on the labor market situation. As mentioned above in Part V, facilitated regularization is foreseen for Tunisian, Algerian and Moroccan nationals with unlawful stays in France.

Only the AJM between Senegal and France provides for a similar scheme in Art. 42, which was introduced by the "*avenant*" of 2008 modifying the AJM of 2006. While the plain meaning of Art. 42 seems sufficiently clear and precise to produce a direct effect, i.e., to create an individual right to an exceptional stay in France, which can be appealed separately, this textual interpretation is disputed. As the French Council of the State expert opinion applicable to the AJM with Cape Verde[224] finds, Art. L 313-14 CESEDA (no longer valid today) supersedes and informs the reading of the provisions of the AJM. Hence, Art. 42 of the AJM with Senegal must also be read in conjunction with Art. L. 313-14 CESEDA. Since then, several cases have debated whether Art. 42 can be 'substituted' for Art. 313-14, for example by a judge.[225]

In one of the first cases, the CAA Lyon was called upon to determine whether the prefectorial decision to leave issued to a Senegalese citizen in irregular but interrupted stays in France since 1990, and since 2007 uninterruptedly, had been a violation of his/her right to an exceptional admission for stay due to a hardship application based on Arts. 313-14 CESEDA and Art. 42 AJM, for either humanitarian considerations or exceptional reasons. The judge denied both, given that a mere consecutive stay of 7 or potentially more than 10 years alone is insufficient to justify an exceptional admission. In that case, the CAA confirmed that the inferior court had not committed an error of law by failing to refer to Art. 313-14 CESEDA and basing the ruling entirely on Art. 42 AJM, since the two provisions are mutually "substitutive" and the judge retains the power to apply one and not the other. Finally, in both provisions, the margin of discretion for the authorities to interpret the text is identical.[226] Art 42 speaks more narrowly of an "offer or proposition of an employment contract (*proposition de contrat*)," whereas Art. 313-14 CESEDA speaks only of a "promise to be employed (*promesse d'embauche*)." For that reason, several applicants in the above cases have attempted to complain about an error of legal appreciation if the judge did not refer to both provisions or, particularly, only referred to the stricter art. 42 AJM rather than the slightly more open formulation of the CESEDA. In all the cases where the two provisions played out against each other, the CAAs decided that the prefects had a margin of discretion, regardless of whether a judge uses one or the other provision, since they can be used interchangeably.

224 CE Sect. avis, Dec. 28, 2019, n°403563.

225 *La convention franco-sénégalaise relative à la gestion concertée des flux migratoires ne régit pas complètement la situation des ressortissants sénégalais salariés*, Association lyonnaise droit administratif, https://alyoda.eu/index.php?option=com_content&view=article&id=2606:la-convention-franco-senegalaise-relative-a-la-gestion-concertee-des-flux-migratoires-ne-regit-pas-completement-la-situation-des-ressortissants-senegalais-invoquant-des-motifs-d-admission-exceptionnelle-au-sejour-ou-se-prevalant-de-leur-qualite-de-salarie&catid=487&Itemid=489 (last visited June 11, 2022).

226 CAA Lyon, 1ère ch., Jan. 27, 2015, 14LY01538.

Since then, several other cases have made it to France's CAAs (Lyon, Marseille and Nancy, Alpes-Maritimes). The denial of exceptional admission based solely on the fact that her skill was not listed as being "in economic need" in Annex IV of the AJM with Senegal was deemed not sufficient for the Prefecture of Haute-Savoie to have violated the applicant's rights. The CAA Lyon found that prefects may interpret the labor market situation even if a job is listed as "under shortage" in Annex IV of the AJM. This teleological interpretation empowers prefects to prioritize their departmental labor market needs at a given moment in time over the plain letter rule of Annex IV of the France-Senegal AJM, which would suggest that once listed, a job is forever deemed to be 'in shortage' regardless of how the labor market situation in a given *Département* of France has evolved (e.g., the food and beverages sector during the COVID-19 pandemic, see the cases below). A plain-meaning interpretation of Annex IV would suggest that the applicant in every case that a job is listed acquires the right to be admitted, regardless of his or her status in France. This interpretation would also pay justice to maintaining friendly bilateral relations between France and Senegal. However, Art. 42's text implies that the grant of a regular stay is not automatic, even if a job is listed in Annex IV. Rather, the prefect can be guided by her own labor market assessment, without reference to the snapshot picture of the economic situation provided by the Annex IV list of shortage occupations. Hence, she may look into the degree of commitment of the employer, by analyzing whether the job offer is sufficiently sound, or ascertaining whether or not there is an employment contract. Hence, in our case above, the Senegalese was not entitled to a residency permit, so even though she had stayed in France for 6.5 years, the decision to remove her was lawful.[227]

In 2015, the Marseille Court of Administrative Appeals (CAA) dealt with the case of a Senegalese citizen, who had been in France since 1999, and who showed a valid job offer as a polyvalent worker for the garment company "Kenza" in the Nice region, a job that was not listed in Annex IV of the Franco-Senegalese agreement. In that case, the CAA confirmed that the prefect had not violated Art. 42 AJM when he denied the appellant the right to invoke the exceptional permission of stay under that article to regularize his status.[228] The question before the CAA, regarding the interpretation of Art. 42 of the Franco-Senegalese AJM in particular, was whether that provision simply restates the scope of application of the Annex IV list of professions in economic demand in France and thus grants prefects a larger margin of discretion, or moves beyond that and grants an entitlement for a Senegalese in irregular stay in France if she meets the criteria to grant her an automatic admission of temporary stay as a salaried worker under the "exceptional" circumstances of Art. 42, if the job is listed as being in duress. Based on preparatory work, which the Court cites, it rejects the second, broader interpretation of Art. 42 as claimed by the applicants, and disregards, it seems, the interpretation of Art. 42 that the Senegalese government would like. In this context, the association of administrative

227 *See* CAA Lyon, 2ème ch., Apr. 12, 2016, 14LY02683.
228 *See* CAA Marseille, 2ème ch., May 21, 2015, 14MA01087.

law of Lyon writes, the AJM between France and Senegal unfortunately has "failed to comprehensively" resolve the legal situation for Senegalese in unlawful stays in France and recourse to the CESEDA is necessary.[229]

In a later case before the CAA Marseille (27 October 2020),[230] the CAA found that if a job is not listed in Annex IV of the Franco-Senegalese AJM, the prefect does not commit an error of law if it denies the entitlement to an exceptional admission of stay (Art. 42 AJM) under a salaried working permit. Consequently, a prefect lawfully retains a margin of discretion to relate the labor market situation to an individual applying for such an exceptional admission of stay under Art. 42 AJM and Art. 313-14 CESEDA. The prefect, so the CAA Marseille, retains the discretion to assess the labor market situation on the ground at the time of the filing of the application for exceptional admission as opposed to 2008, when France and Senegal jointly drew up the Annex IV.

Consequently, the CAA Marseille denied the applicant her entitlement to an exceptional admission for Senegalese workers, in the first place because she could not produce an employment contract, and secondly because her job as a polyvalent food and beverages worker employed in a restaurant that figures on the Annex IV list of professions was not considered under duress at the time of filing the complaint. Thirdly, the CAA argues that the job, even if it was listed back in 2008, today is a "little qualified occupation in a sector not exposed to recruitment difficulties," such that the Court confirmed that the prefect did not illegally reject the request for admission of stay as a salaried worker under the exceptional admission clause of Art. 42 of the AJM.[231] The CAA Nancy found on October28, 2021 similarly that a Senegalese applicant with a job offer from a butcher shop in the city of Metz has no right to stay, even if butchers and assistants to butchers are listed as being "in need" in Annex IV, because he did not train as a butcher, either in Senegal or in France, and even a short apprenticeship in Senegal failed to convince the CAA.[232]

Finally, the CAA Lyon found on February 9, 2021 that even if the job of a waitress or polyvalent worker in the hotel, restaurant or catering sectors is listed in Annex IV as being under duress in France, the prefect retains some margin of discretion (and does not commit an error of law) to reject the exceptional admission of stay based on Art. 42 AJM and Art. 314-13 of the CESEDA, if the applicant fails to produce an employment contract.[233] The CAA Nancy confirmed on February 23, 2021,[234] without restating the Lyon and Marseille cases,[235] that prefects have a margin of discretion deriving from Art. 42 AJM. In that particular case, the prefecture had not unlawfully overstepped its margin of discretion and did not commit an error of law by not itself taking action to establish a hardship exceptional application

229 *See supra* note 225.
230 CAA Marseille, 9ème ch., Oct. 27, 2020, 18MA01766.
231 *Id.*
232 CAA Nancy, 5ème ch., Oct. 28, 2021, 21NC00433.
233 CAA Lyon, 1ère ch., Feb. 9, 2021, 20LY01595.
234 CAA Nancy, 3ème ch., Feb. 23, 2021, 20NC00320.
235 *Id.*

for a permit of stay under Art. 42 AJM and Art. 313-14 CESEDA for a Senegalese during a 10-year stay in France.

In sum, the Senegalese cases before the CAAs in France show that if a profession is no longer experiencing recruitment difficulties in the French labor market—a situation that now persists with the COVID-19 pandemic lockdowns in restaurants and hotels—Senegalese workers will find their requests for exceptional admission denied by the French prefects, who clearly subordinate the plain meaning of Annex IV as listing jobs under duress, and of the Franco-Senegalese AJM 2008 overall, to labor market considerations in their respective *Départements*. Through its "may" provision, Art. 42 of the AJM allows such discretionary scope to the prefects, whether it is used to assess the labor market situation, the skill level of the applicant, the firmness of a job offer, or the prospects of professional development, including the level of socioeconomic integration into French society, etc.[236] Moreover, as the five cases to date show, none has affirmed the right to remain for exceptional reasons, e.g., economic considerations for Senegalese citizens in unlawful stays in France.

XI. Governance Dynamics?

In the migration governance scholarship, there are proponents of a multilevel governance (MLG) approach,[237] proponents of global governance,[238] and a more recent group of scholars who tend to ascribe polycentric functions.[239] To the global governance faction, the Global Compact for Migration aligns with what Hooghe & Marks define as MLG,[240] whereby the connectivity among the layers—local, national, and multilateral—is a common and shared goal. The Sutherland Report preceding the GCM promotes MLG as asteppingstone towards global governance based on multilateralism, which will come about by like-minded groups of countries identifying those bilateral, local, and regional best practices that can be multi-lateralized. How states "prioritize" among the levels is a decision that the GCM leaves open: it "is an agreement that has something for everyone to like—and probably something for everyone to dislike," the flexibility necessary for international cooperation over migration to function, even if it comes at the cost of endangering migrants' human

236 *Loi 2006-911 du 24 juillet 2006 relative à l'immigration et à l'intégration* [Law 2006-911 of July 24, 2009 on immigration and integration], Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 25, 2006, p. 11047, art. 23 ("La carte de séjour temporaire mentionnée à l'article L. 313-11 peut être délivrée, sauf si sa présence constitue une menace pour l'ordre public, à l'étranger ne vivant pas en état de polygamie dont l'admission au séjour répond à des considérations humanitaires ou se justifie au regard des motifs exceptionnels qu'il fait valoir, sans que soit opposable la condition prévue à l'article L. 311-7").

237 *See generally* Caponio & Jones-Correa, *supra* note 29.

238 *See* Kathleen Newland, *The Governance of International Migration: Mechanisms, Processes, and Institutions*, 16 Glob. Governance 331, 343 (2010); Alexander Betts, Global Migration Governance (2009).

239 *See* Micheline van Riemsdijk et al., *New Actors and Contested Architectures in Global Migration Governance: Continuity and Change*, 42 Third World Q. 1 (2021).

240 *See* Lisbet Hooghe & Gary Marks, *Unraveling the Central State, But How? Types of Multi-level Governance*, 97 Am. Pol. Sci. Rev. 233 (2003).

rights.[241] The Sutherland Report was more clear-cut about a hierarchy between the bilateral, local and multilateral levels, a set-up, it asserts, that could be a transitory phase towards global governance of migration.[242]

> If ambition carries the day, . . . they will use the compact to set standards in key areas of migration governance, which they would pledge to respect, and wherever possible surpass, in national policies and bilateral and regional agreements. (Sutherland Report, 2017, para. 12, p. 6/32)

Whereas a hierarchy among levels is necessary to better connect the levels under criteria of due process and mutual checks and balances, in the final analysis, every BLA must align with multilateral treaties (WTO, UN human rights treaties), comply with soft law (GCM, GCR, Agenda 2030), and enforce regional law. It is tempting to hide BLAs in the basement of global migration governance or to secretly keep them in the attic of fragmented international migration law,[243] yet the challenge is to design and implement them carefully. Judicial guarantees are carried over to protect migrants. Whereas BLAs stand as a hallmark of "bottom-up" dynamics of "integrating newcomers," given their potential to synchronize the interaction between them and the other layers of migration governance, the risk they pose is to extract a bilateral migration corridor from its multilateral and regional, socioeconomic, cultural, and legal policy contexts. The benefit of bi-lateralizing migration law and policy for those subject to that bilateral framework is preferential admission and regularization schemes, to which they would not have had access without the AJM. In that sense the intentional close interaction between Art. 42 AJM regularization and the occupational shortage list of Annex IV was intended to depoliticize Franco-Senegalese relations by introducing a level of technocratic automaticity—following the logic that a listed job guarantees an exceptional admission. However, in practice, the prefects, supported by the CAAs, focused on the discretionary space within Art. 42 AJM to overturn the apparent automaticity and assert their power to decide in each individual hardship application case. Read from this angle, the CAAs have repoliticized the Franco-Senegalese AJM over regularizations, since the individual case relates to a labor market situation that is generally assessed at a given point in time by Annex IV, drawn up jointly by France's *Departmentes*, the central government and Senegal.

This downside, the attempt by France to depoliticize a migration corridor and a working relationship with West and North African countries, has backfired for the very reason that preferentialism bears the seed for even more preferentialism and is a policy outcome, which does not level out the playing field among West and North African nations linked to France by an AJM, but rather re-politicizes it.

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241 *See* Newland, *supra* note 40, at 7-8.

242 *See* Rep. of the Special Representative of the Secretary-General on Migration, U.N. Doc. A/71/728 (2017).

243 For a definition of international migration law and its position within the fragmentation and coherence debate of public international law, see Vincent Chetail, International Migration Law 8 (2019).

We are not arguing in favor of ditching the AJMs, but insist on continuing in the line of the CAA jurisprudence, which is to treat all labor migrants under any AJM equally or no less favorably than those from another country linked to France by an AJM. Such a proposal would establish a regional Franco-West/North African bubble on labor migration, which, if permits of stay are liberalized fully for such workers, could be justified as an Art. V exception to the MFN Art. II under the GATS.

From this viewpoint, compliance with the multilateral WTO/GATS obligations connects bilateral agreements back to the regional layer of migration law and policy.[244] By removing the automaticity implied in Annex IV, the CAAs removed a preferential treatment of Senegalese in irregular stays in France. In so doing, they again leveled the playing field among all West and North African nations linked to France by an AJM and restored the AJMs to their original meaning as "one-size-fits-all" agreements. The French courts' verdict has held in check an otherwise unbridled preferentialism, which might have risked re-politicizing the debates over irregular migration, and thus would have reignited a discussion that the AJMs had aspired to put to bed.

XII. Discussion

Any bilaterally exchanged commitment regarding labor migration, whether formally concluded in a binding agreement such as France's AJMs or provisionally embedded in time-limited pilots, including the EU PALIM, THAMM or MATCH, usually privileges pathways for citizens of a specific source country, creating a potential conflict of law with respect to other third-country nationals under EU or WTO/GATS law. Furthermore, the privileges are conditionally linked to obtaining in return the guarantee of cooperation in the fight over irregular migration, including securing orderly, safe returns, sustainable reintegration and border control. In this Article I have demonstrated that once regularizing Senegalese in France was added to the menu of the AJM, Senegal finally felt on an equal footing with France in terms of the risks and benefits of the Eurafrican migratory flows it was asked to manage. In that sense, regularization, more than any of the other positive conditionalities that France had put on offer, including facilitating skills migration or co-funding diaspora investments, is to be credited with depoliticizing the regular/irregular migration debate between France and Senegal, at least at first sight.

On second view, the rampant preferentialism, which this regularization introduces towards other African countries, which have not obtained this additional leverage from France, disadvantages them vis-à-vis Senegal and thus jeopardizes the "equal

244 Mamadou Goita, Sub-regional Consultation for the ECOWAS region on the Regional Review of the implementation of the Global Compact for Safe, Orderly and Regular Migration 6 (2021) ("to avoid individual countries' bilateral agreements that can destabilize regional integration in some cases (West Africa with militarization of borders, hotspots, military bases, externalization of borders etc.)").

level playing field" projected by France's "one-size-fits-all" policy which it is pursuing in the AJM—and this outcome may re-politicize the debate.

However, several French courts of administrative appeal have narrowly interpreted Art. 42 of the AJM with Senegal by widening the margin of discretion for the French prefects. Hence, *de facto,* no Senegalese unlawfully staying in France, whether employed or with a firm job offer, may avail herself any longer of the right to exceptional admission. The recent court cases confirm that Art. 42 confers no individual entitlement and does not produce a direct effect, but must be read in conjunction with the CESEDA; neither do the Annex IV-listed jobs grant an automatic entitlement to regularization, as Senegalese appellants had regularly argued. Contrarily, it is up to the French prefects, and not the wording of the AJM, to decide whether a Senegalese can be regularized—a level of discretion that, in theory, can also work in favor of an applicant, since admission could extend to occupations *not even* listed in Annex IV. This jurisprudence aligns the AJMs more closely with the *acquis* of the EU Return Directive 2008/115, since eliminating the semi-automaticity of the listing of jobs guards against mass regularizations of Senegalese citizens, which the EU Return directive prohibits. In conclusion, what the French judiciary does is ensure that multilevel governance is playing out correctly towards the superior EU by holding the privileges granted bilaterally via the AJMs to source countries in check.[245]

However, the CAAs' *quasi*-systematic overruling of regularizations under Art. 42 AJM has offset one of these rarely, truly bilaterally negotiated outcomes, putting in peril the vision of "joint management" of migratory flows that Sarkozy and Hortefeux wanted to convey. Given the very limited assortment of cases, where stay is granted through this exceptional pathway, France's prefects remain the gatekeepers of "*immigration choisie*," and the judiciary their handmaiden. Even more broadly, stripping Art. 42 of any meaning has crippled Senegal's ability to negotiate bilaterally and once again quashed the aspiration to have bilateral partnerships in migration jointly designed (see Parts I and II above). It has rendered fragile the bond between France, Senegal and the diaspora, which is essential to ensure the regular flow of remittances to Senegal. It also jeopardizes the goodwill of the Senegalese government to take back Senegalese on irregular stays.[246]

However, because certain provisions of the AJMs are precise enough for an individual to lodge an appeal, the AJMs comply with due process and align with this guiding principle of the Global Compact for Safe, Orderly and Regular Migration.[247]

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245 *Cf.* Megiddo on transparency and publicity of BLAs, Tamar Megiddo, *Obscurity and Non-Bindingness in Regulation of Labor Migration*, 23 Theoretical Inquiries L. 95 (2022).

246 *Cf.* Wabgou, *supra* note 127; de Lary, *supra* note 72; Jolivel, *supra* note 6, at 23; Cernadas, *supra* note 224.

247 GCM paragraph 14: Rule of law and due process: The Global Compact recognizes that respect for the rule of law, due process and access to justice are fundamental to all aspects of migration governance. This means that the State, public and private institutions and entities, as well as persons themselves are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international law; however, the GCM concretizes the rule of law and due process principle when access to justice is denied or limited over detention, return and readmission

In that sense, an AJM stands as a "better" deal than an EU mobility partnership, which is intergovernmental but does not provide the quality for an individual to bring a complaint.[248]

On a macro-level, e.g., the EU single market, France's judiciary has quashed the opportunity for the bilateral corridors to fill in for demand-driven recruitment in the lower-skill spectrum or in occupations requested by the EU single market, but not filled by elite migration under the EU labor market directives. Curtailing what could have been a demand-driven labor mobility from West Africa to France, this contested jurisprudence hangs out to dry a valuable precedent to what now is taken up by highly bureaucratized EU-ILO-IOM-managed pilot labor migration schemes, including PALIM and THAMM and the EU talent partnerships,[249] including the MATCH with Senegal. Finally, from a regime theory and sociolegal perspective, France's courts' have brutally decapitated the pivotal symbolism of the regularization clause under Art. 42, which stood as a beacon for transforming irregular into "regular, safe and orderly" migration, and which epitomized the mutually beneficial exchange of interests, developed in partnership between Senegal and France.[250]

Conclusions

In this Article, we have taken a legal analytical perspective to explore whether this negativity associated with BLAs is justified. From its liberalization of circular mobility during the 1960s, to the millennial co-development conventions with Senegal and Mali, to the agreements on young professionals, France has gone a long way toward regulating and liberalizing the cross-border movement of people from West and North Africa to Europe. Yet why France privileges migrant labor in the AJMs with 7 African nations is anything but clear. Along with securing migrant workers for shortage occupations in France's market, France is exploring one trajectory for how to depoliticize bilateral cooperation over sensitive areas such as return and regularization of irregular migrants. With its diverse set of sequential bilateral agreements, some of which are synchronized, e.g., AJMs with agreements on young professionals, France is well-placed in Europe for an in-depth case study on BLAs, to which we have contributed.

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procedures are border screening, but not for legal pathways, including access to justice over a rejection of a permit of work or a dismissed labor migration opportunity.

248 *Cf.* Olakpe, *supra* note 95.

249 Most of the EU experimental labor migration pilots are funded by the EU migration partnership framework (MPF) and involve the IOM office of the respective EU Member State involved, the IOM. *See Pilot Project Addressing labour shortages thru Innovative Migration Models (PALIM)*, Globel Skill Partnerships, https://gsp.cgdev.org/2021/06/30/pilot-project-addressing-labour-shortages-through-innovative-labour-migration-models-palim (last visited June 11, 2022); *Towards a Holistic Approach to Labour Migration Governance and Labour Mobility in North Africa (THAMM)*, ILO.Org, https://www.ilo.org/africa/technical-cooperation/WCMS_741974/lang--en/index.htm (last visited June 11, 2022).

250 *Match: Migration of African Talent thru Capacity-building*, eea.iom.int, https://eea.iom.int/sites/g/files/tmzbdl666/files/documents/MATCH-Info-Sheet-EN-online.pdf (last visited June 11, 2022).

This Article has discussed why the privileged admissions of temporary seasonal workers, employees and professionals complement the EU labor market directives' target groups, but fall short of complying with the WTO/GATS most-favored-nation treatment clause. The former have been triggered now that France's MFN exception towards countries of West and North Africa has expired and that its AJMs have removed only a few, rather than all, of the barriers to labor market access for North and West African citizens. Whereas the economic needs test is eliminated if a job is listed as being "in shortage" in France and in some countries for those who qualify for a skills and talents permit, entry is still quota-based and permits of stay are required in the different categories (except where the numbers indicated are benchmarks, as for Senegal, and not quotas), even if their duration or renewal period has been relaxed. Hence, the requisite elements for the AJMs to fall under the GATS Art. Vbis labor market integration exception are not fulfilled completely, and theoretically France would have to offer the benefits it provides under the AJMs to any other country desiring to conclude such an agreement with France.

Finally, we have shed light on a key area of contestation within BLAs, namely Senegal's exceptional admission clause for its citizens who are on irregular stays in France but can show proof of either a valid employment or an offer thereof. Here, the judiciary, France's regional courts of administrative appeals, has broadly interpreted the margin of discretion, which Art. 42 AJM attributes to the French *Départements*' respective prefects, who are in charge of implementing what is in effect a regularization of Senegalese in unlawful stays. In consequence, the CAAs have backed the prefectorial decisions to annul the stay, even if a Senegalese could prove the job was listed, e.g., restaurant and fast-food workers, caterers and waiters listed in Annex IV as being in shortage in France. Hence, the courts have confirmed that a prefect is entitled to conduct an economic needs test for that type of job in her *Département* and can lawfully conclude, as happened in cases brought during the COVID-19 pandemic lockdowns, that a worker in a sector listed in the Annex IV AJM with Senegal could still be removed. Hence, the courts' regular, quasi-systematic rejection of admissions of Senegalese in unlawful stays and denial of exceptional, regularization under Art. 42 AJM had to be motivated by additional economic considerations other than simply a reference to the list of shortage occupations under Annex IV of the AJM. Such a finding was deemed not to overstep the prefectorial margin of discretion under Art. 42 of the AJM, since job listings in the Annex ultimately need to serve to align the Senegalese offer with France's labor market demands, as they are in flux and cannot be reduced to the snapshot picture, which the Annex IV job listings convey.

At the same time, France's courts of administrative appeal have imparted a French-biased perspective to the AJM with Senegal, which notably waters down the automatic linkage between the shortage occupations annexed to the AJM and the regularization of the status of Senegalese in France, which Senegal had alleged. In so prioritizing France's fluctuating labor market needs over the delicate balance between, on the one hand, the job listings jointly drawn up by France and Senegal in the Annex IV to the AJM, and enlisting Senegal's cooperation over voluntary and

forced returns on the other hand, France risks depoliticizing the bilateral migration diplomacy it had envisioned with Senegal. Instead, France's CAAs emphasize France's entitlement to flexibly assess, regarding each individual hardship application case, the fluctuating labor market as well as the applicant's qualifications[251] and the prospects for longer-term socioeconomic integration. In this line of argumentation, it follows that even for listed jobs, France's CAAs allow the prefectural margin of discretion, which Art. 42 AJM confers on France, to deny a hardship application.

Viewed from the theoretical frames of de- and re-politicization, this Article affirms the key role that the judiciary, an otherwise neglected actor in migration policy formulation, actually plays. The Franco-Senegalese case study at the heart of this contribution confirms how France's administrative courts of appeal have become handmaidens of France's prefects and thus involved in regional immigration politics. The CAAs' standing jurisprudence on the AJMs has narrowed down the legal pathways, which the BLAs grant for migrant workers. In their rulings, the CAAs have re-politicized France's migration policy towards West Africa, by keeping the discretionary space for France's prefects sufficiently open for them to deny the presumed semi-automatic regularization by job listings, which would have opened the floodgates in France for mass regularizations of Senegalese in unlawful stays in France.

Based on a reading of France's National Assembly and Senate public records summarizing the negotiating history and the implementation of France's AJMs, we have seen that France takes care to align its AJMs within broader EU external migration policy and multilateral efforts.[252] For this reason, France's CAAs have deliberately interpreted Art. 42 Senegal-France AJM on regularization textually, so as to comply with the European Union's labor market and return directives, the former which discourage European countries from engaging in mass regularizations. In so doing, the CAAs, have sacrificed bilateral cooperation on migration with Senegal on the altar of EU migration policy, thereby de-politicizing their AJMs in light of EU and WTO law.

More generally, this Article has shown the pitfalls of preferential treatment of migrant labor, which can all too easily backfire in the form of discretionary admissions and pervert the original aim of tolerating the highly contested regularization of hardship cases motivated by labor market shortages. Certainly, with the Global Compact for Safe, Orderly and Regular Migration, under review in 2022, the bilateral agreements by the Global North will also come under heightened scrutiny. It would serve the Franco-Senegalese relationship well if compliance with EU and GATS obligations were made clearer and the commitments, including those under soft law, taken more seriously by all the actors involved, including the adjudicating courts.

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251 CAA Paris, 1ère ch., July 8, 2021, 20PA01037 (whereby a Senegalese applicant for an exceptional admission under Art. 42 AJM with Senegal, first had worked as a cook and later on as a waitress, the former being a job listed under the Annex IV, but given that she had "no qualifications" to prove, the Court confirmed the prefect's rejection of request for admission).

252 Tasca, *supra* note 195.