

***Protecting Domestic vs. Foreign Workers:
The German Experience during the 1990s***

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There are four lessons with a potentially general interest which can be learned from the employment of temporary foreign workers in Germany during the 1990s. In particular, the employment of project-tied workers from Central and Eastern European countries (CEE, e.g. Poland, Hungary, Czech Republic) raised political controversy and public debates which, at first sight, was out of proportion with the relatively small numbers involved. This specific case is thus certainly not representative for the so-called “second generation” of temporary foreign worker programmes in Germany. Among the three main categories of temporary foreign worker programmes during the 1990s, the highest numbers involved was in the category of seasonal worker with consistently more than 200,000 workers. Project-tied work meant the employment of about 100,000 foreign workers in the early 1990s in a first period; later followed by a sharp increase up to 300,000 annually – however, the workers in the second period hailed above all from member states of the European Union (EU). The least important in terms of numbers were the programmes for *Gastarbeiter*. In contrast to the contract worker programmes of the 1960s and early 1970s, this category included workers who came to Germany for training purposes. Nonetheless, when seen in perspective, the case of project-tied workers is so instructive because it highlights the problems raised by the employment of temporary workers in a fairly highly-regulated labour market. The general argument is that densely regulated labour markets function quite differently compared to less regulated markets. Four specific propositions speak to and elaborate this general assumption.

Proposition No. 1: What seems at first to be a trade-off in the protection of domestic vs. the protection of temporary foreign workers points towards institutional (collective bargaining) problems in industrial sectors characterized by the strain of transnationalization. Nonetheless, the size of the temporary foreign workforce is an

important intervening variable between the rights of workers and the institutions which provide these rights because higher numbers of temporary workers ignite disputes over detrimental effects on the domestic workforce.

Under certain circumstances, there is a perceived trade-off between protection of domestic workers and the protection of temporary foreign workers. The size of temporary work force plays a crucial intervening role. In other words, it is an intervening variable between the rights of both categories of workers. In a highly-regulated labour market, the size of the temporary foreign workforce does not matter so much in terms of actual substitution effects but regarding its indirect effects on industrial relations. This became very obvious in the case of posted workers who were sent by their companies to work in subcontracted work projects in Germany during the 1990s. The projects were mainly located in the construction industry, a rapidly transnationalizing industrial sector, characterized by many small entrepreneurs. For some years, one of the main trends has been further subcontracting across borders and thus an increase in the number and proportion of foreign companies. Within this general context, project-tied work was attractive for both general contractors and subcontractors because of, first, extraterritorial employment which ensured that the social wages (e.g. social security contributions) do not correspond to receiving country standards (e.g. Germany) but to those in the countries out of which subcontractors posted their workers abroad (e.g. Poland). Therefore, labour costs were considerably lower, up to one third. Also, second, one may assume project-tied workers constituted a more docile workforce because of their extra-territorial status which deprived workers of certain social rights in Germany.

The benefits for employers such as general and subcontractors become even more obvious when we compare two periods of the employment of posted workers. In the first period workers came in the frame of posted worker arrangements which had been established in bilateral agreements between Germany and Central & Eastern European Countries (CEE) after the fall of the wall. Their numbers dropped from a high of 100.000 in 1992 to more than half after 1993-4 when companies from EU countries began to enter the German market to a higher degree. At that time firms mainly from Portugal began to take advantage of the freedom of services provision of the internal market. These companies outpaced those from CEE countries – among other reasons because they could offer labour at an even cheaper price than the CEE companies who had to pay prevailing German wage rates (excluding social wages). The EU companies could pay the wages in the country of origin. It took some time until the EU attempted to regulate this situation in 1996 by means of a directive

stipulating that workers from EU countries should basically be employed according to the conditions prevalent in the country where the project is fulfilled, i.e. “equal pay for equal work at the same place” (cf. Faist 1997: 236). This partly kept in check the downward pressure on wages of domestic workers. However, the directive did not halt the growing rate of insolvencies among Germany-based small companies. The latter had dominated the market before the transnationalization of this sector through the arrival of companies from the CEE countries, Portugal and the UK.

While a substitution effect caused by the employment of temporary workers cannot be shown to be true, at least for the early 1990s, the consequences for domestic workers were nevertheless dire in terms of protection by collective bargaining agreements. By the mid-1990s employers began to exit the regional construction employers associations. This constituted a threat to this sector-specific collective bargaining structure in the Federal Republic of Germany. One consequence was that minimum wages were introduced which lay below the lowest wages achieved by collective bargaining agreements. Thus, job and wage protection for domestic workers is indirectly mediated by the size of the temporary foreign work force. However, the underlying structural factors are the main driving force of transnationalizing the construction sector in an area of freedom of services – the common market. The increase in subcontracting and the associated use of temporary foreign labour only served to underscore this trend.

Nowadays, the protection standards for foreign workers are higher than in the first half of the 1990s. This applies especially to project-tied workers from EU member states. However, this convergence is based on decreasing numbers of foreign workers who are employed as project-tied workers in Germany and a trend towards equalizing rights of domestic and foreign temporary construction workers, as evidenced by the EU directive. In general, the German case in the 1990s suggests that the decreasing size of the temporary workforce is inversely related to the *de jure* (not necessarily *de facto*) rights protection of temporary foreign workers. The crucial mechanism regulating this relationship is the set of institutions constituting collective bargaining in a highly regulated labour market, characterized by corporatist and tripartite institutions. Although an increasing size of temporary foreign workers does not lead to direct substitution effects – as it may in poorly regulated labour markets – it challenges weak and crumbling labour market mechanisms under stress by transnationalizing markets. The size of the temporary workforce is thus best thought of as an ‘intervening’ variable, while

the transnationalization of the construction sector is akin to an ‘independent’ set of variables, and the rights of both domestic and foreign temporary workers constitute ‘dependent’ variables.

This admittedly very general claim is borne out by a quick look at the temporary foreign worker programme with the highest numbers: seasonal workers in agriculture. Agriculture in Germany, as in most other western countries, is much less unionised than construction and thus also less highly regulated by the ‘social partners’ or by tripartite arrangements. According to the proposition advanced it can bear much higher numbers of foreign workers with fewer rights. For example, seasonal workers accumulate no social security claims in Germany, unless they are employed more than 90 days a year. On average, seasonal workers from Central and Eastern Europe, especially Poland, worked for about 50 days in the late 1990s (remarks by Professor Marek Okolski during the workshop).

It is noteworthy that the issue of project-tied workers has taken such a pivotal role in political conflicts in the construction sector during the 1990s because it served well to indicate more general problems of an industrial sector which has been undergoing radical change. Freedom of services in the EU has opened up those sectors where projects have to be built on site; e.g. because pre-fabrication in other locations is only partly feasible. One may even speak of an instrumentalization of the temporary foreign worker question, i.e. it seemed at times as if project-tied employment is the main cause of the decline of many small-scale German construction companies and increasing unemployment among domestic workers. This is not necessarily an outgrowth of outright (racist) discrimination. The main construction union in Germany (IG Bau) made great efforts to distance itself from foreign worker discrimination. Instead, at the root of the sometimes exaggerated impacts of temporary foreign worker employment is a very complicated bargaining structure which has come under increasing strain.

In sum, temporary foreign worker programmes are particularly contested in highly-regulated labour markets because they pinpoint structural problems of labour market institutions undergoing change. This also means that labour market institutions with high degrees of regulation may have very different ‘needs’ from those in receiving countries with less highly regulated institutions.

Proposition No. 2: There is a structural tension between the interests of the sending countries in optimising the return flow of remittances and knowledge and the tendencies in receiving countries to elevate the level of rights enjoyed even by temporary migrants (“rights revolution”). This does not mean that sending country governments disregard the rights of their expatriates. However, it is a matter of emphasis.

Yet, receiving countries are only one part of the equation. Although the balance of power is quite unequal between sending and receiving countries, sending countries have some leverage once programmes are instituted. This was especially the case in the bilateral treaties between Germany and the CEE countries because these treaties were justified as pre-accession arrangements – one among several measures to set CEE countries onto their road to full EU accession and membership. Specific reference was made to the so-called *Europa-Abkommen* with these countries. Therefore, it is not surprising to find countries such as Poland exerting pressure on the German government to keep up high quotas for the admission of project-tied workers and to withstand the demands by the German unions and employer associations to drastically cut down on the numbers or eliminate these programmes altogether. In short, the Polish government tried to send as many workers through subcontracting companies as possible (Stanislawa Golinowska in Faist et al. 1999, Appendix A). Again, this very specific issue and instance points to a much broader issue involved in temporary foreign worker programmes more generally and probably across the globe: sending countries put efforts into maximizing the return of remittances and foreign currency, and, if they are optimistic, in the transfer of human capital and other forms of knowledge. This is very different from the situation in many receiving countries – at least in Western Europe and North America – where the “rights revolution” of the 1960s (cf. Hollifield 1992) has increasingly limited the ability of employers to use foreign labour on a very flexible basis.

Proposition No. 3: At first sight, the treatment of project-tied workers seems to reveal an application gap of existing labour standards. Yet it is also evident that the frame of reference for many short-term, project-tied workers and their employers is the sending country and both formal and informal arrangements regulating labour relations. There is a further complicating factor in that much of what is labelled ‘illegal’ arises out of the production process itself and thus concerns both domestic and foreign (temporary) labour.

By the mid-1990s, extensive documentation of violation of labour standards concerning project-tied workers was available. However, in our interviews at the time we found a striking absence of foreign project-tied workers taking their complaints to German labour courts. Although they were not covered by German social security law as de-territorialized workers, they needed a working permit issued by German authorities, were under German labour jurisdiction and thus had recourse to German labour laws. One may be tempted to explain this lack of action by their downtrodden status: project-tied workers from countries such as Poland did not dare to complain because they feared losing their job. Another answer, however, found more support by the empirical evidence uncovered in semi-structured interviews: project-tied workers from Central and Eastern European countries actually often took a short-term view on their engagement in Germany. Actually, quite a few of them circulated between Germany and Poland; repeating project-tied employment or, in some cases, switching between project-tied work and irregular and even independent self-employment and contracting. They populated the German-Polish transnational social space (cf. Faist 2003). In general, project-tied workers colluded with employers in “splitting the cake”, profiting from the higher wage and benefit levels associated with an engagement in Germany.

Informal relations between workers and (sub-)contractors or employers arise out of the production process itself and are no specific characteristic of temporary foreign worker employment. The construction industry, for example, is characterized by forward integration or what is called “tight coupling” (Perrow 1986): in construction sites, one contractor after the other has to fulfil contractual obligations within a strict time frame. In case of failure, high pecuniary fines are the result. It thus comes as no surprise that sectors such as construction (or agriculture, for that matter, albeit for different reasons) are characterized by a relatively flexible deployment of labour. Subcontracting foreign companies and thus the use of temporary foreign labour became interesting for contractors especially after German labour legislation had formally outlawed illegal subleasing of workers from one employer to another

(Arbeitnehmerüberlassung) in the late 1970s. When German authorities significantly stepped up control of worksites in the early 1990s to fight the illegal use of project-tied workers, the inspectors were certainly not able to capture this intrinsic problem of the production process itself.

Proposition No. 4: A Modest Policy Proposal – International Temporary Worker Councils

A close cooperation between sending and receiving countries would foster the protection of both domestic and foreign temporary workers. It is to be kept in mind that although temporary foreign labour is used in a very flexible way, more and more newly created jobs in the EU in the construction and other sectors are also of a precarious and short-term nature. Therefore, cooperation between sending and receiving countries should prove beneficial for both domestic and foreign workers – and would not simply be a matter of protecting minority groups of workers. Yet conventional wisdom tells us that governmental collaboration in the field of (temporary) labour migration field is almost impossible. On the one side, receiving countries have no incentive to bargain on temporary worker employment on a collective level with sending countries because they are best off in bargaining individually with each potential source country. On the other side, sending countries would stand to gain from organizing collectively to overcome the asymmetry of power in between senders and receivers. They would thus force receiving countries to bargain on a collective level and foster cooperation between senders and receivers. In nuce, the senders would form a supplier's cartel, very much like OPEC for the oil-producing countries. However, there are serious obstacles to such forms of cooperation. The receiving countries would not be very much affected because the prisoner's dilemma situation among the senders ensures that there is an abundant supply of potential sending countries. Sending countries would compete among each other for the immigration countries' most favoured status. Yet even if sending countries agreed on a common policy towards the receivers, such as quotas on foreign labour, they would be faced with the danger of defection. Partly, this could be overcome by the implementation of international rules. However, the problem in this case is not primarily the relatively weak position of an enforcing third party, for example, international organizations such as the ILO. The 'Migration for Employment Convention' (1949) and subsequent agreements have exceedingly few enforcement mechanisms; certain countries have not even signed it (cf. W.R. Böhning's contribution to the workshop). Instead, it needs to be kept in mind that organizations like ILO are concerned with

providing a framework for minimum standards, which is – realistically speaking – not necessarily in the interests of the senders when it comes to temporary foreign labour (the situation may be different when it comes to settled expatriates). Sending country governments might not always and necessarily be among the most vigorous in pushing for such standards. To sum up, collective action among the senders as a prerequisite for cooperation between senders and receivers is very unlikely and the pay-off matrix is heavily slanted in favour of the receiving countries.

The primary problem therefore is to turn temporary foreign labour employment into a bargaining game in which parties on both the sending and receiving side might develop an interest in at least minimal cooperation. The starting point is the assumption that parties on all sides have an interest in the flexible use of temporary foreign labour under conditions of minimal standards of protection for both domestic and foreign labour. Cooperation would need to rest on a firm institutional foundation. The central pillar would be bilateral or preferably international tripartite (states, employers and unions) or even multipartite (including NGOs) institutions in which the kind of programmes and other features of temporary employment would be negotiated. Such International Temporary Worker Councils, modelled along corporatist arrangements and thus best fitting receiving countries with highly regulated labour markets, could be established bilaterally between countries such as Germany and Poland, or Poland and the Ukraine. Or they could be institutionalised inter- and transnationally between the EU and third countries. In such institutionalised arenas, collective actors could negotiate over the sort of programmes needed at the moment, the quotas of foreign temporary workers involved, and the protections afforded. This would do away with the multitude of specialised programmes solely initiated at the receiving side. The Councils would be better suited to arrange for short-term policy measures. Also, they could react more swiftly to problems of efficiency and protection inevitably arising in the implementation and administration of such programmes. One added advantage is that the inclusion of multiple actors would be an apt tool to take account of the actual patterns of geographical and labour mobility of temporary foreign workers. This could put a lid on widespread irregularity much better than increased worksite control (which should not be abandoned). But, of course, this would apply to irregularity associated with illegal work or residence status; not to irregularity associated with the production process itself.

To close, a crucial caveat is in order. It would be totally unrealistic to expect that such collaborative agreements and institutionalisations would function on a global scale. The prisoner's dilemma situation would prevail. At this point in time, the best chances for realisation of International Temporary Worker Councils is between the EU and adjoining and other third countries because it is only in contexts of ongoing trade and capital exchange and contractual agreements covering these sectors that receiving countries have an incentive to engage in cooperation with sending countries. Temporary worker employment can thus be only part of a wider array of collaborative measures. The bilateral treaties Germany signed with CEE countries are a case in point. As mentioned above, these treaties enabling contracting and subcontracting between companies on both sides were justified and rationalised as a sort of pre-accession aid of an EU member state towards selected CEE countries. This idea could be expanded and institutionalised in the relations between the EU, its member states and a host of third countries.

Selected Literature – each work contains numerous references for further reading:

Thomas Faist, 1997: Migration in Contemporary Europe: European Integration, Economic Liberalization, and Protection, in: Jytte Klausen and Louise A. Tilly (eds.), European Integration in Social and Historical Perspective. 1850 to the Present. Lanham, MD: Rowman & Littlefield Publishers, 223-248

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