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IOM International Organization for Migration



International Labour Office  
Geneva



*Handbook*  
*on Establishing Effective*  
*Labour Migration*  
*Policies in Countries of*  
*Origin and Destination*



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# Foreword

We are pleased to present this first international *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and of Destination*, jointly produced by the Organization for Security and Co-operation in Europe (OSCE), International Organization for Migration (IOM) and the International Labour Office (ILO).

Our organizations recognize that migration has become one of the most visible and critical concerns in ensuring security, stability and economic progress, national welfare and social cohesion for our participating countries. Recognizing that a comprehensive approach is essential to enhance the positive impact of labour migration, IOM and ILO joined the OSCE to prepare this unique and timely resource by combining our respective and complementary competencies.

The aim of the *Handbook* is to assist States in their efforts to develop new policy approaches, solutions, and practical measures for better management of labour migration in countries of origin and of destination. It has been prepared primarily for use by *decision-makers* and *practitioners* in the OSCE area and countries served by IOM and ILO. It analyses effective policies and practices and draws upon examples from OSCE participating States as well as other countries that have considerable experience in this field.

Some 90 million or about half of the world's migrants live in the OSCE area. The majority has left their countries in search of employment, often leaving situations where decent work is simply unavailable or where social, economic and political conditions have seriously deteriorated.

Patterns of migration are increasingly complex, with temporary and circular migration as well as permanent migration reflecting an emerging paradigm of international labour mobility. Migration remains a natural and inevitable phenomenon, but the path to orderly labour migration is not an easy one. Abuse and exploitation, irregular movements, xenophobia, lack of integration, and erosion of standards and stability are amongst its hazards, along with trafficking in persons, smuggling of migrants and corruption.

# Foreword

Migration through cross-border or trans-national flows can effectively be managed only by way of international cooperation. The development of fair and sustainable labour migration policies and practices requires dialogue amongst governments at all levels and has to include other key stakeholders, namely social partners (employers and trade unions) and civil society organizations.

Over the last few years, evolving but not necessarily coherent national responses have been complemented by intergovernmental dialogue and recommendations on migration. Important recent contributions include the IOM's International Dialogue on Migration as well as the Berne Initiative and the ensuing International Agenda for Migration Management; the report of the Global Commission on International Migration feeding into the United Nations General Assembly High Level Dialogue on Migration and Development in September 2006; and the new ILO Multilateral Framework on Labour Migration deriving from the 92nd Session of the International Labour Conference of 2004.

The European Union has achieved an impressive legal, policy and practical acquis in the area of migration while the Council of Europe has developed broad policy guidance and cooperation among its wider membership.

The OSCE participating States have long expressed concern with the need to better manage migration: migration and integration were the thematic focus of the OSCE Slovenian Chairmanship in 2005 which placed migration firmly on the OSCE agenda of political priorities, reflecting the crucial role of regional organizations in addressing migration in the context of security and stability.

The 13th OSCE Economic Forum, held in Prague, Czech Republic from 23 to 27 May 2005, provided the impetus for the joint OSCE, IOM and ILO initiative to produce a Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and of Destination.

While directed particularly towards concerned governments, we expect that this *Handbook* will also be useful to social partners, the media, non-governmental organizations and academia. Furthermore, we hope that the *Handbook* will inspire further dialogue and cooperation among national authorities and other stakeholders, and stimulate the exchange of information and good practice among States in the OSCE area and beyond.



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# Executive Summary

## Introduction

Over the last 45 years, the number of persons living outside their country of birth has more than doubled, from an estimated 75 million in 1960 to nearly 191 million in 2005. Almost half of the 191 million migrants in the world today are women. Estimates put the number of migrant workers at over 86 million. The management of migration flows is therefore crucial given this magnitude and that international labour migration is likely to increase in the future. Labour migration, or the movement of people across borders for employment, has moved to the top of the policy agendas in many countries of origin, transit and destination. Governments at both ends of the migration spectrum are increasing their regulatory capacities to manage labour mobility to the mutual benefit of society, migrants and the State.

The *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* is a follow-up to the recommendation made by the Slovenian Chair at the 2005 Economic Forum of the Organization on Security and Cooperation in Europe (OSCE) to prepare a handbook on migration management policies based on good practices in the OSCE area. The *Handbook* is also the result of work undertaken by IOM and ILO to prepare training curricula, operational guidelines, and tools for its constituents in the effective management of labour migration. The *Handbook* has been prepared by the International Organization for Migration (IOM)'s Labour Migration Division, with the assistance of a number of depart-

ments in the International Labour Organization (ILO), and OSCE and external experts.

The OSCE countries span a number of regions displaying quite different characteristics in terms of labour migration. It includes two traditional countries of immigration, Canada and the United States, both of which operate systems of employment-based immigration. The OSCE also encompasses the whole of the European Union (EU), which constitutes the quintessential labour migration system, with its free movement of workers regime. All EU Member States as well as OSCE participating States to the east of the EU are Members of the Council of Europe, which has developed its own approach to migration, including the adoption of a number of multilateral legal instruments aimed at regulating the lawful movement of migrant workers within the region and guaranteeing their fair treatment. Another region, which is rapidly gaining in importance as far as labour migration is concerned, is the Commonwealth of Independent States (CIS). The largest country in this region, the Russian Federation, is home to the second largest number of migrants after the United States; Ukraine is fourth after Germany and Kazakhstan is ninth. Moreover, CIS countries are among the top ten countries of origin in the world. Finally, labour migration in the Balkans is also moving up the political agenda.

The principal objective of this *Handbook* is to assist States, particularly those in the OSCE area, in their efforts to develop new policy solutions and approaches for better management of labour migration and labour

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migration flows in countries of origin and destination. It has been prepared primarily for use by decision-makers and labour migration practitioners in the OSCE area and in countries served by the IOM and ILO, and contains analysis of effective labour migration policies and practices, drawing upon examples from OSCE participating States as well as other countries. Another important objective is to emphasize that successful management of labour migration requires a deliberate approach to address the complex range of policy issues and choices involved. Countries that have achieved relative success in managing labour migration have done so, because they have been prepared to admit past policy failures and to experiment with new approaches.

## *I. International Legal Framework for the Protection of Migrant Workers*

The rights and freedoms stipulated in international human rights law developed under the auspices of the UN system apply equally to migrant men and women as to any other individual, as do the provisions of international labour law developed by the ILO, including those in the eight core ILO Conventions. Concern for migrant workers has also been expressed through the insertion of specific provisions targeting migrants in Declarations and Plan of Actions of UN World Conferences held over the past decade, such as the 2001 Durban Declaration and Programme of Action against

Racism, Racial Discrimination, Xenophobia and Related Intolerance, and the appointment of a UN Special Rapporteur on the human rights of migrants in 1997.

The first specific international instruments aimed at finding solutions to the problems facing migrant workers include the Migration for Employment Convention, 1949 (Revised) (No. 97) and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) as well as their accompanying Recommendations. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted in December 1990, embodies most of the substantive provisions of the ILO instruments, and in some ways goes beyond them. The UN Convention and the specific ILO Conventions may therefore be considered as complementary.

At the heart of the protection of the rights of men and women migrant workers lies their potential vulnerability to discrimination, exploitation and abuse, especially in marginal, low status and inadequately regulated sectors of employment. In addition, migrants without an authorization for entry and/or employment are at the margins of protection by safety and health, minimum wage and other standards as they are most often employed in sectors where those standards are either not applicable, or not respected or enforced. It is therefore imperative that, as a complement to the formulation of appropriate policies to curb irregular migration and illegal employment, countries ensure minimum standards of protection, including basic human rights, for all migrants workers, *whatever their status*.

Regional standards for the protection of migrant workers have also been elaborated in Europe and North America. Relevant Council of Europe instruments cover general human rights as well as more specific agreements relating to migrants and migrant workers. With regard to the EU framework, while differences exist in terms of rights and benefits granted to migrant workers coming from within the EU, from future accession countries, and from third countries, the EU Charter of Fundamental Rights of 2000, though not a legally binding instrument, is a major point of reference in this context because most of its provisions are applicable to all persons irrespective of their nationality. Migrant workers enjoy general protection under the inter-American human rights system as provided by the 1948 American Declaration on the Rights and Duties of Man and the 1969 American Convention on Human Rights, which both guarantee freedom from discrimination. Certain important principles applicable to migrants and their families have also been developed on the basis of the case law of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

## *II. Issues Underlying Policy Responses in Countries of Origin and Destination*

Policy-makers in both countries of origin and of destination have to devote careful attention to a number of underlying broader issues when crafting appropriate policies. While these issues necessarily differ because of the different labour migration dynamics taking place in origin and destination countries, some are common to both sets of countries, such as the concerns relating to the protection of migrant workers and the need for inter-state cooperation, particularly with a view to preventing or reducing irregular migration. The differential and often discriminatory impacts of legislation, policies and programmes on different groups of women and men migrant workers also need to be addressed to ensure mutual gains from migration.

Countries of origin, while diverse in terms of stages of economic development, also face other common is-

ssues, namely the challenges in optimizing the benefits of organized labour migration, particularly the development of new markets (where applicable), and increasing remittance flows through formal channels, as well as enhancing the development impact of labour migration, while at the same time mitigating the adverse impact of the emigration of skilled human resources. They also have to build institutional capacity and inter-ministerial coordination to meet labour migration challenges.

The issues underlying policy responses in destination countries regarding the admission of migrant workers relate to the detection, assessment and prediction of labour shortages at the national level for both skilled and less-skilled employment and protection for the national workforce in the event that more labour migrants are admitted into the country. Policy-makers in destination countries also need to conduct an analysis of the national labour market in order to understand whether labour migration can provide a solution, at least partially, for adverse demographic trends, particularly the decline in working populations, and the subsequent impact on the availability of social welfare benefits for future generations. Measures also have to be put into place to avoid exploitation of migrant workers in the workplace and society in general, and to combat discrimination and xenophobia amongst the host population. In this regard, politicians and policy-makers also face a sensitive and challenging task in convincing and educating national populations on the need for foreign labour.

## *III. Developing Policies in Countries of Origin to Protect Migrant Workers*

A priority concern for all labour-sending governments is to ensure the well-being of migrant workers and to secure the payment of decent wages and basic provisions. Countries of origin have two main policy options to achieve this: regulatory measures and the provision of support services. While there are no perfect systems for regulation of labour migration, countries of origin do have a range of policy strategies which



can extend the scope and improve the efficiency of their regulatory mechanisms and support services, including: regulation of recruitment; developing and enforcing minimum standards in employment contracts; information dissemination to migrants; assistance in the country of destination and promoting inter-state cooperation.

#### *IV. Optimizing the Benefits of Organized Labour Migration*

An increasing number of developing countries and countries with economies in transition seek to adopt policies, legislation and structures which promote foreign employment for their workforce and generate remittances, while providing safeguards to protect migrants. While job creation at home is the first best option, an increasing number of countries see overseas employment as a part of a national development strategy for taking advantage of global employment opportunities and bring in foreign exchange. For countries seeking to promote foreign employment, labour migration policy necessitates adequate emphasis on the promotion and facilitation of managed external labour flows and should not be limited to the State's regulation and protection functions. This chapter looks at policies to optimise the benefits of organised labour migration, including marketing and the expansion of labour migration, enhancing the development benefits of remittances, skills development and the mitigation of the adverse impact of the emigration of skilled human resources.

#### *V. Administration of Labour Migration*

To meet the policy objectives of protecting citizens working abroad and of optimizing the benefits of labour migration, it is essential that there is adequate institutional capacity and inter-ministerial coordination. This includes giving the management of labour migration due priority in overall development and foreign

policy and in the allocation of resources. Administration of labour migration is usually governed by an Emigration Act or Decree. Implementation of the relevant legislation is usually the responsibility of the Ministry of Labour, but in some cases a separate Ministry has been created for overseas affairs. Within the Ministry, most advanced labour-sending countries have a foreign employment bureau or its equivalent responsible for protection, welfare and promotion.

Managing migration successfully requires close cooperation and coordination of almost the entire Ministerial Cabinet, including the Ministries of Labour, Foreign Affairs and Interior. Links among agencies need to be strengthened, or established, where they have not yet been created.

Crafting a policy for labour migration needs to take into account the international labour migration environment and should be directed towards meeting the overall objectives of protection, development and inter-state cooperation and capacity building. In addition, the policy should be gender sensitive, consistent with the national development plan and comprehensive.

Administrative structures need to be monitored and their performance assessed through the introduction of parameters for monitoring and evaluation. Collection of data on labour migration is essential for producing statistical reports and for providing supporting information for policy-making and planning.

#### *VI. Foreign Labour Admission Policies*

When devising admission policies for foreign labour, in addition to the application of methodologies for assessing labour shortages, policy-makers also have to put in place mechanisms to gauge to what extent such shortages should be filled by foreign labour and how this labour should be channelled into the employment sector or region in question. Further, they have to decide whether to prioritize temporary labour migration, increasingly an interesting option for many destination countries, or migration channels which

lead to a secure residence status or permanent settlement. The *Handbook* focuses on temporary labour migration, since it is prevalent in many countries and is considered to be the best solution in terms of meeting labour market shortages in countries of destination, while ensuring that countries of origin are not deprived of valuable human resources, particularly skilled workers. However, given the extent of demographic and welfare imbalances, employment-based immigration is increasingly a serious option being explored in a number of European countries.

Globalization has fuelled the growth in temporary migrant worker programmes in many destination industrialized countries, which is one of the consequences of the growth in “flexible” labour markets. Given the increasing dependence of employers on temporary migrant labour, particularly in low-skilled sectors such as agriculture, construction, the food industry and services, these programmes are likely to grow in number and complexity as policy-makers attempt to devise innovative ways to channel the lawful admission of migrant workers, on a short-term basis, into the sectors concerned. There is also a renewed interest in the concept of temporary circular labour migration.

The principal policy questions in designing viable temporary migrant worker schemes are how to ensure that the programmes offer the benefits identified and that workers are treated in a decent and equitable manner. Care must also be taken when discussing the concept of “temporary” labour migration. It is important to make a distinction between government policies which admit migrant workers for a limited period with the clear objective that they will return to their country of origin at the end of that period; and more open labour migration schemes which allow for the possibility of settlement.

Many migrant workers, especially those with higher than average skills, are admitted through more regular admission channels, which can be described as the ‘ordinary work permit system’. While most work permit procedures foresee temporary employment, their application may lead eventually to free access to the labour market for migrant workers and a secure or permanent residence. Thus, in practice, they may operate as an employment-based immigration system.

A number of important questions arise regarding the work permit system, which impact on its operation in practice and the treatment migrant workers receive. If the employer holds too much authority over the worker, this may lead to abusive situations. Furthermore, excessively bureaucratic procedures impair the efficiency of the work permit system.

Common temporary labour migration programmes concern seasonal labour migration schemes and arrangements to channel migrant workers into specific sectors of the economy where labour shortages are prevalent. Protection of migrant workers, close and careful cooperation between pertinent stakeholders in both origin and destination countries, and assistance with return are distinct, but related, issues that need to be carefully addressed in order to successfully design such schemes. Trainee worker schemes are also a source of temporary migrant labour. If properly and fairly organized, these schemes may offer personal benefits to participating migrant workers because they can gain important skills and on-the-job training in the destination country. Such schemes may also benefit countries of origin, thanks to the transfer of skills and know-how on the migrant workers’ return home.

Domestic work has been a significant element of the growing phenomenon of migration, particularly in respect of women. While, labour migration has had a generally empowering influence on women in terms of higher self-esteem and increased economic independence, there are many undocumented women migrants in informal, unprotected, hidden and unregulated labour markets, including domestic workers, whose situation provides cause for concern. In many countries, domestic workers are excluded from labour legislation and their working conditions remain unregulated. Therefore, it is very important for countries of destination to recognize the high level of demand for foreign domestic workers and the significance of introducing clear policies. Effective policies have really made a difference to the situation of women migrant workers.

While temporary labour migration, if appropriately managed, can potentially benefit all parties involved in the process (origin and destination countries and migrant workers themselves), there are a number of important policy issues administrators and officials in

destination countries should attempt to address before proceeding to design temporary labour migration programmes. Firstly, they need to consider the advantages of this type of migration vis-à-vis employment-based immigration and the circumstances under which it might be promoted, while at the same time attempting to ensure, in cooperation with developing countries of origin, that the latter are not deprived of their best talent. Secondly, while the concept of temporary and circular labour migration appears sound in theory, increasingly questions are being asked about the design of these programmes in order to operate successfully in the future, in the light of past policy failures of such schemes. In particular, two issues need to be resolved: ensuring temporary migrant workers return to their country of origin, and guaranteeing their fair treatment in the destination country, given their less secure employment and residence status.

## *VII. Post-Admission Policies: Rights of Migrant Workers*

Post-admissions policies are concerned with a number of inter-related elements for regulating the labour market, ensuring protection of workers, and supporting community welfare. Important measures are generally required in five areas:

- labour market regulation;
- protection of migrant (and national) workers in the employment context;
- facilitation of social cohesion;
- improvements in social welfare; and
- social security provision.

Most of these measures are also found in the minimum standards in international human rights and international labour law structures in which OSCE countries participate. In some instances, national legislative measures of countries of origin can also contribute greatly to the protection of their workers while working abroad.

Labour market regulation is concerned with access to employment and occupation in the destination country, whether this entails the migrant worker's first

employment or a second job if he or she becomes unemployed. The rules relating to recognition of diplomas and qualifications can also greatly affect the skill level of employment migrant workers are permitted to access, thus having a significant impact on the degree of their economic and social contribution to the destination country as well as in terms of their remittances and potential means to enhance development of their countries of origin.

While States retain sovereign rights over their migration policies, international law has established a number of principles providing for equality of treatment between regular migrant workers and nationals in the realm of employment and occupation, including monitoring of terms and conditions of employment, access to vocational training, language and integration courses, allowing for freedom of association, and protection against discrimination. Core universal human rights apply to all migrants, regardless of their status, and a broad array of international labour standards provide for protection in treatment and conditions at work.

Social cohesion in destination countries will be facilitated considerably if discrimination against migrant workers and their families can be addressed and eliminated. Moreover, appropriate measures assisting the integration of migrants in society and providing possibilities for family reunification also play an important role in preventing the marginalization of migrants and promoting social cohesion.

The social welfare of migrant workers and their families in destination countries is enhanced by proper access to health care, housing and education on equal terms to those afforded nationals. These areas are also manifested strongly in important social rights protected in international human rights and labour law and to which nearly all OSCE participating States are committed.

Migrant workers are confronted with particular difficulties in the field of social security, as social security rights are usually related to periods of employment, contributions or residency. Migrant workers risk the loss of entitlements to social security benefits in their country of origin due to their absence, and may at the same time encounter restrictive conditions in the host

country with regard to their coverage by the national social security system. Therefore, migrant workers have specific interests in obtaining equal access to coverage and entitlement to benefits as national workers; maintaining acquired rights when leaving the country (including the export of benefits); and benefiting from the accumulation of rights acquired in different countries.

## *VIII. Measures to Prevent or Reduce Irregular Labour Migration*

There are a number of good reasons explaining why irregular labour migration should be prevented or reduced, such as the need to ensure the credibility of legal immigration policies, protect irregular migrant workers from exploitative and abusive situations, and maintain good relations among origin, transit and destination countries.

By and large irregular migrants comprise two groups of persons. First, there are those who arrive clandestinely, sometimes with tragic consequences. The second group comprises those persons who arrive legally (for example, with tourist or student visas) and then overstay the period for which their visas are valid. It is widely acknowledged that the majority of irregular migrants fall into the second group.

Concerns over widespread abuses relating to irregular migration have resulted in a number of responses by the international community focusing on the prevention of these abuses by requiring States to take measures to detect, eliminate and apply sanctions for the clandestine movements of migrants in abusive conditions and illegal employment, including labour trafficking, and on protecting the rights of irregular migrant workers, particularly their fundamental human rights as well as their rights arising out of past employment (unpaid wages, etc.).

A comprehensive or holistic approach is necessary to address the problem of irregular labour migration. Four governing principles should underpin action to prevent or reduce irregular migration:

1. An isolationist approach is bound to fail, and strengthening dialogue, cooperation and partnerships between all countries affected by irregular migration is critical;
2. It is necessary to adopt a set of measures that are both comprehensive and complementary;
3. Control or restrictive measures alone are insufficient; and
4. A cross- or multi-sectoral approach is essential, engaging not merely the participation of governments, but also the social partners and civil society. In particular, the problems of the informal labour market cannot be adequately addressed without the participation of employers and unions.

A series of comprehensive measures to prevent or reduce irregular labour migration can therefore be envisaged at all stages of the migration process encompassing activities in countries of origin; border controls and the articulation of a viable visa policy; measures and sanctions against those who facilitate irregular migration, including traffickers, smugglers and exploitative employers; safeguards for irregular migrant workers; regularization or legalization programmes; return measures with an emphasis on promoting voluntary departure; opening up more legal channels for labour migration; and inter-state cooperation.

## *IX. Inter-State Cooperation*

Dialogue and cooperation among States involved in labour migration processes is essential if international labour migration is to benefit all the stakeholders involved (i.e. destination and origin countries, migrant workers, employers, trade unions, recruitment agencies, civil society, etc.). There are different levels of inter-state cooperation, both formal and informal, in which States are involved at the bilateral, regional and global level.

Formal mechanisms of inter-state cooperation are essentially legally binding treaty commitments relating to cooperation on labour migration, which States have concluded. These agreements may take the form of treaties solely concerned with this subject, as is the case with bilateral labour agreements, or broader

agreements, such as the specific regional and international conventions relating to the protection of migrant workers, which include provisions on inter-state cooperation. States have also entered into important formal commitments on international trade relevant in the context of the movement of persons as service providers.

Bilateral labour migration agreements (BLAs) formalize each side's commitment to ensure that migration takes place in accordance with agreed principles and procedures. BLAs can set up procedures for regulating the whole labour migration process from entry to return, with advantages for both destination and origin countries. For countries of origin, in particular, they ensure their nationals obtain employment and are adequately protected in the destination country.

The principal purposes of BLAs are: economic, with a view to filling temporary shortages in the domestic labour market, such as those in the agricultural sector, while at the same time enabling the migrant and the country of origin to benefit from increased earnings; political, whether to confirm friendly relations or reinforce cooperation in managing irregular migration; and development, with a view, for example, to preventing indiscriminate international recruitment in sectors, such as health services, which have a direct bearing on development in poorer countries.

While some disadvantages have been identified with BLAs, in the absence of a global regime for international labour migration they remain an important mechanism for inter-state cooperation in protecting migrant workers, matching labour demand and supply, managing irregular migration, and regulating recruitment. Where BLAs have worked as a mechanism for the temporary employment of foreign workers, the main reasons seem to be that they target specific sectors with a severe labour shortage; there is a quota or ceiling; recruitment is organized; employers are engaged; and, above all, there is circulation of labour. Moreover, the involvement of employers and their organizations in the implementation of BLAs contributes significantly to their efficiency.

Regional cooperation for the management of labour migration can be divided into formal mechanisms

of regional integration, including free movement of labour initiatives and state obligations to cooperate in regional treaties, and less formal mechanisms, such as regional consultative processes and other informal arrangements.

Labour migration is facilitated to a greater or lesser degree by regional integration processes, which are usually driven by economic factors, such as the establishment of free trade arrangements between countries in the region, with a view to optimizing the potential of markets and economic opportunities. They normally include provisions for the facilitation of the movement of nationals from participating Member States for the purposes of employment and residence. Such arrangements may range from extensive free movement regimes applicable to all categories of persons, including workers, as in the EU, to more limited provisions focusing on the movement of business visitors, professionals, other highly-skilled persons, and service providers, which is the position under the North American Free Trade Agreement. Regional integration in the CIS has also been pursued at various levels, although the results have been mixed.

At the global level, there is no comprehensive international migration regime currently in operation. The admission of persons to States for the purpose of employment is regulated principally by national laws and policies. However, a number of formal mechanisms have been developed at the global level, under the auspices of international human rights and labour treaties or international trade arrangements, such as the 1994 General Agreement on Trade in Services (GATS) which contains globally applicable rules of relevance to the mobility of workers in the context of the trade in services. These rules are found in Mode IV of the Agreement and enable "natural persons" to cross an international border for the purpose of providing a service, although, for the moment, these rules are limited in practice to a narrow category of migrants. In the context of recent WTO trade negotiations, however, delegations from developing and least developed countries have sought greater access for their nationals to labour markets in developed countries.

Reaching formal commitments in focused bilateral labour agreements, regional integration mechanisms,

and regional and international conventions is important for facilitating orderly labour migration and protecting migrant workers. When these agreements are difficult to achieve, as is sometimes the case, other solutions can prove an effective tool for interstate cooperation. These include non-binding consultative mechanisms such as regional consultative processes, joint commissions on labour, and working groups.

Regional consultative processes (RCPs) are an example of non-binding fora bringing together migration officials of States of origin and destination to discuss migration-related issues in a cooperative way. There are two basic characteristics common to RCPs. They are informal and the results, though consensual, are non-binding. Although the focus of such processes depends on the interests of the parties involved, a key in the successful functioning of an RCP is the basic acknowledgement of a shared interest in migration management, despite national interests and experiences. While few RCPs focus exclusively on labour migration, this topic is becoming an increasingly important agenda item. Other formats for non-binding consultations between countries of origin and destination are joint commissions of labour, round tables and study committees or working groups.

On the global level, the Berne Initiative is a state-owned consultation process with the objective of obtaining better management of migration at the national, regional and global levels through enhanced co-operation between States. The process assists governments in sharing their different policy priorities and identifying their longer-term interests in migration with a view to developing a common orientation to migration management. The most important outcome of the Berne Initiative has been the development of the International Agenda for Migration Management (IAMM), a non-binding source and broad policy framework on migration management at the international level. IAMM sets out a number of common understandings and effective practices for a planned, balanced and comprehensive approach to the management of migration, including labour migration and the human rights of migrants.

In June 2004, the 92nd Session of the International Labour Conference held a general discussion on migrant workers based on an “integrated approach”. The Conference adopted by consensus a Resolution concerning a fair deal for migrant workers in a global economy, which called upon ILO and its constituents to implement, in partnership with other relevant international organizations, a plan of action on labour migration. A major element in this plan was the development of a non-binding multilateral framework for a rights-based approach to labour migration which takes account of labour market needs. This Framework approved by the Tripartite Meeting of Experts in November 2005 and submitted to the ILO Governing Body in March 2006, underlines the importance of international cooperation in dealing with labour migration. The Framework contains four broad themes: decent work for all; management and governance of labour migration; promotion and protection of migrant rights; and labour migration and development. Because the Framework is non-binding, the text focuses on the principles and guidelines that should assist Member States in formulating labour migration policy measures and in implementing them.

Inter-state cooperation is vital to an orderly and managed labour migration system. In the absence of a widely accepted international migration system for labour migration (i.e., expansion of GATS to encompass broader categories of service providers and increased ratification of international human rights and labour standards protecting migrant workers), the need to expand and develop international, regional and bilateral cooperation, through formal and informal means, and on the basis of existing best practices, is particularly relevant.

## *X. Conclusion*

The *Handbook* attempts to provide direction for policy-makers in countries of origin and of destination by providing information on effective policies and practices which have evolved in countries with substantial experience in this field, taking account of the local context.

Both countries of origin and destination face common and different priorities and issues, in terms of emphasis, in formulating labour migration policy. The primary concern for countries of origin is to ensure as far as possible the protection and welfare of their migrant workers, particularly those more vulnerable to abuse such as women household employees. An equally important concern of countries of origin is optimizing the development benefits from organized labour migration. These policy objectives can only be met, however, if there is adequate institutional capacity and inter-ministerial coordination to carry them out, as well as inter-state cooperation.

With regard to destination countries, observations and assessments of recent policy-making on labour migration at the national level indicate that, given demographic and welfare imbalances in most European countries, serious consideration has to be given increasingly to certain forms of permanent employment-based immigration. At the same time, a considerable majority of migrant workers, who are lawfully employed in European countries, have been admitted in the context of temporary labour migration schemes, sometimes facilitated by bilateral labour arrangements. Policy-makers face challenges in making these programmes work, while simultaneously protecting the interests of their national workforce (both nationals and lawfully resident migrants) and providing sufficient safeguards for migrant workers admitted under these schemes.

However, given the transnational nature of labour migration, a policy framework developed solely at the national level, irrespective of how innovative or meticulously crafted, will be insufficient to meet all the challenges posed. Consequently, such a framework should be firmly rooted in bilateral, regional and multilateral mechanisms, both of a formal and informal co-operative nature, which inform and supplement national approaches. In this regard, it is important to underline the role of the international legal framework.

Governments, employers' and workers' organizations, parliamentarians, and civil society organizations in all countries, which are participating States of the OSCE, and ILO and IOM Member States, have a fundamental role to play in assuring a regulated and effective approach to international labour migration. Such an approach offers the best route to ensuring that labour migration becomes truly an instrument of development, regional integration, and social welfare in home and host countries, as well as for migrants themselves.

# Intro

## Introduction

Of the estimated 191 million migrants worldwide, more than 86 million are thought to be labour migrants. This figure is much higher, if one takes into account accompanying dependents. The management of migration flows is crucial, given this magnitude and the likelihood that international labour migration will increase in the future. Labour migration, or the movement of people across borders for employment, has moved to the top of the policy agendas in many countries of origin, transit and destination. Governments at both ends of the migration spectrum are increasing their regulatory capacities to manage labour mobility

for the mutual benefit of society, migrants, and the state. At the same time, by its very nature, migration for the purpose of employment is a cross-border or a transnational phenomenon, and cannot therefore be managed or addressed solely at the national level. The development of effective, fair and durable labour migration policies and practices requires cooperation among all states involved in the process (i.e. countries of origin, transit and destination) at all levels of government, together with other key stakeholders, namely social partners (employers and trade unions) and civil society organizations.

International labour migration is an unavoidable yet necessary reality for most countries, including Member States of the International Organization for Migration (IOM), the International Labour Organization (ILO) and participating States of the Organization for Security and Co-operation in Europe (OSCE),<sup>1</sup> will be facing in the coming decades. While states can be categorized as origin and destination countries, or sending and receiving countries, and indeed face both common and different priorities and issues, in terms of emphasis, in formulating labour migration policy, migration is a dynamic process and today's countries of origin may be tomorrow's countries of destination.<sup>2</sup> The experience of central and southern European countries is a particularly good example of the changing dynamics of migration. Moreover, to a certain degree, many countries are also both countries of origin and destination.

Given that the mobility of persons for reasons of employment is here to stay in our globalizing world and likely to increase, comprehensive, efficient and eq-



# duction

uitable management of labour migration is needed to maximize its positive impact and minimize any negative effects for both countries of origin and destination as well as for migrant workers and their families.<sup>3</sup>

## *Background*

Migrants generally, and migrant workers in particular, are actors in development, in both destination and origin countries. They contribute skills, labour, knowledge and initiative to the progress of host countries. They also make major contributions to home countries with their remittances and the return of talent, which contribute to improving human capital and local economies. Labour migration has become a key feature in enabling industrialized countries to meet economic, labour market and productivity challenges in a globalized economy. Migration today serves as an instrument for adjusting the skills, age and sectoral composition of national and regional labour markets. It provides responses to fast-changing needs for skills and personnel due to technological advances, changes in market conditions, and industrial transformations. In countries with aging populations, migration offers a potential for replenishing a declining work force, as well as injecting younger workers, and increasing dynamism, innovation and mobility in the labour force.

A growing body of knowledge amply demonstrates that both male and female migrants make large contributions to economic and social development in both their host and home countries. Numerous studies show that migrants fill vital jobs unwanted by natives,

and that their presence, activity and initiative create additional employment. Migrant contributions to social security systems are helping balance national accounts in a number of countries, even though many will never benefit from their own contributions. By working at low or sub-standard wages, migrants contribute significant subsidies which ensure cheap farm produce, accessible services, affordable buildings, and available health care for example, although they challenge, sometimes involuntarily, prevailing wage and conditions levels in host countries (ILO, 2004a).

Migrant contributions to scientific, social, cultural and sports accomplishments are legend in the histories and identities of many immigration countries.

By volume, with official transfers to developing countries estimated at over US\$160 billion in 2005, migrant remittances are the largest international exchange value after petroleum, and far above current levels of international development aid. While it is often stated that migrant remittances to their home countries, usually developing nations, are expended primarily on consumption, much of this spending is apparently invested in improving housing, nutrition, healthcare and educational levels for families back home. These expenditures clearly have a substantial positive impact on improving human capital, which is the most basic component of development, and have multiplier effects on expanding local activity in construction, food production, and health care and educational facilities.

An urgent priority today is to reduce the cost of remittance transfers, so that the largest proportion pos-

sible arrives for the beneficiary family and community, rather than being paid to financial intermediaries in the form of transfer costs and fees, sometimes reported at rates of 20 per cent or more.

The social and labour conditions of migrant workers and the degree of migrants' integration determine the levels and degree of economic and social contributions they make to social and economic welfare in host countries. Specifically, the conditions of migrant workers directly affect both their abilities to remit part of their earnings and to acquire skills and knowledge which will be useful on their return or during permanent settlement elsewhere. Thus, these conditions have a direct bearing on the level and nature of migrant contributions to social welfare, human capital formation, and development, especially in their countries of origin. For example, employment earnings denied to migrants in exploitative conditions or which deported migrants are unable to obtain prior to departure are economic resources not only stolen from the affected workers, but in effect expropriated from the countries of origin to which a significant part would have been remitted.

While protection of the human rights of all migrants is a legal, political and ethical imperative in its own right, regardless of economic, financial or other considerations, protection of migrant workers, campaigns against discrimination, equality of treatment, and encouragement of integration are demonstrably essential measures for ensuring that migration indeed contributes substantially and positively to development, economic and social, in host and home countries alike.

Labour migration, a phenomenon involving human beings in situations of potential exploitability and inadequate protections, is not one that can be left to market mechanisms alone to regulate. Deliberate policies and practices by states and concerned stakeholders are required to ensure that migration benefits both host and origin countries and the migrants themselves.

In recent years, international dialogue and consultation on migration has increasingly focused on identifying common approaches and means for cooperation

among states in regulating what is by definition a phenomenon requiring international cooperation. A decade ago, delegates of some 160 countries agreed upon a comprehensive common agenda in the chapter on migration of the Plan of Action adopted by the 1994 International Conference on Population and Development (ICPD) in Cairo (UNFPA, 1994). In 2001, the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance adopted the Durban Declaration and Programme of Action with specific elements to address treatment and integration of foreigners (UN, 2002).

Over the last several years, regional migration dialogues, in Africa, the Americas, in the Caucasus-Central Asia region and South-east Asia, have continued discussions and elaborated common approaches. At the global level, the Berne Initiative, for which the IOM provided the Secretariat, resulted in the International Agenda for Migration Management (Swiss Federal Office for Migration, 2005a; IOM 2005d), which sets out a number of common understandings and effective practices for a planned, balanced and comprehensive approach to the management of migration, including labour migration.

Another important contribution was the adoption of Conclusions and a Plan of Action for migrant workers at the 2004 International Labour Conference in Geneva. These Conclusions outline a rights-based approach to regulating labour migration in the context of labour market and employment considerations. They were adopted unanimously by ministerial level government representatives and leaders of trade union and employer federations from the 177 ILO Member countries. Following this Plan of Action, the ILO subsequently elaborated a non-binding Multilateral Policy Framework for Labour Migration from a rights' based approach that takes into account labour market concerns and the sovereignty of states (ILO, 2005a). These developments are presented in more detail in Chapter IX of the *Handbook* on Inter-state Cooperation.

Migration policies and practices can only be viable and effective when they are based on a firm foundation of legal norms, and thus operate under the rule of law. As such, therefore, they must conform to the minimum standards accepted by all OSCE participating

States, and IOM and ILO Member States in international human rights and international labour law. Many of these standards are reiterated at the regional level. There are also specific international standards relating to the protection of migrant workers and members of their families. The two ILO Conventions on Migration, the Migration for Employment Convention 1949 (No. 97) and the Migrant Workers (Supplementary Provisions) Convention 1975 (No. 143), together with the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), provide a broad legal framework for the development of migration policies and practices with respect to the treatment of migrant workers. Together, these three instruments comprise an “international charter” for the protection of migrant workers and provide a normative framework covering most issues concerning their treatment and related inter-state cooperation. Seventy-six countries have now ratified one or more of these three instruments, including a significant number of OSCE participating States, and ILO and IOM Member States. This international legal framework is elaborated in Chapter I.

At the same time, labour migration policy can only be credible and sustainable to the extent it takes into account the interests, concerns and experience of the most directly affected stakeholders. Key stakeholders are the many ministries and agencies within government with responsibility for labour migration, including of course labour ministries. Consultation and policy-making must also take into account the other stakeholders: employers’ organizations and businesses that provide employment; workers’ organizations representing the interests of both migrant and national workers; civil society bodies; and certainly men and women migrants themselves.

Migration policies and practices have to respond to measured and legitimate needs, which also take into account domestic labour concerns. Such a system must rely on regular labour market assessments to identify and respond to current and emerging needs for workers, both high- and low-skilled. Policy and practice will need to address such areas as awareness raising, supervision of recruitment, administration of admissions, training of public service and law enforce-

ment officials, recognition of educational equivalencies, provision of social and health services, labour inspection, rights restoration and recovery for victims of trafficking, as well as many other areas.

## *Why a Handbook on Labour Migration?*

Labour migration, or the movement of people across borders for employment, has moved to the top of the policy agendas in many countries of origin, transit and destination. Governments at both ends of the migration spectrum are increasing their regulatory capacities to manage labour mobility to the mutual benefit of society, migrants and the State. Many are turning more and more to IOM and ILO and other relevant organizations for expert support in the formulation of effective labour migration policies. An increasing number of developing countries and countries with economies in transition seek to adopt policies to promote foreign employment for a part of their workforce and thus generate remittances, while providing safeguards to protect their citizens abroad. Some middle-income countries are also destination countries and are seeking ways to improve management of their labour inflows. Many high income countries, while having long-standing migration policies, must continually adjust to meet labour market needs, attract skilled migrants, reduce irregular migration and mitigate brain-drain.

Migration was placed on OSCE’s agenda in 1975, with the adoption of the Helsinki Final Act (1975), which identified freedom of movement as one of its founding commitments,<sup>4</sup> and which addressed directly the international migration of workers (Textbox 1).

Due to recent labour migration trends in the OSCE area, a number of OSCE participating States have accommodated significant numbers of migrants, while sometimes lacking the policy and legal frameworks for migrants’ protection. Issues related to the human rights of migrants and migrant workers, in particular, have been receiving increasing attention from OSCE over the last few years. OSCE has developed several

## Final Act of the Conference on Security and Co-operation in Europe – Helsinki 1975

### **Economic and social aspects of migrant labour**

The participating States ... are of the opinion that the problems arising bilaterally from the migration of workers in Europe as well as between participating States should be dealt with by the parties directly concerned, in order to resolve these problems in their mutual interest, in the light of the concern of each State involved to take due account of the requirements resulting from its socio-economic situation, having regard to the obligation of each State to comply with the bilateral and multilateral agreements to which it is party, and with the following aims in view: ...

- to ensure, through collaboration between the host country and the country of origin, the conditions under which the orderly movement of workers might take place, while at the same time protecting their personal and social welfare, and, if appropriate, to organize the recruitment of migrant workers and the provision of elementary language and vocational training;
- to ensure equality of rights between migrant workers and nationals of the host country with regard to conditions of employment and work and to social security, and to endeavour to ensure that migrant workers may enjoy satisfactory living conditions, especially housing conditions;
- to endeavour to ensure, as far as possible, that migrant workers may enjoy the same opportunities as nationals of the host countries of finding other suitable employment in the event of unemployment;
- to regard with favour the provision of vocational training to migrant workers and, as far as possible, free instruction in the language of the host country, in the framework of their employment; ...
- to ensure that the children of migrant workers established in the host country have access to the education usually given there, under the same conditions as the children of that country ...
- to bear in mind that migrant workers, particularly those who have acquired qualifications, can by returning to their countries after a certain period of time help to remedy any deficiency of skilled labour in their country of origin;
- to facilitate, as far as possible, the reuniting of migrant workers with their families;
- to regard with favour the efforts of the countries of origin to attract the savings of migrant workers, with a view to increasing, within the framework of their economic development, appropriate opportunities for employment, thereby facilitating the reintegration of these workers on their return home.

important commitments to facilitate the movement of people across borders, as well as within their own countries. There are also specific commitments related to the treatment of migrant workers.<sup>5</sup>

The year 2005 saw unprecedented attention devoted to migration issues by the OSCE, as the Slovenian Chair of the OSCE selected the issue of migration and integration as a priority theme of the year. Moreover, the Slovenian Chairmanship decided to make full use of the unique three-dimensional nature of the OSCE to look at this complex topic in a comprehensive manner: from the political and security, economic and environmental, and human dimension perspectives.

The Slovenian Chair also introduced the subject of (labour) migration management into OSCE's Economic and Environmental Dimension (see Annex 2). The demographic reality in the OSCE area and neighbouring countries constituted the background for discussions on migration during the preparatory process and at the OSCE 13th Economic Forum on "*Demographic Trends, Migration and Integrating Persons belonging to National Minorities: Ensuring Security and Sustainable Development in the OSCE area*", held in Prague on 23-27 May 2005 (OSCE, 2005a). During this discussion, it became even more obvious that migration would continue to represent a growing challenge for the OSCE participating States and that effective mechanisms to improve the management of migration

TEXTBOX 2

### 13th OSCE Ministerial Council Decision No. 2/05 Migration

#### The Ministerial Council,

Reaffirming the commitments related to migration, and in particular regarding migrant workers, and other relevant commitments, especially those recognized in the Helsinki Final Act (1975), the Madrid Document (1983), the Vienna Final Document (1989), the Copenhagen Document (1990), the Charter of Paris for a New Europe (1990), the Moscow Document (1991), the Helsinki Document (1992), the Budapest Document (1994) and documents adopted by the Ministerial Council in Maastricht (2003) and Sofia (2004),

Recognizing the increasing importance of migration, as well as the challenges and opportunities that it presents to participating States,

Further recognizing that migration is becoming a more diverse and complex phenomenon, which needs to be addressed in a comprehensive manner and therefore requires a cross dimensional approach at the national, regional and international levels,

Recognizing that all States should adopt effective national frameworks in order to manage migration,

Underlining that migration is inherently a transnational issue requiring co-operation between States,

Acknowledging that migration constitutes an important economic, social and human factor for host countries as well as for countries of origin,

Acknowledging also that successful integration policies that include respect for cultural and religious diversity and promotion and protection of human rights and fundamental freedoms are a factor in promoting stability and cohesion within our societies,

Determined to fight illegal migration and to address its root causes,

Bearing in mind the different approaches to migration issues by the OSCE participating States, and drawing on their experience and best practices,

Taking into account the initiatives taken and the work done by the OSCE during 2005 in addressing the issue of migration and integration, in particular, the Human Dimension Seminar on Migration and Integration, the Thirteenth OSCE Economic Forum and the 2005 Mediterranean Seminar,

Welcoming the existing co-operation between the OSCE, in particular, the Office for Democratic Institutions and Human Rights (ODIHR) and the Office of the Co ordinator of OSCE Economic and Environmental Activities (OCEEA), and relevant international organizations and institutions,

Considering that the OSCE, within its comprehensive approach to security, could contribute, *inter alia*, by:

- Working in synergy and developing a stronger partnership with international bodies having a specific focus on migration,
- Facilitating dialogue and co-operation between participating States, including countries of origin, transit and destination in the OSCE area, as well as the OSCE Partners for Co-operation and Mediterranean Partners for Co-operation,
- Assisting the participating States, upon their request, to develop effective migration policies and to implement their relevant OSCE commitments,
- Inviting participating States to consider becoming parties to relevant international instruments,

Tasks the Permanent Council to follow up the work initiated in 2005 and to report to the Fourteenth Meeting of the Ministerial Council;

Tasks the Secretary General as well as relevant OSCE institutions and structures, to continue their work on migration issues in all three dimensions.

Source: OSCE (MC. DEC/2/05).

should be put in place (including legislation and policy development, institutions and structures, enhanced dialogue and co-operation at both national, regional and international levels, capacity building, training of personnel and more attention paid to sustainable development). At the Economic Forum, management of labour migration was thoroughly discussed. The Forum and its preparatory process highlighted the links between migration and such factors as economic development through remittances and skills transfer, the environment, security and stability, human rights, organized crime, including trafficking and smuggling of persons, and human capital and brain drain, to mention just a few examples.

Consequently, the work on migration was firmly placed on OSCE's agenda of political priorities and this was reiterated at the 13th OSCE Ministerial Council held in Ljubljana in December 2005, where Decision No. 2/05 on Migration was adopted. This Decision reaffirmed previous OSCE commitments related to migration and in particular those regarding migrant workers. Importantly, the Decision recognized that "migration is becoming a more diverse and complex phenomenon, which needs to be addressed in a comprehensive manner and therefore requires a cross-dimensional approach at the national, regional and international levels", and that "all States should adopt effective national frameworks in order to manage migration" (OSCE, 2005b). It also encouraged OSCE to contribute by "facilitating dialogue and co-operation between participating States, including countries of origin, transit and destination in the OSCE area" and "assisting the participating States ... to develop effective migration policies and to implement their relevant OSCE commitments" (OSCE, 2005b) (Textbox2).

The development of this *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* is, on one hand, a direct follow-up to the recommendation made by the Slovenian Chair at the Economic Forum to prepare a handbook on migration management policies based on good practices in the OSCE area and beyond. This idea received broad support at the Forum and later meetings of the Economic and Environmental Sub-Committee of the Permanent Council.

The *Handbook* is also the result of work undertaken by IOM and ILO to prepare training curricula, operational guidelines, and tools for its constituents in the effective management of labour migration. It has been prepared by IOM's Labour Migration Division, with the assistance of ILO and OSCE, and external experts.

Both IOM and ILO offer considerable experience in the field of migration. Established in 1951, IOM is the principal intergovernmental organization in the field of migration and is dedicated to promoting humane and orderly migration for the benefit of all. IOM's purpose in labour migration is to facilitate the development of policies and programmes that can individually and mutually benefit concerned migrants, governments and societies. IOM's activities in the field of labour migration have increased significantly in recent years, with several active programmes on labour migration in most regions of the world. These programmes comprise broadly: government capacity-building; assisting with pre-departure orientation for, and the provision of information to, migrant workers; facilitating the establishment and implementation of bilateral labour migration arrangements; enhancing the development impact of remittances; and supporting inter-state dialogue and cooperation on labour migration. ILO has a long-standing mandate to protect persons in their working environment, including those who are outside their own countries (i.e., migrant workers), and to promote decent work for all persons. Its unique tripartite structure, recognized role in setting and supervising international labour standards aimed at protecting the rights of all workers, and its expertise in promoting productive employment allows it to play a distinctive role in the field of international labour migration. The activities of the three organizations on labour migration are elaborated in Annex 1 of this *Handbook*. Individual contributors to the *Handbook* from the three international organizations involved in this project, together with outside experts, are identified in the Acknowledgements.

The objective of this *Handbook* is to assist states, particularly those in the OSCE area, in their efforts to develop new policy solutions and approaches for better management of labour migration and labour migration flows in countries of origin and of destination. It has been prepared primarily for use by decision-makers

and labour migration practitioners in the OSCE area and countries served by IOM and ILO and contains analysis of effective labour migration policies and practices, drawing upon examples from OSCE participating States as well as other countries, particularly in Asia, which have considerable experience in this field and have developed numerous innovative policies and good practices.

The purpose of the *Handbook* is twofold:

- to provide current and useful information on labour migration policies in both origin and destination countries as well as recent pertinent developments;
- to assist policy-makers in OSCE countries in the task of designing or revising their policies by providing examples of good and effective policies and practices.

It will also be useful to policy-makers in non-OSCE states, as well as to social partners, the media, non-governmental organizations (NGOs), academia and the general public by providing accurate and reliable information on labour migration policies and practices.

After the launch of the *Handbook* in May 2006, it is proposed that two specialized regional and/or national workshops will be organized to allow decision-makers and practitioners from interested countries to discuss specific areas of the *Handbook* in more detail. The aim will be to assist participants in these workshops not only in familiarizing themselves with effective practices carried out in other countries, but also in discussing how particular policies presented in the *Handbook* might be adapted or developed to suit their specific migration management situations and in identifying key steps to be undertaken by their respective governments to address specific labour migration needs.

The *Handbook* and subsequent workshops will also help to create a basis for future dialogue and co-operation among various national authorities and other stakeholders, and directly facilitate the exchange of information among states in the OSCE area on effective (as well as less effective) policies and practices related to labour migration management.

## *Labour Migration Trends and Characteristics*

### Trends in labour migration

Over the last 45 years, the number of persons living outside their country of birth has more than doubled, from an estimated 75 million in 1960 to nearly 191 million in 2005 (UN, 2006a: 1). Worldwide, one in every 35 persons is a migrant. This trend of increasing international migration and migrants in absolute terms can be expected to continue in the coming decades. Nevertheless, it should be borne in mind that, during the same period, the world's population also grew two-fold and the proportion of migrants in the total population remains about 3 per cent (IOM, 2003b). Estimates put the number of migrant workers at over 86 million (ILO, 2004a: 7, para.9) and, although there has been an increase, migrant workers represented no more than 4.2 per cent of the industrialized countries' total work-force in 1998 (ILO, 2004a: 5, para.17).

While the majority of international migrants originate from developing countries, it is not only a "South-North" or "East-West" phenomenon. Nearly half of all reported migrants move from one developing country to another (ILO, 2004a: 15, para.18). Intra-regional flows are also significant.

### Driving forces

Three key determining factors will continue to fuel international labour migration;

- the "pull" of changing demographics and labour market needs in high income countries;
- the "push" of wage differentials and crisis pressures in less developed countries;
- established inter-country networks based on family, culture and history.

From the migrant's point of view, migration is often a livelihood strategy, since most migration is for economic purposes. It is an outcome of decisions made by individuals and families that are seeking the best solution, given the opportunities and constraints they face.

## Type of flows

A large proportion of labour migration is unauthorized. This is a negative feature of the phenomenon and measures for preventing or reducing irregular labour migration are discussed in the *Handbook* (see Chapter VIII below). The labour market needs both skilled and lower skilled workers. While destination countries are now competing for highly skilled workers, many host societies are becoming more hesitant about admitting lower skilled workers. Nevertheless, there are frequently acute shortages of labour in lower skilled sectors in some countries, given that these are jobs that nationals are reluctant to take and that, consequently, governments are designing temporary worker programmes to meet labour needs in these sectors. Examples of such programmes and how they work are provided in the *Handbook* (see Section VI.4 below).

## Feminization of labour migration

Almost half of the 191 million migrants in the world today are women (UN, 2006: 3) (see Table 1). While women have always migrated as spouses and family members, they are increasingly migrating independ-

ently. Women migrants take up both skilled and less-skilled employment in destination countries, although in both cases, these tend to be gender-specific jobs or jobs in sectors where women predominate. As skilled migrants, women frequently work in the welfare and social professions, as teachers, social workers and nurses. As less-skilled migrants, they are mainly employed as domestic or care workers, as “entertainers”, in the garment manufacturing industry and, to a lesser extent, in agriculture (Piper and Satherthwaite, 2006). In a number of European countries (particularly in France, Italy and Spain), the Gulf States, and in some countries in the Middle East (e.g. Jordan and Lebanon), the domestic service sector remains the most important employment category for migrant women (Piper and Satherthwaite, 2006).

However, when international labour migration is discussed from a gender perspective, women are too often portrayed as victims of trafficking and other exploitative practices, largely because of the gender-segregated sectors in which many migrant women tend to work, such as domestic services, and due to the fact that they are much more prone to suffer discrimination on account of their gender than their male coun-

TABLE 1

### Percentage of Female Migrants among the Total Number of International Migrants, by major area, 1960-2000

Major Area	1960	1970	1980	1990	2000
World	46.6	47.2	47.4	47.9	48.8
More developed regions	47.9	48.2	49.4	50.8	50.9
Less developed regions	45.7	46.3	45.5	44.7	45.7
Europe	48.5	48.0	48.5	51.7	52.4
Northern America	49.8	51.1	52.6	51.0	51.0
Oceania	44.4	46.5	47.9	49.1	50.5
Northern Africa	49.5	47.7	45.8	44.9	42.8
Sub-Saharan Africa	40.6	42.1	43.8	46.0	47.2
Southern Asia	46.3	46.9	45.9	44.4	44.4
Eastern and South-eastern Asia	46.1	47.6	47.0	48.5	50.1
Western Asia	45.2	46.6	47.2	47.9	48.3
Caribbean	45.3	46.1	46.5	47.7	48.9
Latin America	44.7	46.9	48.4	50.2	50.5

Source: Zlotnik (2002).



TEXTBOX 3

### Women Migrant Workers and the Need for Gender Sensitive Policies

“Times have changed, and today more and more women migrate not to join their partner, but in search of employment in places where they will be better paid than in their home country.”

“[M]any female migrants are more vulnerable to human rights abuses since they work in gender-segregated sectors of the economy, such as domestic work, entertainment and the sex industry, unprotected by labour legislation or policy. Many women are in unskilled jobs with limited prospects for upward mobility; they earn low wages, work long hours, and have little or no job security or rights to social benefits. They are frequently unaware of their rights and obligations, and hesitate to lodge formal complaints against employers or others, preferring to suffer harassment and violence. ...

Despite these difficulties and constraints, migration can empower and help to emancipate migrant women. It offers new opportunities and financial independence abroad as well as status within their family and home community. ...

Female migrant workers are major contributors to their home country’s foreign revenue through remittances. ... [W]omen... have [also] forged effective infor-

mal trade links between their home and host countries. Women migrants are becoming agents of economic change.”

“The factors leading to female migration and those conditioning the outcome are likely to differ from those relating to male migration. Immigration and emigration policies and regulations are often gender-insensitive and not gender-neutral in intent or impact. Policies and regulations often reproduce and intensify existing social, economic and cultural inequalities between men and women [...]. The over-generalization/misperception that “men migrate; women are trafficked” can lead to additional biases in migration policies.

It is not only emigration and immigration policies that should be gender-sensitive. Broader economic and social policies and legal provisions that perpetuate or reinforce gender inequality or discrimination in a country should also be addressed.”

Sources: IOM (2003c: 7, Textbox 1.1), ILO (2003c – *Booklet 1: Why the focus on women international migrant workers*, pp. 11, 13 and 50).

terparts. In this respect, they often suffer ‘double’ discrimination, as women and as migrants. While these abuses and exploitation are certainly widespread, the migration of women can also bring numerous benefits to themselves and their families and also to the development of their countries of origin. Therefore, women migrants are increasingly becoming important actors in the economic transformations taking place in their home societies. Consequently, it is important that policy-makers become more aware of the significant role that women play in labour migration and the specific issues their migration raises. They should also ensure that gender aspects of labour migration are mainstreamed into the relevant policies developed both in countries of origin and destination.

### The OSCE Area

The OSCE countries span a number of regions displaying quite different characteristics in terms of migration. Firstly, the OSCE area includes two traditional countries of immigration, Canada and the United States, both of which receive immigrants for permanent settlement, including those who come for employment-related reasons. However, these countries have also established and increasingly utilize temporary labour migration programmes, particularly for less-skilled jobs.

Secondly, OSCE encompasses the whole of the European Union (EU), which constitutes the quintessential labour migration system, with its free movement of

## Labour Migration to the Russian Federation

The Russian Federation has become a significant destination country for migrants. Labour migration to Russia, mainly from CIS countries and East Asia, is by far the most substantial and dynamic migration inflow in the region. According to data from the Russian Federal Migration Service, employment of regular foreign workers in the national economy has increased over the last 15 years. The number of work permits issued to foreign citizens rose from 129,000 in 1994 to 460,000 in 2004, and to 670,000 in 2005. Regardless of this growth, however, regular labour migration constitutes only 0.5 per cent of the country's economically active population. The majority of migrant workers entering the country avoid official channels and the total number of irregular migrants is estimated at approximately 3 to 5.5 million persons, which comprises 5 to 7 per cent of the active workforce in Russia. This figure is comparable with the percentage of lawfully employed migrant workers in Ireland (5.6%), France (6.2%) and Sweden (4.6%).

The development of labour migration to the Russian Federation today is determined by numerous factors, relating to both the migration pressure on Russia from the poorer neighbouring countries and those with a surplus of labour (CIS countries in the first instance) and Russia's demand for foreign labour. The principal reason for the increase of labour migration in the region is the unfavourable economic situation that has affected nearly all of the CIS countries and resulted in a considerable deterioration in living standards for the majority of the population, poverty, unemployment, and a reduction in economic opportunities and perspectives in countries of origin.

The second reason for the growth in labour migration is the increased differentiation in the level of economic development and standard of living between countries and between particular regions. Despite its own domestic social and economic problems, Russia today has a far higher level of economic development, remuneration of labour, and opportunities for effective employment than almost all the CIS countries. Average salaries in Russia are 10 or more times higher than those in many CIS countries. These factors collectively, together with the cultural and historical similarities between Russia and the CIS countries still in place to this day, explain the *inevitability* of large scale labour migration to Russia.

In addition to demographic factors (discussed in Section II.2.2 below), several economic factors also determine the Russian economy's need for migrant workers. Firstly, the national economic growth, planned by the government for the near and intermediate future, lacks the necessary labour. Though, in late 2005, there were 5.7 million persons unemployed (or 7.7 per cent of the economically active population) in Russia, this level of unemployment is structural in nature and varies unequally from region to region. Labour shortages exist in several regions and are expected to deepen. For example, in Moscow, where the inflow of migrants is significant, there were 32,000 registered unemployed persons against 160,000 announced vacancies at the end of 2005. A considerable number of these vacancies require skilled or qualified professionals (e.g. vehicle drivers) as well as unskilled workers in the area of services, municipal services, etc., yet Muscovites do not want to take these jobs. Consequently, either visitors from other regions, or migrants from other countries, the CIS in the first instance, are required to take these jobs.

The Russian labour market is structured in the same way as those of many host countries. The economic sectors, where foreign workers are mostly in demand, are construction, retail, catering, transport, municipal services, industry, seasonal agricultural employment, domestic work, leisure, and the entertainment industry. The segmentation of the labour market is growing and gradually becoming a structural element of the Russian economy and its regions. The economies of many Russian regions today would not function without the inflow of foreign workers.

In Russia, there is practically no research evaluating migrants' contribution to the Russian economy. However, it is indisputable that:

- foreign workers produce a certain share of GDP;
- they enable many Russian companies, especially small and mid-size enterprises, to compete because of the low cost of foreign labour;
- they improve access to goods and services for a relatively poor section of the Russian population.

TEXTBOX 4

**Labour Migration to the Russian Federation (continued)**

The stability of “the migrant element” in the Russian economy is confirmed by the fact that a certain segment of the labour market, focusing wholly on foreign workers, has been formed. These employment sectors are likely to reproduce and maintain the demand for new migrants and, therefore in the near future, the Russian economy will depend more strongly on the inflow of foreign labour.

The lack of skilled labour represents a serious problem for Russia. To date, Russia has not yet developed any mechanism to attract highly qualified workers, either professionals for production processes or intellectuals. This remains a serious challenge to migration policy for the near future. One such mechanism might be the creation of favourable migration conditions for the admis-

sion of students of higher and vocational educational centres with a view to their future employment in Russia.

Russia is the largest centre of admission in the Euro-Asian migration system, including the CIS countries. Every third household in Tajikistan and Moldova has a migrant working in the Russian Federation. Migrants with dependents in their motherland send home an average amount of US\$100 per month. This money is spent on food, medical treatment and education (i.e. for the purpose of country development). For approximately one quarter of families, this money is the unique source of subsistence. Thus, migration is a powerful factor maintaining social stability in the region.

Source: IOM Moscow (March 2006).

workers regime. This regime has been in operation since the late 1960s and is also supported by a generous framework of social provisions. The enlargement of the EU to 25 Member States in May 2004 increases considerably the geographic space in which free movement of labour occurs, although only a few of the old Member States have opened up their labour markets to workers from the new Member States. As a result, the enlarged regime will probably not be fully operational until May 2011 due to transitional arrangements agreed at the time of the accession of the new Members (Section IX.1.3.2 below).

The EU also serves as a major destination region for migrant workers from outside the EU (third countries). To date, individual EU Member States, in the exercise of their sovereignty, have largely conducted their own admission policies, a number of which are discussed in the *Handbook*. Indeed, within the EU, significant policy differences are discernible at the national level between EU Member States in the north and those in the south, such as Italy and Spain, which have a more recent experience of labour immigration, including significant irregular movements due to the adoption of numerous regularization programmes. However, since the entry into force of the Amsterdam Treaty in 1999 amending the EC Treaty, the EU has obtained a man-

date to develop a common policy on the admission and treatment of third-country nationals arriving in the EU, including persons entering for the purpose of taking up employment or self-employed activities. In this regard, in December 2005, the European Commission advanced a policy plan for legal migration, which lays down a roadmap for EU common policy-making in this area for the next four years (Textbox IX.5) (EU, 2005h).

Thirdly, all the EU Member States as well as OSCE participating States to the east of the EU are Members of the Council of Europe, which has developed its own approach to migration, including the adoption of a number of multilateral legal instruments aimed at regulating the lawful movement of migrant workers within the region and guaranteeing their fair treatment as well as a recent Convention on Action against Trafficking in Human Beings (EU, 2005a). The Council of Europe is also home to the European Convention on Human Rights, discussed in Section I.4 below, which is applicable to its 46 Member States,<sup>6</sup> all of which are also OSCE participating States, and which protects all persons, including non-nationals, present within their borders.

A fourth region, which is rapidly gaining in importance as far as labour migration is concerned, is the

Commonwealth of Independent States (CIS). The largest country in this region, the Russian Federation, is home to the second largest number of migrants after the United States; Ukraine is fourth after Germany and Kazakhstan is ninth.<sup>7</sup> CIS countries are also among the top ten countries of origin in the world. Emigration from CIS countries is dominated by flows to the CIS (80%) with the Russian Federation the principal destination, followed by Kazakhstan and Ukraine. Studies have estimated that there are 3-5.5 million irregular migrants in Russia, but only 300,000 migrant workers with proper documentation in 2005 (Textbox 4). An estimated 2 million of these undocumented workers are from Central Asia, including some 600,000 from Tajikistan, about 10 per cent of the Tajik population, and up to 500,000 from Kyrgyzstan. Many of these migrants are filling a niche in the Russian labour market by doing jobs that Russians do not want. At the same time, labour migration and remittances sent to families have become a survival strategy and a financial safety net. Remittances are estimated at some 4-7 per cent of GDP in Armenia, Georgia and Tajikistan and over 20 per cent of GDP in Moldova. Labour migrants often work in the informal sector in Russia, where the lack of legal protection and insufficient information about workers' rights make them vulnerable to exploitation and abuse from recruiters, employers, and officials (Textbox VIII.1). They are also exposed to abuses resulting from xenophobia and racism.

Labour migration in the Balkans is also moving up the political agenda. Since the early 1990s, Albania has been a significant sending country of migrant workers to neighbouring countries in the region, such as Greece and Italy, but, with the break-up of the former Yugoslavia and the subsequent conflicts, labour migration was not thought to be a matter for serious discussion in most of these countries. However, once the conflicts were settled, the region has, facilitated by the EU, launched a few migration management initiatives. The Albanian government has drafted a migration policy with the assistance of IOM. In February 2006, the IOM and MARRI (Migration, Asylum, Refugees Regional Initiative), with financial support from the United Kingdom government, organized a regional seminar focusing on labour migration in the Western Balkans, attended by senior officials from Ministries of Labour and Interior, as well as independent labour migration

experts.<sup>8</sup> This was one of the first regional meetings of its kind and, having identified the principal issues and problems relating to labour migration of concern to policy-makers in the region, a number of broad conclusions were adopted.

## *Regulation of Migration: The Need for a Deliberate Policy Approach*

States regulate migration in order to attract and manage inflows and, in some cases, to promote and manage outflows. The challenge for states is to manage migration for the benefit of countries of origin and of destination, and of migrants and their families. It is impossible to realise this objective, however, without the establishment of a robust policy approach, which is also sufficiently flexible to respond to the changing dynamics of the labour migration phenomenon.

An important objective of this *Handbook* is to emphasize that successful management of labour migration requires a deliberate approach to address the complex range of policy issues and choices involved. Later sections in the *Handbook* elaborate the parameters of such an approach and advance policy responses that appear to work, while also discussing those which have been less successful. Countries that have achieved relative success in managing labour migration have done so, because they have been prepared to admit past policy failures and to experiment with new approaches.

Countries of origin and destination face common priorities and issues, yet different in terms of emphasis, in formulating labour migration policy. In Chapter II, the *Handbook* looks at the issues underlying policy responses. This is followed by national policy responses from the perspective of countries of origin and destination in Chapters III to VII.

However, given the transnational nature of labour migration, a policy framework developed solely at the national level, no matter how innovatively or meticulously crafted, will be insufficient to meet all the challenges posed. Consequently, a framework should be

firmly rooted in bilateral, regional and multilateral mechanisms, in terms of both formal and informal cooperation, which inform and supplement national approaches. In this regard, it is important to underline the role of the international legal framework, located in international and human rights and labour law (Chapter I), since it presents a model for the development of national legislative structures protecting the rights of migrant workers, which is discussed in Chapter VI below. In addition, Chapter IX of the *Handbook*, on inter-state cooperation, examines bilateral arrangements regulating labour migration movements, largely on a temporary basis, between countries of origin and destination (Section IX.1.1); regional integration mechanisms and regional agreements (Sections IX.1.2-IX.1.6):

global level agreements (Section IX.1.7); and the development of fora at all levels (global, regional and bilateral) where government policy-makers and other pertinent stakeholders can discuss, consult and exchange information, experiences and best practices on labour migration (Section IX.2). The important issue relating to the global regulation of the mobility of workers in the context of the provision of services is also discussed in this Chapter of the *Handbook*.

#### ENDNOTES

- 1 There are 55 participating States in the OSCE: Albania, Andorra, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Holy See, Hungary, Iceland, Ireland, Italy, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, the former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, United Kingdom, United States of America, Uzbekistan. With the exception of Andorra, Holy See, Liechtenstein, Monaco and Uzbekistan (as of December 2005), these countries are also IOM Member or Observer States (the Russian Federation, San Marino, Spain, the former Yugoslav Republic of Macedonia and Turkmenistan are Observers). Similarly, with the exception of Andorra, Holy See, Liechtenstein, and Monaco, the above countries are ILO Member States (as of 10 November 2005).
- 2 The terminology “origin” and “destination” countries is used in the Handbook interchangeably with “home” and “host” countries or “sending” and “receiving” countries, although it is acknowledged that a preference may exist for using the first set of terms.
- 3 For the purpose of the Handbook, the terms “migrant worker”, “foreign worker” or “labour migrant” are synonymous.
- 4 “[P]articipating States... make it their aim to facilitate freer movement and contacts individually and collectively, whether privately or officially, among persons, institutions and organizations of the participating States” (Cooperation in Humanitarian and Other Fields, Section I (Human Contacts), Recital 5), (OSCE, 1975).
- 5 At the request of a number of OSCE participating States, at the 2003 Human Dimension Implementation Meeting, a special session was dedicated to the issue of protecting the human rights of migrant workers. Moreover, the issue of tolerance towards, and non-discrimination of, migrant workers was a topic of a special session at the OSCE Conference on Tolerance and the Fight against Racism, Xenophobia and Discrimination that took place in Brussels on 13-14 September 2004. Additional emphasis on the rights of migrants was put at the Maastricht Ministerial Council in December 2003. In accordance with the OSCE Maastricht Ministerial Council Decision No. 4/03 on Tolerance and Non-Discrimination (para. 11), the OSCE was called on to reinforce its activities aimed at “combating discrimination against migrant workers ... [and] to facilitate the integration of migrant workers into the societies in which they are legally residing”.
- 6 Indeed, the only OSCE participating states not members of the Council of Europe are the European states of Belarus and the Holy See, and the Central Asian Republics of Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan, and Canada and the United States.
- 7 Data on the CIS from discussion on the forthcoming World Bank report on Labour Migration in Europe and Central Asia, Geneva, October, 2005 (World Bank, 2005).
- 8 Labour Migration for Integration and Development in the Western Balkans, Zagreb, 22 February 2006.

# *I. International Legal Framework for the Protection of Migrant Workers*

The protection of the rights of workers employed outside their countries of origin has been the subject of increasing concern throughout the UN system. A large array of international instruments exists to provide parameters for the regulation of international migration and standards for human and labour rights.

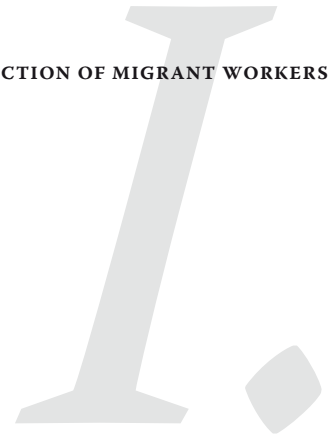
The rights and freedoms stipulated in the Universal Declaration of Human Rights apply equally to migrants as to any other individual, as do the provisions of the human rights instruments which have subsequently been developed by the UN. The protection of the human rights of men and women migrant workers and the promotion of their equal opportunity and treatment is also embedded in the Preamble to the Constitution of the International Labour Organization (ILO) of 1919, and in the Declaration of Philadelphia of 1944. Special attention is devoted to migrant workers in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998).

Apart from the adoption of specific international standards protecting the rights of migrant workers, which also form the basis of the recent non-binding ILO Multilateral Framework on Labour Migration (ILO, 2005), discussed in Section IX.2.5.2 below, concern for migrant workers has been expressed through the insertion of specific provisions targeting migrants in the respective Declarations, Plans and Programmes of Action of UN World Conferences<sup>1</sup> held over the past decade and the appointment of a UN Special Rapporteur on the human rights of migrants in 1997.<sup>2</sup>

While this chapter discusses the international legal framework for the *protection* of migrant workers, it is important to underline that other areas of international law are also relevant for the mobility of workers. One significant area is the law regulating international trade and particularly the provision of services under the General Agreement on Trade in Services (GATS), where Mode 4 is concerned with cross-border movements of “natural persons” for this purpose. As discussed below, international instruments protecting migrant workers do not generally disturb the sovereign right of states to regulate the admission of migrant workers into their territory, but GATS Mode 4 may have the potential to make a considerable impact on the temporary entry of workers in the context of services provision. Indeed, this would be the case if the current narrow categories under GATS Mode 4 applicable mainly to business executives and intra-corporate transferees were expanded to include broader groups of persons. GATS Mode 4 is discussed further in Section IX.1.7.2 in Chapter IX on Inter-state Cooperation.

## *1.1 International Human Rights Law*

International human rights law is found in the International Bill of Rights, which contains the non-binding Universal Declaration of Human Rights (though most of its provisions are generally recognized as constituting International Customary Law) and two general human rights treaties, the International Cove-



nant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>3</sup> It should be emphasized that these instruments protect all human beings regardless of their nationality and legal status.<sup>4</sup> Therefore, migrant workers, as non-nationals, are generally entitled to the same human rights as citizens. While the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) (1990) (Section I.2.2 below) is the only UN instrument of direct relevance to migrant workers (Cholewinski, 1997: ch. 4), there are also several other UN instruments that are of potential importance in terms of protecting migrants from discrimination and exploitation on grounds other than their non-national status. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965), currently one of the most widely ratified of the UN human rights conventions, binds States parties to outlaw discrimination on the grounds of race, colour, descent, or national or ethnic origin against all individuals within the jurisdiction of the State and to enact sanctions for activities based upon such discrimination. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979) consolidates the provisions of existing UN instruments concerning discrimination on the basis of sex and applies to citizens and non-citizens. Other human rights instruments of relevance to migrant workers include the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984) and the International Convention on the Rights of the Child (CRC) (1989).

It is important to keep in mind a number of basic or fundamental rights, which are frequently violated in respect of migrant workers. These rights are found in the general international human rights instruments and are also protected by most national constitutions. Clearly, these rights include freedom from slavery, forced labour, degrading or inhuman treatment or punishment. There is little doubt that the working and living conditions of some migrant workers in certain parts of the world are very similar to the situations depicted in these rights' violations. Such treatment is often evident in respect of those migrant workers who have been trafficked or abused; placed in situations of debt bondage where they find themselves unable to escape a certain abusive employment situation until they have paid off their debts to the employer, agent or recruiter; and other forms of exploitation. Women migrants, because of the gender-specific jobs or sectors in which they predominate, are particularly vulnerable to such abuses. Slavery and forced or compulsory labour in respect of migrant workers is prohibited by general international human rights law, specific international instruments against slavery and slavery-like practices and ILO standards (Sections I.2.1 and I.3 below).

Formerly accounting for only a small percentage of clandestine migration, labour trafficking and smuggling have been broadly affected by the changing nature of international migration, and “unless [they are] brought under control, [they] could become one of the dominant forms of abusive migration in the years to come” (ILO, 1999: para.289). Recognizing that such action requires a comprehensive international approach, the UN General Assembly adopted, in 2000,

the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Trafficking Protocol) and the Protocol Against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol), supplementing the UN Convention Against Transnational Organized Crime (UN, 2000b).<sup>5</sup> The broad range of measures required to prevent or reduce irregular migration, including its most abusive forms, are considered in Chapter VIII.

All migrant workers and their families regardless of their legal status are also entitled to the right to be free from arbitrary arrest and detention, which is protected by international human rights standards against deprivation of liberty, such as those in ICCPR (Art. 9). Many migrants, including those authorized to work, are often subject to confinement and harassment by border officials as well as the police in destination countries.<sup>6</sup>

Particularly important human rights for migrant workers are the freedom of movement within the country and the right to leave.<sup>7</sup> Unfortunately, it is not uncommon for employers, recruitment agents, or even government officials in certain countries, to confiscate the passports of migrant workers to ensure that they do not leave before their work is completed. While these rights might justifiably be restricted for a number of legitimate reasons, such as the protection of national security and public order, provided that the means adopted are proportional to the objective concerned, the confiscation of a passport to ensure that a migrant worker completes his or her work cannot constitute a legitimate State objective.<sup>8</sup>

Special attention should also be devoted to ensuring that migrant workers and their families are afforded effective protection from violence, threats and intimidation, and from xenophobia and discrimination, including at the hands of public officials and private persons or entities (e.g. employers) as well as the general population (Section II.2.5 below). In this regard, an important right is the right of equal access with nationals to the courts (including labour courts or tribunals),<sup>9</sup> so that migrant workers can seek redress for abuses in the country of employment. This right should be facilitated and also include provision for free legal assistance, particularly if migrants do not possess the means to pay.

Finally, while not central to the protection of migrant workers, international refugee law, as embodied largely in the 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol (UN, 1951, 1967) is of some relevance. Firstly, migrants who are victims of trafficking for the purpose of labour exploitation may well also have a valid claim for refugee status on account of their persecution by non-state actors (Art.1(A)(2)). Secondly, the Geneva Convention contains a number of provisions on access to employment applicable to refugees who are lawfully staying in the territory of Contracting parties (Art.17).

## *1.2 ILO and UN Conventions concerning Migrant Workers: A Complementary Set of Standards*

### *1.2.1 ILO conventions*

The first international instruments providing for more comprehensive solutions to the problems facing migrant workers include the Migration for Employment Convention, 1949 (Revised) (No. 97) and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), as well as their accompanying Recommendations.<sup>10</sup> Forty-five states have ratified Convention No. 97 and 19 have ratified Convention No. 143.<sup>11</sup> Because migration often has consequences on both the migrant workers and members of their families, ILO instruments on migrant workers provide for guarantees and facilities to assist migrant workers and their families in all stages of the migration process. It is worth recalling that the ILO Conventions do not affect the sovereign right of each Member State to allow or refuse a foreigner entry to its territory and that it is for each State to determine the manner in which it intends to organize the potential entry of migrant workers or the refusal of their entry. The instruments' provisions do not depend on reciprocity and are also intended to cover refugees and displaced persons in so far as they are workers employed outside their country.



While the ILO instruments concerning migrant workers do not cover all migrant-related operations (for example, they do not deal with the elaboration and establishment of a national labour migration policy), the principles enshrined in these instruments provide an important framework for guidance on what should constitute the basic components of a comprehensive labour migration policy, the protection of migrant workers and measures to facilitate as well as to control migration movements. More specifically, they call for measures aimed at regulating the conditions in which migration for employment occurs and at combating irregular migration and labour trafficking, and measures to detect the illegal employment of migrants with the aim of preventing and eliminating abuses. They also contain provisions on cooperation between states and with employers' and workers' organizations in this regard.

In addition, the instruments call for measures relating to the maintenance of free services to assist migrants and the provision of information, steps against misleading propaganda, and the transfer of earnings. They define parameters for recruitment and contract conditions, participation of migrants in job training and promotion, and for family reunification and appeals against unjustified termination of employment or expulsion. They contain special provisions on access to social services, medical services and reasonable housing. Lastly, but essentially, they call for the adoption of a policy to promote and guarantee equality of treatment and opportunity between regular status migrants and nationals in employment and occupation in the areas of access to employment,<sup>12</sup> remuneration, social security, trade union rights, cultural rights and individual freedoms, employment taxes and access to legal proceedings.

It should be noted that Conventions Nos. 97 and 143 allow for a number of exceptions with respect to the categories of migrants covered by the instruments, notably seafarers (covered by a wide range of specific Conventions), frontier workers and short-term entry members of the liberal profession and artists, as well as the self-employed. Convention No. 143 also excludes trainees and specific duty assignments. However, these exclusions in this Convention only apply to Part II, which deals with equality of opportunity of regular migrants with nationals. They do not exclude these cate-

gories of migrant workers from the basic level of protection relating to basic human rights provided for in Part I of Convention No. 143.

### I.2.2 UN Migrant Workers Convention (ICRMW)

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (UN Migrant Workers Convention, ICRMW)<sup>13</sup> was adopted in December 1990. To date, it has been accepted by 34 States, but it has not been ratified by a single major country of employment. However, a number of significant countries of origin, such as Mexico and the Philippines, have accepted it.<sup>14</sup> The UN Convention embodies most of the substantive provisions of the ILO Conventions and in some ways goes beyond them. The UN Convention and ILO Conventions Nos. 97 and 143 can therefore be considered as complementary.

While the long-term objective of the UN Convention is to discourage and eliminate irregular migration, at the same time it furthers the rights and protections of persons migrating for employment, including those who find themselves in an irregular situation. Other significant aspects of the Convention include the fact that ratifying States are not permitted to exclude any category of migrant worker from its application (Art. 88), the "indivisibility" of the instrument, and the fact that it includes every type of migrant worker, including those excluded from existing ILO instruments.<sup>15</sup> The Convention also provides for a broad definition of "family" taking into account a more modern and up-to-date composition of it (Arts. 4 and 44(2)). Compared to the specific ILO instruments, the UN Convention seems to articulate more broadly the principle of equality of treatment between migrant workers (irrespective of status) and nationals before the courts and tribunals, with respect to remuneration and other working conditions as well as with respect to migrant workers' access to urgent medical assistance and education for children of migrant workers (Arts. 18(1), 25, 28 and 30 respectively). It also contains more extensive rights for migrant workers to transfer their earnings and savings (Arts. 32 and 47), and migrant workers appear to benefit from a clearer level of protection in relation to expulsion (Art. 22).

In terms of the right to reimbursement of social security contributions, however, the ILO instruments (including the specific Conventions on social security) define migrant workers' rights more clearly (Sections I.2.3, VII.5.2 and VIII.4.4). As regards additional rights from which documented migrants and members of their families may benefit (ICRMW, Part IV), the ILO and UN instruments are quite similar, except that ILO Conventions provide for more distinct rights for migrant workers to form a trade union, and the right to equal treatment in terms of access to education, housing and vocational and social services. Finally, ICRMW provides for the possibility of individual complaints by migrant workers (Art.77), but does not, unlike the ILO instruments, emphasize the involvement of workers' and employers' organizations.

### **I.2.3 Protection of the rights of irregular migrants**

At the heart of the protection of the rights of men and women migrant workers lies their potential vulnerability to discrimination, exploitation and abuse, especially in marginal, low status and inadequately regulated sectors of employment. In addition, migrants without an authorization for entry and/or employment are at the margins of protection by safety and health, minimum wage and other standards as they are most often employed in sectors where those standards are either not applicable, or not respected or enforced. It is therefore imperative that countries ensure some minimum standards of protection, including the basic human rights, for all migrants workers, *whatever their status*. ICRMW and ILO Convention No. 143 contain provisions intended to ensure that all migrant workers enjoy a basic level of protection even when they have immigrated or are employed illegally and their situation cannot be regularized. Under Convention No. 143 (Arts.1 and 9(1)), these relate to basic human rights, protective measures for migrant workers who have lost their employment and certain rights arising out of past employment as regards remuneration, social security and related benefits (Chapter VIII). ICRMW extends to migrant workers who enter or reside in the host country without authorization (and members of their families), rights which were previously limited to individuals involved in regular migra-

tion for employment, going beyond those elaborated in Convention No. 143.

In addition to measures to protect the rights of migrant workers, the most recent ILO instruments on migrant workers and the UN Convention (Part VI) both place great emphasis on efforts to curb irregular migration and illegal employment and the need to formulate appropriate migration policies to that effect; the imposition of sanctions to give effect to regulations in this area; exchanging information; providing information to migrant workers; and facilitating the provision of consular services.

## ***I.3 Other ILO Instruments relevant to Migrant Workers***

In addition to the specific ILO standards safeguarding the rights of migrant workers, other important ILO instruments are applicable. Many relevant provisions in the more widely ratified ILO fundamental Conventions as well as in other even less ratified Conventions are not limited to nationals or to those migrants with regular residence and employment status.<sup>16</sup> It is important to consider these standards when looking for guidance for the development of comprehensive labour migration policies. It is also worth recalling that, unless otherwise specified in the ILO instruments concerned, all of the Conventions and Recommendations adopted by the International Labour Conference to date cover nationals and non-nationals, while at the same time maintaining the sovereign right of States to regulate access to the territory or to the national labour market.

Some principles and rights at work that derive from the ILO Constitution and that have been expressed and developed in eight ILO Conventions<sup>17</sup> are deemed to be fundamental for the protection of human rights for all workers, including migrant workers, by the international community and the ILO. They concern freedom of association and the right to collective bargaining (Section VII.2.3 below), freedom

from forced labour and child labour and non-discrimination in employment and occupation (Section VII.2.1 below). Moreover, following the adoption of the 1998 ILO Declaration on Fundamental Principles and Rights at Work,

all members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of their membership of the Organization, to respect and to promote and to realize in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions (ILO, 1998: para.2).

Migrant workers' rights are not only a matter of fundamental rights found in the eight core ILO Conventions. The international labour standards in the areas of social security, maternity protection, employment policy, the regulation of private and public employment agencies, occupational safety and health, conditions of work, protection of wages and labour inspection, as well as those covering sectors employing a large number of migrant workers have been identified by ILO as equally important to the promotion of decent work of all migrant workers (Textbox I.1). The ILO instruments that promote equality of treatment between migrant workers and nationals in the field of social security are particularly relevant and are discussed further in Section VII.5 below.<sup>18</sup>

Considering the increase in private employment agencies dealing with the recruitment of migrant workers, the Private Employment Agencies Convention, 1997 (No. 181) has become one of the most relevant ILO standards for migrant workers today (Sections III.2.1 and VI.4.5.2 below). Convention No. 181 requires ratifying States to adopt measures to provide adequate protection for and prevent abuses of migrant workers recruited or placed in its territory by private employment agencies. These measures shall include laws or regulations that provide for penalties, including prohibition of those private employment agencies which engage in fraudulent practices and abuses (Art.8(1)). In addition, the Protection of Wages Convention, 1949 (No. 95) deserves particular attention as it provides for the settlement of wages due upon the termination of a contract and prohibits "any deduction of wages with a view to ensuring a direct or indirect

#### TEXTBOX I.1

### Principal ILO Conventions relevant to Migrant Workers

Migration for Employment Convention (Revised), 1949 (No. 97)  
Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)

Forced Labour Convention, 1930 (No. 29)  
Abolition of Forced Labour Convention, 1957 (No. 105)

Freedom of Association and Protection of the Rights to Organize Convention, 1948 (No. 87)

Right to Organize and Collective Bargaining Convention, 1949 (No.98)

Equal Remuneration Convention, 1951 (No. 100)

Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

Minimum Age Convention, 1973 (No. 138)

Worst Forms of Child Labour Convention, 1999 (No. 182)

Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19)

Equality of Treatment (Social Security) Convention, 1962 (No. 118)

Social Security (Minimum Standards) Convention, 1952 (No. 102)

Maintenance of Social Security Rights Convention, 1982 (No. 157)

Protection of Wages Convention, 1949 (No. 95)

Employment Policy Convention, 1964 (No. 122)

Employment Service Convention, 1948 (No. 88)

Private Employment Agencies Convention, 1997 (No. 181)

Labour Inspection Convention, 1947 (No. 81)

Labour Clauses (Public Contracts) Convention, 1949 (No. 94)

Plantations Convention, 1958 (No. 110)

Employment Injury Benefits Convention, 1964 (No. 121)

Labour Inspection (Agriculture) Convention, 1969 (No. 129)

Nursing Personnel Convention, 1977 (No. 149)

Occupational Safety and Health Convention, 1981 (No. 155)

Safety and Health in Construction Convention, 1988 (No. 167)

Working Conditions (Hotels and Restaurants) Convention, 1991 (No. 172)

Safety and Health in Mines Convention, 1995 (No. 176)

Maternity Protection Convention, 2000 (No. 183)

Safety and Health in Agriculture Convention, 2001 (No. 184)

payment for the purpose of obtaining or retaining employment”. Consequently, any deductions from wages for payments to fee-charging agencies for the purpose of obtaining or retaining employment would be contrary to the Convention.<sup>19</sup>

## *1.4 Regional Instruments*

When identifying relevant standards concerning labour migration and the protection of migrant workers in OSCE countries, it is useful to look at the set of regional standards elaborated in Europe and North America. However, it is worth recalling here that where regional instruments on migration are more restrictive than the relevant UN or ILO standards, especially when these have been ratified by the Member State concerned, they should not be considered as a replacement for international standards set in this domain.

The Council of Europe’s instruments in the field of labour migration cover general human rights as well as more specific agreements relating to migrants and migrant workers. The European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) (Council of Europe, 1950) has broadest application in that it applies to all persons within the jurisdiction of States parties (Art. 1), including migrant workers and regardless of their legal status. While there are no specific provisions on migrant workers in the ECHR, migrants have obtained remedies from the European Court of Human Rights under its case law in protection of their right to respect for family life and the non-discrimination principle (Arts. 8 and 14 respectively) (see Textbox VII.5). The European Social Charter (1961) and its Additional Protocol (1988), as well as the Revised European Social Charter (Council of Europe, 1996), include a number of provisions relating to individuals living and working in countries of which they are not nationals, covering the right to engage in a gainful occupation in another Contracting party’s territory, provision of information to migrant workers, facilitation of the migration process, equality of treatment of nationals and non-nationals in employment, the right to family reunification, and guarantees against expulsion, etc. (Arts.18 and 19). These instruments, however, are, on their face, only relevant to mi-

grants who are nationals of Council of Europe Member States, and their application is conditional on reciprocity, although this formal position was challenged recently by the European Committee of Social Rights, which monitors the application of the Charter and Revised Charter and administers the Collective Complaints Protocol (Council of Europe, 1995).<sup>20</sup> The European Convention on the Legal Status of Migrant Workers (Council of Europe, 1977) includes provisions relating to the main aspects of the legal status of migrant workers coming from Contracting parties, and especially to recruitment, medical examinations and vocational tests, travel, residence and work permits, family reunion, housing, conditions of work, transfer of savings, social security, social and medical assistance, expiry of the contract of employment, dismissal and re-employment, and preparation for return to the country of origin. However, to date, only eight Council of Europe Member States have ratified this Convention.<sup>21</sup>

With regard to the EU framework, as observed in Section IX.1.3 below, differences exist in terms of rights and benefits granted to migrant workers coming from within the EU, from future accession countries, and migrant workers coming from third countries. The Treaty Establishing the European Community (EC Treaty) provides for freedom of movement for workers from EU Member States (although transitional arrangements are in place limiting this freedom for nationals from the new Member States – see Textbox IX.4) and prohibits any discrimination based on nationality between these workers as regards employment, remuneration and other conditions of work and employment, including social security (Arts. 12 and 39).<sup>22</sup> The EC Treaty also invites the Council of Ministers to take measures necessary to ensure equality of treatment and opportunity between men and women and to combat discrimination based on, inter alia, race, ethnic origin, religion or belief, and sexual orientation.<sup>23</sup> It affords migrant workers from EU Member States a set of social rights unequalled in other regions of the world. Furthermore, the Council is also empowered to take measures in the field of asylum, immigration and safeguarding of the rights of nationals of third countries, although the measures adopted to date on legal migration have afforded third-country nationals lesser rights than those granted EU citizens.<sup>24</sup>

Although not a legally binding instrument, the EU Charter of Fundamental Rights, adopted in 2000 (EU, 2000d), is a major point of reference in this context as most of its provisions are applicable to all persons irrespective of their nationality. It sets out in a single text, for the first time in the EU's history, the whole range of civil, political, economic and social rights of EU citizens and all persons resident in the EU.

While the inter-American system for the protection of human rights does not provide for a specific instrument on migrant workers, they enjoy the general protection provided by the Organization of American States (OAS), which adopted the 1948 American Declaration on the Rights and Duties of Man (OAS, 1948) and the 1969 American Convention on Human Rights (Pact of San José) (OAS, 1969). Both instruments guarantee freedom from discrimination. Certain principles applicable to migrants and their families have also been developed on the basis of the case law of the Inter-American Commission on Human Rights (IACHR)

and the Inter-American Court of Human Rights.<sup>25</sup> In light of the enormous importance that migration has acquired in the past decade, the IACHR decided to devote special attention to the situation of migrant workers and their families in the Americas. The OAS General Assembly adopted several resolutions and organized Summits of Heads of State. In 1997 the IACHR appointed a Special Rapporteur on Migrant Workers and their Families.<sup>26</sup>

The North American Free Trade Agreement (NAFTA) deals only marginally with migration issues through the North American Agreement on Labour Cooperation (NAALC) and also in the body of NAFTA itself, which permits the entry of a certain quota of investors, highly qualified personnel and executives of multinational corporations between signatory States. NAFTA is addressed in Section IX.1.4 below.

## ENDNOTES

- 1 The most extensive provisions on the protection of the rights of migrant workers, including trafficked and smuggled migrants, are found in the Durban Declaration and Programme of Action against Racism, Racial Discrimination, Xenophobia and Related Intolerance, adopted in 2001 (UN, 2002).
- 2 For more information on the work of the Special Rapporteur, see <http://www.ohchr.org/english/issues/migration/rapporteur/index.htm>.
- 3 Both the ICCPR and ICESCR have been ratified by nearly all OSCE countries, with the exception of Andorra (signed ICCPR but not ratified; ICESCR), the Holy See (ICCPR; ICESCR), and the United States (signed ICESCR but not ratified).
- 4 The universality of general human rights instruments in terms of the right-holder is underlined by the Special Rapporteur on the rights of non-citizens (Weissbrodt, 2003: 2).
- 5 The purpose of the Trafficking Protocol is (a) to prevent and combat trafficking in persons, paying particular attention to women and children; (b) to protect and assist victims of such trafficking, with full respect of their human rights; and (c) to promote cooperation among States parties in order to meet those objectives (Art. 2). The Smuggling Protocol aims to prevent and combat smuggling of migrants, as well as to promote cooperation among States parties to that end, while protecting the rights of smuggled migrants (Art. 2). However, the Protocols are not strictly-speaking human rights instruments because they have been adopted in a criminal law context.
- 6 See also ICRMW Art.16(1), which provides for the right of liberty and security of the person and Art. 16(4), which specifically prohibits arbitrary arrest or detention.
- 7 E.g. ICCPR, Art.12(1) and (2). The right to leave is also protected by ICRMW (Art. 8(1)).
- 8 Confiscation of passports is prohibited explicitly by ICRWC (Art.21). Moreover, countries of origin concerned about the "brain drain" of skilled persons cannot impose restrictive measures with a view to preventing such persons leaving the country. They have to seek other means to encourage their nationals to stay in the country or to support "brain circulation".
- 9 E.g. ICRMW Art.18(1).

## ENDNOTES

- 10 ILO Recommendations No. 86 and No. 151.
- 11 19 OSCE countries have ratified at least one of these instruments, namely: Albania (C97), Armenia (C97/C143), Belgium (C97), Bosnia and Herzegovina (C97/C143), Cyprus (C97/C143), France (C97), Germany (C97), Italy (C97/C143), Moldova (C97), Netherlands (C97), Norway (C97/C143), Portugal (C97/C143), San Marino (C143), Serbia and Montenegro (C97), Slovenia (C97), Spain (C97), Sweden (C143), The Former Yugoslav Republic of Macedonia (C97/C143) and the UK (C97).
- 12 Convention No. 143, Art. 14(a), however, permits limited restrictions on equality of opportunity in access to employment (Textbox VII.1). With respect to access to employment and protection against loss of employment, see also ILO (1999: paras. 381-401 and 577-597).
- 13 The ICRMW was adopted by the UN General Assembly (Resolution 45/158) on 18 December 1990 and entered into force on 1 July 2003.
- 14 Five OSCE countries (Azerbaijan, Bosnia and Herzegovina, Kyrgyzstan, Tajikistan and Turkey) have ratified the Convention. It should be recalled, however, that labour migration remains a dynamic phenomenon and that countries of origin may well become future destination countries: for example, Mexico is now also a recipient of migrant labour from Central American countries, such as Guatemala.
- 15 It should be noted however that, while the designation of frontier workers, seafarers and the self-employed is very important and useful, they are not covered specifically in ICRMW's substantive provisions.
- 16 When considering the applicability of ILO instruments to all migrant workers, whether temporary or permanent, or in a regular or irregular situation, a distinction needs to be made between scope and application. For example, while the Conventions may not explicitly exclude irregular workers from their scope of application, it may be difficult to apply certain provisions in practice with regard to these workers. This may be the case especially in areas such as social security or maternity protection where entitlements to benefits may be subject to completion of a qualifying period (based on the period of employment or residence) or depend on contributions made by the workers concerned. Irregular workers, due to their status, are often not in a position to participate in contributory social security schemes.
- 17 Forced Labour Convention 1930 (No. 29) and the Abolition of Forced Labour Convention 1957 (No. 105); the Freedom of Association and Protection of the Right to Organize Convention 1948 (No. 87) and the Right to Organize and Collective Bargaining Convention 1949 (No. 98); the Equal Remuneration Convention 1951 (No. 100) and the Discrimination (Employment and Occupation) Convention 1958 (No. 111); and the Minimum Age Convention 1979 (No. 138) and the Worst Forms of Child Labour Convention 1999 (No. 182).
- 18 For a detailed overview of the ILO instruments on social security, see Humblet and Silva (2002: 41-45).
- 19 Cf. ILO, (2003a: para. 267); for a more detailed explanation on the application of Article 9 of Convention No. 95 see also paras. 268-271.
- 20 This Protocol allows certain trade unions and NGOs to bring complaints against those Contracting parties accepting the procedure under the Protocol. In a case against France, (International Federation of Human Rights (FIDH) v. France decided in September 2004), the Committee found a violation of Article 17 of the Charter concerning protection and assistance to children and young persons in respect of national measures limiting the access of the children of irregular migrants to health care provision. The Committee found it difficult to apply the restrictive personal scope of the Charter to a situation which involved the denial of the fundamental right to health care to a particularly vulnerable group of persons, such as children. The Committee reasoned that it was necessary to interpret limitations on rights restrictively in order to preserve the essence of the right and to achieve the overall purpose of the Charter. The restriction in this case went to the very dignity of the human being, and impacted adversely on children who were exposed to the risk of no medical treatment. Given that medical care is a prerequisite to the preservation of human dignity, legislation or practices denying entitlement to such treatment to foreign nationals within the territory of a State party, even if they are unlawfully present there, cannot be justified under the Charter. See Council of Europe (1996: paras. 29-32).

## ENDNOTES

- 21 France, Italy, Netherlands, Norway, Portugal, Spain, Sweden, and Turkey. The Convention has been signed by Belgium, Germany, Greece, Luxembourg, Moldova, and Ukraine.
- 22 See also Council Regulation 1612/68/EEC (EU, 1968), which deals principally with equality of treatment in respect of access to employment, working conditions, social and tax advantages, trade union rights, vocational training and education.
- 23 See respectively Council Directives 76/207/EEC (EU, 1976) and 2000/43/EC (EU, 2000a) which give effect to Article 13 of the EC Treaty.
- 24 Despite the promises of the provision of “near equality” for third-country nationals made by the European Council in its Conclusions adopted at Tampere, Finland in October 1999 (See EU, 1999).
- 25 See in particular the Court’s Advisory Opinion on the Legal Status of Undocumented Migrants: “The Court considers that undocumented migrant workers, who find themselves in a situation of vulnerability and discrimination with respect to workers who are nationals, have the same labour rights that belong to the rest of the workers in the State in which they are working, and this last must take all necessary measures to see that this is recognized and complied with in practice. Workers, being entitled to labour rights, must be able to count on all adequate means to exercise them.” (Inter-American Court of Human Rights, 2003: para.160).
- 26 For the website of the Special Rapporteur, see <http://www.cidh.org/Migrantes/defaultmigrants.htm>.

# *II. Issues underlying Policy Responses in Countries of Origin and Destination*

Policy-makers in both countries of origin and of destination have to devote careful attention to a number of underlying broader issues when crafting appropriate policies. This section highlights some of these issues, which also reflect the complexity of the labour migration phenomenon. While these issues necessarily differ because of the different labour migration dynamics taking place in origin and destination countries, some are common to both sets of countries, such as the concerns relating to the protection of migrant workers and the need for inter-state cooperation, particularly with a view to preventing or reducing irregular migration.

The differential and often discriminatory impacts of legislation, policies and programmes on different groups of women and men migrant workers also need to be addressed to ensure mutual gains from migration (ILO, 2003b: 1).

## *II.1 Countries of Origin*

Countries of origin range from those that are experiencing a migration transition, characterized by both labour inflow and outflow, established labour sending countries to those that are relative newcomers to organized labour migration. Nevertheless, as countries of origin they all face some common issues. Briefly, these are:

- Challenges in protecting migrant workers from exploitative recruitment and employment practices and in providing appropriate assistance to migrant workers in terms of pre-departure, welfare and on-site services.

- Challenges in optimizing benefits of organized labour migration, particularly the development of new markets and increasing remittance flows through formal channels, as well as enhancing its development impact. At the same time mitigating the adverse impact of the emigration of skilled human resources.
- Building institutional capacity and inter-ministerial coordination to meet labour migration challenges.
- Increasing cooperation with destination countries for the protection of migrant workers, access to labour markets and the prevention of irregular migration.

Faced with these migration challenges, countries may respond with a set of policies, structures and procedures that seek to protect their migrant workers and facilitate orderly migration.

### **II.1.1 Protection of migrant workers and support services**

Given, that, due to structural reasons (including poverty, unemployment and large wage differentials between countries of origin and destination), the supply of workers in lower skill sectors far outstrips the demand and that there are far more workers wishing to work abroad (to earn a livelihood and pursue a perceived better life) than there are jobs, migrant workers can be vulnerable to abuses during recruitment, travel and employment abroad. A common problem faced by many migrant workers worldwide is high migration costs as a result of excessive (and mostly illegal) intermediation fees. In addition, there are problems occur-





ring in the country of employment: those most commonly cited by migrant workers and countries of origin are contract substitution and violations, lack of, reduced, or late payment of agreed wages and non-fulfilment of return air fare obligations, and harassment by employers of female workers (IOM, 2003b). Other problems include poor working conditions, virtual absence of social protection, denial of freedom of association and workers' rights, discrimination and xenophobia, as well as social exclusion.

These developments erode the potential benefits of migration for all parties, and seriously undermine its development impact. Migrant workers can realize their potential and make the best contribution when they experience decent working conditions, and when their fundamental human and labour rights are respected. All countries of origin need to have in place policies, legislation and mechanisms that afford their citizens protection and support from abuses in the labour migration process.

### II.1.2 Optimizing the benefits of organized labour migration

An increasing number of developing countries and countries with economies in transition seek to adopt policies, legislation and structures to promote foreign employment of part of their workforce and generate remittances, while providing safeguards to protect their migrants. While job creation at home is the first best option, an increasing number of countries see overseas employment as a part of a national development strategy to take advantage of global employment opportunities and generate foreign exchange.

For countries seeking to promote foreign employment, labour migration policy necessitates adequate emphasis on the promotion and facilitation of managed external labour flows and should not be limited to the regulating and protecting function of the State.

While respecting the freedom of movement and right of its citizens to seek employment abroad, countries of origin wish to retain their skilled human resources, in whom they have invested. Steps can be taken in this regard.

Finally countries of origin have an interest in discouraging irregular migration (while advocating an increase in legal avenues for labour migration). Irregular migrants are more vulnerable to abuse.

### II.1.3 Institutional capacity building, inter-ministerial coordination and inter-state cooperation

The policy objectives of protecting citizens while working abroad and optimizing the development benefits of labour migration, can only be met if two important elements form a part of the plan.

First, countries must establish the necessary institutional capacity and inter-ministerial coordination to meet their policy objectives. This includes giving due priority to labour migration in terms of overall development, foreign policy, and resource allocation.

Second, inter-state cooperation is essential. Despite all the efforts made by labour-sending countries to protect migrant workers, migrant workers continue to ex-

perience numerous problems in destination countries, particularly vulnerable groups such as female domestic workers, entertainers and lower skilled workers. There are clear limits to what a state can do to protect its migrant workers without the active cooperation of destination countries. In addition to protecting and ensuring the welfare of migrant workers, inter-state cooperation is essential in expanding organized labour migration and curbing irregular movement.

## II.2 Destination Countries

The issues underlying policy responses in OSCE destination countries regarding the admission of migrant workers relate to

- detection, assessment and prediction of labour shortages, at the national level, for both skilled and less-skilled employment.
- analysis of the national labour market in order to understand whether labour migration can provide a solution, in part or in full, for adverse demographic trends, particularly the decline in working populations, and the subsequent impact on the availability of social welfare benefits for future generations.
- protection for the national workforce in the event that more labour migration is admitted into the country.
- measures to be put into place to avoid exploitation of migrant workers in the workplace and society in general.
- measures to prevent or reduce irregular labour migration, which are essential for the legitimacy and credibility of a legal admissions policy.

Admission of foreigners into the country often gives rise to unwarranted concerns and exacerbates social tensions, particularly in a less secure economic climate, which may be expressed in racial discrimination and xenophobia amongst the host population. Politicians and policy-makers face a sensitive and challenging task in convincing and educating national populations on the need for foreign labour.

### II.2.1 Detecting, assessing and predicting shortages of labour<sup>1</sup>

Regardless of the type of labour migration system used in a particular country, its fundamental *raison d'être* is to address a perceived labour shortage. Accordingly, the starting point for any comparative analysis of migration systems has to include an evaluation of how such labour shortages are detected, assessed and predicted, as the perceived importance and duration of a labour shortage motivates authorities to introduce a labour migration system. This section reviews some of the data sources on which labour shortages are measured in selected countries and also the findings of such data sources.

Generally speaking, labour shortages are difficult to forecast: the European labour market needs, for example, are currently determined in a number of different ways. It is quite possible for shortages to exist in one sector of an economy, or even in specific occupations, while overall unemployment is high. However, when assessing the tightness of a labour market, it must be recognized that conventional sources of information have their limitations. Specifically, *employer reports and surveys* have to be treated with caution, as they focus on recruitment difficulties and not necessarily on labour shortages per se. On the other hand, *sectoral and occupation-specific studies* are much more precise snapshots of the current situation, but are limited in their ability to make accurate predictions on economic expansion or contraction and on related labour demand. Consequently, in addition to employers' reports and sector-specific studies, this section also reviews occupation or sector-specific unemployment rates and macro-economic studies carried out by some European countries.

Although some private sector employers may have definite opinions on this topic, they are frequently biased by their somewhat narrow assessment of data concerning the labour market or vacancies, and they tend to articulate views that reflect their immediate business interests. Moreover, businesses often take corrective action themselves by adjusting production, or by modifying their minimum hiring qualifications when faced with a shortage of qualified workers. Accordingly, they may not report a shortage of workers in

their industry. Therefore, rather than solely relying on data supplied by employers, it is usually a better strategy to assess the tightness of labour supply by comparing actual employment rates with structural unemployment as labour market rigidities can themselves be a major cause of persisting unemployment combined with wage inflation.<sup>2</sup>

Unfortunately, information on structural unemployment is not readily available. An alternative reliable indicator is to analyze unemployment rates in relation to vacancy rates for a particular field. For example, France publishes an occupational job seekers ratio, which is defined as the ratio of the number of people seeking employment in a specific occupation to the total number of both job seekers and employed workers in that particular occupation. This ratio, which was designed to provide a disaggregated measure of the tightness within the various labour markets, indicates, for example, that tightness has increased in the French construction and mechanical industries' labour markets (France, 2001).

A similar instrument has been launched in the United States. The US Bureau of Labour Statistics now publishes data under its Job Openings and Labour Turnover Survey (JOLTS) programme that provide demand-side indicators of labour shortages at the national level. The JOLTS programme collects information on the availability of unfilled jobs, which is an important measure of the tightness of labour markets and is a parallel indicator to more general measures of unemployment.

As the problems associated with an ageing working population loom larger (Section II.2.2 below) a number of European countries have commissioned *macro level studies* in order to evaluate current labour shortages. These studies estimate the availability of unused labour among the native and immigrant inactive and unemployed populations, as well as the long-term need for migrant workers. The findings of these research projects generally conclude that immigration can actually have long-term welfare-enhancing effects. Furthermore, such studies also tend to assign a high priority to efforts to mobilize the resident labour supply and to integrate the foreign population into the labour market. In Germany, similar research led to the introduction of an en-

tirely new immigration law (Süssmuth, 2001). Some of its provisions include an adjustable migrant selection mechanism that rewards human capital, as well as mechanisms for attracting highly skilled workers.

Conversely, studies outside of Germany have generally not focused on the need for facilitating selective immigration through new laws, although this will soon change in the United Kingdom with the Government's announcement of a new points-based migration system (Textbox VI.7). Nonetheless, such research is still often based on the idea that immigration might alleviate labour market tightness. For instance, the UK Home Office (Interior Ministry) utilizes existing surveys and data in order to identify and evaluate current and future labour market shortages, and to ultimately assess labour demand and skill needs (Department for Education and Employment, 2001). Moreover, in the UK, evidence of labour market tightness is documented before a decision to facilitate the immigration of persons with a particular set of occupational skills is taken and implemented.

Even though such macro-economic studies may help to ascertain the overall positive effects of migration, or to establish the consequences of ageing and the expected effects of raising participation rates and lowering retirement ages on labour supply, they are still unable to calculate how many migrants could and should be recruited into a country in order to meet labour market needs. Moreover, macro-economic studies generally cannot predict the time during which such identified labour needs will last.

Answers to such questions are best sought by analysing *sector level labour market developments or changes within specific occupations*. Studies like these often try to determine the severity of current labour market tightness and how the situation may change in the near future. Various studies dealing with the shortages in the information technology (IT) sector are examples of this type of research (UK, 2004; Rollason, 2003: 136-137). However, such studies generally do not provide any assessment of the need for labour migration, nor do they refer to migration policies.

Nevertheless, occupational level projections are generally much more detailed than macro-economic

studies, and are valuable in assessing labour market trends. These kinds of projections can be broadly categorized into two groups. The first are the numerous studies that project employment growth, either for two, five or ten years ahead, but which do not provide any indications regarding labour shortages. An example of such research is the *Occupational Outlook Handbook* published annually by the Bureau of Labor Statistics in the US Department of Labor (US, 2006). The second category of projections comprises reports advising and informing college graduates on labour market prospects. When well done, such surveys are particularly useful for attempting to forecast labour market tightness.

### II.2.2 Demographic factors<sup>3</sup>

The demographic deficit, particularly in European countries, and the resulting need for perhaps a significant influx of migrant labour, including employment-related immigration for permanent settlement in these countries to replenish populations and maintain the current level of the workforce with a view to ensuring continued economic growth and support for pension and social security systems, has been well documented in recent reports by the Global Commission on International Migration (GCIM: 2005:13-14) and the ILO (Textbox II.1).

#### TEXTBOX II.1

### The Demographic Deficit

There is a contrast between the ageing populations of the more developed countries and the more youthful populations of developing countries. Although populations are ageing to some extent almost everywhere, the process is more advanced in Europe and Japan, with fertility so low that deaths exceed births. On present trends, between 2000 and 2050 the population of Italy, for example, is projected to decrease by 22 per cent – and while Estonia and Latvia expect decreases of 52 per cent and 44 per cent respectively. Low fertility and rising life expectancy mean that, for Europe as a whole, the proportion of the population older than 65 years of age will rise from 15 to 28 per cent between 2000 and 2050, and in Japan from 17 to 36 per cent.

Source: ILO (2004: 14, para. 48).

#### TEXTBOX II.2

### Demographic Decline and Migration in the Russian Federation

Russia is interested in the admission of migrants for a number of internal reasons. Firstly, there are *demographic* reasons, i.e. the abrupt reduction in the population, especially of persons of working age. In 2005, the population of Russia decreased by 615,500 persons. Under present migration rates, by the year 2050, the population of Russia may decrease to 100 million persons and the population of persons of working age would then decrease to 47.7 million. The number of persons older than 60 years of age will increase from 20 per cent in 2005 to 26 per cent in 2025. In 2005, migration compensated for only 12 per cent of the natural decrease of population, which is clearly insufficient for the stable development of the country. It will therefore be impossible for Russia to compensate its natural decline in population by means of migration alone, because, in order to do so, it would be necessary to admit about 800,000 migrants every year, which is unrealistic and would probably undermine the social, ethnic and cultural unity of Russian society. Consequently, immigration remains a major demographic resource for Russia and the efficiency of this resource depends directly upon the adoption of rational policies regarding the reception and integration of migrants.

Source: IOM Moscow (March 2006).

While demographic changes are expected to aggravate the tightness of labour markets in OSCE European countries as the size of the working population shrinks, increased migration is only one of a number of instruments policy-makers will need to consider to prepare for the decline in the working population. These policies could include increasing labour participation rates, particularly of women and lawfully resident migrants, and postponing retirement ages. Among these options, increased immigration has the immediate advantage of having a positive impact on the population's age and composition because economic migrants generally fall into the younger age brackets. However, migration policies can play only a limited role in addressing Europe's demographic challenges and merely complement other policies.

Furthermore, migration policies have historically been subject to a number of practical and political constraints (OECD, 1991). Indeed, when attempting to utilize migration policies in order to address the shrinking working population in OSCE European countries, it is important to take into account the unrealistically (either politically or practically) high levels of immigration that would be needed to produce a noticeable impact on the structure of Europe's ageing population (UN, 2000a). It has been estimated, for example, that immigration levels would have to triple from 237,000 to 677,000 to maintain populations at their 1995 level in France, Germany, Italy and the UK, and indeed a considerably higher level of immigration would be needed (up to 1.1 million per year) to maintain the 1995 workforce and the dependence ratio.<sup>4</sup> Indeed, this potential need for large numbers of migrants to offset negative demographic trends is also recognized in the Russian Federation where a serious reduction in the population, particularly in persons of working age, has resulted in calls for a more open and rational migration policy (Textbox II.2). Despite these constraints relating to large-scale inflows, however, it is clear that immigration is part of the answer to the demographic deficit.

### II.2.3 Rights of migrant workers

As noted above, protection of the rights of migrant workers is an important consideration for policy-makers in both origin and destination countries. However, it is also clear that protection of migrant workers' rights in the country of employment begins in the country of origin. The more migrant workers are prepared for work abroad, the more likely they will be able to enjoy appropriate protection in the destination country and to know about their rights. As discussed in some detail in Chapter I, these rights are protected under regional and international human rights law and international labour law, but they should also be protected by and effectively implemented under domestic law, including national labour legislation (Chapter VII).

### II.2.4 Managing irregular migration

Policy-makers often argue that preventing or reducing irregular migration is essential for the legitimacy and credibility of a legal admissions policy and to obtain broad public acceptance for such a policy. As observed

in Chapter VIII, irregular migration is undesirable for a number of reasons, including:

- exploitative and dangerous conditions in which irregular migrants work without access to the necessary social and legal protections;
- perpetuation of the informal labour market;
- potentially adverse impact on the lawful domestic labour force, in terms of poorer working conditions and lower wages;
- loss of tax revenue to the state;
- security issues involved in clandestine entry and in the existence of trafficking and smuggling networks facilitating the admission and employment of irregular migrants;
- potentially negative impact on external relations between origin and destination countries where large numbers of irregular migrant workers are concerned.

Consequently, a delicate balance needs to be sought between the adoption of measures to prevent and reduce irregular migration, including internal measures to address informal labour markets in destination countries, and the creation of additional legal channels for the admission of migrant labour into specific employment sectors where demands for labour can be effectively identified. Increasingly, the policy focus is on meeting such demands through the import of temporary migrant workers, although opportunities also exist in a number of OSCE countries for permanent labour migration, particularly for highly skilled workers. These are discussed in Chapter VI.

### II.2.5 Attitude of the host population

Even when it can be established that migrant workers are clearly needed by the economy, policy-makers still face a hard task in convincing and educating the host population, particularly in countries where labour migration is a relatively new phenomenon. Therefore, reorienting migration policy towards lawful admission of migrant workers and regularization of irregular migrants already residing in the country creates new challenges in the social and cultural fields. According to IOM, based on sociological surveys, approximately one half of the Russian population is worried by the presence of migrants, and approximately one quarter of Russian citizens has a negative attitude towards migrants.

Given that there is an increasing ‘cultural distance’ between migrants entering the country and the Russian population (e.g. more migrants from small towns and villages; decrease in migrants’ level of education; and increase in the number of migrants speaking Russian poorly and barely familiar with Russian culture), the attitude of the local population towards migrants is likely to worsen. Therefore, in addition to the provision of integration services for migrants (Section VII.3.2 below), other parallel programmes are also required for developing tolerance among the local population.<sup>5</sup>

#### ENDNOTES

- 1 This section is adapted from Lee (2004: 25-28).
- 2 Research on regular job vacancy surveys indicates that labour shortages are not necessarily cyclical phenomena and are instead believed to be caused by a variety of factors, while being relatively insensitive to short-term economic cycles. In Europe, recent labour market data indicate that labour shortages have not only become more and more acute over the years, but are going to remain in place despite the economic downturn that commenced in 2002. This will be particularly relevant in the service sector, which is frequently cited as an area where European firms have trouble in recruiting workers (OECD, 2003).
- 3 This section is partly adapted from Lee (2004: 27).
- 4 ILO (2004: 14-15, para. 49), citing UN (2003). The dependence ratio is the relationship between the number of number of elderly persons (i.e. over 65 years of age) and the number of persons of economically productive age (usually between 16-65) in the population.
- 5 Information provided by IOM Moscow (March 2006).



# *III. Developing Policies in Countries of Origin to Protect Migrant Workers*

This chapter will address policies to promote the protection and welfare of migrant workers. Countries of origin have two main policy options to achieve this: regulatory measures and the provision of support services. The following chapter will cover policies to optimise the benefits of organised labour migration, including marketing and the expansion of labour migration, enhancing the development benefits of remittances, skills development and the mitigation of the emigration of skilled human resources.

## *III.1 Policy Strategies*

A priority concern for all labour-sending governments is to ensure the well-being of migrant workers and to secure the payment of decent wages and basic provisions. There are no perfect systems of regulation of labour migration. However, countries of origin do have a range of policy strategies which can extend the scope and improve the efficiency of their regulatory mechanisms and support services, including:

- conduct of pre-employment orientation seminars (PEOS) and intensified information campaigns, which provide applicants with sufficient information to enable them to make decisions;
- empowerment of migrant workers, especially through the formation of community-based organizations, to enable their voice to be clearly heard and taken account of in policy development;
- streamlining and simplification of regulations and procedures intended to protect workers, to prevent the regulatory framework from becoming

unwieldy and thus an unintended inducement to irregular migration;

- close supervision and monitoring by governments of recruitment activities undertaken by overseas employment promoters/agencies, to minimize malpractice and abuses against those seeking overseas jobs;
- introduction of criminal proceedings, in addition to cancellation of agencies' licences, against serious offenders;
- special attention to the supervision of recruitment and deployment of categories of workers especially vulnerable to malpractice and abuse, such as female domestic workers and lower skilled workers;
- raising of workers' skill levels to higher standards to improve their employment opportunities and promotion of their deployment abroad, taking into account any concerns relating to brain drain;
- introduction of stronger measures to ensure enforcement of the employment contract at the worksite, in particular through bilateral arrangements and agreements with host governments;
- introduction of support services such as pre-departure orientation and a welfare fund;
- inter-state cooperation between countries of origin and destination.

Labour migration policies need to include measures to prevent abusive practices and promote decent and productive work for women and men migrants in conditions of freedom, equity, security, and human dignity. Such policies should recognize the similarities and differences in the migration experiences of different categories





of women and men and aim at eradicating all forms of discrimination and gender inequality, as well as tackling other vulnerabilities, violations and their consequences. Such policies, legislation and programmes should also consider the fact that women migrants often find themselves in irregular situations, in unregulated sectors of the economy, or as victims of traffickers or smugglers and subject to many forms of violence and abuse.<sup>1</sup>

### *III.2 Regulation of Private Employment Agencies*

Most migrant workers lack information about job opportunities, particularly when they leave their country for the first time in search for employment abroad. Likewise, employers in receiving countries are looking for efficient ways to fill vacancies with migrant workers and require information about suitable candidates. In an increasingly globalized world where new migration routes are opening up and migration flows are diversifying, private recruiters play an important role in matching supply and demand.

The evolutions in the migration industry provide opportunities for a wide range of private recruiters, from small and specialized private employment agencies to multinational companies. Apart from these legally operating businesses, there is a parallel world of semi-legal or outright criminal recruiters, often linked to smuggling or trafficking networks. Research has shown that

where legal migration channels are limited, migrant workers will largely depend on illegitimate recruiters or their own social networks. The challenge for governments is therefore to promote legal migration, regulate the market for private employment agencies, protect migrant workers from abuses and curb unfair competition in recruitment.

Since it is so easy for recruiters to work under disguise or “underground”, it is essential to combine regulatory measures with promotional campaigns to ensure compliance with the law. There are numerous approaches to regulating and monitoring activities of recruiters, while ensuring that migrant workers are protected from abuse. The choice for one approach or another should be based on an analysis of the recruitment industry, its main type of activities, and possible problems. The scope of legislation may differ according to the type of private employment agency (PEA), however, legislators should not leave the legal status of PEA undefined. The following section provides an overview of regulatory approaches, starting with a brief introduction to international standards.

#### **III.2.1 International standards**

There are several international instruments that oblige states to protect migrant workers from abuse during recruitment and that provide guidance with respect to legal standards. The most recent and detailed provisions can be found in the ILO Private Employment Convention no.181 (1997) and ILO Recommendation no.188. This instrument replaced ILO Fee-Charging Employment Agencies Convention no.96 (1949), which is still in force in a few ratifying member



states. In addition, there are the UN Convention on the Protection of the Rights of all Migrant Workers and Members of their Families as well as the ILO Migrant Worker Conventions that refer to the regulation of recruitment in migration.

ILO Convention No. 181 recognizes the potentially positive role PEA can play in national and international labour markets. It obliges ratifying states to determine the legal status of PEA and the conditions governing their operations upon consultation with relevant workers' and employers' organizations (Art.3). Article 2 provides a comprehensive definition of a PEA:

“Any natural or legal person or enterprise, licensed or not, independent of the public authorities, which provides one or more of the following labour market services:

- Services for matching offers of and application for employment, without the private employment agency becoming a party to the employment relationship, which may arise there from.
- Services consisting of employing workers with a view to making them available to a third party.
- Other services related to job seeking, determined by the competent authority after consulting the most representative employers' and workers' organizations, such as the provision of job-related information, that do not set out to match offers and applications for employment.”

This definition covers two types of employment relationships that can have a bearing on the bargaining power of migrant workers. The first service, which is the most common and most often exercised by PEA in sending countries, encompasses the actual placement of workers with a user enterprise. The second service refers to temporary work agencies or other types of labour providers, which often employ migrant workers in receiving countries and hire them out to employers. These agencies are part of a triangular employment relationship. In addition, there are agencies offering special services, such as job trainings or job fairs, which therefore correspond to the third part of the definition.

Legislators can also exclude certain types of agencies from operating in the market. This may be rele-

vant for categories of workers which have been subject to abuse in the past or which may be better served through the Public Employment Service (PES) (Art.2). Several provisions of the Convention concern the protection of workers recruited and placed by a PEA. They include guaranteeing fundamental rights to workers as well as special protection measures for migrant workers (Arts. 4, 5, 8, 9, 11 and 12).

Recommendation No. 188 calls on States to combat unfair advertising practices, including advertisements for non-existing jobs, which is especially relevant in migration. PEA should also be prevented from recruiting workers for jobs involving unacceptable hazards or risks. Other provisions in Convention No. 181 and Recommendation No. 188 deal with the promotion of cooperation between PEAs and PES.

Before deciding on a particular policy towards PEAs, governments should set up an adequate institutional framework to monitor and enforce compliance with national legislation. In most countries, a specialized department in the Ministry of Labour is responsible for these tasks. Sometimes, it may be advisable to set up an independent authority working in cooperation with several relevant ministries, social partners and other civil society organizations. In any case, the authority should have a clear mandate and sufficient resources to carry out its monitoring activities.

### III.2.2 Registration and licensing

The most commonly used approaches to regulating the activities of PEAs are registration and licensing. Registration requires the agency to register for a fee with the Chamber of Commerce or other relevant authorities. A registered agency is then subject to routine checks by tax authorities or labour inspectors like any other business. Given the particular sensitivity of the recruitment business, however, many countries have opted for a licensing system.

If implemented properly, licensing helps establish transparency in the market and detect illegal activities. However, since it imposes an additional burden on business, it is crucial that a dual approach be developed: rewards for complying agencies and penalties for

those resorting to illegal practices. The responsible public authority should also keep a register of licensed agencies and make this publicly available. The register may be complemented by a “black list” of agencies that have violated the law. It is also critical that legislators clearly delimit the liability of PEAs and user enterprises in the event of violations of labour laws and of other legislative provisions. Furthermore, PEAs should be required to comply with labour and equal opportunities laws, and this will no doubt assist in defining the responsibilities of PEAs and use enterprises with regard to the protection of workers.

Some governments have developed model employment contracts that cover minimum labour standards, such as job description, remuneration, working hours and holidays, transportation, compensation for injuries, emergency medical care, and dispute settlement procedures. PEAs should be compelled to use these model employment contracts as benchmarks and keep records of all issued contracts.

Regulation of PEAs should also include reporting and data protection systems for personal information on clients and job seekers. A critical issue, in particular with regard to recruitment for employment abroad, is the collection of fees from job seekers. ILO Convention No. 181 stipulates that PEAs “shall not charge, directly or indirectly, in whole or in part, any fees or costs to workers” (Art.7). However, if it is “in the interest of the workers concerned, and after consulting the most representative organizations of workers and employers”, exceptions may be allowed for certain categories of workers or types of services provided by PEAs. Interpretation of the exceptions provided under national law with regard to Convention No. 181 is reviewed by the ILO Committee of Experts on the Application and Supervision of Standards. In fact, the collection of fees is permitted by most national legislation. The issue is not so much the charging of fees, but to curb overcharging.

Conditions for issuing a licence may vary to great extent, but in general they cover the following issues:

- **Licensing fee:** the fee should be adequate and reflect the business environment for PEAs in the country concerned. Legislators may opt for band-

ed fees to lower the entry barriers for small PEAs.

- **Financial capacity of the applicant:** this may include proof of a specified minimum start-up capital and/or a deposit as safeguard against violations of contracts or as guarantee against loss and damages for which the PEA would be liable.
- **Personal and professional qualification of staff:** this refers to criteria such as age, nationality, reliability (i.e. absence of criminal record), professional training etc. of the applicant and staff to be employed by the agency.
- **Management and marketing capability of the applicant:** the applicant and staff should possess the management and marketing skills required for carrying out job placement activities and obtaining contracts with employers. This is particularly relevant in recruitment for employment abroad.
- **Validity of licence and re-application:** most licences are issued for a limited period of time, requiring PEAs to re-apply or to request extension of their licence.
- **Scope and transferability of licence:** a licence may be restricted to one specific holder, location of the agency, or type of activity.

State laws should require that the corporate and legal personality of recruitment agencies be verified and thus subject to scrutiny and operational monitoring. These legal and corporate personalities are embodied in a licence, which requires certain standards concerning the PEA’s:

- legal personality;
- corporate personality;
- financial capability;
- marketing capability;
- recruitment capability;
- management capability.

A detailed illustration of standards that can be required are shown in Table III.1.

The Philippines and Pakistan are two countries with an active private sector in recruitment. There were 1327 licensed recruitment agencies in the Philippines in 2003. Table III.2 illustrates licensing requirements in Pakistan and the Philippines.

TABLE III.1

### Standards and Requirements for Licensing Recruitment Agencies

Standard	Purpose	Proof
<i>Legal personality</i>	To certify the business to legally operate.	<ul style="list-style-type: none"> <li>• Articles of Incorporation for corporations;</li> <li>• Articles of Partnership for partnerships;</li> <li>• Certificate of Single Proprietorship for single owners.</li> </ul>
<i>Corporate personality</i>	To show that it can exist as an enterprise.	<ul style="list-style-type: none"> <li>• Certificate of bank deposit stating the minimum paid-up capital specified by law;</li> <li>• Income tax return of incorporators within 2 years;</li> <li>• Corporate tax paid by the agency for those seeking re-licensing;</li> <li>• Clearance of the incorporators or owners from any criminal liability which may cast doubt on the enterprise to exist legally.</li> </ul>
<i>Financial capability</i>	To provide financial resources for international operations and the ability to absorb consequences of possible failure in the market.	<ul style="list-style-type: none"> <li>• Certificate of an agreement with a reputable bank covering sufficient amount to answer valid legal claims as a consequence of recruitment or contract violations;</li> <li>• Surety bond from accredited banks as assurance that the agency will not default on their obligations to the recruited applicants.</li> </ul>
<i>Marketing capability</i>	To exhibit competence in looking for or identifying employment opportunities existing overseas.	<ul style="list-style-type: none"> <li>• Duly executed special power of attorney, authenticated by embassy or consulate officials or labour attachés regarding the existence of the employer in the receiving state;</li> <li>• Duly executed special power of attorney, authenticated by embassy or consulate officials or labour attachés regarding the existence of the project in the receiving state;</li> <li>• An authorized job order request with prescribed number of workers.</li> </ul>
<i>Recruitment capability</i>	To ensure the competence of the agency to scrutinize, assess, identify qualified applicants to the needs job requests.	<ul style="list-style-type: none"> <li>• List of recruitment personnel;</li> <li>• Their individual curriculum vitae;</li> <li>• Proof of academic qualification preferably with degree in Psychology or Human Resources, or any similar experiential qualification in interviewing and giving examinations.</li> </ul>
<i>Management capability</i>	To ensure the capability of management and the adequacy of equipment or facilities for continued operation.	<ul style="list-style-type: none"> <li>• List of administrators and personnel;</li> <li>• Their curriculum vitae;</li> <li>• Copy of contracts or lease of ownership of buildings or office spaces and the office address;</li> <li>• Assurance, duly sworn, in that the agency will recruit only medically fit applicants.</li> </ul>

Source: IOM (2005b).

TABLE III.2

**Licensing Requirements in Pakistan and the Philippines**

Requirements	Pakistan	Philippines
National	Yes	Yes
Application fee	US\$16	US\$200
Registration	Company	Company (with paid up capital of US\$40,000)
Character certificate	Good conduct certificate	No criminal record
Refundable Deposit	US\$5,000	US\$20,000
Other	License fee – US\$500	Surety bond – US\$2,000
Validity of licence	3 years	4 years

Source: Mughal and Padilla (2005).

Note: Original sums were in national currencies and converted to US dollars by the authors.

**III.2.3 Monitoring and enforcing regulation of PEAs**

Before introducing new legislation on PEAs, governments should develop a monitoring and enforcing mechanism that ensures that all market actors meet the requirements. Licensing fees should be a part of this mechanism. Monitoring and law enforcement can be carried out by the licensing authority or by regular labour inspection units and the police in case of criminal activities. In order to operate effectively, law enforcement officials must have clear benchmarks and standards against which the performance of PEAs, as well as other types of agencies, can be evaluated. The conditions and criteria stipulated in the licence can be used for this purpose, as well as codes of conduct and relevant labour and immigration laws. Law enforcement officials should also be trained on these regulations.

Monitoring activities can involve pre-licensing as well as on-the-spot inspection once the licence has been issued. Inspectors will check documents submitted on a regular basis as part of the reporting requirements of PEAs. They may also gather evidence during unannounced inspections which could usually be carried out on the basis of complaints or reports on suspicious practices. The monitoring authority can use a range of sources to cross-check information provided by PEAs, such as screening of media advertisements, reports from trade unions or NGOs, and verification of employers through embassies.

Monitoring activities should be linked to a complaint mechanism for workers and, more specifically migrant workers. Workers who have been deceived or abused during recruitment should have the possibility to file complaints and to receive compensation. Adjudication through regular court proceedings can be costly and difficult for migrant workers. It is therefore advisable to set up in addition an administrative complaint procedure which would also assist law enforcement authorities in targeting criminal recruiters (see the example in Table III.3).

If the monitoring authority finds sufficient evidence for malpractice and if persuasion does not lead to a change of behaviour, administrative and/or penal sanctions should be imposed. They can include forfeit of the deposit and performance bonds posted, fines, revocation or withdrawal of a licence, imprisonment, and seizing of assets.

The authorized state institution should be empowered to monitor the operations of recruitment agencies, by:

- obtaining reports by recruitment agencies on job placement, status of employment of those deployed, and other information needed by state agencies;
- organizing periodic visits or inspections by state agents or their representatives;
- introducing information campaigns identifying recruitment agencies or foreign employers



TABLE III.3

### Complaint Procedures

**Tier 1 Private Employment Agencies**

In the event of abusive employment conditions abroad, the migrant should first contact the PEA that hired him or her. The PEA should then attempt to settle the dispute between employee and employer amicably and by voluntary agreement.

**Tier 2 Responsible State Authority**

If tier 1 fails, then the appropriate institutions should provide impartial and effective third-party assistance through conciliation, arbitration, and mediation. Institutions should get in touch with their counterparts in the country of employment. Should the complaint be proven, the responsible authority should revoke or suspend the licences or satisfy claims for refunding.

**Tier 3 Adjudication**

Though prolonged and costly, this is the best way to deal with serious abuses of human rights in the recruitment process, including human trafficking. Complaints involving acts that are criminal in nature and require the imposition of penalties such as fines and imprisonment come within the jurisdiction of the courts.

blacklisted for violations of the law or for having perpetrated illegal acts or abuses;

- establishing efficient and competent mechanisms for review of migrant workers’ employment contracts prior to signature and during their employment when the contract is enforced.

#### III.2.4 Fees and documents required from potential migrants

In addition, the state institution should disseminate information to the public on recruitment-related fees and costs allowable under the legislation, such as:

- cost of placement and documentary services;
- skills testing fees;
- medical examination and inoculation;
- passport and visa fees;
- airport terminal fees (if applicable);
- other authorized fees.

Placing an upper limit on the fees that PEAs can charge is common practice. Supply and demand factors underpinning migration should also be considered when regulating the issue of fees. In India fees vary according to the worker’s level of qualification (see Table III.4).

TABLE III.4

### Fees charged to migrant workers by PEAs in India

Type of worker	Fee (in US\$)
Unskilled	45
Semi-skilled	65
Skilled	110
Highly skilled	220

Source: India (2004).

In the Philippines, the recruitment fee must not be more than one month’s salary specified in the employment contract. In response to problems of over-charging by recruitment intermediaries and exorbitant migration costs, some countries of destination have now introduced legislative restrictions on these fees. Israel, for example, has recently issued a decree limiting the cost to the migrant worker to approximately US\$650.

Documents to be provided by prospective labour migrants during the recruitment process include:

- proof of qualification (certificates, diploma, transcript of records);

- passport and visa requirements;
- clearances from state institutions (skills training);
- provision for medical insurance, funds or social security.

### III.2.5 Performance-based incentives and sanctions

Some countries have made extension of the licence contingent on performance, in order that a recruitment agency which fails to deploy a minimum number of workers may see its licence revoked. At the same time, awards are bestowed on best performing agencies, in recognition of their contribution to national development.

There are several ways in which government authorities can create positive incentives for PEAs to ensure compliance with national law. Governments have already tested a number of incentives, such as:

- extension of licence for a longer period, or waiver of renewal requirement;
- tax incentives;
- contracts are processed more speedily or automatically;

- inclusion in a formal and publicly available list of recommended agencies;
- invitation to participate in government missions of foreign market development;
- offer to fill quotas as part of bilateral agreements;
- other promotional incentives related to the marketing of law-abiding agencies.

### III.2.6 Self-regulation

Although necessary for curbing abusive recruitment practices, policing by States will not, in itself, be sufficient, given the forces of demand and supply at play. Industry associations have been formed and have the potential to develop and enforce voluntary codes of conduct.

In addition to statutory requirements, PEAs have developed their own codes of conduct, either on specific issues or in a more general sense. Codes of conduct can be put in place by individual companies or by an association. Subscribers can be individual PEAs or user enterprises. Although codes of conduct are not le-

#### TEXTBOX III.1

### Recruitment Agencies in the Russian Federation – Steps towards Self-Regulation

Russian legislation provides for compulsory licensing of agencies dealing with employment of Russian citizens abroad. At present, 590 recruitment agencies have received a license from the Russian Federation Federal Migration Service (FMS). The overwhelming majority of these agencies are small companies for which recruitment is quite often not the main business activity, but one which offers a way to generate a quick profit.

In addition to regulation by FMS, initial steps towards self-regulation have been taken. A non-commercial partnership, International Association on Labour Migration (MATM), was established in 2004 and includes over 70 private recruitment agencies from Russia, Tajikistan and Moldova. The Association's principal task is the development of "civilized" forms of labour migration. MATM members have adopted a Code of Business

Ethics by which they are guided in their work. MATM is taking steps to join the International Confederation of Temporary Work Businesses (Confederation Internationale des Entreprises de Travail Temporaire (CIETT)).

In Moscow, in February 2006, MATM organized an international conference on "Increasing the Role of Civilized Labour Migration in Development of Economy of Russia and CIS Countries: the Role and Place of Employers and Private Recruitment Agencies". MATM works in a close cooperation with the RF Federal Migration Service, RF Rostrud (Federal Service on Labour and Employment), RF Ministry of Foreign Affairs as well as with representative offices of IOM and ILO in Moscow and other partners.

Source: IOM Moscow.

gally binding, they should reflect national laws. Their value is of a moral nature: a code is a promise and a commitment vis-à-vis clients and the wider public.

Past experience has shown that the development of codes of conduct is more effective when the following practices are adhered to:

- While the specific standards to be included in the code are an internal affair of a company or private association, they should nonetheless be discussed with trade unions, government, and civil society organizations.
- Independent monitoring mechanisms that stipulate clear criteria and sanctions for non-compliance should be included, although this is often the most controversial aspect of the code.
- The code and information on non-complying subscribers must be communicated to the public.
- A code should be clearly distinct from the by-laws of a federation or private business association, though the combination of these two documents could be used to increase the threshold of membership.

A growing number of codes of conduct have been developed by PEAs or their associations. The best known is that developed by the International Confederation of Temporary Work Agencies (CIETT), which establishes general rules to be adopted by national business associations.<sup>2</sup> CIETT supports the principle of self-regulation by PEAs through cooperation with the relevant institutions. National codes should reflect the spirit of this code, and indeed, in many cases, they may go well beyond the general standards set out by CIETT.

In addition to voluntary codes of conduct, some PEAs have favoured more competitive systems of self-regulation, such as rating or labelling. Major multinational companies promoted the labelling system. The result was the introduction of the ISO 9000 label of quality management by the International Organization for Standardization. Throughout the ISO 9000 family, emphasis is placed on the satisfaction of clients. For example, in 2002, Kelly Services was certified to ISO 9002 quality standards, and like many PEAs, now include the ISO 9000 labels in their advertising and marketing campaigns as a guarantee of fair practice.

### III.2.7 Involvement of public employment agencies

While the role of State agencies in recruitment has clearly been overtaken in most Asian labour sending States by the private sector, an argument could be made for deployment through the State for categories of workers especially vulnerable to malpractice and abuse, such as female domestic workers.

International organizations like IOM who have wide experience in migrant application processing and services can also be called upon for the selection of workers and is doing so with regards to labour migration to Canada, Italy and Spain.

## III.3 Procedures for Departure

### III.3.1 Employment contracts<sup>3</sup>

Ensuring employment contracts that guarantee a fair wage and basic provisions have been an important part of efforts of countries of origin to protect their nationals abroad. In general the essential elements of an overseas employment contract are:

- identification of the parties to a contract – both the employer and the worker;
- details on minimum terms and conditions, such as salary, hours and place of work, overtime, etc.;
- information on specific benefits over and above the minimum benefits provided by the host country;
- certification that both parties to the contract accept the terms and conditions;
- notarization of the contract.

Countries of origin have also developed model employment contracts which establish minimum requirements for their workers in the country of destination, such as:

- guaranteed wages for specified working hours and overtime pay for work carried out beyond specified working hours;
- free transportation from point of hire to site



of employment and return or off-setting arrangements;

- free food and accommodation, or offsetting arrangements;
- free emergency medical and dental treatment, and facilities including medicines;
- insurance coverage;
- just or authorized cause for termination of employment;
- repatriation of remains and belongings at employer's expense in case of death;
- one day of rest per week;
- procedures for dispute settlement.

Such provisions should take into account existing labour and social laws of the host country, as well as national customs, traditions, mores, and practices. They should also comply with existing conventions and bilateral or multilateral agreements with the host country, as well as existing labour market conditions.

The Philippines, for example, have introduced benchmarks for setting wages. Filipino migrant workers are not allowed to accept wages that are lower than the prevailing minimum rate for the same skills in the host country or lower than the standards fixed by bilateral agreements or international conventions to which the host country is a signatory. In no case is a migrant worker allowed to receive a salary lower than the prevailing wage in the Philippines.

Terms and conditions may deviate from what is prescribed by the Philippines Overseas Employment Administration (POEA) as long as both employer and employee agree, if the total compensation package is higher than the minimum prescribed by POEA and that complies with existing laws. Thus, the recruitment agency is obliged to inform the foreign employer of POEA's minimum requirements.

In addition, POEA has developed skills-specific and country of destination employment contracts, including prescribed employment contracts for Filipino entertainers bound for Japan, domestic workers for Hong Kong<sup>4</sup> and seafarers in general (see Annex 3 for a sample contract prescribed by the POEA).

Administratively set standards, as included in model employment contracts, form the basis for permitting the employment of nationals abroad. However, in the absence of any agreement between States on methods for ensuring their implementation, it is very easy for contract substitution to take place. Authorities in the countries of employment would have to assume the responsibility of ensuring that violations of contracts are penalized, as the Department of Labour in Hong Kong (Special Administrative Region of China) does. (Abella, 2000). Otherwise much of the efforts to ensure minimum standards in employment contracts in countries of origin are of little use.

In Jordan, the government has endorsed a legally enforceable Special Unified Working Contract for foreign domestic workers developed with the assistance of UNIFEM and national stake-holders. The contract is the first of its kind in the Arab region and is required for the issuance of visas and permits. The government is also amending national labour laws to provide domestic workers with legally recognized and enforceable rights protection (UNIFEM, 2004).

### III.3.2 Emigration clearance

In democracies, it is a generally accepted rule of international law relating to the movement of persons across borders that people have the right to leave the territory of a State (including their own country). In Asian labour-sending countries, however, there exist a varying range of exit controls as part of protection measures. In the Philippines, for example, it is mandatory for migrant workers to have POEA clearance before leaving the country. Pakistan, Bangladesh and Indonesia have varying degrees of restrictions on female migrant workers leaving the country. In India, emigration clearance is required for certain blue-collar occupations. Asian labour-sending countries have in the past banned employment in specific destination countries for a certain period, owing to abuses in that country (Baruah, 2003a). Deployment is also banned to countries in conflict, where the basic safety of the worker is at risk.

In the Philippines, workers are thoroughly documented through the clearances, certificates, credentials and the employment contract required as a condi-



tion for their deployment. Only after all the documentary requirements of various Philippine government agencies have been satisfied is the final document released to the migrant worker – the overseas employment certificate – that serves as the worker’s exit clearance at airports. No airline will permit a migrant worker to board its flights without surrendering this certificate, which also entitles the migrant worker to exemption from payment of the travel tax and terminal fee. Members of the worker’s family are also entitled to a reduced travel tax (IOM, 2005b).

Emigration clearance for persons in lower skilled occupations, in order to verify that minimum standards in employment contracts are met, may be necessary and helpful, but this process must be quick and not create additional cost for the migrant. In the Philippines, the time taken for the clearance is just three hours (provided that all documents are in order). The Handbook does not recommend restrictions on female migration as a good practice. Such measures go against the principle of promoting equal employment opportunities for men and women. Besides, it does not provide an adequate solution to the problems of exploitation and abuse of female migrants.

Implementation of regulatory measures, whether by controlling recruitment or by using emigration clearance to check the validity of overseas employment contracts, becomes more challenging for countries of origin when movement is eased by the introduction of visa-free regimes (e.g. as in the CIS) or by proximity (e.g. Indonesians and Filipinos working in Malaysia). The easing of movement, whether deliberate or due to physical factors, enables potential labour migrants to travel to the country of destination without necessarily first obtaining a job (and employment contract). In such cases, while regulatory measures remain important, countries of origin will need to rely more on support services and inter-state cooperation to ensure the protection and welfare of their citizens working abroad.

## *III.4 Support Services*

The provision of support services to labour migrants can extend from information provision, a contributory welfare fund to meet emergency needs in the country of destination, provision of insurance coverage, and posting of labour attachés to advise and assist workers abroad.

### **III.4.1 Information dissemination**

#### **III.4.1.1 Pre-employment**

As millions of people move across borders each year, the need for information has become fundamental to all migration decisions. Distorted perceptions and insufficient information about the realities in the countries they are trying to reach increases the importance of giving migrants access to information. Most migrants are unaware of the practical, legal, social and economic consequences involved in moving to another country. This lack of awareness puts migrants at risk and undermines orderly migration. Information dissemination helps fill this void by providing migrants with the basis to make informed decisions.

In recent years, labour sending countries have recognized the need for holding not only pre-departure orientation a few days before departure, but also pre-employment orientation seminars (PEOS) and intensified information campaigns, to provide applicants with sufficient information to enable them to make decisions. Information campaigns can inform potential overseas workers on safe recruitment, travel and employment procedures, and on the risks of irregular migration, regular movement options, and regulations of both receiving and sending countries, including those on illegal recruitment.

A variety of communication activities using several media can be used. Mass media ensure that information reaches large audiences quickly, while direct grassroots contacts provide the informal setting required for a more in-depth and frank discussion.

- **Migrant Resource Centres:** MRCs provide a focal point to plan, conduct, and carry out information dissemination, as well as a place where

## TEXTBOX III.2

### Information Resource Centre for Labour Migrants in Tajikistan

An Information Resource Centre for Labour Migrants was established in Dushanbe in 2004 by IOM and the Government of Tajikistan with the support of OSCE in order to provide intending and actual labour migrants with accurate information on their life and work abroad. Tajikistan's limited employment opportunities and mountainous terrain make it difficult for its inhabitants to make a living. As a result, in an attempt to escape poverty, almost every Tajik family has at least one member who is a migrant worker. The Tajiks seasonally migrate to neighbouring Kazakhstan, Kyrgyzstan, Uzbekistan but most go to Russia. A recent IOM study on labour migration in the region revealed that some 600,000 Tajiks are economic migrants. Unfortunately however, Tajik migrants are not well informed of employment realities abroad.

Most Tajiks work in the informal and lower skilled sectors in Russia and even when they have a regular status, labour exploitation is common. Many economic migrants do not know where to go with questions or for information on travel and work abroad. As a consequence, unofficial recruiters and traffickers use this situation to their advantage.

The Government of Tajikistan, IOM and OSCE determined that an effective way to address some of the problems is through the creation of a public resource centre with qualified counsellors who can provide information tailored to the needs of migrants. The Resource Centre provides information on employment conditions, travel and document requirements, registration, migrants' rights, press reports, maps and contacts, risks of trafficking and smuggling in persons, health risks and tips for economic migrants. Through this project, information is also provided on community organizations and resources, social services and longer-term integration facilities.

Particular attention is paid to collecting and preparing up-to-date information in the field of labour migration and disseminating it to intending labour migrants:

#### 1. Travel and documentation:

- documents required for travel (passport and other documents)
- entry and exit (rights and responsibilities of border guards and citizens);
- customs (customs procedures, rights and responsibilities on both sides of the border);
- police (how to prevent abuse);
- transport means and ticketing (air and road transport);
- visa information and embassy addresses;
- counter-trafficking information.

#### 2. Admission and post admission:

- legalization in destination country (registration);
- legalization of employment (work permit);
- health (first aid, HIV/AIDS prevention);
- education (admission);
- overseas representations of the Republic of Tajikistan and other contact addresses;
- relationship with employer (employment contract and possible risks);
- housing (housing agreement and risks);
- employment in foreign countries (realities and possible risks for Tajik citizens).

The information is disseminated via booklets, posters, counselling services, tours, mass media, meetings, workshops and seminars.

Source: IOM Dushanbe.

migrants can telephone or visit for counselling services (see Textbox III.2).

- **TV documentaries:** Produced by national public and/or private television companies or by sponsored productions, they present the experiences of the migrant during the migration process or of the unsuspecting victim of trafficking. Broadcast on prime time, they can be followed by discussion and debate.
- **TV debates/round tables:** IOM and ILO officials, foreign embassy representatives, migration experts, and potential migrants can help clarify migration issues and may urge the audience to ask questions and provide feedback.
- **TV public service announcements:** PSAs are short and convey strong, simple and practical messages.
- **Radio broadcasts:** Write-in, phone-in or email-in programmes give concrete, simple answers to listeners' questions on migration. They offer the advantage of being flexible and personalized, and therefore have a greater impact with the public.
- **Radio PSAs and FM plugs:** These are short messages tailored for younger audiences. Their compact and lively formats deliver practical information, testimony from migrants or simple, strong messages.
- **Soap operas:** Soap operas convey effective messages in countries where official channels lack credibility or impact. Drawing on real-life situations and adding personal drama against a wider historical or social background, they allow listeners and viewers to identify with powerful role models.
- **Printed materials:** Using simple language, printed materials describe the realities of migration and the consequences of irregular departures. They address issues of major interest to migrants and the public at large and can include sections on family reunification and legal employment

abroad. They can be distributed through IOM, ILO, local NGOs, consulates, and schools or inserted into local newspapers.

- **Outdoor media:** Posters and billboards with simple, high-impact messages showing the consequences of irregular migration bring the message to people on the street.
- **Networking and seminar tours:** Seminars “bring the message” in person to the people, and provide concrete, legal information. Participants also receive a “Migration Q&A Booklet” to reinforce the seminar’s message.

All these campaigns should start from a thorough knowledge of its audiences to ensure that information meets real needs. Sample Knowledge Attitude and Practice (KAP) surveys should be conducted among the audience both before and after the information dissemination campaigns in order to assess impact.

#### III.4.1.2 Pre-departure orientation

Pre-departure orientation courses are targeted to labour migrants who have secured an employment contract. They can impart practical knowledge about their future living and working environment, and cover such topics as basic language skills, financial management, health counselling, and human rights awareness. The overall objective is to equip departing migrants with reliable and accurate information regarding their employment and life abroad, return and reintegration, protection of migrant workers from potential abusive employment practices in the country of destination, and enhancement of the gains that can be made in orderly labour migration through a short course.

The steps for instituting pre-departure orientation courses are:

- making an assessment of needs and developing a curriculum for pre-departure orientation;
- developing pre-departure orientation curriculum for the main destination countries and for vulnerable categories of migrants;
- establishing in-country capacity by carrying out comprehensive pre-departure orientation for

migrants, by training of trainers and curriculum development;

- establishing financial sustainability.

**Need assessment, compilation and sharing of curriculum:** a country-specific assessment should be carried out to identify the gaps in pre-departure orientation currently underway and determine priorities in terms of the target group. Curricula already in use should be collected for sharing and adaptation.

**Examples of curriculum development:**

a) *Focus on Domestic workers:* The governments of the Philippines and Sri Lanka have developed orientation programs for domestic workers leaving for Hong Kong and the Middle East, covering the following areas with a duration of two days:

- rights of a domestic worker based on the standard employment contract;
- obligations of a domestic worker based on a code of conduct,
- “do’s and don’ts” in dealing with the employer and living in the destination country;
- destination country profile;
- standard duties of a domestic worker;
- services and benefits offered by government bodies and NGOs;
- options and procedures for sending remittances;
- travel documents, airport procedures and travel tips;
- arrival in destination country;
- return and reintegration;
- savings options.

b) *Focus on lower skilled workers:* A general orientation can also be developed for lower skilled workers for specified destination countries. The duration of the course can be two days and cover the following areas:

- worker rights based on the standard employment contract and labour law in destination country;
- destination country profile including society and cultural norms;
- health awareness;
- services and benefits offered by government bodies and NGOs;

- options and procedures for sending remittances;
- travel documents, airport procedures and travel tips;
- arrival in destination country;
- return and reintegration;
- savings options.

c) *Focus on destination countries in the EU, North America and Australia/New Zealand:*

- labour law and worker’s rights;
- country profile including society and cultural norms;
- language training.

The Italian Ministry of Labour provides funds for language training and cultural orientation in countries of origin. IOM has implemented such programmes, including in Moldova, and the curriculum outline is contained in Annex 7.

*Training of trainers:* A group of trainers from government bodies, educational institutions and NGOs should be identified for training in delivery of the curriculum, while language trainers, from language/educational institutions in the country of origin or destination, should be identified separately. The IOM has conducted pre-departure orientation courses for workers departing for Italy and Canada and language courses.

**III.4.2 Migrant Welfare Funds**

Migrant welfare funds (MWFs) are an innovative and financially sustainable means of providing support services to vulnerable migrants and those migrants in distress. Although only implemented in Asia to date, they have the potential to be of value to all labour-sending countries.

**III.4.2.1 Objectives of funds**

Three major labour-sending countries have established welfare funds: Pakistan, Philippines and Sri Lanka. The principal objectives of the funds are to provide protection to overseas workers (OW) on the job site, death, disability and health insurance, financial support for repatriation of remains, and fares for involuntary return. The funds provide other services for workers and their families, including pre-departure orientation, support for education and training, and credit for



various purposes (e.g. financing migration, housing and small businesses).

### III.4.2.2 Administration and operation of funds

Migrant welfare funds (MWFs) are administered by public or semi-public agencies: Overseas Pakistani Foundation (OPF), the Philippine Overseas Workers Welfare Administration (OWWA) and the Sri Lanka Overseas Workers Welfare Fund (OWWF). All three involve representatives of overseas workers and of the national office in charge of labour migration. They are financed by contributions from departing labour migrants fixed at about US\$25 per person. OWWA, together with POEA, were created by Presidential decree in 1977, just two years after the first large group of 35,000 construction workers left for the Middle East. The Pakistani Emigration Ordinance, adopted in 1979, provided for the establishment of OFP, while Sri Lanka created its welfare fund in 1985. Apparently both funds were adapted from the Philippines' model, since there are great similarities in their objectives, organization, and funding sources.

By law, all three funds charge US\$25 though the actual amount collected depends on how quickly the fee in local currency is adjusted to changes in the exchange rate. Migrants' contributions finance virtually all the activities of the welfare funds. Their principle objectives are similar, but the funds differ in their methods in delivering services, with some being more effective than others. A late comer in the field of OW protection, the Sri Lanka fund exhibit more effective practices than the other two funds.

MWFs in the Philippines, Pakistan and Sri Lanka have been assessed for their effectiveness in achieving their objectives and the OSCE countries can no doubt learn from reviewing their strong and weak practices, particularly with regard to:

- their role as an essential component of the national office for migrant workers;
- the importance of protection for migrants on the job site and MWFs' contribution to this;
- arrangements for insurance coverage and benefits;
- other services.

A welfare fund must be a part of a larger body which is responsible for the various needs of labour migrants. In all three countries, migration is a regulated and closely monitored activity where an office of foreign employment is charged with such tasks as:

- screening recruitment agents to prevent exploitative and fraudulent practices;
- setting minimum standard foreign wages and terms of employment;
- negotiating with host countries for extending their labour and other laws to migrants;
- facilitating emigration processes;
- settling disputes between migrants and recruiters;
- collecting information about employment opportunities and promoting markets for labour migrants;
- producing statistics on migration and doing policy research.

POEA has all these responsibilities and offers comprehensive preparation for labour migrants prior to their departure for foreign lands. It issues each departing worker with a certificate of approval of the employment contract needed to exit the country and to waive travel tax. The Sri Lanka Bureau of Foreign Employment (SLBFE) requires recruitment agents to supply information on foreign employers and foreign addresses. This information allows tracking of labour migrants on the job site, especially in places well known for ill treatment of the more vulnerable (e.g. housemaids). All labour migrants are registered as a member of the welfare fund by the migration bureau.

To work against abuse of labour migrants and ensure good working and living conditions, the presence of MWFs in the destination country is essential. Financial reports published by the welfare funds reveal the protection they have provided. Pakistan allocated 13 per cent of its welfare services budget at job sites, covering consultations, legal services, repatriation of remains and return of migrants. Sri Lanka allocated a higher proportion, 35 per cent of its budget for the same purposes. The Philippine MWF runs 28 labour migrants centres in countries with large concentrations of migrant workers. It pays for legal services to defend overseas workers in foreign courts. All three

funds pay for the cost of repatriating remains and fares for labour migrants whose employment has been forcibly terminated because of physical abuse, contract violations, and other reasons. Labour migrant centres and consular offices cooperate in assisting them in difficult situations. MWFs have been effective in assisting labour migrants who encounter problems on-site and this is their greatest benefit.

#### III.4.2.3 Insurance schemes

Membership with the welfare fund automatically includes insurance against death and disability. The membership fee is fixed at about US\$25 per contract period, usually two years, and covers both insurance and other fund services. The fee is collected from all departing workers. In the Philippines, those already abroad may voluntarily become members. The fee is uniform for all labour migrants irrespective of variations in risk of death, disability, or expected income loss likely to incur in specific professions or destinations. The risk is greatest for the less educated female housemaids located in the Middle East, while professional workers in all countries face relatively low risk. The Philippine OWWA pays US\$3,600 for accidental death and US\$1,845 for natural causes, recently increased from a uniform P20,000, or about US\$500. It pays P10,000 or US\$200 for funeral expenses. The death benefit is equivalent to less than two years' salary for housemaids in Brunei, the lowest wage paid to labour migrants. Skilled blue collar workers and professionals who earn much more than the Brunei housemaids receive the same benefits. In Pakistan, death benefit is also uniform at close to US\$5,000, while Sri Lanka's OWWF pays US\$1,048. Disability benefits are also much higher in Pakistan averaging US\$1,785, compared to only US\$335 in the Philippines and US\$68 in Sri Lanka. Apparently, benefit levels were set in an arbitrary manner.

In Sri Lanka and Pakistan, migrant insurance is channelled through state insurance companies, while the Philippines welfare fund handles insurance claims itself. Its insurance scheme is relatively simple to manage, since both premium and benefits have been set arbitrarily. Moreover, there are only a few hundred cases where labour migrants claim death and disability benefits each year.

The insurance scheme in all three countries although a start is insufficient and needs to be reformed in order to make it commensurate with the risks labour migrants face, for example by setting premiums and benefits which reflect the level of risk of death or disability and of expected loss of income. One solution could include retention of the present scheme as a common base for all labour migrants, but allowing them to take additional insurance voluntarily. For example, a reputable private insurance company in the Philippines has offered group insurance for labour migrants at one peso per P1,000 benefit for groups of at least 200 members each. Groups can be formed in locations where there are large numbers of migrants.

#### III.4.2.4 Other services

All three MWFs, but especially OPF, have tried to establish other services to labour migrants and their families, to the point where they can intrude on services already offered by specialized government agencies including:

- credit facilities for migrants or their families;
- scholarship for children;
- livelihood projects or small businesses;
- vocational training.

The OPF also invests in housing projects, and establishes and operates schools. However, with limited financial resources and technical capabilities for running these activities, it has not had much success. These extra services had little outreach, compared with the number of overseas workers, and a number have not been successful.

Thus, a welfare fund should be established as a component of a broader programme for promoting the welfare of migrant workers. Moreover objectives should be limited to its core role: protection of labour migrants, assistance at the job site, and adequate insurance against death and disability.

### III.4.3 Government assistance in destination countries through labour attachés

This section expounds on the role of the country of origin's embassy or consular office in the labour migra-

tion process, particularly of the labour attaché. The appointment of attaches is governed by Articles 7 to 11 of the 1961 Vienna Convention on Diplomatic Relations. As agents of their own departments or ministries but serving as diplomats under the Head of Mission, the attaché and their families enjoy diplomatic privileges and immunities as guaranteed by the Vienna Convention. While the role of the embassy in providing support and assistance to labour migrants is better understood in established labour-sending countries in Asia and Mexico, this aspect is relatively underdeveloped in Eastern Europe and Central Asia. The labour attaché is a member of the diplomatic mission appointed from the Ministry or Department of Labour and charged with functions relating to labour relations between his or her country and the host country. A labour attaché has the following duties:

- protect workers abroad in his or her diplomatic mission's jurisdiction;
- undertake marketing and identification of job opportunities;
- assist in the development of policy regarding labour;
- promote good relations with the host country on labour matters.

The Head of Mission has overall responsibility for the conduct of relations being discharged within the post, while the consulate is in charge of protecting its nationals in the host state. The labour attaché has the authority, through proper coordination with other diplomatic and consular agents, to protect nationals with respect to their employment within the jurisdiction of the diplomatic mission.

#### **III.4.3.1 Protection of workers**

The labour attaché's task is primarily to safeguard the migrant's rights both as a worker and as an individual by:

- maintaining his or her rights and upholding his or her dignity as a person and as a worker;
- ensuring that he or she is not exploited or subject to discrimination;
- providing assistance on all matters pertaining to his or her contract or employment;
- certifying that the terms and conditions of the worker's employment contract conforms with the laws and regulation of the home country and that

the contract is fair and just;

- assisting migrant workers in the recovery of dues or other benefits owing to them, whether such proceeds emanate from their employer, from their recruiter or employment agency or from the host government out of the funds created for them;
- assisting migrant workers on occasions where violations of their contracts or provisions stated therein occur;
- helping migrant workers in cases of non-payment of their salaries or allowances, or non-conveyance of their benefits;
- helping migrant workers in cases when they are subjected to inhumane conditions, sub-standard working environment, unhealthy or unsafe working condition;
- providing proper documentation to regular migrant workers;
- ensuring that undocumented migrants, smuggled or trafficked, are protected and their repatriation facilitated;
- coordinating with the consulate for the transit of dead bodies of workers to their families in the home country;
- ensuring that injured or sick migrant workers receive medical attention and, if they choose, facilitated in their going back home;
- ensuring that the rights and well-being of women migrant workers are protected, their special needs attended to and their persons protected against abuse and exploitation;
- providing legal assistance or representation in courts, in coordination with the consulate, when workers' rights as persons or as workers are violated; when they face allegations in court, or when they are detained because of allegations;
- providing counsel or advice to migrant workers in regard to problems pertaining to their employment or to cases that would affect their work.

#### **III.4.3.2 Identifying job opportunities and promotion**

The labour attaché serves as an agent not only for protecting migrant workers' rights but also for seeking out and developing viable opportunities for employment for his or her nationals. In this area, his or her tasks include:



- conducting ongoing studies or research on labour market trends in his or her area of assignment;
- gathering and analyzing information on the employment situation and other facts related to employment;
- establishing contacts with government agencies in the host state and their officials for exploring possible sources of employment;
- establishing links and coordination with the host country's private agencies that might be looking for employees to fill certain labour demands;
- linking up with industries, associations or chambers of commerce, business, industries or entrepreneurs which are potential sources of employment for his/her nationals;
- organizing ongoing training or skills enhancement for members of the community of migrant workers within his or her area of assignment;
- authenticating the special power of attorney that specifies the number and nature of job demand or orders in the receiving state as secured by the employers in that state;
- authenticating the special power of attorney subscribed by employers in the receiving country, which state that their business as legitimately existing and operating in that country.

#### III.4.3.3 Assistance in the development of labour policies

Since the labour attaché is closely involved with the concerns of employees overseas, he or she is the person who is often best equipped with knowledge about the conditions of his or her nationals working in a foreign land. In this case, a labour attaché is required to:

- classify cases or circumstances encountered by migrant workers and to provide reports to his or her department through the Head of Mission;
- provide insights on employment trends within his or her jurisdiction;
- advice his or her agency, and when needed, to provide counsel to law-makers or policy-makers regarding the need to maintain, improve or amend policies or legislation on migrant workers or other laws that would affect them;
- ensure that policies on migrant workers are gender sensitive;
- provide advice to his or her country's policy-

makers on the need to enter into bilateral agreements with the host country regarding the employment of his or her nationals in the receiving state.

#### III.4.3.4 Promotion of good relations with the host country on labour matters

A labour attaché is a diplomat responsible for labour relations and thus for promoting good relations in this domain. As a rule he or she is required to:

- encourage the organization or participation of migrant workers in recreational, cultural or social events in the host country where their country could be represented;
- ensure that, in the advent of problems or difficulties suffered by migrant workers, he or she is governed by the conduct of diplomacy in negotiating, transacting, arbitrating, or bargaining with the government or private agency or association in the host country.

#### III.4.3.5 Labour attaché's knowledge and skills

In the discharge of these functions, a labour attaché should be equipped with certain knowledge of:

- international legal instruments, treaties or agreements;
- the host country's situation in terms of labour demand and employment needs, as well as of his or her home country's potential employment market in terms of supply;
- policies and laws affecting labour in both countries.

Equally, the labour attaché should be equipped with skills in:

- diplomacy and tact;
- counselling, negotiation, conciliation and arbitration;
- analysis, organization and coordination;
- documentation;
- language (of the host country);
- research;
- networking;
- data handling;
- basic statistics;
- psychological assessment;
- human resource development.

### *III.5 Inter-state Cooperation*

Despite all the efforts made by sending countries to protect migrant workers, migrant workers continue to experience numerous problems in destination countries, particularly vulnerable groups such as female domestic workers, entertainers and lower skilled workers. There are clear limits to what a State can do to protect its migrant workers without the active cooperation of the countries of employment. In addition to the protection and welfare of migrant workers, inter-state cooperation is essential in expanding organized labour migration and curbing irregular movement. This particular dimension is discussed in Chapter IX.

#### ENDNOTES

- 1 See UN (2004: Agenda item 89(b), A/59/287/Add.1, 4). This world survey sets out recommendations that, if adopted, will improve the situation of migrant, refugee and trafficked women. Recommendations include ratification and implementation of all international legal instruments that promote and protect the rights of migrating women and girls; review of national emigration and immigration laws and policies in order to identify discriminatory provisions that undermine the rights of migrant women; development of policies that enhance migrant, refugee and trafficked women's employment opportunities, access to safe housing, education, language training in the host country, health care and other services; education and communication programmes to inform migrant women of their rights and responsibilities; and research and data collection, disaggregated by sex and age, that improve understanding of the causes of female migration and its impact on women, their countries of origin and their countries of destination in order to provide a solid basis for the formulation of appropriate policies and programmes.
- 2 See <http://www.ciett.org>.
- 3 This section is in part from IOM, (Draft) Labour Administrators' Training Curriculum (IOM, 2005b). The curriculum was developed with the financial support of the U.K. Department for International Development (DFID) and its principal author is Tomas Achacoso.
- 4 Throughout this Handbook "Hong Kong" refers to the Hong Kong Special Administrative Region of China and "Taiwan" to the Taiwan Province of China.
- 5 This section is largely reproduced from IOM (2005b).



# *IV. Developing Policies in Countries of Origin to Optimize the Benefits of Organized Labour Migration*

An increasing number of developing countries and countries with economies in transition seek to adopt policies, legislation and structures which promote foreign employment for their workforce and generate remittances, while providing safeguards to protect migrants. While job creation at home is the first best option, an increasing number of countries see overseas employment as a part of a national development strategy for taking advantage of global employment opportunities and bring in foreign exchange.

This Chapter will look at the role of marketing in facilitating and expanding labour migration, improving remittances services and enhancing the development impact of remittances, and skills development, as well as the issue of brain-drain. For countries seeking to promote foreign employment, labour migration policy necessitates adequate emphasis on the promotion and facilitation of managed external labour flows and should not be limited to the State's regulation and protection functions. Some of the specific modalities through which States can engage in the facilitation and promotion of international labour migration are described below.

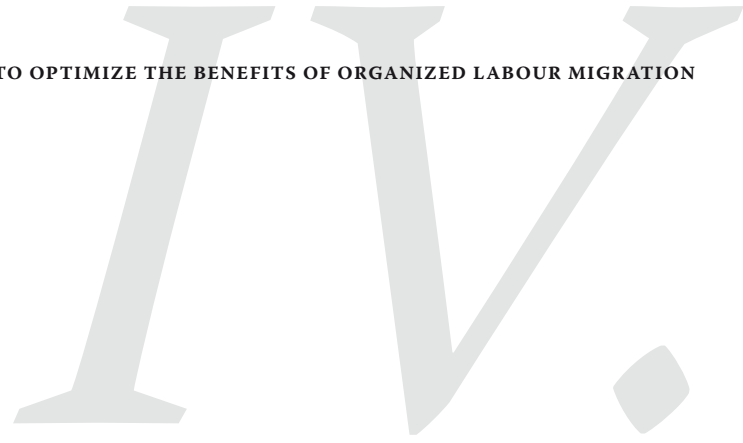
## *IV.1 Importance of Marketing<sup>1</sup>*

Since labour migration is primarily a demand-determined market, countries wishing to deploy their workers abroad must be able to seek out prospective employers amidst the competition coming from other labour-sending countries. Thus, marketing is the lifeblood of any overseas employment programme.

*Marketing* is the management process responsible for identifying, anticipating, satisfying customer requirements profitably. By breaking down this definition into its component parts, we can derive a better description.

*Management* refers to the top levels of the organization or a country. In the case of the Philippines, the President of the Republic takes an active hand in determining and guiding policies and programmes. On the diplomatic front, embassies utilize a country team approach, which puts all embassy personnel under the supervision and authority of the ambassador (ILO, 1991).

*Process* connotes a flow or movement forward involving a number of steps or operations involving nu-



merous entities or organizations. By its nature, it signals constant movement as opposed to a static position.

*Identifying* the requirement is the first critical step in marketing to determine the market of a product or service. It requires knowledge of both the supply and demand side of the market.

*Anticipating* is the necessary quality that allows one to remain competitive in the market. It implies a proactive attitude which allows an organization to be a step ahead of competitors in terms of what skills will be required by whom and when.

*Satisfying* or giving satisfaction is a universal concern of most customers. They look for products or service providers that will meet their requirements.

*Customer requirements* refer to the reliability of the product or service provider, competent and qualified workers, a cost effective process, timely delivery and transparent transactions.

*Profitability* refers to the whole migration process, where the host country and country of destination, migrant workers and the recruitment agency should all experience a win-win situation.

Marketing is a necessary first step in the effort to “export” a country’s labour. It also connotes a country’s deliberate policy to use the export of labour as a means to ease unemployment and rely on the flow of remittances to prop up its foreign exchange earnings. Countries intending to deploy their nationals abroad need to search for opportunities beyond their national boundaries in an international market which is highly competitive. This is attained with a working knowledge of market research.

The marketing process must start with an analysis of Strengths, Weaknesses, Opportunities and Threats, more commonly known as a SWOT analysis. When placed in the context of international labour migration or an overseas employment programme (OEP), an updated SWOT analysis can help to focus a country’s efforts in areas where it has built-in strengths, or help it to determine strategies in the context of opportunities or threats. A well-executed SWOT can help to shape a marketing strategy but, more fundamentally, it can help to determine a market research plan. Therefore, although an in-depth SWOT is always preferred, even the most singular level SWOT will help to point an institution in the right direction for the development of a marketing strategy.



### IV.1.1 The market development process/ developing an international labour migration marketing cycle

For facility of presentation, a Market Development Process Matrix is provided below which can serve as a framework for reference of the various stages of the process. The stages inherent in market development are chronologically laid out on the upper horizontal axis with 5 columns describing the different stages. The vertical axis lists the different schemes and strategies (inputs) designed to implement the targets objectives or goals (outputs), which are in turn laid out on the lower horizontal axis.

The first stage in market development is identification of the target market and assessment of supply capacity. It is important that both target market and supply assessment be undertaken simultaneously, since human resources development in a country usually is undertaken to meet local demands. A market becomes viable when there is a match between the demand and supply sides of the equation. A match signifies that the educational qualifications and experiences demanded by the foreign employer match those of workers from the sending country. If the variations between expectations and current capacity of the workers are not in congruence, some upgrading measures may be undertaken by way of skills upgrading or complementary courses in order to narrow any gap.

The entry stage follows, during which time the overseas employment programme of a sending country embarks on schemes to enable its workers to gain a foothold in the labour economy of the host country. The goal at this stage is to stimulate a market environment that raises the consciousness and awareness of foreign employers of the availability of workers from a particular country by highlighting their qualities, availability and competitiveness.

Having gained a foothold in a foreign market, the next step is programme implementation where the actual attainment of job contracts and recruitment agreements transpires as a result of inputs from the first two stages. At this point, a country's deployment machinery becomes known to others and comparisons are taken with other competing source countries to determine the better source of workers.

Next is the market share growth stage during which time deliberate efforts are undertaken to expand a sending country's market share. This presupposes that a sending country has the means of determining its share of the market and to what extent it can expand its participation in that market. Data on the international labour migration market is highly inadequate. Gut-feel measures may at times be necessary in order to at least estimate one's competitive standing and on demand and competitive trends.

The last stage in the process is market share maintenance, which ensures that current customers are satisfied and that their satisfaction will lead to recommendations to other prospective employers or repeat orders, whenever necessity dictates. It also means being in a strong position to fend off competitors trying to acquire market share.

#### IV.1.1.1 Market development efforts

The stages in market development should flow towards efforts for establishing specific market development and employment promotion measures, as enumerated in the vertical section of the matrix. This may be pursued in four general categories, namely, (1) research and planning, (2) personal selling and promotions, (3) print promotions and (4) corporate promotions and industry servicing projects. As an illustration, POEA's approach in the Philippines is described below.

##### (a) *Research and planning*

Research and planning are two inseparable tasks that comprise the lifeblood of a market development programme. Market-oriented research is undertaken to a large extent during the first stage of the market development process.

In the Philippines, the operational set-up of its market research group is based on the "desk officer system", which assigns particular markets on a regional basis and skills-based segments. This system facilitates the research process as it designates a desk officer on a per region basis such as the Middle East, Europe or Asia. It also allows for the development of regional expertise and specialization for each desk officer, making them wholly responsible for the conceptual and procedural formulation of regional market projects while coordi-

FIGURE IV.1

<b>Government-led Market Development Process Matrix</b>					
STAGE INPUT	Target Market Identification & Supply Assessment	Market Entry Stage	Market Programme Implementation	Market Share Growth Stage	Market Share Maintenance Stage
1. Research and planning	*****		*****		
2. Personal selling and promotions					
a. Marketing Missions			*****		
1) Technical Study or Fact-finding Mission	*****		*****		
2) Top-level goodwill and promotionsmission		*****			*****
b. Field visit / client calls		*****			*****
3. Print promotions					
a. Ad. programme		*****		*****	
b. Support communication materials		*****	*****		
c. Direct Mailing		*****			
4. Corporate promotions & industry servicing projects					
a. Familiarization campaign		*****	*****		
b. Greet-a-client				*****	*****
c. Client referral advisory			*****		
d. Market information service			*****	*****	*****
<b>Output</b>	<b>Market prospects</b>	<b>Host government/ employer awareness, goodwill, conducive market environment</b>	<b>Initial job contracts; recruitment &amp; bilateral labour agreements; market information</b>	<b>Stronger share &amp; foothold (additional &amp;/ or new job orders/ agree-ments)</b>	<b>Continued host government/ employer patronage</b>

Source: Achacoso (1987).

IV.

nating with other areas of concern, such as defining research standards in implementation and control.

This geographic segmentation is crucial as it simplifies the application of promotional strategies, as will be seen below. The relative autonomy inherent in this arrangement also provides an environment conducive to creative/innovative thinking.

A skills or industry based approach allows for the determination of market behaviour which is easier to dissect and correlate with appropriate strategies. Since such research make reference to the whole industry and is not for POEA's exclusive use, feedback from industry participants is relied upon as inputs and form part of the feedback loop during the making of plans and their implementation. Thus, POEA research outputs are circulated within the industry. A Monthly Market Situation Report (MSR) is provided to the private sector through their associations, which in turn distribute them to their members. The MSR is a consolidated report on current international labour market developments and relevant economic trends and events that have a bearing on the Philippine overseas employment programme. In addition, labour-receiving country profiles are prepared in order to have a comprehensive brief on the labour, political and socio-economic conditions as well as prospects and problems in each country. Information on immigration policies and business laws of different countries are continuously gathered, analyzed and disseminated.

This type of research is essentially based on analytical reading of secondary sources such as trade journals, regional economic magazines and national development plans of labour-sending countries. This is complemented by feedback derived from consultations and close liaison work with the marketing staff of private sector groups. Inputs are also derived from reports of Labour Attachés and whatever can be culled from Philippine Embassy reports.

#### (b) *Personal selling and promotions*

There is no better way of knowing the market than by meeting and talking directly with people on the ground, essentially officials of the host country and human resource development officers of private companies. This is the concept behind the "personal sell-

ing" approach adopted by POEA. Personal selling is done through a variety of ways which include among others, 1) the dispatch of special marketing teams on field missions and 2) client calls or field reconnaissance by Labour Attachés and/or special POEA representatives.

1) *Marketing Missions*. There are basically two types of marketing missions that are undertaken:

- *Technical Study or Fact-finding Missions* – This type of mission is generally participated in only by government officials composed of POEA's middle managers and senior technical staff with occasional representatives from other government agencies. It is basically a fact-finding or fact-substantiating strategy to assess opportunities or explore new prospects for Filipino manpower by undertaking research and improving the information base on prevailing wage rates, development plans, comparative data on competition from other countries, labour and business laws, employment practices and other relevant information on the target country.
- *Top Level Goodwill and Promotions Missions* – This type of mission is either purely composed of ranking government officials (i.e. Minister of Labour, POEA Administrator, or Undersecretaries) or is joined by representatives from the private sector. The composition of the team is in itself a key selling strategy in as much as it "opens doors" in target markets, establishes goodwill, and fosters bilateral understanding and cooperation with the target country. Opportunities to meet with top officials of foreign corporations are more readily arranged and greater attention is given to the promotion of the Filipino workers qualities and competitiveness.

The inclusion of representatives of the private sector enhances the business development aspect of the mission and facilitates the establishment of links with prospective employers/contractors. Representation from the private sector is usually obtained through nominations by the industry associations with the sponsoring government institution having the final approval. All expenses



incurred by the private sector are at their account, although government assists in securing preferential airfare and hotel rates.

2) *Field Visits/Client Calls* – Aside from these overseas missions, POEA carries out periodic marketing activities in coordination with Labour Attachés; who are the eyes and ears of the Ministry of Labour in the field. Labour Attachés act as on-site “information centres” and “distribution outlets” for promotional and communication materials developed by the home office. They also conduct “door-to-door” visits to prospective clients and provide the home office with leads and recommendations. They play a very important role in information generation and as feedback resources.

(c) *Print promotions*

Printed promotional materials are very important as a marketing tool and POEA relies on them quite heavily. The development of these printed materials emanate from POEA’s marketing personnel, since they require the perceptive analysis of the hiring tendencies and characteristics of employers and are blended with a concise and comprehensive presentation of what the country or POEA can offer by way of its services. The print campaign is conducted through 1) the use of advertisements in media, 2) support communication materials, and 3) direct mail.

- *Advertisements* – The use of advertisements are particularly strong at the entry and growth stages of the market development process. At the entry stage, these advertisements serve as launching pads or image-builders of the Filipino worker as a better alternative or as a preferred choice. During the growth stage, these advertisements highlight the comparative advantages and competitive edge of the Filipino migrant worker.

POEA conceptualizes and utilizes advertisement copies depending on their target audience and the purpose of the campaign. These take the form of institutional or tagline advertisements, greeting advertisements, write-ups, press releases and promotional articles strategically released and placed in various media outlets either locally or internationally. Factors such as readership profiles, circulation record, language medium, cost

and other factors determine the frequency and placement of such advertisements.

- *Support Communication Materials* – These generally refer to hiring primers, skills brochures, corporate profiles, marketing portfolios, annual reports, information kits and flyers. Prepared by POEA personnel and used as support materials in marketing activities, they provide handy and comprehensive information on the Philippine overseas employment programme and its facilities and are updated whenever necessary. The distribution network for these materials range from the Philippine embassies, marketing missions, labour attachés, business centres in leading hotels, and the direct mail campaign.
- *Direct Mail Campaign* – This strategy is employed to reach out to a predetermined group through sales letters and flyers all year round in order to support government and private sector efforts. Mailing lists of different sectors are developed with the assistance of Philippine embassies and labour attachés who recommend target sectors after research. This campaign is considered as a more cost-effective promotional instrument since it only involves the cost of production of letters and mailing costs.

(d) *Corporate promotions and industry servicing projects*

POEA undertakes a number of soft-sell schemes to strengthen its corporate image and the overseas employment programme in general. It also pursues projects, which support the market development efforts of the private sector. These include:

- *Familiarization Campaign* – POEA hosts meetings and initiates dialogues with selected officials of foreign embassies based in Manila. This gives POEA an opportunity to discuss vital issues and problems affecting its migrant workers in that particular country and a means for updating them on the latest developments, policies and programmes of the government/POEA. Newly posted officials are immediately visited and given a briefing or orientation on POEA’s activities.



- *Greet-a-Client Campaign* – This is another soft-sell approach which involves sending greeting cards to important clients, both foreign governments and private employers, on special occasions such as holidays or national Independence Day celebrations. This provides a means of sustaining linkages with clients for them to continue patronizing Filipino workers.
- *Client Referral Advisory System* – The success of the market entry stage of the market development process is reflected in the level of interest or actual job orders and contracts for hiring Filipino workers sent to POEA by prospective clients. If the interested employer is a government entity wishing to have their workforce requirements filled by POEA, this is referred to POEA’s Government Placement Department. If the client is from the private sector, their job order is endorsed to the private sector through the Client Referral Advisory System.

The Client Referral Advisory System is supervised by POEA and is utilized as a means of rewarding top performers in the recruitment industry. Top performers are those who maintain a good track record in terms of their high operating standards and professionalism in the conduct of their business affairs. Guidelines and the mechanisms of inclusion of private recruitment agencies in the Client Referral Advisory are mutually agreed between POEA and the private sector.

- *Market Information Service* – A mini databank is maintained that contains reference materials, foreign and local studies on migration, reports and other vital market data and information and is made available to foreign and local clients of POEA. For instance, recruitment agencies wishing to participate in a bidding process may need data on a foreign country’s business or tax laws to enhance its chances. POEA assists, and if the data required is not available, may seek the assistance elsewhere.

## IV.1.2 Market research

Market research on labour migration opportunities focuses on demand analysis and in particular on the profile, quality and quantity of the demand. This type of research is demand-, rather than supply-oriented.

Market research is a systematic process for generating knowledge on a target market through a structured way of obtaining, analyzing, processing, interpreting and reporting data. Every market is governed by four elements:

- there is a product or service wanted;
- it can be secured at a certain price;
- there is a quantity of demand among those who want the product or service;
- there is the quantity of supply of those willing to provide the product or service.

In the international labour market, the supply of migrant workers from one country is meant to fill a certain demand for migrant workers overseas for which the foreign employer is willing to pay. The idea behind this type of market research is to formulate the right decision in order to match the amount of demand for labour in the receiving state with the quantity of supply of labour from the sending state (Warren et al., 2002). Market research provides the link between demand and supply by providing the appropriate information for making an informed decision.

Any market research proceeds in the following manner:

- recognition of an opportunity or problem;
- designing the research plan;
- gathering the data;
- interpreting the data;
- reporting of research output.

## IV.1.3 Role of the private sector

The role of the private sector in identifying and creating opportunities for an OEP cannot be overemphasized. An involved private sector will not only decrease the financial and staffing costs on governments when it comes to the marketing process, but also gives access to certain circles, and thereby information, that public officials may have a more difficult time acquiring.

In Asian labour-sending countries, governments acknowledge that the private sector is the engine of growth in the recruitment industry and that it is mainly responsible for opening new markets and placing Asian workers in more than 200 countries around the world and on thousands of ocean-going vessels. It actually serves as a bridge that narrows the employment gap between labour-sending and labour-receiving countries in their quest to match available skills with overseas demand for migrant workers.

The private sector also plays an important role in selecting only the most qualified and efficient migrant workers for their foreign principals or employers, since they wish to establish long-term relationships and repeat job orders with their foreign principals. This is actually the best form of protection that a migrant worker can have – that his or her skills are appropriate for the job required and he or she is suited to the work in every sense. The private recruitment agencies are co-employers of the workers they deploy. Thus, it is in their interest to ensure that their foreign principals treat migrant workers well and scrupulously observe the provisions in the employment contract.

The private sector realizes that it has to explore new markets constantly and initiate innovative approaches and services, if it is to remain competitive, both locally and internationally. Competition forces them to develop an efficient approach and demands operational flexibility in order to remain competitive. They are therefore more capable of addressing the dynamism that this kind of a market demands than government.

Furthermore, the dynamic nature of international labour migration puts the private sector in a more advantageous position over government as far as the marketing and placement of workers abroad is concerned. This is because the private sector can mobilize their resources more efficiently and expeditiously than government agencies which normally operate under more constrictive conditions imposed by bureaucratic red tape and drawn-out budgetary process.

While emphasis should be placed in attaining a balance between market development and welfare protection mechanisms, labour-sending countries might need to highlight market development without neces-

sarily sacrificing protection mechanisms for its workers given the high costs involved in market development and research. Governments might have to assist the private sector in terms of sharing information regarding market conditions and job availability in various labour-receiving countries. This is one area as mentioned above, where close cooperation with the Ministry of Foreign Affairs can help to bring down the cost of market research and development. The Ministry of Foreign Affairs is on-site and can acquire, through purchase or official request to the appropriate government agency of the host country, copies of their official publications or five-year development plans and other information that can serve as inputs to their marketing plans.

## IV.2 Information Dissemination

Information dissemination is important not only to inform potential overseas workers of safe recruitment, travel and employment procedures and the risks of irregular migration, but legal labour migration opportunities and procedures and mechanisms. As shown in Section III.3.4.1, a variety of communication activities using several media can be used.

An informed and transparent labour market information system or service on existing jobs at home and abroad is an effective way of combating abuses suffered by migrant workers. Access to reliable sources of information about employment opportunities at home and abroad will allow potential migrants and their families to choose wisely from these opportunities. Adequate and reliable labour market information may also improve their search for local jobs before seeking employment abroad and provide them with criteria for a better evaluation of the actual costs and benefits of working abroad. Such information should respond to the following questions:

- How to find out about employment opportunities in potential countries of destination?
- What are the essential requirements (education, skills, qualifications, experience, capital, agency fees, passports and visas, etc)?

- How can existing skills and abilities be applied to different employment options?
- How to find out which recruitment agents are reliable and trustworthy, and which are not?
- What are the dangers related to illegal recruitment and direct hiring by potential employers?
- How to find out about suitable countries of destination?
- What are the legal requirements for entry and admission?
- What are their rights, entitlements and obligations and how to exercise these rights?
- What are the other factors to take into account in considering employment in another country?
- How to evaluate and compare realistically employment and income earning opportunities at home and abroad (purchasing power)? (ILO, 2003c, Booklet 2: 21-22).

It is highly recommended that States of origin provide migrant workers with accurate information to assist them in their search for employment. The Ukraine's State Employment Service (SES) offers a good example of the establishment and maintenance of a system of information on job openings at the national level: the *Unified Informational System* (UIS). This is a nationwide database of vacancies and job seekers and will soon be accessible in most employment centres throughout the country.

### ***IV.3 Bilateral and Regional Labour Agreements***

Movement of labour is eased as a part of regional integration processes as well as on the basis of a BLA or arrangement. This aspect will be dealt in chapter IX on inter-state cooperation.

## ***IV.4 Migrant Remittances***

It is quite clear that foreign exchange earned by nationals working abroad looms large in the formulation of labour migration policy.

### **IV.4.1 Role of remittances in national economies**

#### **IV.4.1.1 Definition**

Three streams of money transfers are included as remittances in the IMF's annual publication, the *Balance of Payments Statistics Yearbook*. These are workers' remittances, compensation of employees, and migrant transfers. However the term "remittances" has come to include more in the eyes of a number of States, institutions and experts. For IOM's purposes, migrant remittances are defined broadly as the monetary transfers that a migrant makes to the country of origin or, in other words, financial flows associated with migration. Most remittances are personal cash transfers from a migrant worker or immigrant to a relative in the country of origin, but they can also be funds invested, deposited, or donated by the migrant to the country of origin. The definition could possibly be altered to include in-kind personal transfers and donations. Some scholars go further to include transfers of skills and technology, as well as "social remittances" (Baruah, 2006b). The scope of this section is limited to monetary transfers.

#### **IV.4.1.2 Scale and importance**

International remittances received by developing countries in 2005 were estimated at around US\$167 billion and have doubled in the last five years (World Bank, 2006). Migrant remittances constitute an important source of foreign exchange, enabling countries to acquire vital imports or pay off external debts. Remittances also play an important role in reducing poverty (World Bank, 2006). There is growing awareness of the potential that remittances contribute to economic development in migrant-sending countries at the local, regional and national levels. A USAID study on remittances in Armenia summarizes the view on the economic impact of migrant remittances (Roberts, 2004).

Consensus views on the impact of migration and remittances on the sending countries have been subject to cycles of pessimism and optimism. In the early 1990s, for example, the general pessimistic view was that remittances do not promote growth but "exacerbate the dependency of sending communities by raising material expectations without providing a means of satisfying them, other than more migration. Individ-

TABLE IV.1

### Economic Benefits and Costs of Remittances to a Receiving Country

Potential Benefits	Potential Costs
Are a stable source of foreign exchange which eases foreign exchange constraints and helps finance external deficits	Ease pressure on governments to implement reforms and reduce external imbalances (moral hazard)
Are potential source of savings and investment for capital formation and development	Reduce savings of recipient families and thus have a negative impact on growth and development (moral hazard)
Facilitate investment in children's education and human capital formation	Reduce labour effort by recipient families and thus have a negative impact on growth and development (moral hazard)
Raise the standard of living for recipients	Migration leads to "brain drain" and has a negative impact on economy that is not fully compensated by remittance transfers
Reduce income inequality	Increase income inequality
Reduce poverty	

Source: Roberts (2004).

ual families attain higher standards of living, but communities achieve little autonomous growth". Some analysts went so far as to advise governments and donors to discourage migration and remittances. There has been a sea change in recent years in the consensus view, and currently there is a great deal of excitement about the potential of remittance inflows to support growth and development. This is due partly to the fact that remittance flows to developing and transition countries have become so large, and partly because the theoretical understanding of remittances has changed.

As Roberts (2004) mentions, in recent years a view has emerged that migration and remittances are the result of family decisions based on optimizing their potential, given the opportunities and constraints they face. Simplistic views that remittances lead to "excessive" consumption, import dependency, or "unproductive" investment in housing and land are no longer tenable. The potential costs of remittances are now viewed as largely deriving from moral hazard problems. For example, remittances can ease pressure on governments faced with large external deficits to engage in difficult structural reforms. They also could have a neg-

ative impact on recipient households' commitment to work, savings and investment, even if this is the objective of the remittance sender.

The importance of migrants' remittances as source of development finance is now widely recognized in various fora including the UN, EU and G-8. For the majority of countries in the Eastern Europe/Central Asia (ECA) region remittances are the second most important source of external financing after FDI and, for many of the poorest economies, remittance receipts are the largest source, greater than contributions from foreign aid. Three of the world's largest recipients of remittances as a portion of GDP are in ECA (Moldova, Bosnia and Herzegovina, and Albania – see Textbox IV.4).

It is important to keep in mind that remittances are private and family funds and, as such, there are essentially two stakeholders: the remittance sender and the recipient. In between, there are a host of actors: intermediaries in the transfer process, governments in both receiving and sending countries responsible for policy framework, supervision and facilitation, and institu-

tions engaged in research and seeking to enhance the development impact of remittances.

Given that remittances are private funds, they should not be viewed as a substitute for official development assistance.

Although there may be exceptions, most labour migrants go abroad to work in order to support their families back home and will therefore seek to send most of their earnings home, even in the absence of special inducements. For policy-makers, the issue is not how much more remittances can be earned through migration, but:

- how remittance channels (services) can be made more cost-effective, accessible, reliable, quick and transparent;
- how the development potential of remittances can be enhanced.

#### IV.4.2 Data collection

Use of remittances as a resource for development requires better information and data on remittance flows, usage patterns, transfer mechanisms, good practices and attitudes, and preferences regarding savings and investment schemes. Official records on remittances usually under-estimate remittance flows, although figures can also be inflated by the inclusion of non-remittance flows. In many ECA countries, under-reporting is more common given the lack of data on remittance collection and the number of informal channels for sending remittances.

Two problems in general with remittance data are also common to ECA countries. First, relatively weak financial systems and a high proportion of intra-regional migration suggest that a substantial proportion of total remittances is made through informal channels, yet data and estimates on informal flows are lacking. Second, the poor quality of data, faulty data collection or the recording of non-remittance payments as remittances distorts analysis of the data available.

Data collection is weak in many countries but can be improved by:

- putting in place a centralized data collection and reporting mechanism for banks and money

transfer organizations (MTOs); so that remittance flows can be recorded and measured;

- conducting surveys of households and key informants to assess types of remittance services and their efficiency; volume of informal remittances; use and impact of remittances;
- sharing of good practices among policy-makers, remittance companies, banks and micro-finance institutions (MFIs).

#### IV.4.3 Remittance services

Reducing remittance costs and increasing access to cost-effective, fast and safe remittance services, not only benefits migrants, but also potentially increases the funds remitted and made available to recipients.

Remittances are sent in various ways: through banks, money transfer companies, by hand or through a third party (e.g. Hawala transactions), depending on a number of factors. The remittance industry consists of formal and informal transfer agents. At the formal end are global MTOs, such as Western Union and Money Gram, as well as smaller MTOs serving specific geographical markets, such as Anelik Bank for Russia-Armenia (Textbox IV.3), global and national banks. Informal methods include unregistered MTOs, such as Hawala dealers, individuals, friends and relatives, bus drivers, traders and the like. The simplicity of the money transfer operation lends itself to the many unregistered actors who usually provide a service at a lower cost than the well-known MTOs.

It is generally recognized that fees for remittance services charged by global MTOs are high, regressive (higher for smaller amounts) and non-transparent. Fees may be as high as 20 per cent of the principal, depending on the remittance amount, channel, destination and origin country and service (World Bank, 2006). The average price is reported to be around 12 per cent of the principal in 2004. Currency conversion charges are even less transparent, ranging from no charge in dollar-based economies to 6 per cent or more in some countries (World Bank, 2006). Prices have declined in some high volume corridors, but still remain very high in low volume corridors, many of which concern ECA countries.

Leading players in the transfers market earn large profits, while the transaction cost for migrants remains relatively high, though it is beginning to fall. This situation is unwarranted when one considers that money transfer is usually a simple operation and constitutes a low risk. Where there is sufficient volume or competition, there is no reason why remittance channels should not be low cost, efficient and accessible. Research by the World Bank indicates that, for major MTOs, the cost of a remittance transaction appears to be far lower than the price (World Bank, 2006).

#### IV.4.3.1 Advantages and disadvantages of informal systems

Informal fund transfer systems (IFTs) such as Hawala can have legitimate and illegitimate uses. In some countries, they are legal and labour migrants find the system quick, cost-effective, convenient, versatile and anonymous. However, IFTs can also be used for illegitimate purposes such as circumventing capital and exchange controls, tax evasion, smuggling, money laundering and terrorist financing (El Qorchi et al., 2003). Typically, IFTs thrive in jurisdictions where the formal sector is weak or where significant market distortions exist. Fees charged are as low as 1-2 per cent of the remittance amount with a delivery time of 24 hours (Varma and Sasikumar, 2005; World Bank, 2006).

Remittances carried by hand through transport operators, couriers, friends and relatives is also common in certain regions including ECA, but is vulnerable to leakage during border-crossings and through theft.

Over-valuation of exchange rates, restrictive foreign exchange practices, lack of efficient, adequate and reliable banking facilities, and low relative rates of return on financial assets, as well as high transfer costs and low access to the formal sector explain why migrants use unrecorded remittance systems. Whether incentives can significantly divert remittances to formal channels when the fundamental services remain distorted and institutional deficiencies are not rectified is doubtful.

#### IV.4.3.2 Formal systems

##### (a) *Money Transfer Operators*

Global MTOs are the main formal remittance channels worldwide. The main advantages perceived by users are access, speed, reliability and simple procedures. Less costly alternatives have developed but are not as widely available. MTOs, such as Western Union, have good brand recognition (and have large marketing budgets). They are however relatively expensive to use, compared to the less costly services offered by smaller and specialized MTOs, such as Anelik.

##### (b) *Financial institutions*

Account-based services for money transfers are usually less costly. A comparison of the approximate cost of remitting US\$200 by major MTOs, banks, other MTOs, and Hawala found that banks were more competitive than major MTOs in all corridors where comparative data was available (World Bank, 2006).

IRNet, a credit union service, is also an innovative alternative to MTOs and charges a flat rate of US\$6.50 per remittance. However the sender has to be a member of the credit union. There are 14 countries in Europe/Central Asia and North America where the credit union is active (WOCCU, 2004).

Apart from being less expensive than MTOs, banks have the advantage of complementing remittance services with other financial products.

##### (c) *Other services*

Card-based innovations are also cost effective. For example, Visa offers four products for money transfer and has tie-ups with banks, MFIs, and retail outlets. It is a relatively new mechanism (with scope for growth).

Financial service providers and other organizations catering for the poor and migrants can forge creative institutional partnerships to provide remittance services. Alliances with banks, credit unions, postal networks, international MTOs and retail outlets allow them to leverage their strengths (proximity to clients) and overcome their weaknesses (limited transfer experience, restrictions on foreign exchange dealings and access to the payment system) (Isern et al., 2004).

One solution is the bundling of money transfers. In India, an NGO, Adhikar, is piloting a domestic money transfer service which centralizes the transfer and distribution of small transfers of migrants and routes them through one account in a partner bank. This brings down the transaction cost and generates a fee for the NGO. Another is the postal services with their wide network (and in some cases, already an actor in domestic remittances) which are attractive to MTOs for forming partnerships.

#### IV.4.3.3 Government initiatives

Over the years, governments in labour-sending countries have introduced a number of policy measures designed to influence the flow of remittances and increase flows through formal channels. As remittances are private transfers, these policy measures have largely take the form of incentives.

##### (a) *Financial products to attract remittances*

Currently India is the country receiving the largest amount of remittances. Non-Resident Indian (NRI) deposits were established in 1970 and have become one of the main ways of attracting savings by Indian migrants. A series of incentives were provided: higher interest rates, exchange rate guarantees, repatriation facilities, and exemption of wealth and income tax on savings and on interest. The incentives were created mainly to augment foreign exchange reserves and, once this was achieved, many were withdrawn during the 1990s (Varma and Sasikumar, 2005). NRI accounts have proved attractive largely to migrants belonging to the professional and skilled categories.

In recent years, one of the most important initiatives for attracting savings from Indian migrants has been floating specialized bonds for development purposes. Two such bonds, Resurgent India Bonds (1998) and the Indian Millennium Deposits (2000) raised US\$4.2 billion and US\$5.51 billion respectively (Varma and Sasikumar, 2005).

Other South Asian countries have also put in place additional incentives to attract remittances. In Pakistan, the government confirmed the importance of remittances as a tool for economic development by introducing a series of incentives in 2001. For a minimum remitted amount (US\$2,500-10,000), overseas

#### TEXTBOX IV.1

##### **Anelik Bank Ltd.**

Anelik Bank Ltd. was founded in 1990 in Armenia by a group of enterprises working in light industry. It was incorporated as a limited liability company in 1996. Its total capital is US\$3.7 million and it has 6 branches, 5 of which are in Armenia. The sixth branch, in Moscow, Russia, is incorporated as a daughter company, Anelik Ru. The Bank has credit programmes with the Eurasia Foundation, EBRD, USDA, IOM, and the World Bank.

Launched in 1997, Anelik's money transferring system allows individuals to make transfers without opening a bank account. The sender must provide the receiver's exact name, and the city and the country to which the money is transferred. Both the sender and the receiver must present identification to the respective banks. The cost of transfer ranges between 1.5 per cent and 3 per cent of the total amount transferred. Anelik guarantees that the money will be received within 3-24 hours. Anelik Bank has made money transfer a business focus and their fees are low. The same is true of Unibank, another Armenian Bank. Both banks serve the Russia-Armenia remittance corridor. There are large numbers of labour migrants from Armenia working in the Russian Federation. In 2003, fees from money transfer represented 91.9 per cent of Anelik's non-interest income and 48.5 per cent of total income.

Owing to their low fees, the two banks now account for most of the money transfers coming into Armenia and their pricing policies have brought some remitters using informal channels into the formal sector. In contrast to remittances to Armenia from Russia, there is greater use of informal channels for remittances to Armenia from western Europe where the formal channels are not as cost-effective.

Source: World Bank (2005); [www.anelik.am/ru](http://www.anelik.am/ru); Roberts (2004).

Pakistanis were given privileged access to higher education, public housing and share offerings, as well as free renewal of passports and import duty exemption (for US\$700 per year).



*(b) Simplification of transfer procedures and extending financial network*

When Tajik banks first handled money transfers from abroad, the procedures involved were so cumbersome that migrants would not use them. Moreover, between 1993 and mid-2001, the government levied a substantial tax on foreign exchange transfers. Through the abolition of this tax and simplified transfers, Tajik commercial banks have emerged as the main transfer mechanism for remittances.

National banks in South Asia have opened branches in migrant-receiving areas and established correspondent accounts with international banks in order to extend their financial services network. Similarly, MTOs have extended their domestic network through partnerships with local agents and the postal service. Streamlining of transfer procedures (in terms of both simplification and speed) has led to a marked increase in remittances through formal channels in Bangladesh.

*(c) Counselling and advice*

As a part of pre-departure orientation given to migrant workers, state overseas employment entities in the Philippines and Sri Lanka advise workers on how to remit their earnings. Similar information is provided to Tajik migrants through an Information Resource Centre established by IOM and OSCE in Dushanbe. However, it is clear that much more can be done in the area of providing information to migrants about the real costs of remitting and the various transfer options available in host countries.

*(d) Access to services for irregular migrants*

With the backing of the US and Mexican governments, Mexican Consular Identification Cards (CICs) issued in the US are becoming an accepted form of identification for opening US bank accounts, thus giving irregular migrants access to the formal financial sector. Mexican officials have successfully negotiated with banks and transfer agencies in the US and, since December 2001, some 15 banking institutions and their branches allow migrants from Mexico, whether legal or illegal, to open bank accounts on presentation of identity cards provided by the Mexican consulates. Migrants' relatives at home can then use ATM cards to withdraw funds for about US\$3 per transaction, much lower than the usual money transfer fee (Russell, 2002).

*(e) Macro-economic policies and institutional framework*

It is recognized by many experts in the field that the most important measure governments can take to stimulate remittance flows and realize its development potential is to create a sound policy environment that minimizes macro-economic uncertainty, ensures transparency, and introduces standardized regulation of financial institutions. Governments need to pursue sound monetary policies, such as correctly valued exchange rates, a positive real interest rate, and liberalized foreign trade. But this is not enough. Governments also need to establish an institutional framework for the safe and low cost transmission of remittances, for competition and for proper operations by all participants. Governments can stimulate remittance flows and realize their development potential by creating a sound policy and legal environment that encourages capital inflows, including remittances.

Reducing the cost of sending remittance and increasing access to cost-effective, fast and safe remittance services not only benefits migrants, but also has the potential to increase the level of funds remitted and made available to the recipient. There is ample scope in most countries to promote more efficient and safe services, including:

- promotion of regularization of the informal transfer sector through registration and filing of returns;
- promotion of sound macro-economic policies and financial sector capacity building and accountability, such as establishing simplified and clear regulatory frameworks for foreign exchange management and liberalization of the exchange rate regime;
- introduction of measures to deepen and widen the foreign exchange market and provision of specialized banking services for non-residents;
- encouragement of a larger number of banking and other financial institutions in the transfer of remittances;
- increased access to banking service points both in the source and recipient countries to reduce costs and increase efficiencies;
- strengthening of communication systems and relationships with the diaspora in different countries;
- transformation and adaptation of formal transfer

systems to make them faster, more flexible, more cost effective and more accessible in order to reduce use of informal systems by migrants and their households;

- adoption of innovative linkages between information technology and financial transfer systems to reduce the cost of remittance flows, taking into account the best national and international experiences;
- information campaigns encouraging migrants to open a bank account of their choice, during the emigration clearance procedures for departing workers;
- offer of low cost pre-departure loans as a way of encouraging migrants to use formal banking channels;
- dissemination of information on remittance services and options via pre-departure orientation and in MRCs established in countries of destination;
- enhanced coordination between Ministries of Labour Migration and Finance, major financial institutions and other agencies, as appropriate, on the issue of external labour migration and associated remittance flows;
- capacity building through improved consular services for migrants, including creation of data bases and issue of secure identity documents, which facilitate use of formal remittance channels.

## *IV.5 Enhancing the Impact of Remittances on Development*

Migrant remittances constitute an important source of foreign exchange, enabling countries to acquire vital imports or pay off external debts and also play an important role in reducing poverty. There is growing awareness of the potential that remittances have to contribute to economic development in migrant-sending countries at the local, regional and national levels. Given that remittances are private funds, measures to enhance their development impact should not be involuntary in nature for the senders and recipients.

### **IV.5.1 Recipients' strategies for remittances**

An IOM survey carried out in Guatemala (Guatemala, 2004) found that recipient households used 53 per cent of remittances to buy basic items such as food and clothing. A further 11 per cent was spent on education and health. As much as 36 per cent was directed to savings, economic purposes and for the purchase of assets, including housing.

Studies in CIS countries (Tajikistan, Moldova, Armenia) have found that the amount allocated for savings and investment is small. In Tajikistan (Olimova and Bosc, 2003), labour migration and remittances have not led to individual accumulation of wealth nor have they accelerated the pace of SME development. Nevertheless, as a survival strategy, labour migration has become a crucial stabilizing factor to offset the effects of economic crisis. IOM and UNDP have initiated a pilot project to take things further (see below).

Where the investment climate is safe and returns attractive, migrants have invested in financial instruments for development (India, via development bonds). Philanthropic contributions have also resulted (Latino Hometown Associations in the United States).

### **IV.5.2 Leveraging remittances**

A number of countries, including Brazil, El Salvador, Mexico, Panama, and Turkey, have introduced remittance-backed bonds to raise funds at lower interest rates on international bond markets. This initiative may be premature for countries where financial institutions do not have experience with issuing bonds on international markets, but the idea of remittance-backed bonds is very interesting, though it needs to be evaluated cautiously (Roberts, 2004). As mentioned earlier (in Section IV.4.3.3), financial products have been developed to attract savings and investment from remittances.

Some governments have instituted special programmes to assist the reintegration of returning migrant workers and stimulate investment and business develop-

ment. Such initiatives have basically taken four forms:

- facilities for importing capital goods and raw materials;
- business counselling and training;
- entrepreneurship development;
- access to loans.

IOM and UNDP are implementing a project in

Tajikistan that matches investment of remittances in livelihoods and businesses with training, credit and advice (see Text Box IV.2).

Financial intermediaries can attract migrant deposits and channel them into loans for existing small and micro-businesses. In other words, labour-sending countries might wish to encourage micro-finance institutions (MFIs) to at-

**TEXTBOX IV.2**

### Pilot Project on Enhancing the Development Impact of Remittances

Tajikistan is the largest labour-sending country in Central Asia. One in four families has at least one member working abroad. The total labour migration out of Tajikistan in 2004 was estimated at 600,000, almost 10% of the total population of 6.8 million. The amount of remittances sent home by labour migrants from Tajikistan through official channels is US\$240 million, which is much higher than the country's annual budget.

While the remittances sent to Tajikistan help the migrants' families to solve some of their financial problems, a large amount of these resources is used to cover their immediate needs. Investment in longer term sustainable economic activities is limited.

In partnership with UNDP, IOM is enhancing the capacity of migrant households, local communities and civil society actors to promote the investment of remittances in viable livelihoods for migrant families. In coordination with local development committees, small business and agricultural loans were extended to labour migrant households investing a matching amount from remittances. The total investment amounted to approximately US\$80,000. Loans were linked to business training and preparation of business plans. In addition, labour migrants made matching contributions to repair community infrastructure (schools, clinics, bridges, transformers).

Source: IOM Dushanbe.

**TEXTBOX IV.3**

### Albania – Action Plan on Remittances

It is estimated that over 20% of the Albanian labour-force, predominantly young males, have left Albania for Greece, Italy and other western European countries since the 1990s. Together with this high rate of migration, it is estimated that a minimum of US\$650 million (approximately 20% of GDP) was remitted to Albania in 2003, making Albania one of the countries most dependent on remittances in the world.

In 2004, the Albanian Government approved the National Strategy on Migration (NSM) and its action plan. With regard to remittance management, unlike other sections which were fully elaborated, the National Strategy outlined the need to establish a detailed plan of action for creating and implementing a coherent and comprehensive policy on remittance management. To rectify this oversight, a workshop was held

in November 2005, entitled "Competing for remittances, linking emigration of Albanians and development of Albania", during which partners agreed on the need to create an interagency working group which would strengthen statistical collection facilities, undertake empirical analysis, and pursue policy development initiatives. The workshop also provided an opportunity to develop the NSM action plan with relation to remittances and led to a call to promote and carry out related research activities and longitudinal studies on remittance flows, with a particular focus on remittance behaviour, return potentiality, and related issues. The workshop also underscored the necessity to design policy that would lead to the creation of a conducive environment and incentives for using remittances in income generating activities.

Source: IOM Tirana.

tract remittances. Banks, credit unions and regulated MFIs are in a good position to leverage the economic impact of remittances. Remittances can also be used for housing loans. For example, the Guatemalan government and IOM are developing an innovative project which will finance low-cost housing for migrant families from remittances together with housing subsidies.

The Latino Home Town Associations (HTAs) in the United States draw together people from the same town or state in the country of origin and enable them to retain a sense of community as they adjust to life in the US. Typically, their first purpose is social, linked to activities in the hometown. Perhaps the most successful and best-known example of migrant involvement in a range of development activities can be found in Mexican HTAs. The Mexican state of Zacatecas has one of the oldest matching fund programmes and it has now been emulated by two other states in Mexico. Under these programmes, the Mexican government teams up HTAs and other actors to spur economic development. Initially, for every dollar donated by emigrants, the federal and state governments added US\$1 each. In recent years, the municipal government is an equal contributor as well. HTAs tend to fund projects that benefit the entire community, in areas such as education, health, sanitation, and civic works (Rodolfo and Lowell, 2002).

As mentioned in section IV.4.3.3, the most important measure governments can take to stimulate remittance flow and realize its development potential is to create a sound policy environment that minimizes macro-economic uncertainty and ensures the transparency and standard regulation of financial institutions. In tandem with incentives, the most important step governments can take to stimulate remittance flows and realize their development potential is to create a sound policy and legal environment that promotes capital inflows, including remittances.

An indicator of financial sector stability is whether people commonly use banks for depositing their savings. This is not the case in many ECA countries.

The World Bank (2006) has recently argued that incentives to increase flows and channel them to more productive uses is more problematic than reducing

transaction costs and improving the overall savings and the investment climate. There is no doubt that the benefits of reducing transaction cost are obvious, and that improving the overall climate for savings and investment is critical, but the latter is often a medium- to long-term process for States. In the interim, incentives and specific opportunities for investments by migrants in their country of origin may be helpful, particularly if there is a foreign exchange crisis. Similarly, much more can be done in building the capacity of HTAs and their partners in the effective implementation of development projects, and in evaluating whether national funds are being diverted away from better uses. However, there is little doubt that mobilization of philanthropic contributions from Diaspora organizations for grass-roots development is a positive measure.

Many ECA countries are active participants in internal, regional and inter-continental migration and this trend will continue at least in the medium term. As migration drives remittances, remittances will continue to play an important role as a source of finance in these countries.

It should be recognized that remittance inflows are the source of not only foreign exchange receipts, which can be used to finance the balance of trade deficits or the current account deficit, but also of productive investment and social development. Bearing in mind that remittances are private funds, in addition to improved data collection and reduced transfer costs, the development potential of remittances can be magnified in labour sending countries by:

- identification of productive and sustainable avenues of investment for remittances, for instance by facilitating the setting up of enterprises directly by migrants or through intermediate mechanisms, transferring savings via deposit accounts and specialized bonds, and developing loan products for migrants and their families for projects such as housing;
- formulation of policies that enhance the contribution of migrant associations to the development of the country of origin;
- Improvements in the overall savings and investment climate.

## *IV.6 Education, Training and Skills Development*

It is clear that abuses in recruitment are less common for skilled occupations since migrant workers are usually better educated and more aware of the dangers and have better terms and conditions. Some labour-sending countries have recognized this and now concentrate on raising workers' skill levels to improve their employment opportunities. Enhancing a person's human capital as well making information available on job opportunities are both equally important.<sup>2</sup>

**Good information** about domestic and foreign markets and its adequate dissemination to stakeholders is essential in every step of the migration process. This must be good information about employment opportunities and skill requirements as regards the domestic and foreign markets.

**Setting quality standards** in higher education/training programs is of obvious importance for the global labour market. The International Maritime Organization Standards of Training, Certification and Watch-keeping were established by the International Convention on Seafarers in 1978 and have been adjusted regularly to meet developments in the sector. As a member of the organization, the Philippines has implemented the standards and this has significantly helped the employment of its seamen on international shipping lines, where they represent 20-25 per cent of employees. In contrast, Filipino nurses experience greater difficulty finding employment in OECD countries because of the low quality of their nursing education, yet nurses with the highest qualifications tend to migrate, leaving the domestic market in short supply.

**Education** not only gives a person greater advantages in making the right migration decision, but matching education and skills to those desired in destination countries qualifies him or her for the best available job abroad. There should be education and training institutions providing training of relatively high demand which students will want to pursue and

may be prepared to pay for if necessary. Even if training in the desired skills exists, students still need to have access to information on foreign demand for skills and the financial resources to pay for the training. Poor information will lead to bad choices, while financial constraints prevent students from pursuing the most desirable qualifications.

Countries of origin should develop training facilities for prospective students prepared to acquire the education that domestic and foreign markets are seeking, yet this is not a simple task for governments to address. They will have to adopt an **education and training policy and strategies to meet the prospective demand for skilled human resources**. In this task, they will have to address the following issues.

### **IV.6.1 Developing education/training programmes**

#### **IV.6.1.1 Defining requirements in quantity and quality**

There is currently demand for major skill categories, such as engineering, computer science, natural science, management and finance, education, and medicine.

In ECA countries, governments have established extensive educational systems and their populations have achieved high schooling levels by world standards, more than 9 years in the former USSR countries. More than 50 per cent of the adult population (25 years and older) have received a secondary education, and a high proportion have undertaken further studies. Reforms are required to introduce training programmes in skills for which there is demand, improve quality of training and to focus on advanced education with development externalities. Sharing the cost of tertiary education with students and their families will free resources for reform measures.

ECA countries may seek to participate in the ongoing European OECD programme which sets a standard core curriculum and accreditation system for selected fields of study. The programme aims for a mutual recognition of degrees obtained in the various member countries.

#### IV.6.1.2 Financing higher education

This is a critical issue for most governments. Education benefits the person concerned and families and students have been willing to bear the cost. However, subsidies for education are warranted for courses that have positive externalities or are viewed as a basic need. This is not an issue for primary education, since it is considered a human right, but there are no obvious externalities in secondary and higher education as a whole. However, advanced instruction for research and development has been supported as it contributes to technological change, improved management and organization, enrichment of culture, policy-making, curriculum development and teaching materials, etc. Many countries are trapped into subsidizing education in most categories, either because of traditions inherited from past decisions or colonial government or because political pressure from the public. An indiscriminate system of subsidy adopted in some countries tends to obstruct efforts for improving the efficiency of education. ECA countries face greater difficulties reforming the financing of education as their populations are used to a fully subsidized education system. National governments in these countries could concentrate subsidies to higher education in priority programmes of instruction and research.

## IV.7 Emigration of Skilled Human Resources

Skilled migration or “brain drain”, in particular, has come under strong criticism on the grounds that it can have a cumulative negative effect on fragile economies. There is also an ethical dimension as the poorer sending countries bear the costs of educating the potential migrants, while the receiving countries reap the benefits. The issue can also be seen as one of “brain overflow”. Viewed from this perspective, emigration reduces the supply-demand gap for skilled workers in developing countries and ensures optimal allocation of unused human resources.

Clearly, however, when there is a skill shortage or when skills are difficult to replace, the cost is high for the sending country. This is the case in Africa, for example, which, as a region, may have lost one-third of its highly skilled personnel in recent decades. The problem has been less serious in Asia.

The following steps can be taken, though they should not prevent migrants from exercising their right to freedom of movement:

- promotion of ethical recruitment to prevent indiscriminate international recruitment in development sensitive sectors such as health, particularly in small and fragile economies, through recruitment under bilateral labour agreements;
- creation of systems to recoup some loss of investment in countries of origin by inclusion of practical training as part of select higher education programmes, investment by destination countries in training and education proportional to the loss in investment suffered by the country of origin, and retention of skilled workers through voluntary means;
- better targeting of subsidies in higher education (as described in Section IV.6.1.2).

#### ENDNOTES

- 1 This section is reproduced from IOM (2005b).
- 2 A person’s human capital consists of formal education, skill honed by work and other experiences and desirable traits such as discipline, integrity and sociability.



# *V. Administration of Labour Migration*

To meet the policy objectives of protecting citizens working abroad and of optimizing the benefits of labour migration, it is essential that there is adequate institutional capacity and inter-ministerial coordination. This includes giving the management of labour migration due priority in overall development and foreign policy and in the allocation of resources.

Governments in organized labour-sending countries are committing more technical and financial resources to the formulation and implementation of labour migration policies. Over the last two decades, a number of specialized institutions have come up to address concerns about foreign employment. Some experts note that the “bureaucratization” of labour migration policy has reached very sophisticated levels in some Asian countries (Abella, 2000). Nevertheless, other experts point out that research into the issue of institutional capacity for an effective administration of international labour migration has been neglected (Achacoso, 2002).

Administration of labour migration is usually governed by an Emigration Act or Decree. Implementation of the relevant legislation is usually the responsibility of the Ministry of Labour, but in some cases a separate Ministry has been created for overseas affairs. Within the Ministry, most advanced labour-sending countries have a foreign employment bureau or its equivalent responsible for protection, welfare and pro-

motion. In the case of the Philippines, there are three entities, one for protection and promotion functions (POEA), a second for welfare and adjudication functions (Overseas Workers Welfare Administration or OWWA), and a third for skills development, training and certification. In addition to a foreign employment bureau, some countries have a public sector arm for recruitment (Bangladesh, Pakistan). In Azerbaijan, the Ministry of Labour has a migration service responsible for the placement of workers abroad which has deployed over 200 health personnel to Saudi Arabia.

Two other ministries also engaged in the labour migration process are the ministry of home affairs or of the interior for passport issuance and immigration, and the ministry of foreign affairs (MFA) for promotion and interstate cooperation. The supporting role of MFA is clearly an important one. For example, in Kyrgyzstan, MFA’s Department of Migration Service is mandated to play an important role, inter alia, in:

- protection and ensuring migrants’ rights, including foreign workers and Kyrgyz working abroad, in compliance with the norms of international law and Kyrgyz legislation;
- facilitation and strengthening international cooperation in migration.



## *V.1 Establishing the Policy-making Team<sup>1</sup>*

Managing migration successfully requires close cooperation and coordination of almost the entire Ministerial Cabinet. It cannot be emphasized strongly enough that the continued and active participation of all major stakeholders of the migration programme, including the Ministries of Labour, Foreign Affairs, Interior, Justice, and Immigration, is critical for ensuring the successful implementation of an overseas employment programme.

### **V.1.1 Sharing the overseas employment programme burden**

Links among agencies need to be strengthened, or established, where they have not yet been created. This inter-agency approach helps to focus diverse government resources on a rapid response to the needs of migrant workers and on overcoming loopholes that allow unscrupulous recruiters to take advantage of vulnerable applicants. An example of Inter-Agency Coordination and Cooperation can be found in Annex 4.

For instance, the cost of gathering information on market conditions and developments, which must be undertaken on a continuing basis, can be reduced if organ-

ized in tandem with embassy personnel. This is currently not the case with many countries of origin since their Ministries of Labour and of Foreign Affairs have no clearly defined linkages. While this task is made easier with the advent of modern facilities like the Internet, there is still no substitute for old-fashioned methods for gathering and analyzing data: manual work, identification of hidden opportunities, contacts with recruitment and human resource managers of foreign companies.

There is a critical need to bring all the key actors of this complex system together in what management development specialists refer to as “getting the whole system into the room.” Bringing all persons representing crucial interdependencies together is a matter of mutual benefit and requires commitment to team-building or future planning sessions in order to harmonize and develop ongoing relationships.

Cooperation and coordination among agencies does not come automatically, but must be nurtured throughout the process with the creation of a positive environment, establishment of mechanisms and of regular and consistent interaction. Management of the migration process must be conceptualized as a combination of several independent organizations in close and continuing interaction with a designated agency, as discussed below in Section V.1.2.

The lead role is taken by the *Ministry of Labour*, since labour migration is primarily an employment issue. *Ministry of Foreign Affairs* is responsible for providing diplomatic services and for the protection of migrant workers while they are in a foreign land. The *Ministries of Justice and/or the Interior* will have their share of responsibilities, since migration policy must be embodied into legislation and their prosecutorial and security services will be required to handle cases of violations.

Traditionally, *Education and Health Ministries* are not included among the vital stakeholders in migration but, given the growing and persistent demand for trained nurses, teachers, caregivers, and even agricultural workers, they are often invited in order to ensure that the country's curriculum development can accommodate demands in the international labour market. The *Ministry of Education* will be involved in training issues and in developing the education curricula which will give future graduates the qualifications need to work abroad and skills enhancement and development courses for prospective and deployed migrant workers.

The *Ministry of Information's* expertise is necessary for disseminating information on illegal recruitment and other illegal activities from which prospective migrant workers should be shielded. Migrant workers must also be given official brochures and documentation during the first steps towards employment abroad so they will not be influenced by false information and deceptive practices. Since foreign exchange will be a residual (if not primary) objective of an overseas employment programme, the *Central Bank* must provide banking systems for the safe and expeditious transfer of money and find ways to reduce the transaction costs of remittances. *Social Security and other Welfare Services* contribute their mechanisms for providing migrant workers with welfare packages. Police and other law enforcement agencies have a role to play in upholding the law, investigating complaints of illegal activities, and detaining illegal recruiters.

### V.1.2 Designated autonomous body

The government institution directly responsible for handling the migration process is usually located under the authority and supervision of their respective Ministers or Secretaries of Labour. Several countries

have established such bureaux, including:

- India: Office of the Protector of Emigrants created in 1983;
- Sri Lanka: Sri Lanka Bureau of Foreign Employment (SLBFE) created in 1985;
- Pakistan: Bureau of Emigration and Overseas Employment created in 1972;
- Philippines: Philippine Overseas Employment Administration (POEA) created in 1982;
- Tajikistan: State Migration Service: established in 1998.

It is important that these designated agencies are capable of responding expeditiously to the issues raised by the dynamic nature of migration. In the Philippines, for example, policies emanate from a Governing Board composed of only five people:

- a representative from the land based sector;
- a representative from the sea-based sector;
- one representative from the women's sector;
- the POEA Administrator;
- the Secretary of Labour who chairs the board.

In this way, the layers of hierarchy of authority are reduced, while communication and policy decision-making are facilitated. The OEP's structure and procedures can be amended relatively easily by a Governing Board of this nature and this will ensure a rapid response to the changing nature and dynamism of migration.

In addition, governments should be prepared to introduce and enact legislative instruments (laws, decrees, memorandum orders, circulars, etc.) quickly to provide these statutory bodies with the ability to adjust to changes in global labour markets and developments in the industry.

From 1982 to the first quarter of 2000, POEA issued a total of 829 Memorandum Circulars that are either new policy documents, updates of existing policies and procedures, or guidelines and information for all sectors involved in the programme. Similarly, a large number of laws were passed or considered between 1987 and 1991, as shown by Table V.1, indicating the ongoing concern of government officials to plug loopholes or strengthen the labour migration programme to meet the changes occurring in the overseas labour market.

## TEXTBOX V.1

### Institutions Dealing with Labour Migration – State Migration Service of Tajikistan

The State Migration Service (SMS), under the Ministry of Labour and Social Protection of the Population, acts as a coordinator with a central office and local branches. It is responsible for general policy and regulations with respect to labour migration. It also

- participates in the preparation of projects for inter-state agreements and other normative documents;
- organizes of the work on external labour migration and employment of foreign citizens in the Republic of Tajikistan;
- ensures licensing of activities of the persons engaged in the sending and recruiting of labour and implements control of the observance of licensing requirements;
- implements control over realization of projects and programmes on the employment of citizens of

Republic of Tajikistan, as well as over activities of legal and natural persons, over the observance of contractual conditions;

- participates, together with diplomatic representations and consular institutions in other states, in the investigation of cases of violation of rights of migrant workers, citizens of Republic of Tajikistan.

It also makes recommendations for immigration quota, as well as oversees implementation of inter-state agreements. In 2002, three representative agencies for the Ministry of Labour were established in the Russian towns of Moscow, Novosibirsk, and Volgograd.

Source: Technical Cooperation Centre, IOM Vienna.

TABLE V.1

### Bills and Resolutions on Labour Migration filed by the Philippine Congress, 1987-1991

	House of Representatives (200 members)	Senate (24 members)	Total
Bills	32	23	55
Resolutions	46	41	87
<b>Total</b>	<b>78</b>	<b>64</b>	<b>142</b>

Source: Asia (1992).

## V.2 Crafting the Policy

Crafting a policy for labour migration needs to take into account the international labour migration environment and should be directed towards meeting the following overall objectives, as indicated in Chapter II:

- protection and welfare of migrant workers;
- optimizing the benefits of labour migration and mitigating adverse impact;
- inter-state cooperation and institutional capacity building.

These overall objectives are also, respectively, social, developmental and strategic in nature, and can be broken down into specific objectives and activities under each of the three overall objectives. In addition, the policy should have the following characteristics (Abella, 1997):

- consistency with the national development plan;
- comprehensive;
- ability to establish order in migration;
- fair and transparent;
- effective and efficient;
- gender sensitive.

### V.2.1 Consistency with the National Development Plan

Policy pronouncements on migration need to be placed within the context of an overall labour and employment strategy with appropriate interfacing with other development policies such as education, foreign affairs, trade and investment. The strategy will necessarily include goals and objectives such as promotion of employment, protection of nationals abroad, acquisition of new skills, improvement of the use of remittances to assist in national development, and reintegration into society of returning migrants.

Pronouncements on labour migration policy should also define the government's relationship with the private sector in this area and indicate that there is a supportive policy environment through the participation of other ministries. When developing international labour migration policy, the following key questions need to be addressed:

- Does the policy complement the State's overall development plan?
- How does it assess the social and economic im-

part of the policy in terms of brain drain and any sudden disruption of social services?

- Is there a mechanism to account for these effects?

Labour migration policy should be in harmony with the State's overall development plan. Even if labour migration policy will have a positive impact on foreign currency earnings and on domestic unemployment rates, it should not detract from a holistic approach towards development.

### V.2.2 Comprehensiveness

Labour migration policy should reflect the government's overall programme and take into account the diverse areas where migrants are likely to go. It should incorporate the State's intentions in entering into bilateral or multilateral agreements with receiving countries for the protection of migrant workers. Policy should also introduce programmes that address the welfare of migrant workers during re-integration on their return home. Key questions to be addressed include:

- Does the policy take into account the well-being of migrant workers and also of their families?
- Does it contain mechanisms for the protection of migrant workers?
- Does it consider the need for skills enhancement or development for migrants leaving to work abroad and on their return?
- Does it consider the "brain gain" to reverse the "brain drain"?
- Does it envision negotiation of bilateral or multilateral agreements to commit receiving states to protect national workers?

### V.2.3 Protection of migrant workers

Since labour migration involves a series of processes, policy should take into account the establishment of mechanisms to enforce order in the migration process. The policy should include introduction of legislation against illegal acts and for the protection of migrant workers embarking for overseas work.

- Are there measures in place to protect the worker at every step of the migration process?
- Is there a mechanism for redress of grievances while the worker is abroad and on his or her return?

### V.2.4 Fairness and transparency

Labour migration policy should represent a wide consensus, based on prior consultation with the different sectors of society. Policy goals should also be clearly stated with a view to addressing certain development needs of the State and should result from consultation and consensus with the sectors involved. Among key questions to be addressed are:

- Is the policy the product of consultation and participation with a wide range of expertise and of sectors in society?
- Is it based on research?

### V.2.5 Effectiveness and efficiency

Policy on labour migration should also empower administrative agencies by equipping them with mechanisms to enforce the measures introduced. Administrative agencies should seek to achieve these policy goals through the establishment of attainable targets within definite timeframes. Moreover, the policy should contain measures for checks and balances to ensure that agencies' performance is subject to oversight and monitoring.

- Is there an institution equipped with rules and mechanisms that can uphold and protect the rights of migrant workers and their families?
- Are there mechanisms to provide checks and balances in filing and adjudicating complaints against erring agents and representatives of state institutions?

### V.2.6 Gender sensitivity

One way to achieve a gender sensitive policy is to place women experts in the team that would formulate the labour migration policy. Gender sensitivity takes into account the differences in socio-cultural roles, needs and opportunities, constraints and vulnerabilities of women and men (ILO, 2003c) The policy should consider the special needs of women by identifying aspects of the migration process where they are particularly vulnerable. The policy should also identify specialized job markets for women where they may be particularly exposed to abuse or exploitation while in the home country or the destination country, and take preventive measures. It should also account of special needs of women due to gender differences.

- Does the policy consider the different working conditions for women and for men working abroad?
- Does the policy provide for the identification and protection of women in vulnerable employment markets?
- Does the policy generate mechanisms in providing for these needs while in employment abroad and at the time of their return home?

### V.2.7 Sample policy and procedural interventions

Several countries have introduced a number of policies and procedural interventions. An analysis of those already in place in four countries is shown in Table V.2 below. These can serve as a guide for the range of policies that must be in place in order to have a holistic OEP. While there are a large number of similarities in these countries' policies, there are significant differences in their substance and application.

TABLE V.2

## Government Functions and Services Provided by Overseas Employment Programmes, Selected Labour-Sending Countries

Countries	Bangladesh	India	Sri Lanka	Philippines
<b>Standard setting and enforcement</b>				
Minimum standards for work contracts	*****	*****	*****	*****
Pre-employment briefing				*****
Pre-deployment briefing	*****		*****	*****
Restriction on passport issue	*****	*****	*****	
Emigration clearance to leave country	*****	*****	*****	*****
Trade test requirement		*****	*****	*****
State-subsidized skills training	*****	*****	*****	*****
Negotiation of supply agreements	*****	*****	*****	*****
Social security arrangements			*****	*****
Performance bond from worker		*****	*****	*****
Repatriation bond or fund		*****	*****	*****
<b>Supervision of Private Recruitment</b>				
Licensing/regulation of private recruiters	*****	*****	*****	*****
Ban/restriction on direct hiring	*****	*****	*****	*****
State operation of recruitment agency	*****	*****	*****	*****
Periodic inspection of recruitment agency	*****	*****	*****	*****
Limit recruitment fee charged to worker	*****	*****	*****	*****
Cash/security bond requirement	*****	*****	*****	*****
Regulation of job advertising	*****	*****	*****	*****
Renewal of contract clearance				*****
Joint and solidarity liability			*****	*****
Client referral service				*****
<b>Settlement of Claims/Disputes</b>				
Conciliation on site/upon return	*****	*****	*****	*****
Adjudication system		*****	*****	*****
<b>Welfare Services</b>				
Contribution to Welfare Fund	*****		*****	*****
Labour Attaché assistance	*****	*****	*****	*****
Welfare Centres			*****	*****
Welfare Officers			*****	*****
Low-cost insurance	*****		*****	*****
Legal aid to worker in distress on site	*****	*****	*****	*****
Repatriation assistance	*****	*****	*****	*****
Social welfare services	*****		*****	*****
Education facilities	*****		*****	*****
Scholarships for children of workers			*****	*****
Health/medical facilities				*****
Livelihood programmes for family				*****
Financial loan programme			*****	*****
Employment assistance for returnee				*****
Returnee training programme				*****
Trauma care centre for returnees			*****	
Duty-free privileges	*****	*****	*****	
<b>Institutional Capacity</b>				
Organizational chart	ooooo	*****	*****	*****
Vision/Mission statements			ooooo	*****
Written policies and procedures	ooooo	*****	ooooo	*****
Recruitment policies and procedures		*****	*****	*****
Planning system			ooooo	*****
Management Information System			ooooo	*****
Training policies and programmes			ooooo	*****
Performance appraisal system			ooooo	*****
Position description			ooooo	*****
Records management		*****	ooooo	*****
Incentives and promotions schemes			ooooo	*****
Physical structures and equipment	*****	*****	*****	*****

Source: Achacoso (2002).

Legend: \*\*\*\*\* = in place and fully implemented | ooooo = in place but minimal implementation/development

### V.3 Institutional Mission and Vision Statements

A country’s labour migration policy is a statement laying out the State’s intentions with regard to labour migration. However, a sound State policy on labour migration, which usually leads to the creation of government institutions, still needs to be well-managed and directed towards the attainment of set goals. Policy-makers must bear in mind that as institutions and subordinate offices are created, the people working in these units may become cloistered within a closed environment and, over time, may identify themselves only in terms of their office. As a result, the overall goal, for which these

offices were created, may be lost or buried under the weight of everyday tasks.

Statements of mission and vision are tools for strengthening agencies and their employees’ commitment and creating such statements is therefore a major step in institutional capacity-building. Well-thought out and articulated mission and vision statements help all members of the organization, whether at the highest or the lowest echelon, to understand their common purpose and goals. Each office, department or agency can develop its own mission and vision statements in consonance with the overall policy for migration policy set by the State. As Peter Drucker (1993) states:

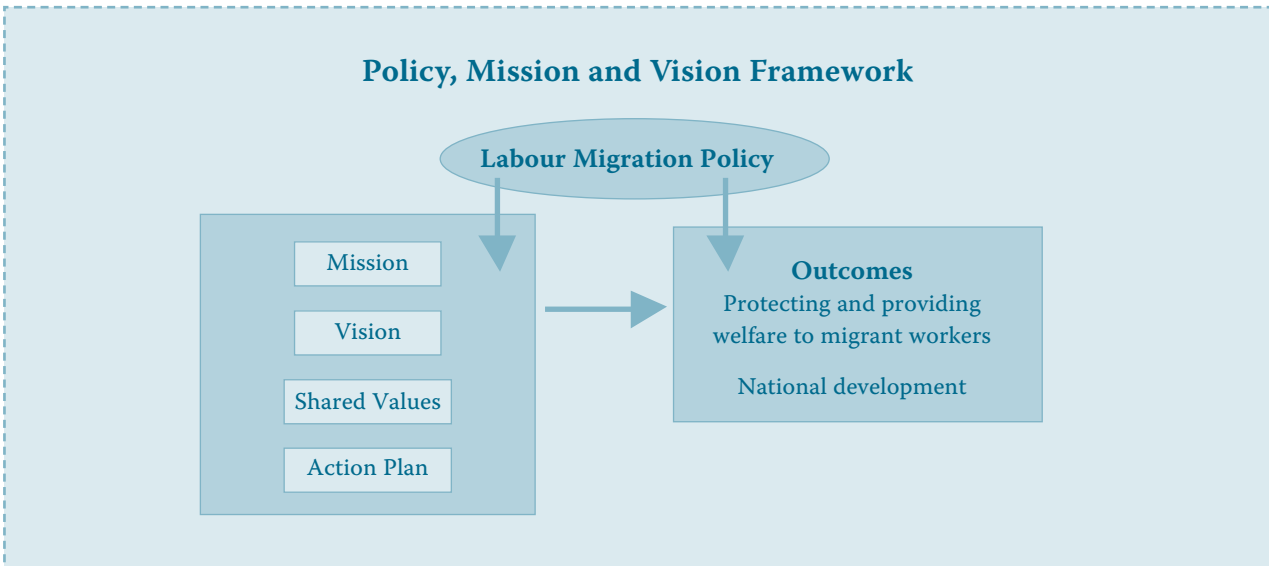
They (government agencies) must therefore have a clear mission that translates into operational goals and that provides for effective action. Of course, businesses also deteriorate if they do not have a clear mission; they become diffused and their efforts splinter... A government agency will start to flounder almost immediately unless it clearly defines its mission and emphasizes the mission again and again.

These five questions must be addressed in strengthening institutional capacity:

- |  |   |                                |
|--|---|--------------------------------|
| 1. What is our business?               | = | Visioning (Vision and Mission) |
| 2. Who are our clients?                | = | Targeting                      |
| 3. What do our clients consider value? | = | Situation/Needs Analysis       |
| 4. What have been our results?         | = | Performance Review/Evaluation  |
| 5. What is our plan?                   | = | Action Planning                |

The effect of the construction of mission and vision statements can be seen through the following framework:

FIGURE V.1



The *mission* states the goals the office or institution hopes to accomplish within the context of the labour migration policy. The *vision* states how the office will develop and its objectives to be attained within a certain period of time, in response to the question “what do we want to become?” As a social group working towards the accomplishment of a mission, individuals must share certain common values with their clients, values which both agents and clients consider important in the accomplishment of tasks. POEA has provided an example of a Mission/Vision statement:

**MISSION:**

Corollary to its mandate, POEA’s mission is “to ensure decent and productive employment for Overseas Filipino Workers.”

**VISION:**

Its vision is to be a culturally sensitive, customer-driven and business-oriented advocate of the overseas Filipino workers’ well-being. It will actively support generation of employment through the licensed recruitment entities, and on a government-to-government arrangement. It will facilitate, enhance and preserve employment of Overseas Filipino Workers.

Based on these statements, the question of how to accomplish the mission will be answered by a series of administrative mechanisms. It is essential that these details be mapped out, since they will be very useful in identifying the strengths, so that they can be encouraged, and weaknesses, so that they can be rectified. Mission and vision statements should be regularly assessed and re-stated.

**TEXTBOX V.2**

### Learning from the POEA Process

#### 1. Providing an Administrative Manager

Reorganization of POEA took place in 1987, during which a third position of Deputy Administrator for Management Services was created in order to ensure that POEA’s administrative machinery contributed towards the attainment of its mission and objectives in the most efficient and effective manner. In this way, the Philippine government emphasized its view that the promotion and protection of the welfare of migrant workers is equally dependent on building, creating and sustaining a migration institution which delivers efficient and effective services.

This new post was overall responsibility for the mechanics and organization of POEA’s bureaucracy and representative units, as well as for administrative questions. The most challenging aspect of this position is resolving administrative problems relating to the implementing of policies and objectives. It is essential for ensuring the smooth internal workings of the organization.

#### 2. Written Policies and Procedures

In many developing countries, written policies and procedures are often inadequate or missing. Producing written statements of an institution’s procedures and objectives (mission, programmes, and policies) is not only essential to good management, but also serves to institutionalize and standardize operations and procedures. This ensures a rational environment for all concerned.

Standardization of procedures, particularly in when these involve regular interaction with the general public, is a strong deterrent to the exercise of discretionary powers and arbitrariness in decision-making by authorities, which have been shown to be major factors in the commission of graft and corruption.

Against this backdrop, all POEA’s policies, procedures, plans and programmes are available in writing and cover as many anticipated eventualities as possible in detail. These procedure manuals also serve as a valuable tool in standardizing operating procedures and for training the organization’s new entrants.

#### 3. Initiative and Innovation

When challenged with issues that affect the success of its daily operations and the ability to meet its goals, labour-sending countries can still find ways and means to overcome these obstacles by introducing new and creative approaches. Creating an environment for innovation and development of initiatives in a situation where they, as labour-sending countries, are often at a disadvantage is challenging but can be achieved. While it is necessary for destination and sending countries to achieve a consensus on norms and standards in approaches to international labour migration for both sides to experience a semblance of order in the conduct of the overseas employment programme between countries, the following examples show that labour-sending countries can also innovate in order to initiate or quicken the process.



### Learning from the POEA Process (continued)

#### (a) In Diplomacy

Realizing that solutions were sometimes hindered by procedural and administrative matters, POEA proposed the establishment of “joint technical committees” to the Japanese and Saudi Arabian Ambassadors. These committees were charged with harmonizing and coordinating procedural and administrative matters relating to the recruitment and processing of workers migrating to these countries.

With the consent of both parties, these joint technical committees met regularly to discuss administrative and procedural concerns. POEA and the Saudi Arabian Ambassador were able to negotiate a mutually acceptable employment contract for household helpers through the efforts of the “joint technical committee.”

As far as other countries were concerned, POEA arranges regular informal luncheons or dinners with Ambassadors and other embassy officials, primarily to maintain good relations and to exchange notes on developments of mutual interest and concern. Foreign embassies are routinely provided with copies of POEA’s official publications and memorandum circulars.

#### (b) In Services

Being primarily a service-oriented institution, POEA introduced numerous policies and programmes designed to improve conditions for migrant workers. Prominent among these was discussions with the banking industry which, at that time, was reluctant to handle the remittances of migrant workers due to a misperception about the amount of paper work involved.

In response to numerous complaints about the lack of reliability of “courier services” and the subsequent loss or “reductions” in remittances, the banks were encouraged to introduce banking mechanisms to facilitate the transfer of remittances and speed up the distribution of funds to intended beneficiaries. They were also invited to extend their services to migrant workers by setting up desks within POEA premises, thus encouraging workers to open bank accounts and learn of other services on site.

#### (c) Red Tape

The documentation required of potential migrant workers entails the completion of time-consuming and costly procedures with several government agencies. Well-meaning efforts can be easily neutralized by the debilitating problem of red tape, a common problem in many developing countries, where little is

Source: IOM (2005b).

achieved without a multitude of clearances, signatures, permits and stamps.

For example, the requirement for every worker to secure a clearance from POEA prior to returning to his worksite was perceived as a necessary, important and indispensable control mechanism. Every year, thousands of migrant workers schedule their annual vacation to coincide with the Christmas holidays. Although this influx occurred regularly and always during a month shortened by holidays, the system would dissolve into near panic and frayed nerves for all.

After a thorough review and revision of existing procedures and requirements, the entire process was reduced from the previous average of three to five working days to an average of three hours: documents submitted at 8 am could be released by 11 am the same day, if they were in order. Applicants were informed of each step of the process and what to expect within a particular timeframe. Any undue delay would be identified by the supervising authority and could lead to a summary investigation.

A one stop processing centre for both land-based and sea-based migrant workers was established for this procedure, thus allowing applicants to have documents required for work overseas secured in one place. All government agencies involved in the migration process are required by law to establish branches within POEA’s premises. The Department of Foreign Affairs, for example, has set up an office for accepting applications and issuing passports, while the National Bureau of Investigation issues police clearances. The system was simplified in order to prevent bureaucrats from delaying the processing of papers without any legitimate reason.

This is a step towards the eventual electronic linking of data bases maintained by government agencies involved in the migration process. Currently, three electronically-operated systems are in place: E-receipt issued conjointly for POEA and OWWA transactions; E-Submission which processes employment contracts encoded by agencies and transmitted to POEA via the internet; and E-Card, which carries the migrant worker’s permanent identification number, replacing the Overseas Employment Certificate (OEC) previously required for exit procedures. The E-Card can also be used for obtaining OWWA membership, sending remittances, receiving discounts in shopping malls and for paying bills, as a credit card.

## V.4 Monitoring and Evaluating Performance

Administrative structures need to be monitored and their performance assessed through the introduction of parameters for monitoring and evaluation. Table V.3 offers an example of monitoring Key Research Areas in Performance in the labour migration process

on the basis of key indicators. It should be noted that the areas of performance correspond to the phases of the labour migration process. The indicators, however, are empirically set as parameters to gauge performance. These are measurable factors on which the performance can be reflected. Level of satisfaction as indicated in some areas can be measured in terms of how many are satisfied or the decrease in complaints regarding the performance in that area.

TABLE V.3

Monitoring Performance Indicators		
Phase	Performance	Indicators
Market determination and promotion	<ul style="list-style-type: none"> <li>workers deployed;</li> <li>properly matched jobs with the workers qualification and skills;</li> <li>determination and projection of the employment demand;</li> <li>diversification of labour deployment in different countries.</li> </ul>	<ul style="list-style-type: none"> <li>greater number of workers deployed, reduced unemployment;</li> <li>employer satisfaction, fewer complaints or sackings of workers for poor performance;</li> <li>precision in determining and projecting employment demand;</li> <li>more countries of destination;</li> <li>wider areas or types of jobs.</li> </ul>
Recruitment	<ul style="list-style-type: none"> <li>curbing illegal recruitment;</li> <li>curbing trafficking of migrant workers;</li> <li>efficient licensing of recruitment agencies;</li> <li>efficient information campaign regarding proper application and recruitment;</li> <li>facilitating smooth recruitment.</li> </ul>	<ul style="list-style-type: none"> <li>number of arrests, prosecutions and convictions of illegal recruiters and traffickers;</li> <li>number of licensed recruiters;</li> <li>number of arrests of illegal recruiters;</li> <li>number of complaints about processing of recruitment licences;</li> <li>reduced time and higher quality of service in processing of recruitment papers;</li> <li>reduced time and higher quality of processing of licences for recruitment agencies;</li> <li>wider dissemination of information regarding procedures for application and recruitment;</li> <li>wider dissemination of information on blacklisted abusive overseas employers and recruiters.</li> </ul>
Pre-departure	<ul style="list-style-type: none"> <li>curbing contract substitution;</li> <li>facilitating pre-departure seminars;</li> <li>conducting appropriate training programmes;</li> <li>preventing maltreatment, exploitation, or sexual abuse through training and seminars.</li> </ul>	<ul style="list-style-type: none"> <li>reduced number of cases of contract substitution;</li> <li>sufficient pre-departure seminars;</li> <li>client satisfaction in seminars;</li> <li>client satisfaction in training seminars;</li> <li>more passes of trade tests after the seminars;</li> <li>reduced number of complaints of maltreatment, abuse, and exploitation.</li> </ul>

TABLE V.3

### Monitoring Performance Indicators (continued)

Phase	Performance	Indicators
Journey	<ul style="list-style-type: none"> <li>• facilitating safe and smooth departure;</li> <li>• eradication of excessive travel fees collected at the airport;</li> <li>• curbing smuggling of migrant workers;</li> <li>• elimination of abuse or victimization at the airport/departure point.</li> </ul>	<ul style="list-style-type: none"> <li>• reduced number of complaints victimization or hassles on departure;</li> <li>• reduced number of complaints regarding extortion or collection of excessive fines before departure;</li> <li>• reduced number of incidents of smuggling of migrant workers.</li> </ul>
Arrival	<ul style="list-style-type: none"> <li>• ensuring safe arrival through assistance from embassy officials;</li> <li>• assurance of adequate accommodation as specified in the contract.</li> </ul>	<ul style="list-style-type: none"> <li>• reduced number of complaints regarding the lack of embassy assistance;</li> <li>• reduced number of complaints about inadequate accommodation.</li> </ul>
Working	<ul style="list-style-type: none"> <li>• curbing contract substitution;</li> <li>• reduction, if not eradication, of violations against the workers;</li> <li>• attention to and resolution of complaints filed with the labour attaché.</li> </ul>	<ul style="list-style-type: none"> <li>• reduced number of cases of contract substitution;</li> <li>• reduced number of complaints regarding violations of workers rights;</li> <li>• increased number of resolution of complaints filed with the labour attaché.</li> </ul>
Termination of contract	<ul style="list-style-type: none"> <li>• coordination with employer on repatriation of migrant workers for cases of illegal termination of contract in violation of the work agreement;</li> <li>• reduction, if not elimination, of cases of non-payment of wages and benefits.</li> </ul>	<ul style="list-style-type: none"> <li>• increased number of coordinated or resolved cases of repatriation;</li> <li>• reduced number of cases of non-payment of benefits or wages upon termination of contract.</li> </ul>
Re-employment	<ul style="list-style-type: none"> <li>• assistance for re-employment of terminated migrant workers.</li> </ul>	<ul style="list-style-type: none"> <li>• increased number of assisted cases for re-employment;</li> <li>• reduced number of complaints regarding the lack of assistance.</li> </ul>
Return or reintegration	<ul style="list-style-type: none"> <li>• provision of benefits to returning migrant workers;</li> <li>• facilitation of smooth return;</li> <li>• curbing extortion or victimization at the airport/arrival point upon return;</li> <li>• assistance and training for business ventures, loans, or re-employment;</li> <li>• resolution of cases regarding redress or grievances relating to contract violations;</li> <li>• smooth procedures for claiming benefits by reduction of bureaucratic procedures;</li> <li>• provision of support systems for families;</li> <li>• provision of financial advice for families.</li> </ul>	<ul style="list-style-type: none"> <li>• increased number of satisfied claimants of migrant worker benefits;</li> <li>• reduced number of complaints regarding migrant worker's return;</li> <li>• adequate number and quality of assistance for returning migrant workers;</li> <li>• reduced number of complaints of extortion or victimization at the airport/arrival point upon return;</li> <li>• increased number of resolved cases relating to complaints and grievances;</li> <li>• reduced time and higher quality of service in processing migrant workers' claims;</li> <li>• adequate number and quality of support systems and of financial advice to migrant workers' families.</li> </ul>
Legislative and diplomatic efforts	<ul style="list-style-type: none"> <li>• adequacy of laws to address the protection of migrant workers and their welfare;</li> <li>• existence of concluded bilateral and multilateral agreements for their protection;</li> <li>• accession or ratification of international legal instruments.</li> </ul>	<ul style="list-style-type: none"> <li>• sufficient number and quality of legislations to protect and provide welfare for migrant workers;</li> <li>• approximate equality in number of bilateral or multilateral agreements with the number of countries of deployment;</li> <li>• greater number of international legal instruments acceded to or ratified.</li> </ul>

## V.5 Data Collection

Collection of data on labour migration is essential for producing statistical reports and for providing supporting information for policy-making and planning. In some countries of origin, information for the purpose of planning and monitoring overseas employment and monitoring is collected on flows and stocks of labour migrants abroad disaggregated by destination, gender, age, education and occupation. Labour attachés also assemble statistics on the nature of complaints registered with their embassies.

### V.5.1 Terms and definitions

Migration, both internal and international, is often studied by looking at the number and characteristics of migrants and at the impact that migration has on migrants themselves and on geographical areas from which they come and to which they travel. While there are no universally agreed definitions, “international migrants” are often defined as any person who has changed his or her country of usual residence. The terms “usual residence” is typically defined as having lived, or intending to live, in the country for at least 12 months. Those who have been living or intend to live in the country for less time are not considered usual residents, but “short-term or temporary migrants”. The level of international migration, including labour migration, is measured using two concepts: stocks and flows.

The “international migrant stock” is the total number of international migrants living in a country at a particular point in time. The stock of international migrants is normally measured by the number of “foreign-born” or “foreigners” living in the country. The “foreign-born” residents are defined as those who were born outside their current country of residence, while “foreigners” are defined as those who do not have the citizenship of their current country of residence and, depending on how international migrants are defined, it is possible for foreigners to live in their country of birth, i.e. they are non-citizens who have never moved away from their country of birth. People born outside their country of residence, but are citizens at birth (e.g. born abroad of national parents living abroad), are often excluded from the “foreign-born” population. Depending on available data sources, some countries col-

lect information on the “foreign-born,” some collect information on “foreigners,” while others use a combination of both, to measure their stock of international migrants. The stock of international migrants can decrease over time due to death, naturalization of foreigners, or net out-migration, though it is more common for the stock of international migrants to increase, due to net in-migration.

Net international migration is the difference between the total number of migrants entering (in-migrants) and leaving (out-migrants) a country. The number of migrants entering or leaving a country over the course of a specific time period (e.g. one year) is measured by the migration flow. Migrations flows occur between two geographic areas, consisting of an origin and a destination. In-flows are the number moving into a given geographic area (e.g. country of destination), while out-flows are the number moving away from that same area (e.g. country of origin). The difference between in-flows and out-flows is net migration, which can be either positive or negative. Most countries collect migration flow data on an annual basis, though some survey-based questions use a five-year period. International migration flow data is normally reported for “foreigners,” rather than for “foreign-born”. In terms of available international migration data, in-flow data is much more common than out-flow data.

International labour migration is a sub-set of international migration, thus stocks and flows (ins and outs) will always be smaller than those for all international migrants. There are several ways to measure and define labour migration, which can yield different results. The broadest definition includes all international migrants who are currently in the labour force (both employed and unemployed) as labour migrants. This method is often used when measuring the total stock of labour migrants. A more restrictive definition counts labour migrants as only those who entered a country for the explicit purpose of employment. This can be measured in two ways, either through legal documents used to enter or live in a country (e.g. visa types or residence permits), or by asking the migrant why they moved to a country, thus receiving their subjective reason. Most labour migration flow data is based on legal reasons for admittance, using visa or residence permit data, but this system does not cover “irregular” migrants entering a country without legal permis-

sion. Methods measuring migrants in terms of usual residency often fail to capture temporary migrant groups like seasonal workers.

As a measure of the impact of international migration, migrant remittances are of great interest in the study of labour migration. International remittances are financial transfers from a migrant to household residents in their country of origin. Transfers can be monetary (cash, money transfers, cheques, etc.) or in-kind (goods, donations, payments for a household, etc.). Remittances are typically measured using “balance of payment” data compiled by relevant statistical authorities in member countries (typically the central bank or NSO). Balance of payments records cover a country’s economic transactions with the rest of the world. However, this data excludes information on “informal” (e.g. hand-carried) or “in-kind” remittances, as well as excluding most transactions made at money transfer centres. Household survey data can be used to collect more detailed information about migrant remittances.

### V.5.2 Data sources

A number of data sources can be used to measure the stock and flow of international migrants, including labour migrants:

- household surveys (such as population censuses or labour force surveys);
- administrative registers (such as population registers or registers of foreigners);
- other administrative sources (such as residence permits, work permits, or asylum applications);
- data derived from exit controls;
- border collection data (visa types, at entry or exit from a country).

Migration data from different data sources are not comparable in all cases, due to differences in coverage, measurement, and the purpose behind each data source. For more information, see Annex 5.

#### V.5.2.1 Household surveys

The primary household survey used to collect stock data on international migrants is the population census. Depending on population coverage and definitions of usual residency, when combined with “place of birth” or “citizenship,” a good estimate of stock can be

attained, though there is often under-coverage of hard-to-enumerate populations, such as irregular migrants. If the census collects labour force data, these questions can be used to identify labour migrants. Previous residence questions can be used to estimate international migration in-flows. Questions about household members or family members living abroad can capture international migration out-flows, but will tend to underestimate total emigration. A major drawback of census data is that it is normally only conducted once every ten years (or every five years in the case of Canada), which makes the timeliness of data less useful.

Other household surveys, such as annual labour force surveys, can ask questions on place of birth, citizenship, and previous residence, as well as other dimensions of international migration, such as reasons for moving, but suffer from relatively small sample sizes, particularly for smaller groups, such as international migrants. This renders the validity of data suspect, particularly with regard to stocks and flows, even if detailed labour force information is collected. Another drawback to household surveys, particularly labour force surveys, is that they often do not collect information from collective housing or group quarters, which often house many recent international migrants.

Household surveys are a good source for collecting information about the characteristics of labour migrants. The International Labour Organization (ILO) is currently testing a number of migration-related questions for inclusion on international labour force surveys, using Armenia being one of its test countries. This module will help countries collect information about labour migrant stocks, labour migration processes, migrants’ occupations, motivations for moving, socio-demographic and economic characteristics of labour migrants, and migrant remittances.

#### V.5.2.2 Administrative registers

Many European countries have comprehensive population registers (i.e. Austria, Lithuania, Netherlands, Sweden), or registers of foreigners (i.e. Germany, Slovakia, Switzerland), which are accounts of legal residents within a country. Some countries even have registers of special populations such as asylum-seekers (e.g. Belgium, Slovenia). These registers can be used to measure the total stock of international migrants in a

country, as well as in-flows when new migrants are entered (in the case of population registers, usually after one year), and out-flows when people leave the country. Registers also often collect information on characteristics (age, sex, citizenship, etc.) of migrants. Some problems can occur when people (both natives and immigrants) leave a country and fail to deregister from the system. Registers also miss many undocumented immigrants living in the country, particularly those staying for short periods. Also, different countries have different criteria for including foreigners in flow data, which can make comparability across countries a problem.

### V.5.2.3 Other administrative sources

Residence and work permit data, as well as visa-types, are often used to measure migration flows (e.g. France), particularly if the country does not have a population register. This data can provide counts on the number of foreigners granted an entry permit for permanent residence, the number departing from a permanent residence, and the number of nationals receiving permits for permanent residence outside their country of residence. Stocks can be measured by the total number of people holding current residence permits. This source is popular for the measurement of labour migration statistics, since residence and work permits are often issued on the basis of employment.

Asylum applications and new grants of refugee status can also be used in the measurement of labour migration, as many pending asylum cases become economically active while awaiting decisions. These sorts of data are limited in that it is difficult to capture stocks and outflows, since these statistics require an accounting of the number of expired permits and knowledge of whether that person has remained in the country or not, while it misses many nationals who might leave the country without formal declaration. Further, this data is not collected to measure migration statistics, but for administrative reasons, and hence there is little effort to abide by recommended international standards regarding migration statistics.

### V.5.2.4 Data derived from exit controls

Countries of origin also have statistical sources producing information exclusively on international migrant workers generally as a by-product of procedures established to provide emigration clearance, especially in the labour-sending countries of South and South East Asia. Information on the number of workers departing each year, disaggregated by destination, gender, age, education and occupation is available from the Philippines, Sri Lanka and Thailand.<sup>2</sup>

### V.5.2.5 Visa and border collection data

These data sources include information collected at international borders, such as types of visa issued (both before and after entry into the country), or entry and exit cards (e.g. International Passenger Survey for flights into the United Kingdom). Types of visa allow migrants to be placed in categories (student, employment or family reunification) and are often used to measure labour migration flows. Exit visas can be used by some countries for measuring out-migration, including that of nationals. Unauthorized migrants who are apprehended at borders are often registered, thus become the source of estimates of irregular migration into a country. For measuring labour migration, this data presents problems since work must be organized before entry into country in order for the migrant to be designated as a labour migrant. This method does not consider people entering on tourist visas or via family reunification but who later enter the labour force as labour migrants. Similarly, people issued temporary work visas who then overstay their visa and other “irregular” migrants are not counted in statistics from these sources.

## V.2.6 Labour attaché reports

This is a valuable source of data on problems faced by migrant workers. The Philippines and Sri Lanka, for example, provide break-downs of total number of complaints received by number, country, gender and nature.

## ENDNOTES

- 1 Sections V.1 - V.4 are largely reproduced from IOM (2005b).
- 2 For an illustration see [www.slbfe.lk](http://www.slbfe.lk)



# VI. Foreign Labour Admission Policies

When devising admission policies for foreign labour, in addition to the application of methodologies for assessing labour shortages, policy-makers also have to put in place mechanisms to gauge to what extent such shortages should be filled by foreign labour and how this labour should be channelled into the employment sector or region in question. Further, they have to decide whether to prioritize temporary labour migration, increasingly a valuable option for many destination countries, or migration channels which lead to a secure residence status or permanent settlement.

This *Handbook* focuses on temporary labour migration schemes, since these are common in many countries and are thought to be the best solution in terms of meeting labour market shortages in countries of destination, while ensuring that countries of origin are not deprived of valuable human resources, particularly skilled workers. Various forms of temporary labour migration, including concrete policy examples from individual countries, are described and analysed in Section VI.4.3 below.

While the primary objective of this exercise is to describe the most effective policies with reference to pertinent examples, it is important to emphasize that the effectiveness of any specific policy is often difficult to assess in the absence of agreed criteria and appropriate mechanisms for its evaluation. However, policies in this area are generally recognized as failing if they become, inter alia, overly bureaucratic to administer, too costly for all stakeholders in the labour migration process, or risk placing migrant workers in exploitative situations. Therefore, when attempting to identify good policies and practices, it is also important

to highlight those which are or have been less successful and generally recognized as such by authorities in the destination countries concerned.

If policy-makers and administrators elect to focus on designing temporary labour migration schemes, there are a number of policy angles that should be taken into account with a view to ensuring that operation of these programmes is linked to the objectives for which they were established. Important issues include ways to manage efficiently the “temporariness” of labour migration so that it remains temporary and to ensure equitable treatment for migrant workers entering under such programmes. It has been contended that the increasing complexity of these schemes in a number of countries has led to a proliferation of different temporary statuses. As a result, it is increasingly likely that these migrant workers will find themselves in illegal situations, and consequently become exploited (Anderson and Rogaly, 2005: 47-49; Morris, 2002; Samers, 2004). Resolution of such questions is crucial if countries of origin seek to obtain greater access to labour markets in destination countries, particularly for lower-skilled jobs.

While the admission of foreign workers is an important feature of state sovereignty, policy-makers' capacity to act accordingly is also dependent on the existence of bilateral labour arrangements with the countries of origin or of systems of regional integration, such as a free movement of workers regime or a free trade regime facilitating the movement of certain categories of persons. These aspects are discussed in Part VIII of the *Handbook* on inter-state cooperation.



## VI.1 Permanent versus Temporary Migration

As noted above, authorities in destination countries have to decide whether to opt for permanent or temporary labour migration. Given the extent of the demographic deficit (Section II.2.2 above), employment-based immigration is increasingly a serious option in a number of European countries. Whether migrant workers should be granted a more secure residence status, which might eventually lead to permanent residence in the country concerned, is partly dependent on whether the host country prefers an admissions policy limited to temporary migrant workers or whether it may also wish to contemplate permanent labour migration. The international legal framework pertaining to labour migration, examined in Chapter I, does not generally interfere with the sovereignty of states in deciding upon rules and policies for first admission.<sup>1</sup> Nevertheless, there are some persuasive arguments for supporting an incremental improvement in the residence status of migrant workers (including the removal of all employment restrictions) for the following reasons:

- While employers clearly benefit from a flexible workforce, particularly in lower-skilled sectors where temporary workers are preferred, it may also be to their advantage to retain good workers rather than bear the cost of re-training workers.
- The longer migrants stay in the host country, the case for granting a more secure residence status becomes stronger for humanitarian reasons, and particularly if they are accompanied by close family members.
- Affording migrant workers a more secure resi-

dence status facilitates their integration into the host community and assists in their social inclusion. Clearly, it is detrimental to social cohesion and stability in the destination country when workers are marginalized from mainstream society.

- An incremental improvement in the residence status of migrant workers is consistent with their establishment of economic and social ties in the host community.

Traditional countries of immigration, such as Australia, Canada and the United States, have determined that an element of permanent immigration is necessary to ensure economic growth and to sustain basic social welfare provision. As observed in Section VI.3.1 below with reference to Canada, the decision to admit permanent migrants is based on their employment prospects and their ability to integrate in the country concerned. They are then granted permanent residence status on arrival.

Most European countries, however, still emphasize facilitation of temporary labour migration, although, as noted in Sections VI.3.3 and VI.3.4 below, permanent immigration of migrant workers is supported, under certain conditions, in a number of European countries, and policies have been put into place to this effect. In such instances, the acquisition of permanent residence status for these migrant workers is facilitated usually after a certain period of employment and residence, which can serve as a test of their integration potential. European countries normally also distinguish between skilled and lower-skilled migrant workers in respect of access to a more secure residence status. This approach is based on the premise that

highly skilled workers are more likely to find alternative employment in an economic downturn and thus less likely to become a burden on the host country's social welfare system. But the greater ability of highly-skilled migrants to adapt to and to integrate in a changing labour market does not necessarily mean they will be better integrated in the host society. Highly-skilled persons often constitute a transient population and usually have limited interest in learning the local language and familiarizing themselves with the host community's culture.

## *VI.2 Assessing Foreign Labour Demand*

This section considers the different means by which government policy-makers, often in consultation with other interested stakeholders such as employers, workers' organizations and regional authorities, can assess the need for foreign labour in the country or in a particular region or employment sector.

### *VI.2.1 Quotas and ceilings*

Quotas and ceilings set fixed numerical limits for the admission of labour in a country and are seen in certain countries as important tools of labour migration management. Quotas are usually established annually, often at a high level of government (e.g. Korea); are based on a number of sources, such as economic forecasts, employer reports, or regional unemployment rates (e.g. Italy); and are reached in consultation with the social partners (employers and unions), regional governments (e.g. Spain), and civil society.

Quotas can set an actual fixed number of migrant workers to be admitted or as a percentage of the total labour force. Croatia, Italy, Spain and the Russian Federation operate the first method (see Textbox VI.1).

In the Russian Federation, the labour migration quota is established on a regional basis, taking into account the state of the labour market, based on employer applications and their approval by the local Employment Service (Rostrud), and the demographic situation

in the region concerned. However, the quota is only applicable to foreigners needing a visa to enter Russia and therefore mainly relates to citizens from distant countries, the Baltic States, and Georgia and Turkmenistan, as these countries are not covered by the visa-free regime in the CIS (Section IX.1.5 below). The quota is approved annually by a decree of the Federal Government and has been set as 329,300 as compared to 214,000 for 2005.<sup>2</sup>

Austria sets its quota as a percentage of its total labour force, which, over the last few years, has been fixed at approximately 8-9 per cent. Kazakhstan also adopts a quota system for labour migration based on the total percentage of the work force (Textbox VI.2). Some quotas apply to the admission of all migrant workers to the country, while others are only applicable to the admission of migrants to certain geographic regions, employment sectors or industries. It is also possible to set quotas for foreign labour as a percentage of an individual enterprise in the sector concerned.

Although quotas are often associated with temporary forms of labour migration (e.g. the UK quotas for workers in agriculture and food production discussed in Textboxes VI.12 and VI.14), they can also be a feature of permanent migration systems. For example, Norway operates a quota of 5,000 migrants for the facilitated entry of professionals into its labour market (i.e. it does not apply a labour market test) with a view to affording this group permanent residence in the short- to medium-term (Norway, 2002). The Canadian Government considers that between 225,000 and 250,000 immigrants should be admitted for permanent residence in 2006 in order to sustain the population rate. As discussed in Section VI.3.1 below, this is a figure which cuts across various immigrant categories (i.e. economic migrants, immigrants admitted in the family class, and refugees). However, it is not a fixed quota by any means, but only an approximate target to be achieved (Canada, 2005b).

Admission procedures in respect of quotas are usually simplified, although the existence of a quota does not necessarily mean that the labour market test (Section VI.2.2 below) is withdrawn. For example, in the UK, the labour market test still has to be satisfied generally on first admission.

## TEXTBOX VI.1

### The Quota Systems in Italy and Spain

#### Italy

Law 40/1998 introduced a system of quotas for non-EU labour migration to Italy. The quotas are issued annually on the basis of Prime Ministerial decrees, and are divided up according to region, type of labour, job category and nationality. Most of quota jobs relate to medium or lower-skilled work, which is a particular feature of labour migration to Italy in contrast to some other European countries. For 2006, the government authorized 120,000 new entries for employment (salaried/wage-earning work or self-employment) and 50,000 for seasonal work. The 120,000 posts were broken down as follows:

- 78,500 of which the following are reserved to: cooperation agreements for migration:
  - 45,000 housekeepers and family care assistants
  - 2,500 workers in the fisheries sector
  - 4,000 workers for study and on-the-job training
  - 2,000 foreign citizens who have completed vocational and language training before departure
  - 1,000 executives and other highly qualified professionals
- 3,000 self-employed workers: researchers, entrepreneurs engaged in activities beneficial to the national economy; professionals; business administrators; well-know artists engaged by private and public organizations;
- 500 workers of Italian origin (of whom at least one great-grandparent is Italian) resident in Argentina, Uruguay or Venezuela:
- 38,000 workers from specific countries:

- 4,500 Albanian nationals
- 3,500 Tunisian nationals
- 4,000 Moroccan nationals
- 7,000 Egyptian nationals
- 1,500 Nigerian nationals
- 5,000 Moldavian nationals
- 3,000 Sri Lankan nationals
- 3,000 Bangladeshi nationals
- 3,000 Filipino nationals
- 1,000 Pakistani nationals
- 100 Somali nationals
- 1,000 Ghanian nationals
- 1,400 workers from other countries which are to sign bilateral agreements with Italy

Sources: Italy (2003); OECD (2005: 211); IOM Rome (April 2006).

#### Spain

The Spanish Government establishes fixed quotas after consultation with the social partners as well as regional governments and authorities. Shortage sectors in the labour market are identified according to the region and no labour market test is needed to fill the quota. For 2004, the quota was set at a total of 30,978 of which 10,908 places were for long-term positions and 20,070 for temporary positions. The quota for temporary employment was 48 per cent higher than in the previous year. Originally, the quota was used as a means of regularizing workers in unauthorized situations, but it is now open only to migrant workers coming from outside of Spain.

Sources: Serra et al. (2005); Pérez (2003); Spain (2001).

VI.

## TEXTBOX VI.2

### Labour Migration Quota in Kazakhstan

“Foreign workers are required to have a work permit to work legally in Kazakhstan. Obtaining these work permits can be difficult and expensive. The government cites the need to boost local employment by limiting the issuance of work permits to foreigners. .... The work permits quota system is based on the 1998 Law on Employment of the Population. Under this system, the government makes a limited number of work permits available to foreigners based on the area of specialization and geographic region. Since 2001, the annual number of work permits is subject to a government-established quota. In January 2003 the government issued decree (No. 55) [which] sets forth new procedures for the annual

determination of this quota. Local authorities submit to the Ministry of Labour and Social Protection estimates of the required number of foreign work permits for the upcoming year. The Ministry then establishes the quota and issues permits based on it. Work-permit availability is primarily based upon a proven lack of qualified Kazakhstani citizens to fill the positions in question. In 2003, the government set the work-permit quota at 0.14 per cent of the active labour force. The quota has steadily increased; the 2004 quota was 0.21 per cent, and the 2005 quota is 0.28 per cent. The quota assumes an active labour force of 8 million people.”

Source: US Department of State (2005).

When policy-makers and administrators consider whether to adopt a quota system as an instrument of labour migration management, they need to take into account the following advantages and disadvantages that have been identified concerning the utility of such a system:

#### *Advantages*<sup>3</sup>

- Quotas provide a clear reference framework on the admission of foreign labour for politicians, administrators, employers, civil society and the general public.
- Quotas can serve important political objectives regarding the need for migrant labour and to calm public concerns regarding the influx of migrants.

#### *Disadvantages*

- Quota systems are thought to involve a high level of regulation and bureaucracy and therefore are frequently criticized by employers for their lack of flexibility and inability to respond to fluctuating labour demands.<sup>4</sup> Often, by the time quotas were adopted for certain employment sectors, labour market conditions in those sectors had already changed. Consequently, quotas frequently remain unfilled.<sup>5</sup>
- Moreover, even if jobs are readily available in quota-specified sectors, it is often difficult to match potential migrant workers with employers, thus creating ripe conditions for unscrupulous foreign labour intermediaries or agents who take advantage of vulnerable workers. For example, in the Ukraine, it was reported in 2004 that agents charged US\$1,000-2,000 per worker for recruiting agricultural workers to the UK's Seasonal Agriculture Workers' Scheme (TUC, 2004).

### **VI.2.2 Labour market test**

Most destination countries in Europe apply a labour market or resident worker test to applicants for a work permit for the first time and also to migrant workers seeking to change jobs if they have not met minimal time period requirements for free access to

employment (Section VII.1.1). These tests assess whether there are workers available for the work in question on the domestic labour market.

The labour market test usually requires employers to advertise the post with the national labour authorities for a specified period (e.g. between 4 and 5 weeks as in the Netherlands) or demonstrate that they have taken active steps to recruit for a specified period of time (e.g. 4 weeks in the UK) (UK, 2006a: 6). In the Netherlands, application of the labour market test is particularly strict, since both advertising the post *and* active recruitment efforts are necessary. EU Member States are required to apply the EU preference principle and governments must ensure that employers do not hire non-EU or third country national workers before satisfying the authorities that no suitable EU workers can be found, including third-country nationals lawfully resident in their territories (Textbox VI.3). Labour market tests are also applied in Canada and the United States and these are discussed below in the wider context of the admission policies of these countries (Sections VI.3.1 and VI.3.2).

Several countries make exceptions to the labour market test in respect of admission of highly skilled workers or of categories of workers where there are shortages, such as health workers, engineers, and IT specialists, either by not applying the test or by relaxing the rules. Clearly, this more liberal approach has considerable economic advantages, since it enables a more speedy and efficient admission of migrant workers who will fill shortages in important employment sectors.

In many instances, the labour market test is lifted when an application for a work permit is made. However, the length of the period for obtaining free access to the labour market (Section VII.1.1.2 below) normally depends on the conditions or rules governing the initial admission of migrant workers, which frequently distinguish between skilled and less-skilled migrants. Moreover, most work permits are limited to a specific employer and may apply to a specific region in the destination country. There are clearly disadvantages in creating such inflexible systems, since a migrant worker's dependency on a particular employer or enterprise may result in an unproductive employment relation-

## TEXTBOX VI.3

**The EU Preference Principle**

In European Union Member States, the EU preference principle encompasses the entire EU labour market and preference in the hiring process should be accorded to nationals, EU citizens and lawfully resident third-country nationals.

The EU preference principle is best summarized in a non-binding Council Resolution:

“Member States will consider requests for admission to their territories for the purpose of employment only where vacancies in a Member State cannot be filled by national and Community manpower or by non-Community manpower lawfully resident on a permanent basis in that Member State and already forming part of the Member State’s regular labour market” (EU, 1994).

Moreover, the EU Accession Treaty contains transitional arrangements (Section IX.1.3.2 below) permitting Member States to maintain their national rules for admission to employment of citizens from the new EU Member States for a period of two years in the first instance (with a possible extension to five and then seven years) and has added additional criteria in this respect. Member States’ authorities applying these transitional arrangements are now required to give preference to nationals from new EU Member States over third country nationals wishing to be admitted for employment into the Member State concerned.

this section will examine employment-based immigration, which is of growing relevance as policy-makers in a number of European countries are now considering the introduction of permanent economic migration, as a means for meeting immediate or projected labour market needs and for addressing certain demographic and welfare imbalances.

Employment-based immigration is a well-established feature of immigration systems of Canada and the United States. Some European countries are now also promoting the admission of migrant workers with a view to their settlement, specifically in Germany (Textbox VI.4) and the UK.<sup>7</sup>

## TEXTBOX VI.4

**Permanent Labour Migration Opportunities in Germany**

Under the Immigration Act, highly skilled workers, such as senior academics, researchers, and senior managers in business and industry, may be granted permanent residence upon arrival in Germany. Self-employed foreigners may also immigrate to Germany if their business is of economic interest and can be expected to have a positive economic impact.

Source: Germany (2006).

ship or, at worst, exploitative conditions. Consequently, migrant workers should be able to change jobs, at least within the same employment sector. These issues are considered in more detail in Section VI.4.2 below.

## **VI.3 Admission Policies: Employment-based Immigration**

Broadly-speaking, admission policies for the recruitment of migrant workers can be divided into two types: employment-based immigration and temporary labour migration. While the *Handbook* focuses on the latter because of its prevalence in most OSCE states,

The Czech Republic has also recently introduced employment-based immigration for highly-skilled migrant workers. This country is, in effect, a new country of immigration experiencing labour shortages in a number of key sectors and considerable demographic decline, particularly in its working population. Implementation of this policy may therefore be of interest to other countries in Central and Eastern Europe and Central Asia, particularly the Russian Federation.

The principal characteristics of employment-based immigration systems are described in some detail below. It is difficult to identify which systems constitute a best practice because of the differences in labour market needs and demographic circumstances in the countries examined, but it is evident that the establishment of a points system based on objective criteria is

the fairest and most transparent way of admitting permanent migrant workers.

### VI.3.1 Canada

Policies on immigration and settlement are the responsibility of Citizenship and Immigration Canada (CIC). CIC regulates the number of immigrant applications, selection criteria, and visa requirements. With Human Resources Development Canada (HRDC), it is also responsible for skilled and temporary migrant workers entering Canada. An independent body, the Immigration and Refugee Board, hears applications for asylum and appeals from CIC decisions. The Immigration and Refugee Protection Act (IRPA) 2001 replaced the 1976 Immigration Act and brought in simpler and more coherent legislation, reflecting contemporary Canadian values (Canada, 2001a). It provides the basis for Canadian immigration rules. Agreements between the federal government and provincial governments have given provinces (particularly Québec) an important role in the selection of independent migrants,<sup>8</sup> such as skilled workers or business immigrants, for permanent residence and in the administration of programmes related to temporary workers, such as seasonal agricultural workers and domestic workers, known as live-in caregivers (Textbox VI.16).<sup>9</sup>

Canada accepts approximately 230,000 immigrants for permanent residence annually. There are three main classes of entry for permanent status: “*economic*” (skilled workers, business immigrants, provincial nominees, live-in caregivers, and their immediate family); “*family*” (spouses, partners, children, parents and grandparents of the sponsor); and “*protected persons*” (government-assisted and privately sponsored refugees, people recognized in Canada as Convention refugees (UN, 1951) or as in need of protection, and those granted protection through the pre-removal risk assessment process) (Canada, 2004). In 2004, 235,824 persons became permanent residents of Canada (all three classes included) (Canada, 2005b). Economic migrants constituted 57 per cent of all landings, and 113,442 skilled workers and their dependants (47,889 principal applicants and 65,553 spouses and dependants) and 9,764 business immigrants (2,708 principal applicants and 7,056 spouses and dependants) were admitted for permanent residence in 2004 (Canada, 2004).

Unlike the USA, Canada does not have a set quota for admitting immigrants. However, the Minister for Citizenship and Immigration annually issues a statement on the planned level of migration intake for the following year.<sup>10</sup> On average, there are between 225,000 and 250,000 arrivals each year and the government has met its admissions targets in the annual immigration plans for the past five years. Before 2000, however, the level of immigration was lower than projected, causing Canada to be described as one of the few countries constantly receiving fewer immigrants than anticipated or desired. Canada’s open immigration policy can be attributed to sluggish population growth and a desire to boost its economy.

Canada’s points system was established under the 1976 Immigration Act. It assesses economic migrants against a set of criteria, including level of education, previous work experience and age. During the 1990s, it was thought that a high percentage of immigrants were too dependent on welfare, despite passing the points test. The system was reviewed in 1998, following evaluation by an independent commission on citizenship and immigration. Some of the commission’s recommendations were included in the IRPA.

IRPA introduced significant changes in the selection procedure for skilled workers, especially for the provinces (with the exception of Québec, since selection criteria were included in the 1991 Canada-Québec Accord). The new selection process placed more emphasis on education, previous work experience and language ability. These modifications included:

- allocating more points for applicants with a second degree or a professional qualification;
- increasing the maximum number of points allocated for proficiency in English and French;
- awarding points for applicants with one or two years of work experience in order to attract young migrants with high levels of education but limited practical experience;
- adjusting the age scale to award maximum points to applicants between the ages of 21 and 49;
- reducing the pass mark to 75 points in response to concerns that too high a pass mark would exclude many skilled immigrants (IPRA; Canada, 2002a; 2002b).

In addition, IRPA regulations also affect other categories of skilled migrants, by applying new definitional requirements for the business and entrepreneur categories, emphasizing that the applicant's wealth must be legally acquired (Canada, 2002c: para.88). For self-employed applicants, the requirement of a degree of experience was also included.

### VI.3.1.1 Skilled workers

Skilled workers are people who may become permanent residents because they have the ability to establish themselves economically in Canada. To qualify as a skilled worker, prospective migrants have to meet the minimum work experience requirements; at least one year's full-time work experience within the last ten years in a category specified on the Canadian National Occupational Classification.<sup>11</sup> Certain occupations are sometimes placed on a restricted list to protect the Canadian labour market, and are therefore not available to potential applicants despite prior work experience in these fields. They must also demonstrate that they have sufficient funds to support themselves and their family after arrival in Canada, unless they have already secured employment. Finally, such applicants must earn 67 points or more in the six selection criteria: education; proficiency in the two official languages (English and French); work experience; age (a maximum 10 points is awarded to applicants aged between 21 and 49 at the time of the application); secured employment in Canada; and adaptability, assessed according to whether the applicant has, *inter alia*, previously studied or worked in Canada or has family members living there.<sup>12</sup>

It is also possible to immigrate as a skilled worker to the province of Québec under the 1991 Canada-Québec Accord on Immigration, which enables Québec to establish its own immigration criteria and to select immigrants who will adapt well to living in the province, although the Canadian government remains responsible for their admission (Canada, 1991: 3). To immigrate to Québec, migrants must meet the requirements for one of the three programmes for workers established by the Québec Government:

- the assured employment programme where the prospective migrant has been offered a job by a Québec employer, which cannot be filled by a Canadian citizen or permanent resident;
- the occupation-in-demand programme where

the applicant possesses a minimum of six months work experience in a listed occupation;

- the employability and occupational mobility programme where the applicant and his or her spouse, if applicable, have an employability and occupational mobility profile enabling them to adjust readily to changes in the Québec labour market.<sup>13</sup>

In addition to the separate immigration selection criteria for skilled workers operated by the province of Québec, it is also possible to migrate as a permanent resident to a particular Canadian province in the Provincial Nominee Class. Prospective migrants must first apply to the competent provincial authorities to be nominated for immigration by that province on the basis that they meet the province's particular immigration needs and that they have a genuine intention to settle there. Once a provincial nomination is obtained, a separate application must be submitted to CIC. Applicants for permanent residence as provincial nominees are not required to satisfy the six selection criteria for skilled workers established under the Federal Government programme.<sup>14</sup>

### VI.3.1.2 Business immigrants

This entry route is aimed at business immigrants (Canada, 2002c: 88-109),<sup>15</sup> who are classified as investors, entrepreneurs and the self-employed who are expected to develop the Canadian economy through investment and the creation of jobs. They can be accompanied by their dependents.

The qualifying criteria for investors are:

- prior business experience, i.e. the management of a business and control of a percentage of the equity or the management of at least five full-time job equivalents per year for at least two years in the period beginning five years before the date of application for a permanent resident visa;
- a legally obtained minimum net worth of CDN \$800,000;
- a written indication to an immigration officer that they intend to make or have made an investment of CDN \$400,000 in Canada.

This investment is placed with the Receiver General of Canada and is used by participating provinces to create jobs and help develop their economies. CIC will

return the investment to the applicant, without interest, approximately five years after the applicant becomes a permanent resident.

The qualifying criteria for entrepreneurs are:

- prior business experience;
- a legally obtained minimum net worth of CDN \$300,000;
- control of a percentage of the equity of a qualifying Canadian business equal to or greater than one third;
- provide an active and ongoing management of the qualifying Canadian business;
- create at least one incremental full-time job equivalent for Canadian citizens or permanent residents, other than the entrepreneur and their family members.

Applicants must meet these conditions for a period of at least a year and comply with them for three years after they become permanent residents.

The qualifying criteria for self-employed migrants are:

- relevant experience in cultural activities, athletics or farm management, i.e. at least two years in the period beginning five years before the date of application for a permanent resident visa;
- the intention and ability to establish a business that will, at a minimum, create employment for the applicant; and
- a significant contribution to cultural activities or athletics or purchase and management of a farm in Canada.

Although there are no specific immigration conditions for this category per se, applicants must have enough money to support themselves and their family members after their arrival in Canada.

### VI.3.1.3 Family class

The rules relating to family reunion for migrants admitted as permanent residents are generous on the whole. Migrants with permanent residence in Canada can be joined by family members, provided that they agree to sponsor them for a period of between three to ten years depending on the relationship. Persons eligible for family reunion are:

- spouses, common-law or conjugal partners 16 years or older;<sup>16</sup>
- dependant children up to the age of 22, including adopted children; intended adoptees under the age of 18;
- parents and grandparents;
- brothers, sisters, nieces, nephews, or grandchildren who are orphans, under the age of 18, and unmarried or not in a common-law relationship (IRPA: ss.12(1) and 13 (1); Canada, 2002c: 116-137).

The family class constituted the second largest immigration category after skilled workers (including dependants) in 2004.<sup>17</sup>

## VI.3.2 United States

Immigration, perhaps more than any other social, political or economic process has shaped the United States over the past century. The current 'employment-based' entry categories for both permanent ("immigrants") and temporary ("non-immigrants") admission are defined in the Immigration Act of 1990 (IMMACT 1990). While the absolute numbers of employment-based migrants admitted were fairly high between 2000 and 2004, ranging from 82,000 to 179,000 immigrants, they accounted for only 11.6 per cent to 16.8 per cent of all immigration<sup>18</sup> to the US. Persons admitted as permanent residents are granted the "green card," a document giving the right to an indefinite period of stay, and may be naturalized as US citizens after five years' residency.<sup>19</sup>

### VI.3.2.1 Employment-based preferences

A minimum of 140,000<sup>20</sup> employment-based immigrant visas are available each year, including both the principal applicant and his or her spouse and children. The US quotas are set at the same maximum number of admissions every year. However, this limit can be adjusted by use of a complex calculation.<sup>21</sup> The preference for employment-based migrants is skills-oriented. Even in years when the numerical limit rises above 140,000, the number of immigrant visas granted on the basis of unskilled labour is capped at 10,000 worldwide.<sup>22</sup>

The preference system gives an advantage to certain categories of workers and imposes overall limits on ad-



## TEXTBOX VI.5

## The Employment-based Immigration Preference System in the United States

### Preference 1: Priority Workers (40,000 visas)

- Persons with extraordinary ability (proven by sustained national or international acclaim) in the sciences, arts, education, business, and athletics. No US employer is required.
- “Outstanding” (internationally recognized and having at least three years of experience) professors and researchers seeking to enter in senior positions. No labour certification is required, but a US employer must provide a job offer and file a petition with the US Bureau of Citizenship and Immigration Service (BCIS) for the worker.
- Executives and managers of multinational companies (requires one year of prior service with the firm during the preceding 3 years). No labour certification is required, but a US employer must provide a job offer and file a petition with the BCIS for the worker.

For these workers, the number of visas available must not exceed 28.6 per cent of the worldwide level, plus any visas not required for Preferences 4 and 5.

### Preference 2: Members of the Professions with Advanced Degrees and Aliens of Exceptional Ability in the Sciences, Arts, or Business (40,000 visas)

- Professionals holding an advanced degree or bachelor’s degree and having a minimum of five years experience in the profession;
- Persons with exceptional ability in the arts, sciences, or business, as demonstrated by a significantly above average level of expertise.

All applicants must have a labour certification approved by the US Department of Labour (DOL), or a Schedule A designation (Section VI.3.2.2 below) or establish that they qualify for one of the shortage occupations in the Labour Market Information Pilot Program. A job offer is required and the US employer must file a petition. The US Attorney General can waive the requirement of a job offer and labour certification if he deems it to be in the national interest. The number of visas available will not exceed 28.6 per cent of the worldwide level, plus any visas not required for the classes specified for Preference 1.

### Preference 3: Skilled Workers, Professionals, and Other Workers (40,000 visas)

- Skilled workers with a skill level equivalent to at least two years vocational training or experience;
- Professionals with a bachelor’s degree;
- Other workers (unskilled workers) capable of filling positions requiring less than two years training or experience. This sub-category is limited to no more than 10,000 visas per year.

All applicants must have a labour certification approved by the DOL, or a Schedule A designation, or establish that they qualify for one of the shortage occupations in the Labour Market Information Pilot Program. The US employer must file a petition for a visa. The number of visas available will not exceed 28.6 per cent of the worldwide level, plus any visas not required for the preferences in categories 1 and 2.

### Preference 4: Special Immigrants (10,000 visas, no more than 7.1 per cent of the world wide level)

This category includes ministers of religion and persons working for religious organizations, foreign medical graduates, alien employees of the US government abroad, alien retired employees of international organizations, etc. No more than 5,000 such visas may be allotted to persons pursuing religious vocations and no more than 100 may be allotted to applicants seeking to work as broadcasters or as grantees for the Broadcasting Board of Governors. A petition for Special Immigrant is required for all applicants except overseas employees of the US Government.

### Preference 5: Employment Creation (Investor) Visas (10,000 visas, no more than 7.1 per cent of the world wide level)

This category applies to investors, who invest at least US\$1 million. However, a minimum of 3,000 visas are reserved for investors, who invest US \$500,000 in rural or high unemployment areas. The investment must create employment for at least 10 US workers. Investors are granted only conditional lawful permanent resident (LPR) status for two years, and the law contains extensive anti-fraud provisions.

missions. The total number of visas available to nationals of a single foreign state may not exceed 7 per cent of the total number of family and employment-based immigration visas (US, 2006b).<sup>23</sup> By law, the 140,000 employment-based immigrant visas are distributed in accordance with five preferences (Textbox VI.5).

### VI.3.2.2 Procedures

All prospective immigrants planning to obtain immigrant visas through employment in the US must obtain an approved immigrant visa petition from the US Citizenship and Immigration Services (USCIS).<sup>24</sup> Where required, labour certification must be granted by the US Department of Labour (DOL) before the employer can submit the petition, and is subject to DOL establishing that there are no US workers who are able, willing, qualified and available for the employment offered to the alien and that the wages and working conditions of similar employed US workers will not be adversely affected.<sup>25</sup> Approval by the DOL does not automatically guarantee visa issuance. The US Department of State (State Department) issues immigrant visas to foreign workers on the condition that the applicants establish their admissibility to the US under the provisions of the Immigration and Nationality Act.<sup>26</sup>

The certification process is normally handled by an immigration lawyer, and can take several years. Employers and immigrants are frustrated by the delays, and tend to use temporary visa categories to bridge the gap between the decision to hire the worker and the government's grant of permanent resident status. As a result, the recruitment process is often academic, the employer having already hired the foreign worker.<sup>27</sup> At present, because of the unwieldy bureaucratic processes for approving labour certifications and applications for admission, the permanent immigration quotas for skilled workers are not filled in any one year, despite a growing backlog of applications waiting for approval.

### VI.3.2.3 Conclusion

The economic prospects of the US will remain strongly tied to immigration forces. Immigrants comprise 14.3 per cent of the population aged 16 and over, and account for roughly the same percentage of the labour force (US, 2003; 2005b). During the late 1990s, all legal immigrants contributed a net 35 per cent to

total growth in population, while the number of foreign-born workers increased by nearly 25 per cent compared with just 5 per cent of all native-born workers. Furthermore, as immigrants and immigration flows in general have become part of the debate on national security, immigration will continue to be an issue of high-level foreign policy and diplomatic attention. Ultimately, however, the US' ability to capture the benefits of immigration will depend on its capacity to integrate immigrants in a meaningful way. This is as true in America's big cities, as it is in the heartland.

## VI.3.3 Czech Republic

Migration management is a relatively new policy issue for the Czech Republic and presents challenges of facilitation, rather than of deterrence. The Czech Republic became a Member of the European Union on 1 May 2004 and began to tackle issues of migration during its accession process. Currently, migrants represent roughly 2 per cent of the Czech population and the rate of immigration is significantly lower than that of other EU Member States (Czech Republic, 2005). Due to low birth rates and anticipated ageing of its population, the Czech Government hopes to prevent labour shortages and other ill effects of these downward demographic trends through increased immigration (Drbohlav, et al., 2005). The Czech Ministry of Labour and Social Affairs (MLSA) is responsible for managing migration and labour policies and programmes.

### VI.3.3.1 Permanent residence: general criteria<sup>28</sup>

Under Czech law, migrants can apply directly for permanent resident status, or must first obtain temporary status in the country (Pechová, 2004). The first group comprises three categories:

- close relatives of Czech citizens;
- individuals in need of humanitarian protection or worthy of special consideration;
- minors or dependent students seeking to live with a permanent resident parent.

Other foreigners only become eligible for permanent residence after a designated period of residence in the Czech Republic on a temporary visa. This period is set at 8 uninterrupted years for spouses, dependent children, and single parents (over the age of 70) of for-

eigners already possessing permanent resident status. Any alien present in the Czech Republic for 10 uninterupted years on a long-term visa may also apply for permanent resident status. Long-term visas are required for stays exceeding 90 days. Such visas are valid for one year, but may be renewed without submitting a renewal application on condition that the specific purpose of the visa remains the same. Any change in employment (employer, location, or position) will invalidate the visa.

An individual wishing to work in the Czech Republic must first secure a work permit through his or her employer, who must also have a permit to hire foreigners. Both work and hiring permits are subject to application fees. A local labour office will then assess the applicant's eligibility, using a labour market test to ensure that no Czech citizen, permanent resident, or EU citizen registered with the office is available for the position. Once an applicant has obtained an application number, he or she can apply for a long-term visa.

### VI.3.3.2 Pilot project for permanent labour migration: active selection of qualified foreign workers

MLSA launched a pilot project for the recruitment and selection of applicants for permanent immigration in 2003 (Czech Republic, 2004). This is a preliminary effort to boost the country's professional workforce and make significant reductions in the time requirement for permanent residence eligibility. The pilot phase of the project will operate until 2008 and several hundred migrants are expected to be admitted each year.<sup>29</sup>

The project grants permanent resident status to participants after a period of employment in the Czech Republic. If participants lose their job, without being the cause, they are also given 30 days to secure a new position. Currently, the project includes nationals from: Bulgaria, Belarus, Canada, Croatia, Kazakhstan, Moldova, Serbia and Montenegro, and the Ukraine.<sup>30</sup> Recently, eligibility was extended to most persons grad-

#### TEXTBOX VI.6

### Pilot Project for Permanent Labour Migration in the Czech Republic – Points Criteria

#### Employment (3 points required)

- 1 point per every 2 months for which the work permit is valid, during the first year
- 1 point for every 6 months of validity during the second year
- 1 point for 12 months of validity during the third year

#### Professional Experience (1 point required, except for graduates of Czech universities and secondary schools)

- 1 point for every six months of full-time employment prior to his/her current position

#### Completed Education (2 points required)

- 2 points each for completed secondary vocational or higher education
- 3 points for a Bachelor's degree
- 4 points for a Master's degree
- 4 points for a PhD

#### Age

- 4 points for persons aged 22 years and under
- 8 points for persons aged between 23 and 35 years
- 1 point is subtracted from 8 for each year over 35

#### Previous Experience with living in the Czech Republic

- 1 point for every six months of continuous time spent in the Czech Republic, prior to selection for the pilot project

#### Language Skills

- 6 points for certified knowledge of the Czech or Slovak language
- 3 points for English, French or German

#### Family Evaluation

- Up to 6 points for the points allotted to a spouse applicant, under the above criteria, multiplied by 6 and divided by 56
- 2 points for every minor child or dependent child, not to exceed 6 points

Source: <http://imigrace.mpsv.cz/?lang=en&article=criteria>

uating from Czech universities after 1995 and from Czech secondary schools after 2000, regardless of citizenship (Ivanovičová, 2006).

All applicants must first secure a job in the Czech Republic and obtain both a work permit and a long-term visa for the purpose of employment, valid for at least 6 months, although they do not have to begin working before applying to join the project.<sup>31</sup> Under the project application's points system, applicants must obtain at least 25 points (out of the 66) to be eligible for participation. Individuals may apply at any time once they believe they have enough points. Applications which fail to score the minimum number of

points are kept in the database and applicants may re-submit their application if, for example, their language ability improves. Applicants are judged on the basis of a number of criteria (Textbox VI.6).

Every two months, applicants with the highest points are selected from a computer database of applications and invited to become project participants. After the participant has worked two and a half years in the Czech Republic, the government conducts a "social check". If the participant and his family are deemed well integrated, they will be recommended for permanent residence.

#### TEXTBOX VI.7

### A Points-Based Migration System for the United Kingdom

#### Five Tiers

Underpinning the new system will be a five tier framework, which will help people understand how the system works and direct applicants to the category that is most appropriate for them.

- **Tier 1:** *Highly skilled individuals to contribute to growth and productivity*
- **Tier 2:** *Skilled workers with a job offer to fill gaps in UK labour force*
- **Tier 3:** *Limited numbers of low skilled workers needed to fill specific temporary labour shortages*
- **Tier 4:** *Students*
- **Tier 5:** *Youth mobility and temporary workers: people allowed to work in the UK for a limited period of time to satisfy non-economic objectives*

#### Points and structured decision-making

For each tier, applicants will need sufficient points to obtain entry clearance or leave to remain in the UK. Points will be scored for attributes which predict a migrant's success in the labour market, and/or control factors, relating to whether someone is likely to comply with the conditions of their leave.

Points will be awarded according to objective and transparent criteria in order to produce a structured and defensible decision-making process. Prior to making their application, prospective migrants will be able to assess themselves against these criteria, reducing the number of speculative and erroneous applications.

#### Sponsorship [See also Textbox VI.9]

All applicants in Tiers 2-5 will need to provide a certificate of sponsorship from an approved sponsor when making their application. The certificate of sponsorship will act as an assurance that the migrant is able to do a particular job or course of study and intends to do so. The sponsor's rating, an expression of their track record or policies in sponsoring migrants, will determine whether applicants receive more or fewer points for their certificate.

In order to sponsor migrants, employers and educational institutions will need to make an application to the Home Office, satisfy the requirements for the particular tier in which they wish to sponsor migrants, and accept certain responsibilities to help with immigration control.

#### Financial Securities

In due course, financial securities will be required for those whose personal circumstances or route of migration suggests that they present a high risk of breaching the immigration rules.

#### Next Steps

The new system will be introduced in a phased manner tier by tier.

Source: UK (2006b: 2).

### VI.3.4 United Kingdom

While the United Kingdom has not yet implemented comprehensive measures on employment-based immigration, the ordinary work permit scheme (Textbox VI.9) contains relatively generous criteria for permanent residence. The Immigration Rules (UK, 1994) provide that work permit holders can apply for indefinite leave to remain (permanent residence) after they have been in work permit employment for a continuous period of five years, although the grant of this status is not viewed in terms of “a right” and is subject to the discretion of immigration officials.<sup>32</sup> However, the UK is moving towards a partial employment-based immigration system based on a general points scheme comprising objective criteria, on the lines of those discussed above in respect of Canada and the Czech Republic. From July 2005 to November 2005, consultations on implementation of such a scheme took place between interested stakeholders in the UK, followed by publication of the government proposals for a new economic migration system in March 2006 (Textbox VI.7) (UK, 2006b), although this system is unlikely to be implemented before late 2007 or 2008 (Harvey, 2006:2). However, a prototype points-based scheme for the selection of highly skilled migrants has been in operation for over four years (Section VI.3.4.1 below).

#### VI.3.4.1 Highly Skilled Migrant Programme (HSMP)

The Highly Skilled Migrant Programme (HSMP) was introduced as a pilot scheme at the end of January 2002. Over 2,500 applications were received in the first phase of the scheme and more than 1,500 were granted. Given the positive response to the HSMP, it was revised and incorporated into the formal UK Immigration Rules (UK, 1994: paras. 135A-135H).

In contrast to the ordinary work permit system (Section VI.4.1 below), the HSMP is supply-driven. Migrant workers can enter to seek employment and no labour market test is applied. The HSMP is operated on the basis of a points system, and 65 points are required to qualify for admission (Textbox VI.8).

Applications from doctors (general practitioners) under the HSMP are given priority. Successful applicants are admitted for an initial period of 12 months,

#### TEXTBOX VI.8

### UK Highly Skilled Migrant Programme

Points are awarded for:

- education (30 points for PhD; 25 points for a Master's (e.g. MBA); 15 points for a Graduate degree (e.g. BA or BSc);
- work experience (25-50 points);
- past earnings over the 12 months prior to the application (25-50 points);
  - the earnings threshold was divided into two categories: applicants 28 years of age and those under 28 years of age, with a view to facilitating the entry of young professionals who are required to meet a lower earnings limit);
  - countries are divided into five categories A-E, the income level the applicant is required to demonstrate is adjusted according to the category of their country;
- achievement in the chosen field (15 points are awarded for significant achievement and 25 for exceptional achievement);
- partners' achievements (an additional 10 points is also available for a skilled partner who has lived with the applicant for two years or more).

Applicants must also demonstrate:

- ability to continue to work in their chosen field in the UK;
- possession of sufficient savings and/or potential income to accommodate and support themselves and their families without recourse to public funds while they look for work; and
- willingness to make the UK their main home.

Source: HSMP (UK, 2006d).

which can be extended for a further 3 years. After a total of 5 years stay in the UK, HSMP migrants may apply for indefinite leave to remain (permanent residence).

In due course, the HSMP will be replaced as the first tier in a new points system, which the UK Government announced in March 2006 (Textbox VI.7) (UK, 2006b: 21-24).

## ***VI.4 Admission Policies: Temporary Labour Migration***

Globalization has fuelled the growth in temporary migrant worker programmes in many destination industrialized countries (Martin, 2003), which is one of the consequences of the growth in “flexible” labour markets. Given the increasing dependence of employers on temporary migrant labour, particularly in low-skilled sectors such as agriculture, construction, the food industry and services, these programmes are likely to grow in number and complexity as policy-makers attempt to devise innovative ways to channel the lawful admission of migrant workers, on a short-term basis, into the sectors concerned.

There is also a renewed interest in the concept of temporary circular labour migration (GCIM, 2005: 17, 31), considered by some stakeholders as constituting a “win-win” situation for

- destination countries seeking to meet labour market needs and avoid the economic and societal problems connected with the integration of migrants on a long-term basis;
- countries of origin to address ‘brain drain’, promote the transfer of know-how, and gain from the transfer of remittances;<sup>33</sup>
- migrant workers and their families.<sup>34</sup>

The principal policy questions, however, are how to design viable temporary migrant worker schemes with a view to ensuring that the programmes offer the benefits identified and that workers are treated in a decent and equitable manner.<sup>35</sup> These questions are discussed in Section VI.4.5.2 below after providing an overview of the work permit system and the different forms temporary labour migration may take with reference to specific country examples.

Temporary labour migration can apply to a number of worker categories, from highly skilled labour for specialized jobs to, more frequently, lower-skilled workers into certain shortage occupations, which few national workers are able or willing to take, such as seasonal work (e.g. agriculture, tourist industry), construction, food production, or domestic and care sectors.

However, care must be taken when discussing the concept of “temporary” labour migration. It is important to make a distinction between:

- government policies which admit migrant workers for a limited period with the clear objective that they will return to their country of origin at the end of the specified period;
- more open labour migration schemes which allow for the possibility of settlement by the migrant worker in the destination country.

Section VI.4.3 below discusses the first type of temporary labour migration policies, with reference to country-specific examples. However, many migrant workers, especially those with higher than average skills, are admitted through more regular admission channels, which can be described as the “ordinary work permit system” (Section VI.4.1 below).

### **VI.4.1 The work permit system: general characteristics**

The rules applicable to the work permit system differ from country to country but broadly-speaking, the following procedures normally apply:

- Application for admission is usually made outside of the country in response to a formal job offer, although sometimes applications for employment by foreigners within the country are also considered.
- Permission for admission to the destination country to take up the employment concerned, normally after satisfying a labour market test (Section VI.2.2 above), is granted by officials in the consulate or embassy of the country concerned, often with the assistance of officials with expertise in labour matters.
- An employment/work permit is granted to the employer or worker, or sometimes to both (see critique of the work permit system in Section VI.4.2 below).
- The worker often also has to obtain separate permission for residence (i.e. residence permit);
- The employment/work permit is time-limited, but can usually be renewed if the job is still available.
- A change of job by the migrant worker (called “switching” in the UK), whether to another

## TEXTBOX VI.9

### The Ordinary Work Permit Scheme in the UK

The Ordinary Work Permit Scheme, like the HSMP, discussed in Section VI.3.4.1 above, is aimed at skilled persons. Both provide an avenue to permanent residence after a stay of five years in the UK. The work permit scheme in the UK is based on a demand-driven system because it is the employer who applies for a work permit. The scheme is divided into two parts: Business and Commercial work permits and Training and Work Experience work permits.

Business and Commercial work permits are divided into two tiers:

- **Tier 1** includes Intra-Company Transferees (ICT), board level posts, positions related to inward investment, sponsored researchers, and skills shortage occupations. As of January 2006, the skills shortage occupations included: health care workers (all nurses, general practitioners (GPs) and most medical consultants); engineers; actuaries; veterinary surgeons; school teachers in posts covering compulsory education; and a general category including pharmacists, senior physiotherapists and social workers. IT workers were removed from the skills shortage occupations list in September 2002, because of a significant downturn in the IT sector. No labour market test is applied in respect of Tier 1 work permits.

- **Tier 2** encompasses all other posts and a work permit can be granted to the applicant if the job offer cannot be filled by a UK or EEA national. A labour market test is applicable and the employer has to advertise the position for at least four weeks before submitting a work permit application.

Business and Commercial work permits are also subject to the following skills, qualifications and experience criteria:

EITHER the job must require the following qualifications:

- a UK equivalent degree level qualification; or
- a Higher National Diploma (HND) level qualification which is relevant to the post on offer; or
- a HND qualification, which is not relevant to the post on offer plus one year of relevant full time work experience at National/Scottish Vocational Qualification (N/SVQ) level 3 or above;

OR the job must require the following skills:

- 3 years full-time experience of using specialist skills acquired through doing the type of job for which the permit is sought. This should be at N/SVQ level 3 or above.

Source: UK (2005b).

employer in the same employment sector or an employer outside that sector, may or may not be permitted under national rules without the need to leave the country, but, if permitted, may require satisfaction of a further labour market test.

- Free access to employment of their choice can be granted to migrant workers admitted under a regular work permit scheme after a certain number of years (e.g. two to five years) of work or residence in the country.
- The worker may also qualify for a more secure or permanent residence status in accordance with the foreigners' legislation of the country concerned.

As can be seen, while at the outset the above proce-

dures foresee temporary employment, their application may lead eventually to free access to the labour market for migrant workers and a secure or permanent residence (settlement). In practice, they may operate as an employment-based immigration system. The ordinary work permit scheme in the UK is a good example of a system which may also lead to more permanent labour migration (Textbox VI.9), although, as discussed above, it will be replaced in the next few years by a points-based system.

In Spain, there are essentially two migration routes leading to settlement. The first is the normal work permit route. The employer must satisfy a labour market test that s/he cannot find other Spanish, EU or EEA nationals for the job in question. Once granted, the work permit

can be renewed for so long as the job remains available. No labour market test needs to be satisfied on renewal (Spain, 2001: Arts.69-72). Permanent residence can be obtained after five years consecutive employment on the basis of a 1+2+2 year formula.<sup>36</sup> The second route is through the quota (contingente) (Textbox VI.1).

In Italy, most labour migration opportunities are temporary in nature, given that they are mainly for lower-skilled employment. However, it is possible to obtain more secure or permanent status. After a period of 6 years continuous lawful residence in Italy, migrant workers can obtain a residence card (permanent residence), provided they are able to demonstrate that they have sufficient resources to maintain themselves and their families.

#### VI.4.2 Critique of the work permit system

A number of important questions arise regarding the work/employment permit system, which impact on its operation in practice and the treatment migrant workers receive. The disadvantages of granting the work permit to the employer, rather than to the migrant worker, would appear to outweigh any advantages. If the employer holds too much authority over the worker, this may lead to abusive situations, particularly if it is difficult or impossible for the migrant to change employment while he or she is within the country. Consequently, one way of affording protection generally to migrant workers in ordinary work permit employment is to ensure that they hold the work permit and also that they have an unlimited right to change employer and occupation after a short period of, for example, three months. However, there should be no qualifying period for migrants employed in temporary lower-skilled schemes where employer abuses are likely to be more prevalent (Ryan, 2005: 40-41, 122).

The work permit system as a whole is not without criticism. For example, in October 2005, a report by the Irish Labour Relations Commission concluded that the work permit system in Ireland, where the work permit is held by the employer, leads to exploitation (Textbox VI.10) and serves as an obstacle to the migrant's access to dispute-resolution mechanisms.

#### TEXTBOX VI.10

### The Irish Work Permit System as an Obstacle to Migrant Workers' Access to Dispute-Resolution Mechanisms

Evidence from a study by the Irish Labour Relations Commission indicates that the work permit system, as it currently operates in Ireland, is an impediment to migrant workers achieving full parity with Irish nationals, particularly in terms of access to dispute resolution services

This view is shared by many working within the system and by organizations helping migrant workers. The Equality Authority sees the work permit system as the crux of the problem of exploitation of workers. The Migrant Rights Centre Ireland (MRCI) believes that the work permit system should be abolished and replaced by a 'green card' system, which would give similar rights to all migrant workers. The Immigrant Council of Ireland has called for changes in the work permit system so that the permit is held by the employee and not by the employer. This is a view also put forward by the UN Committee on the Elimination of Racial Discrimination which called on the Irish Government to consider issuing work permits directly to employees to help combat the exploitation of foreign workers.

Meanwhile, the Chamber of Commerce of Ireland has stated that it considers the current Irish immigration system to be unsatisfactory for both employers and employees. It called on the government to bring forward its plans to introduce a comprehensive immigration system that is responsive to labour market needs and which ensures equity for all workers and their partners.

Source: Ireland (2005a).

Furthermore, excessively bureaucratic procedures impair the efficiency of the work permit system. As observed above in Section VI.3.2.2, the US labour certification procedure is particularly cumbersome with the result that the employment-based immigration system has effectively ground to a halt.



In the Russian Federation, the system for hiring foreign labour is based on complex administrative procedures involving the establishment of an annual quota (Section VI.2.1 above) and a dual permit structure. This is a system, which appears to hinder rather than smooth the admission of much needed foreign labour into shortage sectors in the economy. Licences to employ foreign workers are issued to employers by the local employment service (*Rostrud*), while employment permits are also issued to the migrant worker. This procedure is difficult to manage for both employer and employee, and also involves significant fees: the employer pays a tax of RUB 3,000 for each foreign worker and the worker pays RUB 1,000 for his or her work permit. A further complication lies in the process, and raises the problematic issue mentioned earlier: only employers apply for both permits and this often leads to abuse, particularly since migrant workers must obtain a new work permit to change employer, even if this does not entail a change of employment sector or place of residence.

Proposals to introduce changes and to liberalize the work permit system in the Russian Federation include:

- extending the duration of the employer's permit for hiring migrant workers from 1 year to 3 years, with a possible renewal for a further year;
- allowing the worker to be employed for a period of up to 4 years;
- enlarging the categories of foreign workers not currently covered by the permit procedures;
- introducing a "one-step" permit system for hiring migrant workers;
- establishing a more favourable regime which will attract highly-skilled migrants;
- creating a centralized database for registration of foreign citizens and stateless persons;
- developing an on-line information system for foreign citizens located outside the Russian Federation who may be interested in taking up temporary employment in Russia.<sup>37</sup>

In the UK, one of the reasons for moving to a points-based system was the bureaucratic and uncertain procedures of the established work permit system:

[I]t is apparent that the design of the work permits scheme is found to be inefficient by employers. Employers said that the process is time-consuming,

bureaucratic, cumbersome and difficult to understand. In addition, employers commented that there is no guarantee of success, so that time and effort spent applying for a work permit where the applicant is then turned down for a visa is frustrating. Even where applications were successful the procedure was still deemed to be lengthy and inefficient (UK, 2006b: 7; Dench et al., 2006: 8).

### VI.4.3 Forms of temporary labour migration

In contrast to the ordinary work permit system, these schemes are clearly temporary in that migrant workers are expected to return home after completion of their employment. Consequently, the arrangements for hiring temporary migrant workers are normally much more flexible than those under ordinary work permit procedures.

#### VI.4.3.1 Seasonal labour migration schemes

The most common temporary labour migration programmes concern seasonal labour migration schemes, for which arrangements have been established in many OSCE countries. A common definition of a "seasonal worker" is: "a migrant worker whose work by its character is dependent on seasonal conditions and is performed only during part of the year" (ICRMW, Art.2(2)(b)). In many OSCE countries, these arrangements apply mostly to the agriculture sector, although the tourist industry also benefits from seasonal labour migration schemes.

The key features of these schemes can be summarized as follows:

- These can be a significant source of temporary migrant labour to the country. For example, in 2003, under bilateral agreements, Germany admitted over 300,000 migrants for seasonal employment (Textbox VI.11), while the UK quota is set at 16,250 for agricultural migrant workers for 2006 (Textbox VI.12); and the largest group of migrants in Norway (15,700 in 2002) were seasonal workers, mostly from Poland and other countries in Central and Eastern Europe (OECD, 2005: 246).
- They operate for short periods, normally between 3 and 9 months.

## TEXTBOX VI.11

### Seasonal Migrant Workers in Germany

Seasonal workers from Central and Eastern Europe may be employed in agricultural and forestry occupations and in the hotel and restaurant industry for up to four months to fill temporary labour needs. In 2003, 318,549 foreigners (mostly Polish citizens) were legally employed in these occupations in Germany (In 2002, there were 307,182 foreigners lawfully employed as seasonal workers).

Source: Germany (2006).

## TEXTBOX VI.12

### Seasonal Agricultural Employment in Europe

#### United Kingdom

The Seasonal Agricultural Workers Scheme (SAWS) enables farmers and growers to recruit seasonal agricultural workers for low-skilled work from outside the EEA. As with the ordinary work permit scheme, SAWS is managed by Work Permits (UK), which contracts with a number of organizations and operators to administer the scheme on its behalf. There is a SAWS quota of 16,250 places for 2006. Migrant workers can be recruited for a period of between 5 weeks and 6 months and employers are responsible for providing clean and sanitary accommodation.

The key admission and other criteria for SAWS are:

- applicants must live outside the European Economic Area (EEA), be 18 years of age or more and be students in full-time education;
- applicants must approach the operators directly, or through their university or college;
- successful applicants receive a work card (similar to a work permit);
- entry clearance must be obtained from the nearest British diplomatic mission;
- no switching into work permit employment is permitted;
- dependants cannot accompany the SAWS worker.

Source: UK, Home Office Immigration and Nationality Directorate, [http://www.workingintheuk.gov.uk/working\\_in\\_the\\_uk/en/homepage/work\\_permits/saws.html](http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/work_permits/saws.html)

#### Italy

The principal temporary labour migration opportunities are in seasonal work, for which the largest quota is set (Textbox VI.1). The sectors for seasonal employment are agriculture, tourism,

services and industry. The procedural criteria and conditions for seasonal work include:

- duration of seasonal work permit can range between 20 days to a maximum of 9 months;
- seasonal migrant workers have priority for re-entry into Italy;
- after two years of employment, migrant workers may obtain a three-year work permit (though a visa is required for each season);
- family reunion is limited to spouses and minor children.

Source: Italy (2003: 155, 158).

#### Spain

In Spain, Type "T" permits are issued for seasonal work. While seasonal work is subject to a labour market test, there are usually no Spanish, EU or EEA nationals willing to undertake the tasks concerned. Seasonal employment is located mainly in the agricultural and temporary services sectors and is also facilitated by bilateral agreements (Section IX.1.1 below), and the maximum duration of such employment is 9 months within a 12-month period. A particular feature of seasonal employment in Spain under the Type "T" permit is the route it provides to a more secure residence status after 4 years of employment. In addition, migrants holding type "T" permits must present themselves to the same diplomatic mission or consular office where they lodged their original application within a period of one month of the end of their stay in Spain. Non-fulfilment of this obligation can constitute grounds for refusal of subsequent applications for other types of work permit.

Source: Spain (2001: Art.78(2)).

## TEXTBOX VI.13

### Seasonal Agricultural Workers Project: Guatemala-Canada

The Seasonal Agricultural Workers Project Guatemala-Canada is a result of joint efforts by the Ministry of Foreign Affairs and the Ministry of Labour and Social Welfare, with cooperation from IOM.

The Project was established in 2003 through an agreement with the Province of Québec's *Fondation des Entreprises de Recrutement de Main-D'oeuvre Agricole Étrangère* (FERME, Foundation of Recruiting Enterprises of Foreign Agricultural Labour), under the supervision of the Department of Human Resources and Skills Development Canada (HRSDC).

The Government of Guatemala and FERME agreed to promote migration of seasonal agricultural workers, with the objective of benefiting the country of origin and the host country, while reducing irregular migration and the associated risks. The Government of Guatemala requested technical cooperation and implementation of the agreement by IOM:

- assistance with selection of candidates to meet the Canadian needs for seasonal agricultural workers;
- coordination with the Ministry of Labour to assure compliance with work procedures and immigration requirements for seasonal workers;
- travel arrangements for seasonal migrant workers.

IOM has signed a Memorandum of Understanding with FERME for this Project.

Guatemalan workers are also protected by Canadian labour laws and have life insurance and medical insurance. The Project is monitored by consular representatives of Guatemala in Canada who supervise the farms where Guatemalans work, with the aim of supporting Guatemalan workers as well as Canadian employers.

#### Main Procedures

*Demand:* Associated farms in Canada submit requests for seasonal workers to FERME, which are then processed and assessed for approval. Once requests have been approved, they are sent by FERME to IOM Guatemala with copies to the Guatemalan Embassy in Canada. Each request includes the number of workers, expected date of arrival in Canada, duration of the work contract, and type of farm crop.

*Recruitment:* Recruiting is carried out in different communities and municipalities in Guatemalan departments. This

process involves interviews and assessment of workers to see if they fulfil requirements for the Project and completion of a form with general information for their possible selection. Some Canadian entrepreneurs also participate in the recruiting process. Workers then visit the IOM office and submit the documents required for inclusion in the Project. Once these documents have been received, a visa application is completed and the respective file is created.

*Visa Application:* The visa application and all the appropriate documents are sent to the Canadian Embassy for the issue of Medical Examination Forms. The test results are issued in Trinidad and Tobago indicating whether workers are fit to carry out seasonal agricultural work in Canada.

*Work Permit Application:* If medical examinations are approved, workers are assigned to a request for seasonal agricultural workers and a work permit from HRSDC is requested through FERME. Once the Canadian Embassy has the HRSDC work permits, the visas are issued.

*The Journey:* Workers are invited to visit the IOM office a few days before the journey for instructions regarding the journey, appropriate behaviour and discipline norms with which they will have to comply during work, and relations with other people on the farms. Each worker receives a folder with all travel documents on the first day of the journey. These documents are classified to facilitate Migration clearance in Guatemala and Immigration in Canada, and include those documents to be handed to the employer.

#### Main Results

The Project is successful. The number of beneficiaries is continually increasing and the inter-institutional coordination mechanisms between national institutions (Ministry of Foreign Affairs, Ministry of Labour) are being strengthened with technical cooperation from IOM. Project evaluations carried out with the participation of national authorities and Canadian employers confirm these positive results.

The Project began in 2003 with an initial group of 215 workers: 180 men (84.7%) and 35 women (16.3%). By 2005, the numbers had more than tripled: 675 workers were sent, 611 men (90.5%) and 64 women (9.5%).

Source: IOM Guatemala (February 2006).

- Some require migrants to return home for a defined period of time before re-entering the country (i.e., a “rotation system”, as found in the Netherlands, Norway, Spain, and the UK).
- Some are limited to certain migrant workers from specific countries (e.g. the UK Seasonal Agricultural Workers Scheme is limited to full-time agricultural students from Eastern Europe and some CIS countries).
- In some destination countries, specific schemes are limited to nationals of countries with which bilateral agreements have been concluded (Canada and Mexico, Commonwealth Caribbean States<sup>38</sup> and Guatemala (Textbox VI.13); and Germany and Central and Eastern European countries).
- Employers may be required to provide suitable accommodation for migrant workers.
- Family reunion is rarely permitted.

Protection of migrant workers, cooperation between pertinent stakeholders, and assistance with return are distinct, but related, issues that need to be carefully addressed in order to design a successful seasonal labour migration scheme. Migrant workers participating in such schemes are often vulnerable to abuse, given the generally difficult jobs involved, isolation in rural areas common to agricultural work, and their clearly defined temporary legal status in the country. Consequently, such schemes need to contain a number of in-built safeguards, such as:

- facilitated travel to the destination country and on return to the country of origin;
- minimum wage guarantees and safe working conditions;
- access to health care and social protection; the provision (usually by employers) of suitable accommodation (a feature of some schemes discussed above);
- monitoring or inspection mechanisms to ensure that the promised employment and living conditions are being met.

Close cooperation between all stakeholders, including government ministries in countries of origin and of destination and social partners, is also vital. One scheme containing many of these elements is the IOM project facilitating the migration of seasonal agricul-

tural workers from Guatemala to Canada (Textbox VI.13). Moreover, given that irregular migrants are often also found in sectors covered by seasonal worker arrangements, it is important that these arrangements recognize actual demand for labour in those sectors. Assistance with return, discussed in more detail in Section VI.4.5.1 below, can often be achieved by providing migrant workers with incentives, such as reimbursement of social security contributions, attractive terms for savings and investments, and facilitated re-entry to the scheme. While re-entry does not normally lead to a more secure residence status, given the nature of seasonal work, the creation of a route to employed-based immigration after a certain number of years could be considered, as in Spain, where this is possible after 4 years of seasonal employment.

#### **VI.4.3.2 Temporary schemes for specific employment sectors**

Some countries have also introduced temporary labour migration schemes to channel migrant workers into specific sectors of the economy where labour shortages are prevalent. For example, in the UK, there is a quota of 3,500 places for migrant workers in the food manufacturing sector for 2005-2006 under the Sectors Based Scheme (Textbox VI.14). The construction industry is another important sector for low to medium-skilled migrant labour in Canada and Germany; and for skilled workers in the Netherlands, Norway and Spain.

In Spain, there are two principal types of temporary labour migration opportunities. The first is seasonal work (Textbox VI.12). The second concerns work carried out under Type “A” permits. These positions are subject to a labour market test; the permit is limited to specific employment activities in the economic interests of Spain (e.g. work on infrastructure, such as electricity and gas utilities, railways, telecommunications, assembly of industrial plants); and the permit is valid for the length of the employment contract and up to a maximum of one year (Spain, 2001: Art.78(1)).

Policy considerations for establishing temporary migration schemes for specific employment sectors are similar to those discussed in the context of seasonal worker programmes above (Section VI.4.3.1).

## TEXTBOX VI.14

## UK Sectors Based Scheme (SBS)

The Sectors Based Scheme (SBS) is a low-skilled work permit scheme, which was introduced on 30 May 2003 to address labour shortages in the hospitality and food manufacturing (meat and fish processing and mushroom production only) sectors. The SBS was introduced after consultations with social partners and other relevant stakeholders (employers, trade unions and industry representatives). Originally, a quota was set aside for nationals from the then EU accession countries, but this is no longer relevant after 1 May 2004 since nationals from these countries now have free access to the labour market in the UK provided that they register with the authorities (Section IX.1.3.2 below). In June 2005, the scheme was revised and work permits are no longer issued for the hospitality sector. The SBS quota for 2005-2006 is 3,500 permits (600 in fish processing; 2,100 in meat processing; 800 in mushroom processing).

## Key Features and Criteria:

- applicants must be aged between the ages 18 and 30 throughout the whole application process;
- entry clearance must be obtained from the nearest British diplomatic mission;
- work permits will only be issued for a maximum of 12 months and migrant workers must leave the UK after this period;
- employers are obliged to inform Work Permits (UK), if they have any doubts as to whether the individual has left the UK;
- switching from the SBS to another work permit scheme is not permitted;
- previous holders of an SBS work permit may re-apply for admission under the SBS for another permit, but only after they have been outside of the UK for at least two months;
- dependants cannot accompany the SBS work permit holder to the UK;
- normal work permit criteria apply (i.e. a labour market test, showing that the employer has ascertained that there are no national or EU workers available by advertising the position for a period of four weeks), although the required skills threshold is much lower than under the ordinary work permit scheme (Textbox VI.9).

Source: UK (2005b).

## VI.4.3.3 Trainee worker schemes

Trainee worker schemes are a key source of temporary migrant labour and trainee workers play a significant role in the labour markets of the countries concerned. The main features of these schemes are:

- Work permits are normally granted to trainees, without application of labour market tests.
- Most schemes require the trainee to meet specific qualifications or conditions (i.e. student status or workers sent by foreign employers for work experience).
- Schemes often apply to lower or medium-skilled labour.
- Employment is for a limited period (between 24 weeks and 2 years).
- In some destination countries, trainee worker schemes are aimed at young persons from specific countries.<sup>39</sup>
- Some countries apply a rotation scheme.<sup>40</sup>

If properly organized, these schemes may offer personal benefits to participating migrant workers because they can gain important skills and on-the-job training in the destination country. Such schemes may also benefit countries of origin, thanks to the transfer of skills and know-how on the migrant workers' return home. However, considerable care should be taken to ensure that trainee worker programmes are not abused by employers and that such workers are not exploited as cheap labour.

## VI.4.3.4 Domestic work

As observed in Section 3.4 in the Introduction, labour migration has had a generally empowering influence on women in terms of higher self-esteem and increased economic independence, but there are many undocumented women migrants in informal, unprotected, hidden and unregulated labour markets, including domestic workers, whose situation provides cause for concern.

### The Training and Work Experience Work Permit in the UK

The Training and Work Experience work permit is issued for temporary positions for training and work experience and beneficiaries are normally not able to switch to Business and Commercial work permits. Workers with these permits must leave the UK for a period of between 12 and 24 months before they can return on a further permit.

Work-permit holders who are non-EEA nationals need to obtain entry clearance for admission to the UK for a period of more than.

6 months. The person concerned must apply to their nearest British diplomatic post (British Embassy, Consulate or High Commission) in their country of residence within six months of the issue of the work permit. If entry clearance is granted, it is usually for the full period of stay stated on the work permit.

Family members or dependants of work permit holders can come with the work permit holder and also have access to employment, if the worker is granted entry clearance for a period of more than 6 months.

Sources: UK (2005c).

Domestic work has been a significant element of the growing phenomenon of migration, particularly in respect of women. Domestic work is mainly performed by internal or international women migrant workers who represent in many destination countries between 50 to 60 per cent of all women migrant inflows. In Italy, 50 per cent of the estimated one million domestic workers are non-EU citizens and in France over 50 per cent of migrant women are believed to be engaged in domestic work (RESPECT, 2000). The lack of legal migration opportunities for women generally is one of the main reasons why there is a concentration of women in domestic work.

ILO defines a domestic worker, household helper or domestic aid as any person employed in or in relation to a private residence either wholly or partly in any of

the following capacities: cook, house servant, waiter, butler, nurse, baby sitter, personal servant, bar attendant, footman, chauffeur, groom, gardener, launderer or watch keeper. Existing demand in labour markets for foreign domestic workers is not recognized officially and many nationals are abandoning the domestic sector in their countries. It is unlikely that nationals, who already represent a limited number of domestic workers, would come back to work in the sector.

#### (a) *Lack of an international convention covering the domestic sector*

In 1965, ILO adopted a resolution concerning the conditions of employment of domestic workers and Member States were urged to introduce “protective measures” and workers’ training wherever practicable, in accordance with international labour standards. At that time, consideration was given to research in this sector in order to have a base upon which an international instrument on the employment conditions of domestic workers could be adopted. To date, there is no international convention for these workers, due to a lack of international support.

In many countries, domestic workers are excluded from labour legislation and their working conditions remain unregulated. The employment of domestic workers is not thought to “fit” the general framework of existing labour laws, since most work done by domestic helpers is generally invisible, undertaken in the houses (which are not considered as workplaces) of private persons (who are not considered employers). Because of all these factors, migrant domestic helpers are not normally considered employees and their work is undervalued. Most national labour laws do not take into account the specificity of their employment relationship, thus denying their status as “real workers” entitled to legislative protection. The working conditions of domestic workers remain, in essence, unregulated. In fact, not only do some countries not consider household helpers as workers and exclude them from protection, they also do not provide them with optional protection under any other national law. Many other countries include discriminatory provisions specifically concerning domestic workers or deny them the right to organize in trade unions.

First, it is very important for countries of destination to recognize the high level of demand for foreign do-

mestic workers. Second, it is crucial to recognize the significance of introducing policies. Existing policies have really made a difference to the situation of women migrant workers. Some countries, like Italy and Spain, have recognized the demand in their labour market and have called for regularization schemes and/or have established annual quotas for women migrants coming to work in this sector. A regular migration status can make a real difference in the social cost of women's migration, both for themselves and their family members. Women migrants who enjoy regular status can return to visit their families more often, send a larger share of remittances, and plan to go back home earlier when they have saved enough money to start a business and build a house in their country of origin. They can earn proper wages and obtain social security. On the other hand, where there are no regularization schemes, the human cost is the long-term separation from their families. They may have to forego seeing their spouse, children and other family members for many long years, receive very low wages, no social security and very often suffer from extremely bad working conditions where they find themselves in abusive and exploitative situations.

On the basis of research and experiences from various ILO projects and meetings, a number of fundamental steps for the protection of domestic workers in their countries of destination have been established:

- *Legislation*: ensuring that labour legislation provides the same rights and protection to domestic workers as to any other workers and does not include discriminatory clauses;
- *Policy development*: ensuring that migration-related policy recognizes labour market demand for domestic workers and opens up legal channels of migration for them;
- *Monitoring*: introducing some form of monitoring of working conditions in the work place;
- *Prohibiting abuse*: for example, banning the withdrawal of identity documents of domestic workers;
- *Prosecution*: enforcing prosecution of recruitment agents and of employers and sponsors identified as having violated their contractual obligations or having committed abuses;
- *Flexibility*: increasing flexibility for domestic workers in changing employers (without imprisonment and deportation), in cases of complaints of abuses;

- *Legal protection*: as a minimum, domestic workers should benefit from legal provisions on clearly defined daily hours of work and rest periods; night work and overtime, including adequate compensation; clearly defined weekly rest and leave periods; minimum wage and payment of wages; standards on termination of employment; and social security protection.

Moreover, given that most domestic workers live in the household and that they will therefore lose their place of residence if they lose their job, it is important that they have access to social services and accommodation or at least temporary shelter.

(b) *Some best practices on protection of domestic workers*

In 2003, Citizenship and Immigration Canada established the *Live-in Caregiver Programme* for employers and caregivers based on labour market shortages of Canadian or permanent resident workers to care for children, elderly people or persons who have disabilities. This is the first programme of its kind in industrialized countries.

Prior to 2003, Canada had given permanent residence status to only 216 persons working as housekeepers, servants and personal services, and another 1,721 persons registered as childcare specialists. The *Live-in Caregiver Programme* allows applications for permanent residence in Canada after two years of employment, within three years of their arrival to the country (Textbox VI.16). While the programme clearly provides a legal migration route for this category of employment, it should be emphasized, however, that it has been criticized, specifically on the requirement that the caregiver live in the employer's home and, more generally, on the exclusion of domestic work from the employment-based immigration points system (Section VI.3.1.1 above), given the high demand for this kind of work and that the level of qualifications would normally have enabled these workers to obtain permanent residence status from the outset. It would appear that this approach was adopted in order to ensure that at least two years of care work were provided before these workers were able to attain permanent residence and move on to other employment.

### Canada's Live-in Caregiver Programme

The objective of the Live-in Caregiver Programme is to provide opportunities for qualified migrants to work in Canada as carers for children, the elderly or the disabled in a private household where there are no Canadians or permanent residents available to undertake the work (Immigration Regulations, 2002, ss. 110-115). A central feature of the programme is the requirement that the migrant lives in the employer's home. Persons wishing to work as live-in caregivers must apply for a work permit outside of Canada, have a job offer confirmed by the local Human Resources and Skills Development Canada (HRSDC) Centre and meet four conditions: (1) successful completion of the equivalent of a Canadian high school education; (2) successful completion of six months of full-time training in a classroom setting or 12 months full-time paid employment, including at least six months of continuous employment with one employer in a field or occupation related to the job sought as a live-in caregiver within three years of submitting their application for a work permit; (3) sufficient knowledge of one of Canada's official languages; and (4) possession of an employment contract with the prospective employer (Immigration Regulations, 2002, s. 112). As with other kinds of temporary work in Canada, it is possible to change employer whilst in the country provided that the new employment offer is confirmed by the local HRSDC Centre and a new work permit is obtained. However, according to the UN Special Rapporteur on the human rights of migrants, who visited Canada in 2000, it would appear that not all live-in caregivers are aware of this possibility and that finding a new job might prove difficult in the event of a complaint against a previously abusive employer.

After working full-time for a cumulative period of two years as a live-in caregiver within three years of their arrival, migrants can apply for permanent residence in Canada (Immigration Regulations 2002, s. 113(1)(d)). Time spent on extended vacations away from Canada, however, does not count towards the two-year period of employment. Once an application for permanent residence has been assessed favourably, migrants can apply for an "open" work permit granting them free access to the labour market until they are formally granted permanent residence status. In 2004, 4,292 live-in caregivers and their dependants (3,296 principal applicants and 996 spouses and dependants) were admitted to permanent residence.

Sources: Canada (2002d); UN ECOSOC (2000b); Canada (2005b: 6).

In April 2005, the European Trade Union Confederation (ETUC), in cooperation with PICUM and IRENE, organized an international seminar, "Out of the Shadow: organizing domestic workers, towards a protective regulatory framework for domestic work". The objective of the seminar was to examine the potential of European trade unions for organizing and promoting policy-making initiatives regarding domestic workers.

Trade unions in various western European countries are today providing their support to migrant women domestic workers (documented and undocumented). In Belgium, FGTB (Belgian trade union federation) provides migrant women domestic workers with legal and administrative assistance. In Italy, CGIL and UIL trade unions supported the 2002 regularization campaign (Textbox VIII.5) by providing legal and administrative assistance. CGIL went so far as to launch a programme entitled "Active Citizenship for Migrant Women". In Portugal, since the law has recently been modified to simplify and assist the legalization of migrant women workers, the UGT-P (Portuguese trade union confederation) has developed training courses to familiarize union leaders with legalization procedures and support services available to immigrants and organized various congresses on this theme. In Spain, UGT (Unión General de Trabajadores) has undertaken important work on extending protection to undocumented workers in general, and to women migrant domestic workers in particular. In the UK, the Transport and General Workers Union (TGWU) has for many years been encouraging migrant domestic workers to join its ranks, whatever their status. The same scenario has been repeated in Greece, where a domestic workers' trade union has been set up in liaison with the Athens Labour Centre (ICFTU, 2002: 2-3). In Switzerland, SIT (Inter-professional Workers' Union) helps undocumented domestic workers with administrative hurdles, providing candidates with certificates proving that they are defending them, and protecting them from arrest until the end of their procedures. Domestic workers in Switzerland come mainly from Peru, Colombia, Brazil and the Philippines. SIT is trying to develop a system of employment 'cheques', a formula that already exists in France, which allows each employer to declare cleaning women to the social insurance and tax au-



thorities without administrative complications (ICFTU, 2002: 3-5).

#### VI.4.3.5 Contract workers

A feature of temporary labour migration specific to Germany is the system of secondment under the *Werkvertrag*, where contract workers are posted to Germany for employment, but continue to be employed by their employer in the home country. In 2002, 45,400 contract workers were recruited under bilateral agreements with just under half coming from Poland (OECD, 2005: 195-196).<sup>41</sup> While a work permit is required for the employment in Germany, a feature of this system is that no labour market test needs to be met. Moreover, the employee is only insured for social

benefits in his or her own country and not in Germany, which reduces the cost of the worker to employers in Germany. However, such an arrangement can be disadvantageous to the worker, if the benefits in the country of origin are significantly less attractive (as is often the case in the countries from which these workers come).

#### VI.4.4 Policy issues

Temporary labour migration, if appropriately managed, is claimed to benefit all parties involved in the process (countries of origin, destination countries and migrant workers) (GCIM, 2005: 16, para.25),<sup>42</sup> and an example of how this can be achieved in practice is pro-

#### TEXTBOX VI.17

### Circular Labour Migration and Co-development

In 1999, Unió de Pagesos (Farmers' Union) of Catalonia, together with the farmers' unions of Valencia and Mallorca started to manage the hiring of farm workers from Colombia, Morocco and Romania with a view to meeting the labour needs of farms during the harvest period.

Unió de Pagesos specializes in the management of flows of seasonal farm workers. It defines and evaluates labour needs in the agricultural sector. It manages quotas with the Ministry of Labour, the recruitment of workers, and logistics, such as the issuing of visas, transportation, housing and monitoring of work conditions.

The Hosting Programme, promoted by the Foundation "Agricultores Solidarios" or "Farmers for Solidarity", begins on the arrival of seasonal workers with an introductory training and information course on labour laws, access to the health care system, remittances, basic knowledge of the language and local social resources. It also supports workers in the event of their hospitalization and organizes socio-cultural activities and training on different subjects requested by the workers.

In addition, "Agricultores Solidarios", through the Development Programme, promotes and supports seasonal workers who wish to assist with the development of their communities of origin through collective initiatives. These initiatives look for a social or productive impact in their local communities,

which, for example, might involve the establishment of a women's information centre, a group of small milk producers or a cooperative for the marketing and sale of fruits. In addition to obtaining money for their families, migrants, through their empowerment and the support of the "Agricultores Solidarios" network, can also promote socio-economic initiatives in their origin communities.

Co-development begins with the movement of seasonal workers between origin and host communities. They remain, on average, six months in the host society and six months at home. As a result, two parallel flows are created:

- An economic flow: seasonal workers contribute with their work to the sustainability of the fruit sector in the host country. In return, they receive wages, which, to a large extent, become remittances for their families.
- A more intangible flow, namely the interchange of knowledge and experiences. In host countries, the presence of seasonal workers approximates citizenship with the realities of less favoured and vulnerable communities. It promotes the development of these communities with collective projects co-financed by the host communities.

The twinning programmes allow for the stabilization of temporary labour migration and affect in a positive way the impact of the migration process on origin communities.

Source: Unió de Pagesos (April 2006).

vided in Textbox VI.17 with reference to the temporary migration of agricultural workers to Spain.

There are a number of important policy issues administrators and officials should attempt to address before proceeding to the design of temporary labour migration programmes.

First, as discussed in Section VI.3 above, permanent labour migration is increasingly being considered as a viable option in certain European countries, particularly with a view to attracting highly skilled migrants to settle in the country concerned. Policy-makers in destination countries need to consider the advantages of this migration vis-à-vis temporary labour migration and the circumstances under which it might be promoted, while at the same time attempting to ensure, in cooperation with developing countries of origin, that the latter are not deprived of their best talent. Second, while the concept of temporary (circular) labour migration appears sound in theory, increasingly ques-

tions are being asked about the design of such programmes in order to operate successfully in the future, in the light of past policy failures of such schemes particularly in North America and Western Europe (Textbox VI.18). There do not appear to be any ready-made solutions in this regard.

#### VI.4.5 Making temporary labour migration programmes feasible

Two issues in particular need to be resolved: ensuring that temporary migrant workers return to their country of origin, and guaranteeing fair treatment for them in the destination country, given their less secure employment and residence status. For the first of these concerns, European destination countries operate a diverse number of policies and administrative practices to regulate temporariness and these are mainly connected with ensuring or facilitating return. For the second issue, given policy failures in the past (Textbox VI.18), it is important to prevent the exploitation of temporary migrant workers by proper protection of their rights. A related but distinct issue is the need to avoid labour market distortions and structural dependence of certain employment sectors on foreign labour.

In this regard, it has been proposed that measures should be put into place to ensure that migrant workers are hired only when they are needed. Such measures may include charging the employer a high fee for each worker hired. This should be set at a rate which will give the employer an incentive to seek workers on the domestic labour market or to consider other alternatives, such as mechanization of the production process or outsourcing (Ruhs, 2005: 214).

The imposition of limits or conditions on family reunification is used in some countries as a means of ensuring that temporary migrant workers are less likely to want to stay in the destination country and thus return home at the end of their employment contract. The complex issue of integration is addressed in Section VII.3.2 below, although it is important to emphasize at this juncture that there is considerable disagreement over this issue in the context of family reunion. On the one hand, some European countries (Austria, Germany and the Netherlands) have attempted to impose conditions on the admission of family members

#### TEXTBOX VI.18

##### Temporary Foreign Worker Programmes (TFWPs) and Past Policy Failures

“The second charge [in addition to ethical arguments based on rights’ considerations – see Chapter VII] is that [TFWPs] are simply unfeasible. This argument is based on the fact that many of the past and existing TFWPs, most notably the Bracero Programme in the USA (1942-64) and the Gastarbeiter programme in Germany (1955-73), failed to meet their stated policy objectives and instead generated a number of adverse, unintended consequences. The three most important adverse impacts included the exploitation of migrant workers in both recruitment and employment, the emergence of labour market distortions, and the growth of a structural dependence by certain industries on continued employment of migrant workers and, perhaps most importantly from the receiving country’s point of view, the non-return and eventual settlement of many guest workers.”

Source: M. Ruhs (2005: 213).

(including family members of citizens) in order to assess whether the persons concerned are suitable for integration into the host community (Groenendijk, 2004). On the other hand, family unity is seen as a vital component of successful integration in society.<sup>43</sup> With regard to temporary migrant workers, family reunion is often not permitted for seasonal work in a number of OSCE countries. In the UK, for example, it is currently not permitted at all in respect of most lower-skilled temporary labour migration to the UK (e.g. SAWS and the Sectors Based Scheme – Textboxes VI.12 and VI.14), and in Spain it is subject to a one-year waiting period, which effectively precludes family members from joining foreign workers who are in the country on a temporary basis.<sup>44</sup> In Canada, family reunification is not possible under the Seasonal Agricultural Workers Programme for Mexican and Caribbean migrants.

#### VI.4.5.1 Ensuring return

There are a number of policy means by which destination countries may attempt to ensure the return of temporary migrant workers, including:

- border controls on exit from the country of employment;
- reporting obligations for employers or sponsors with respect to migrant workers still in the country;
- reporting obligations for migrant workers when they go back home with a view to facilitating a subsequent return to the country of employment;
- operation of rotation systems which preclude the worker from returning to the same employment, at least for a defined period of time;
- various financial incentives to return;
- more traditional means of ensuring return, i.e. deportation or expulsion.

Controls may exist in the form of checks at the border on exit from the country of employment. Although some countries operate exit controls (e.g. EU Member States participating in the Schengen system are obliged to do so, for both EU citizens and third country nationals (EU, 1990: Art. 6(2)(b)), these controls are not normally conducted with the objective of checking whether migrants have overstayed the period of validity of their work permit in the country concerned. As a result, there are few statistics available on this specific question. However, recent changes to EU border rules

now require that passports of all third-country nationals be stamped when entering and departing the EU for short-term visits and this should make it easier to determine who has overstayed, as well as to measure the extent of this problem.<sup>45</sup>

In the UK, under the Sectors Based Scheme (Textbox VI.14), employers are currently obliged to report to Work Permits (UK) if they have any doubts as to whether the migrant worker has left the country after the completion of his or her period of employment (UK, 2005b: 3, para.5(d)). In accordance with the new points-based system announced by the UK Government in March 2006 (Section VI.3.4 above), employers' obligations will become stricter under the sponsorship arrangements (Textbox VI.19). Moreover, Spain has negotiated bilateral agreements which encourage departing migrant workers to register their return to their country of origin with Spanish consular authorities there, if they wish to gain facilitated access to Spain for employment purposes in the future (Textbox VI.12 and Section IX 1.1.3 below).

A number of European countries operate "rotation systems", particularly for seasonal workers, and in Germany and the UK for migrant trainee workers (Section VI.4.3.3 above), which require such workers to leave their territory after completing their temporary employment and prevent them from re-entering for a certain period of time (between 3 months to 9 months for seasonal workers and between one year to three years for workers on trainee schemes).

Migrant workers from a number of destination countries have been offered incentives to return in the past with mixed success. These incentives usually involve financial assistance to help migrants in the socio-economic reinsertion process, or to become self-sufficient or to set up a small business on their return home. Such incentive schemes, however, are more often associated with assisting unsuccessful asylum seekers and irregular migrants to return voluntarily (Section VI-II.4.6 below).<sup>46</sup> Other financial incentives may include enabling migrant workers to benefit from social security or payroll tax reimbursements on their return to their country of origin (Martin et al., 2005: 122), or the setting up of special savings accounts enabling migrant workers to benefit from special high interest

## Sponsorship under the Proposed New Points-Based System for Migration into the UK

### The policy

57. The policy intent underpinning sponsorship is that those who benefit from migration – not just the Government, but also employers and educational institutions – should play a part in ensuring the system is not being abused. By working together it will be possible to achieve a system that delivers the migrants the UK needs, but which also keeps out those that it does not. A properly managed migration system for the UK is a responsibility shared by Government and society as a whole.

### Certificates of sponsorship

58. For each application in Tiers 2-5 [see Textbox VI.7], a valid certificate of sponsorship will act as an assurance from the sponsor that the applicant has the ability to do a particular job or course of study, and should be regarded as trustworthy from an immigration perspective, i.e. is likely to comply with the conditions of their leave. This will replace the subjective tests under the current immigration rules which necessitate a judgment about whether a course is suitable for a particular applicant, something that is best left to the educational institution, or whether an applicant is able to do a particular job, which an employer is better placed to judge. ...

### Approved sponsors

61. Because of the weight given to the assurances made by sponsors in the entry clearance or leave to remain process, it will be important to ensure that all sponsors are competent and acting in good faith. It will therefore be necessary for all organizations that wish to sponsor migrants to be approved by the Home Office in order to issue certificates of sponsorship. Prospective sponsors will therefore need to make an application showing that they meet the set requirements and undergo some checks before they are approved. ...

Source: UK (2006: 19-20).

### Responsibilities of sponsors

63. As well as taking on greater responsibility for checking the credentials of migrants they wish to bring to the UK, sponsors will be required to cooperate with the Home Office's monitoring.

64. Sponsors will be required to inform us if a sponsored migrant fails to turn up for their first day of work, or does not enrol on their course. Similarly they will be expected to report any prolonged absence from work or discontinuation of studies, or if their contract is being terminated, the migrant is leaving their employment, or is changing educational institution. Sponsors will also need to notify us if their circumstances alter, for example if they are subject to a merger or takeover. ...

### Rating sponsors

66. In order to address this, we will rate sponsors A or B according to their track record and policies. This will in turn give migrants they wish to sponsor more or fewer points when making their applications to us. Sponsors, who conform with all their responsibilities and whose migrants are found regularly to comply with their immigration conditions, can expect to be rated A. Sponsors, who have a less good track record or could do more to improve their procedures, will be rated B. Sponsors will therefore have an incentive to ensure they are doing their best to help maintain the integrity of the control. New sponsors will be risk-assessed on a case-by-case basis before being allocated an initial rating.

67. Failing sponsors, or those in relation to whom we have evidence of large-scale noncompliance or fraud, will be removed from the list of approved sponsors and may be prosecuted. Prior to removal, sponsors will be notified of our intentions and given the opportunity to make representations, though all applications will be suspended in the interim.

rates on the condition that the savings will only be released to them on their return to the country of origin (Ruhs, 2005: 213).

The standard method of enforcing the temporary stay of migrants is expulsion or deportation, applied to foreign workers who overstay and therefore find

themselves in unauthorized or irregular situations. However, there are clearly humanitarian and cost issues connected with this means of ensuring return, particularly for forced returns. IOM, for example, advocates the long-term sustainability of voluntary return. Indeed, while developing EU law and policy in this area has until now focused on cooperation among

Member States on forced return, the recent Commission proposal on common standards and procedures for returning illegally resident migrants (Textbox VI-II.8), including irregular migrant workers, supports a one month “period for voluntary departure”, which would give time to potential returnees to consider returning on a voluntary basis, with the advantage that this may give them the possibility of re-entry at a later date (EU, 2005c: 4 and Art.6(2)).

#### VI.4.5.2 Fair treatment of temporary migrant workers

Growing competitive pressure on employers as a result of globalization and the increasing introduction of flexible working practices pose a number of difficulties for fair treatment and protection of the rights of temporary migrant workers. In many countries with temporary labour migration programmes, migrant workers may find it difficult, if not impossible, to

#### TEXTBOX VI.20

### International Standards relating to the Protection of Temporary Migrant Workers

ILO’s principal conventions for protecting migrant workers, Conventions No. 97 and No. 143, and the ICRMW do not generally differentiate between migrant workers admitted for settlement and those admitted for temporary employment in terms of their protection, although some adjustments have been made to address particular categories of temporary work.

Students and trainees are excluded explicitly from the equal treatment part of Convention No. 143. They are also excluded from the provisions of ICRMW, except under Part V, which applies to particular categories of migrant workers and removes certain rights protections from project-tied workers and specified-employment workers, such as access to vocational guidance and placement services, vocational training, social housing, and free choice of employment (Art. 61 and 62). While there may also be limitations on the rights of seasonal workers, the pertinent provision, Article 59(1), is not mandatory. Indeed, for seasonal workers who have worked in the country of destination for a significant period of time, ICRMW (Art. 59(2)) urges States parties to treat them more favourably by facilitating their access to other forms of employment and giving them priority over other workers seeking admission.

With the exception of permissible minor adjustments, therefore, rights’ safeguards for temporary migrant workers and migrants with a more secure residence status should be equivalent in principle. Moreover, recent policy proposals for making temporary labour migration programmes operate more effectively are not incompatible with ensuring adequate protection for the rights of migrant workers. For example, the Global Commission on International Migration’s report recommends, inter alia, that, in the effective design of such programmes,

careful consideration should be given to informing temporary migrants about their rights and conditions; ensuring that migrants are treated equally with nationals with respect to their employment rights; affording temporary migrants the right to change their employer during the period of their work permit; and monitoring the implementation of the work permits and contracts provided to such migrants with a view to blacklisting countries and employers that violate the provisions of such documents (GCIM, 2005:18, para. 34).

However, rapid growth in temporary migrant worker programmes and their potentially adverse impact on the protection of migrants’ rights were not anticipated by the international instruments, and therefore these questions have not been addressed with sufficient clarity or detail. Indeed, the ILO report to the June 2004 International Labour Conference observes that “current ILO standards were not drafted with the protection of temporary workers in mind and the provisions applicable to other lawfully admitted migrant workers may not always be well suited to their situation” (ILO, 2004a: 89, para. 282).

It is noteworthy, however, that the European Commission’s Policy Plan on Legal Migration, which sets out a road-map for policy-making in this field until 2009 (Textbox IX.5), proposes the adoption of a general framework directive guaranteeing a common framework of rights to all non-EU or third-country nationals in legal employment in EU Member States without reference to their length of stay, although the level to which the rights would be protected has not been specified at this stage.

Sources: Böhning (2003); GCIM (2005); ILO (2004); EU (2005f).

change their employers or jobs, be reunited with their families, gain secure residence status, and have access to the full range of social security protections in the country of employment.<sup>47</sup> Moreover, temporary migrant workers are vulnerable to certain abuses in the recruitment process (Section III.2 above). In particular, unskilled workers are more likely to use the services of private recruitment agents who compete intensely for placing their workers with employers in the destination country. Such abuses include deliberate misinformation about working and living conditions in the country of employment and the charging of excessive fees.<sup>48</sup> These migrant workers may also suffer similar abuse at the hands of employment intermediaries in destination countries (Section VIII.4.3 below). The requirement in some countries that employers sponsor migrant workers may also result in exploitation, such as late payment of wages, substitution of the original

employment contract with one containing fewer safeguards for the migrant worker, restrictions on freedom of movement, and, in some cases, physical or sexual intimidation (Ruhs, 2003: 13-15, ILO, 2003b).

Generally speaking, however, the international and regional standards relating to migrant workers do not make significant distinctions between temporary migrant workers and other labour migrants in terms of their access to important employment and social rights (Textbox VI.19), nor are such distinctions normally found in national legislation. Frequently, the problem lies in the absence of explicit provisions in national law relating to the protection of migrant workers and the exclusion of vulnerable categories, such as domestic workers (Section VI.4.3.4 above) and agricultural workers, from national labour legislation.

## ENDNOTES

- 1 E.g. ICRMW (UN, 1990: Art.79) observes in explicit terms: "Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention".
- 2 Information provided by IOM Moscow (March 2006).
- 3 Cf. Böhning (1996: 33).
- 4 E.g. employers and trade unions in Spain considered the 2000 quota a failure because it did not meet labour needs. See Pérez (2003).
- 5 E.g. in 2002 when Spain set a labour migration quota of 32,079 places, of which 10,884 places were available for stable long-term employment, and 21,195 places for temporary work. However, according to the Spanish Government, only 13,633 places (42.5%) in the 2002 quota were taken up: 3,113 for stable long-term posts and 21,195 for temporary employment (Pérez, 2003: 4).
- 6 Also referred to as an "economic needs" test.
- 7 The UK established its Highly Skilled Migrants Programme in January 2003 in order to facilitate the insertion of highly-skilled migrants. This programme will in due course be included in a five-tier points-based managed migration system, at the first level (Section VI.3.4 below).
- 8 Provided the criteria used are in line with current federal immigration laws.
- 9 Québec is the only province with the authority to select immigrants independently (Canada, 2001b).
- 10 Since 2001, the annual immigration plan has provided prospective admissions targets for at least two years into the future, although the Minister continues to submit annual plans, adjusting previous projections when necessary (Canada, 2001b).
- 11 Skill type O, Skill level A or B. See CIC Canada at <http://www.cic.gc.ca/english/skilled/qual-2-1.html>
- 12 Ibid. at <http://www.cic.gc.ca/english/skilled/qual-5.html>

- 13 See <http://www.immigration-quebec.gouv.qc.ca/anglais/immigration/permanent-worker/prerequisite.html>
- 14 See <http://cicnet.ci.gc.ca/english/skilled/provnom/index.html> (Provincial Nomination).
- 15 See also <http://cicnet.ci.gc.ca/english/business/index.html> (Who is a Business Immigrant?).
- 16 Due to a February 2005 change in policy, spouses and common-law partners need not have valid temporary immigration status for their sponsorship to be approved. See <http://www.cic.gc.ca/english/sponsor/faq-spouse.html>
- 17 In 2004, 62,246 persons were admitted as permanent residents in the family class and 65,124 in 2003 (Canada, 2004; 2005b).
- 18 Immigration to the US can be generally grouped into four major categories: family reunification, employment-based immigration, refugees and asylees, and diversity (Bednarz and Kramer, 2004; 95-96).
- 19 Provided the applicant has been in the US for at least 30 months within the previous five years and has not been outside the US for a period greater than one year.
- 20 Under IMMACT 1990, the annual number of employment-based immigrants has increased from 54,000 to a minimum of 140,000. Despite this expansion, employment-based principals (i.e. not their accompanying families) accounted for 3.7-7.8% of annual immigration for fiscal years 1992-2001.
- 21 The adjusted limit for employment-based admission will be 140,000 plus the unused family visas from the preceding year.
- 22 Title 8 (Aliens and Nationality) U.S. Code (8 U.S.C.) § 1153(b)(3)(B) (2006).
- 23 8 U.S.C. § 1152 (2006). Thereafter, additional persons from the same country cannot receive immigrant visas for that year and must go on a waiting list. The following year, the process starts again.
- 24 As a result of a huge reorganization adopted by the US Congress, under the Homeland Security Act of 2002, the functions of the Immigration and Naturalization Service (INS) were transferred to the newly created Department of Homeland Security (DHS) on 1 March 2003. A separate unit within the DHS, US Citizenship and Immigration Services (USCIS), inherits the operational functions of the former INS, and is responsible for naturalization, asylum and adjustments of status.
- 25 Labour certifications are initiated by the employer, who must file a form with the DOL. Previously, employers filed with a State Workforce Agency (SWA) office. The new system, instituted in March 2005, is called the Program Electronic Review Management (PERM), which streamlines the certification process. Title 8 (Aliens and Nationality) Code of Federal Regulations (8 C.F.R.) § 656. In addition to individual labour certification, DOL has created a schedule of occupations and has delegated approvals for these to USCIS. The Schedule A Occupations List provides a catalogue of professions, for which the DOL has determined there are insufficient US workers who are able, willing, qualified or available for employment and that employment of foreigners in these occupations will not adversely affect the wages and working conditions of US workers similarly employed. Schedule A occupations include: physical therapists who must have qualifications necessary for taking the licensing examination in the State where they will work; and professional nurses having either passed the Commission on Graduates in Foreign Nursing Schools (CGFNS) Examination, or a full and unrestricted licence to practice in the State of intended employment. 28 C.F.R. §656.10 et seq.
- 26 8 USC § 1101 et seq. (2006); 8 USC § 1154(a)(1)(I) (2006).
- 27 Statistics for 2000 show that 85 per cent of immigrants “admitted” for economic reasons were already in the US and have changed their status to that of “immigrant”.
- 28 Entry requirements for citizens of the EU, European Economic Area (EEA) or Switzerland are not addressed in this section.
- 29 As of 3 October, 2005, a total of 317 participants received permanent resident status under the programme (Milos, 2005). The project establishes annual admissions quotas for internal and external applicants (300 applicants each) (OECD, 2004b).
- 30 When the testing phase of the project proves successful, it will be opened to nationals of all third countries.
- 31 Bulgarian, Croatian and Kazakh nationals may apply through Czech embassies in their home countries, but nationals of other participating countries must apply within the Czech Republic after securing their work permit and visa. Applications are available online at [www.immigrationcz.org](http://www.immigrationcz.org).
- 32 The period of 5 years replaces the previous four-year period as from 3 April 2006 (UK, 2006c: para.134).
- 33 See GCIM (2005: 16, para. 25). The World Bank emphasized the importance of remittances for developing sending countries in its most recent Global Economic Prospects Report (World Bank, 2005).

- 34 Circular temporary migration may also benefit migrants, especially if their reintegration back home or re-entry into the destination country is facilitated.
- 35 For a comparative overview of a number of temporary labour migration programmes in Europe, North America and elsewhere, the problems connected with them and suggestions for the future successful operation of such programmes, see Martin (2003); Ruhs (2003). See also Ruhs (2005: 203), Martin et al. (2005: chs 4 and 5).
- 36 Organic Law 8/2000, Article 32(2); Royal Decree 864/2001, Article 42 (see Spain, 2001).
- 37 Information provided by IOM Moscow (2006).
- 38 For more information on the Canadian Seasonal Agricultural Workers Programme, see <http://www.sdc.gc.ca/en/epb/lmd/fw/seasagri.shtml>
- 39 For example, Germany's "guest worker" training programmes invite young people from Central and Eastern Europe, for a maximum of 18 months. 3,000 to 6,000 people participate each year (see [http://www.zuwanderung.de/english/1\\_anwerbung.html](http://www.zuwanderung.de/english/1_anwerbung.html), visited 28 February 2006).
- 40 For example, in Germany, the trainer worker must remain outside the country for 3 years before returning, while in the UK this period is between 1 and 2 years (Textbox VI.15) (UK, 2005c: 6, paras. 42-43).
- 41 The remaining workers came from Hungary, Croatia, Romania and the Czech Republic.
- 42 See also Ruhs (2005), who argues that there is an ethical case for new and expanded temporary foreign worker programmes (TFWPs), which is "motivated by the argument that a managed liberalization of international labour migration, especially of low-skilled workers for whom international migration restrictions and thus also international wage differentials are greatest, would benefit all sides; and that of all the possible ways to manage and liberalize labour immigration in a world of sovereign states, TFWPs are the most realistic policy option" (original emphasis).
- 43 See Directive 2003/86/EC on the right to family reunification (EU, 2003d), Preamble, Recital 4: "Family reunification is a necessary way of making family life possible. It helps to create socio-cultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty".
- 44 In this respect, another "means of control" can be restriction of access to the labour market for family members, sometimes advanced as necessary to protect the domestic labour market, but which may also have the adverse effect of isolating such family members in the host community and thus working against their integration.
- 45 Council Regulation 2133/2004/EC (EU, 2004j) amending the provisions of the Schengen Convention (EU, 1990) and the Common Manual, which gives detailed effect to these provisions. Moreover, the EU is planning to establish a European Visa Information System (VIS). Once VIS is established, travel documents and the biometric data of all third-country applicants for short-term visas will be entered into the VIS database, and will, in theory, assist in identifying "overstayers" who destroy or lose their travel and identity documents (EU, 2004k).
- 46 See e.g. the IOM assisted voluntary return programmes implemented in a number of host countries in Europe, and UNHCR's voluntary repatriation of refugees in post-emergency situations.
- 47 See Ruhs (2003: 8-9), with reference to six programmes in five countries (Germany, Kuwait, Singapore, Switzerland, and the United States). See also Cholewinski, (2004: 82-84).
- 48 ILO Convention concerning Private Employment Agencies 1997 (No. 181) prohibits private employment agencies from charging "directly or indirectly, in whole or in part, any fees or costs to workers", although the competent authority, in the interests of the workers concerned and after consulting the social partners, may authorize exceptions in respect of certain categories of workers as well as types of services provided by private employment agencies (Art. 7).





VI.

# *VII. Post-Admission Policies: Rights of Migrant Workers*

Post-admission policies are concerned with a number of inter-related elements for regulating the labour market, ensuring protection of workers, and supporting community welfare. Important measures are generally required in five areas:

- labour market regulation, including access, mobility and recognition of qualifications;
- protection of migrant (and national) workers in the employment context, including monitoring of terms and conditions of employment, access to vocational training, language and integration courses, allowing for freedom of association, and protection against discrimination;
- facilitation of social cohesion, particularly through measures to prevent discrimination, promote family reunification, and assist integration;
- improvements in social welfare, including areas of access to health care, education, housing and community organizing;
- provisions on social security.

Most of these measures are related to ensuring adequate protection for migrant workers while in the destination country, and are also found, in the form of minimum standards, in the international rule of law framework of human rights and international labour norms in which OSCE countries participate. As underlined in Chapter I, this framework does not merely concern the citizens of a given country, but are equally applicable to resident non-citizens, such as migrant workers and members of their families, including those without regular status. In addition, specific international instruments have also been adopted under the auspices of the UN and the ILO concerning the protection of migrant workers and

their families. This framework of general and specific instruments is buttressed by normative developments in Europe, particularly within the European Union, discussed in Section IV above and Section IX.1.3 below, as well as in the context of the Council of Europe, which encompasses many of the OSCE countries to the east of the enlarged EU space. However, these international and regional standards can only have an impact on the daily lives of migrant workers if they are implemented effectively at the national level. The protection of migrant workers while working in the destination country is best secured by the legislation of that country, whether this is by the labour code, employment legislation, or other rules concerned with the regulation and protection of foreigners, which applies and builds on the minimum norms accepted at the international and regional level. Moreover, even if the countries concerned are not yet prepared to adopt in full these international or regional standards, they can still serve as a model for the development of national legislation.

In some instances, the national legislative measures of countries of origin (see Chapter III) can contribute greatly to the protection of their workers while working abroad, and examples of such measures are also provided in a number of sections below.

## *VII.1 Labour Market Regulation*

Labour market regulation is concerned with access to employment and occupation in the destination

country, whether this entails the migrant worker's first employment or a second job if he or she becomes unemployed. The rules relating to recognition of diplomas and qualifications can also greatly affect the skill level of employment migrant workers are permitted to access, thus having a significant impact on the degree of their economic and social contribution to the destination country as well as in terms of their remittances and potential means to enhance development of their countries of origin.

## VII.1.1 Access to employment

### VII.1.1.1 Employment restrictions

National legislation in most countries, with the exception of a few countries where immigrants are permanently admitted on arrival, contains restrictions which may affect free choice of employment. These restrictions may directly limit the access of migrant workers to employment by regulating the circumstances in which they may change jobs or by establishing priorities for employment in favour of national workers (Section VI.2.2). The employment of migrant workers is indirectly affected by other limitations such as statutory provisions requiring employers to obtain authorization to employ foreign workers or fixing the proportion of national workers who must be employed in an undertaking.

In countries such as Belgium, Cyprus, and the Czech Republic, work permits are issued to foreigners at least during the initial period – for a given post in an enterprise or for a given employer. In others such as Bulgaria, work permits are issued for a given geographic region. In Austria and Switzerland, the residence or work permit issued by the authorities is restricted in principle to a given can-

ton; after five years or ten years respectively, however, the migrant worker has the possibility of seeking work throughout the country. In countries such as Albania and Japan, the authorization may be granted for a given occupation or branch of activity without being limited to a single employer, either from the start of the initial period of employment or when certain conditions of residence and employment have been met.

The legislation of Austria requires both an employment authorization and a work permit. Although the employment authorization must be obtained by the employer, it is nonetheless restrictive in its effects on the occupational mobility of the foreign workers, since they may not be hired by employers who have been refused employment authorizations (see also Section VI.4.2 above with regard to the position in the Russian Federation). In the United States, these employment authorizations are granted only if warranted by the employment market situation or if the quota of foreign workers which has been fixed for each undertaking or at the national level is not exceeded, or if it is not going to have negative implications for salaries and working conditions of national workers employed in similar activities (Section VI.3.2.2 above).

Normally, in cases where migrant workers aspire to job changes, since they are entitled to have access to the immigration country's public employment service, they can ask at any time to be placed in a different job, even on the first day after entry. Officials can normally not deny access to their services; but they can hold migrants to jobs in a particular industry or occupation, if that is what the government of the destination country has decided and if they have only recently entered the

country. They can also reserve political functions entirely to nationals (Böhning, 1996: 58). As observed in Section V.4.2, however, restrictions on job mobility within the same employment sector should not continue for too long, particularly in lower-skilled work, because this increases the risk of the migrant worker being exploited.

#### **VII.1.1.2 Free access to the labour market**

The provision of free access for migrant workers to the labour market is an important step, which can play a vital role in promoting the integration of migrant workers and their families in the destination country. Free access to the labour market is a question determined differently in European countries, although, in many instances, migrant workers, depending on the conditions relating to their first admission, can usually access the labour market freely after a minimum period of between 2-5 years of employment in the country concerned (Cholewinski, 2004: 58). The duration of such geographic, industrial or occupational restrictions on employment varies considerably from one country to another, for example: Australia (two years, but only concerns permanent residents), Austria (from five or eight to ten years), Belgium (from two or three to four years), Croatia (three years), Finland (two years), Luxembourg (between four and five years), Netherlands (three years), Spain (three years), Switzerland (between five and ten years), United Kingdom (four years).

However, in those destination countries where free access to employment is available to foreign workers, the right is frequently limited in accordance with admission rules and it is usually granted to skilled migrant workers earlier than to lower-skilled workers. In some countries operating employment-based immigration (see Section VI.3 above), free access to employment is applicable from the moment of arrival in the country (e.g. Canada). In contrast, in some destination countries, such as those in Asia, free access to employment is not granted at all because labour migration is perceived as strictly temporary.

Admission and immigration rules can also either overtly or covertly discriminate against female migrants because of the gender division of labour in both countries of origin and destination. Persistent occupational gender segregation implies that most jobs avail-

able to women migrants are “feminine jobs” related to their traditional roles. The gender-neutral demand for household employees, nurses and entertainers is in fact directed at the recruitment of women. The gender-specific labour supply is based on stereotypes and gender roles with skills training programmes defining certain occupations as more suitable for women. This may be indirectly reflected in admission rules and women may as such be eligible as autonomous migrants only for certain categories of jobs. Although there are middle and high-level women professionals such as nurses, academics, teachers and managers of multinational corporations, the majority of women migrants are in low-skilled jobs in the domestic service, entertainment, labour-intensive factories, care work and sometimes agriculture. In addition, some countries require women migrant workers to undergo pregnancy tests in order to be admitted for employment or make pregnancy a ground for termination of employment, which is contrary to international human rights and labour standards (ILO, 2003c; UN, 2004: para. 153).<sup>1</sup>

The rules in international migration instruments relating to access to the labour market for migrant workers also differ. While everyone has a right to work in accordance with the International Covenant on Economic, Social and Cultural Rights (ICESCR) (Art.6), a right applicable to all persons regardless of their nationality, states can make distinctions between nationals and non-nationals if such distinctions pursue a legitimate State objective and can be justified on the basis of the principle of proportionality. The protection of the national workforce may well constitute such an objective in certain circumstances. ILO Convention No. 143 takes a liberal approach to this question, in effect enabling migrant workers to access the labour market after two years of employment, while considerably more discretion is afforded States parties ratifying the ICRMW (Textbox VII.1).

#### **VII.1.2 Involuntary job changes**

There is a consensus in the specific ILO and UN standards that if a migrant worker loses his or her job, he or she does not necessarily or immediately have to leave the immigration country but should be viewed as part of the normal workforce. In cases in which migrants involuntarily lose their jobs because of illness, or because

## TEXTBOX VII.1

### International Law and Access to the Labour Market for Migrant Workers in the Country of Employment

#### International Covenant on Economic, Social and Cultural Rights, Article 6(1)

“The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his/her living by work which s/he freely chooses or accepts, and will take appropriate steps to safeguard this right.”

With regard to the application of the right to work to migrant workers and their families, the Committee on Economic, Social and Cultural Rights, in General Comment 18 on the Right to Work adopted on 24 November 2005, underlines that “[t]he principle of non-discrimination as set out in article 2.2 of the Covenant, and in article 7 of the [UN Migrant Workers Convention], should apply in relation to employment opportunities for migrant workers and their families” (2005: para. 18).

#### ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), Article 14

In the case of migrant workers’ access to employment other than that for which they were recruited, Article 14 of ILO Convention No. 143 stipulates two types of restrictions that can be imposed.

A Member State may:

- a) make the free choice of employment, while assuring migrant workers the right to geographical mobility, subject

to the conditions that the migrant workers have resided lawfully in its territory for the purpose of employment for a prescribed period not exceeding two years or, if its laws or regulations provide for contracts for a fixed term of less than two years, that the worker has completed his first work contract;

- b) restrict access to limited categories of employment or functions where this is necessary in the interests of the State. Under this provision, migrant workers can claim the right to seek a job different from the one allocated to them under their first work contract after their first two years in the country or after completion of their first contract if this is shorter in duration.

#### UN Migrant Workers Convention (ICRMW), Article 52

Under this Convention (UN, 1990), a government is not prohibited from restricting a worker recruited abroad to employment in one industry or occupation. But such restrictions cannot be maintained for more than two years. As from the first day of the third year of the foreigner’s presence in the country, he or she is entitled to seek another job. Any particular job can still be refused to the migrant if – within the meaning of a vacancy test – a national worker, or someone put on a par with nationals, is willing to take it. As from the first day of the sixth year of the foreigner’s stay, however, he or she should have the same right to a job as a national worker.

the employer terminates the employment relationship or goes bankrupt, ILO Convention No. 143, in Article 8, contains the following wording concerning migrant workers lawfully residing in the country:

- a) [T]he migrant worker shall not be regarded as in an undocumented or irregular situation by the mere fact of the loss of his/her employment, which shall not in itself imply the withdrawal of his/her authorization of residence or, as the case may be, work permit.
- b) Accordingly, he/she shall enjoy equality of treatment with nationals in respect in particular of

guarantees of security of employment, the provision of alternative employment, relief work and retraining.<sup>2</sup>

Slovakia has signed bilateral agreements on the mutual employment of migrants stipulating that when the migrant’s employment relationship is terminated for any reason which is beyond his or her control, the recruiting body shall endeavour to find other appropriate employment. However, in Austria, a migrant worker who is unemployed runs the risk of being expelled due to insufficient means of subsistence, regardless of whether he or she possesses a valid permanent residence permit. Switzerland also states that a permanent

residence permit can be revoked in case of poverty, as under Swiss law, poverty is a legal ground for expulsion, although the decision to expel an individual must respect the principle of proportionality, that is to say, expulsion is only ordered where return to the country of origin is possible and can be reasonably enforced.

ILO Convention No. 143 does not, however, grant migrants the right to stay in the country after the two years of presence or when their first contract has expired. Article 8(1) refers exclusively to migrant workers who lose their employment, as opposed to those whose employment comes to an end as foreseen in the employment contract. Thus, the common practice of specifying a period of time and insisting that migrants return to the home country upon completion of this period is not in itself in contradiction to this provision (ILO, 1999a).

### VII.1.3 Brain waste and lack of recognition of diplomas

Many migrant workers, especially women, sacrifice themselves in occupations for which they are overqualified. Some of them possess university degrees or other high level qualifications: university graduates, architects, doctors, accountants, etc. A large number of these women migrant workers, for example, enter domestic work (Section VI.4.3.4) and have a difficult time, especially if they are undocumented, to climb up the occupational ladder. The “one-employer” rule or the restriction to change type of employment also disproportionately affects women; a university graduate working as a household employee cannot take up another occupation that would make more appropriate use of her skills or education, even if there is a job opening (ILO, 2003c: 13).

The same issues discussed on the section on brain drain (Section IV.7) will apply to brain waste: countries of origin spend large portions of their educational funds on workers who then leave their home country to find a job abroad. However, in terms of remittances, because these workers occupy low-skilled jobs, the countries of origin can be considered to be losing out even more through brain waste than through brain drain. Since these migrants frequently enter the labour market without documents and at the lower-skilled level, the wages they receive are much lower than those they would receive if they were able to occupy posi-

tions that make use of their qualifications. In turn, their low wages reduce significantly the amount of remittances that they can send home.

One of the reasons causing this high level of brain waste in human resources is that most of these workers reside and work in the country of destination as irregular migrants. There is a large demand in industrialized countries’ labour markets for caring services where there is often no recognized demand for foreign workers and where there are not enough legal channels of migration into these occupations. In this regard, best practices have been identified in Greece, Italy and Spain, where a large number of women foreign workers concentrated in the domestic sector have been regularized. In Italy, the 2002 regularization scheme led to a total of 450,000 foreign workers registered as *collaboratori familiari* (of whom 84 per cent were women) and representing 35.2 per cent of the total number of regularized workers (Textbox VIII.5). In early 2006, the Italian Labour Ministry published its quotas for foreign workers which included 45,000 work permits for the domestic sector, out of a total of 170,000. In Spain, the 2005 regularization scheme also benefited a large number of migrant workers in this sector: 191,570 work permits were issued to foreign migrant domestic workers (of whom 89 per cent were women), representing 33.4 per cent of the total number of regularized workers. In Greece, the number of migrant women working as household employees regularized in 1998 was also very high (32.6%).

Apart from the issue of reducing irregular migration by regularizing workers established in the labour market for a number of years, recognition of this labour market demand and opening up of legal channels of migration are necessary.

Another reason for brain waste is the lack of a system of recognition of diplomas and qualifications between major countries of origin and countries of destination. The recognition of qualifications obtained abroad is thus the other main area in which significant changes to national policy and practice are necessary in order to ensure that regular entry migrant workers can access employment on equal terms with national workers (Textbox VII.2).

## TEXTBOX VII.2

### Recognition of Qualifications

One important prerequisite to enable migrants to compete with nationals for jobs is recognition of foreign qualifications in the country of employment. Article 14 of ILO Convention No. 143 states that “a Member may ... (b) after appropriate consultation with the representatives organizations of employers and workers, make regulations concerning recognition of occupational qualifications acquired outside its territory, including certificates and diplomas”. The same provision is contained in Paragraph 6 of ILO Recommendation No. 151.

However, recognition of vocational and academic qualifications of migrant workers is an area where States do not appear to have made much progress, either unilaterally or bilaterally and at the regional level (with the exception of pertinent developments in the EU). Only a small number of States seem to be working on the question. Italy’s legislation provides that “within the framework of a national integration programme, and on the basis of agreements with local and regional authorities, educational institutions must promote (...) study tracks leading to the compulsory education certificate or the upper secondary school diploma which would take account of education obtained in the country of origin (and) criteria for the recognition of qualifications obtained in the country of origin, in order to facilitate integration into the school system”.

In Australia, the Commonwealth Department of Workplace Relations and Small Business provides national recognition in metal and electrical trades for permanent residents and skills assessment in most trades for people applying to migrate to Australia. State governments also provide assistance with skills recognition, such as the Overseas Qualifications Unit in the Victorian Department of State Development, which operates under the coordinating umbrella of the National Office of Overseas Skills Recognition, which is part of the Commonwealth Department of Employment, Education, Training and Youth Affairs.

New Zealand’s Qualifications Authority has responsibility for assessing overseas qualifications for their equivalence to those gained in New Zealand. In addition, New Zealand legislation requires the registration of people wishing to practice certain professions, e.g. doctors, and the Government reports that “human rights jurisprudence establishes that qualifying bodies must have procedures in place for assessing overseas qualifications”.

A small number of States also recognize qualifications on the basis of bilateral or multilateral agreements, e.g. Slovakia.

Source: ILO, International Migration Programme (MIGRANT), March 2006.

## VII.2 Protection in the Employment Context

While States retain sovereign rights over their migration policies, international law has established three fundamental notions which characterize protection for migrant workers and members of their families:

- Equality of treatment between regular migrant workers and nationals in the realm of employment and occupation.
- Core universal human rights apply to all migrants, regardless of status. This was established implicitly

and unrestrictedly in ILO Convention No. 143 and later delineated explicitly in the 1990 ICRMW. It is also a fundamental principle of international human rights law. As stated in Section I.3 above, the eight core ILO Conventions apply to all migrant workers.

- A broad array of international labour standards providing for protection in treatment and conditions at work (including occupational safety and health, maximum hours of work, minimum remuneration, non-discrimination, freedom of association, and maternity leave) apply to all workers. This notion was upheld in a recent Advisory Opinion issued by an international court, the Inter-American Court of Human Rights, which states:

The migrant quality of a person cannot constitute justification to deprive him/her of the enjoyment and exercise of his/her human rights, among them those of labour character. A migrant, by taking up a work relationship, acquires rights by being a worker that must be recognized and guaranteed, independent of his/her regular or irregular situation in the State of employment. These rights are a consequence of the labour relationship (IACHR, 2003).

Preventing exploitation of migrants, criminalizing the abuse of persons by human traffickers and smugglers, and discouraging irregular employment requires

enforcement of clear national minimum labour and human rights standards for protection of workers, whether nationals or migrants (see Section VIII.4.3). International labour standards on forced labour and child labour, freedom of association and non-discrimination, occupational safety and health, and the protection of wages provide minimum international norms for national legislation. A necessary complement is *monitoring and inspection*, particularly in such areas as agriculture, construction, domestic work, the sex industry and other sectors of “irregular” employment, to prevent exploitation, detect forced labour, and ensure minimal *decent working* conditions for all.

### TEXTBOX VII.3

#### International Standards Protecting Migrant Workers concerning Terms and Conditions of Employment

According to ILO Convention No. 97 (Art.6 (1)(a)), migrant workers lawfully residing in the country shall not be treated less favourably than nationals in the areas of remuneration, hours of work and overtime, holidays with pay, restrictions on home work, minimum age, apprenticeship and training and employment of women and young persons, in so far as such matters are regulated by law or regulations or under control of the administrative authorities.

According to ILO Convention No. 143 (Art.10), lawfully resident migrant workers shall enjoy “equality of opportunity and treatment in respect of employment and occupation”. Article 12 guarantees equality of treatment with regard to working conditions for all regular migrant workers who perform the same activity whatever might be their particular conditions of employment.

ILO Recommendation No. 151 (para.2) indicates that documented migrant workers should be accorded equality of opportunity and treatment in terms of:

- a) access to vocational guidance and placement services;
- b) access to vocational training and employment of their own choice on the basis of individual suitability for such training or employment, account being taken of qualifications acquired outside the territory of and in

- the country of employment;
- c) advancement in accordance with their individual character, experience, ability and diligence;
- d) security of employment, the provision of alternative employment, relief work and retraining;
- e) remuneration for work of equal value;
- f) conditions of work, including hours of work, rest periods, annual holidays with pay, occupational safety and occupational health measures, as well as social security measures and welfare facilities and benefits provided in connection with employment.

Article 9(1) of Convention No. 143 provides equality of treatment for *all* migrant workers in respect of rights arising out of past employment as regards remuneration, social security and other benefits.

ICRMW (Art.25(1), stipulates that *all* migrant workers – those who are lawfully present as well as those who are undocumented or in an irregular situation – shall enjoy “treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and other conditions... or terms of employment”. Moreover, Article 25(2) adds: “It shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment...”



### VII.2.1 Terms and conditions of employment

With regard to minimum terms and conditions of employment (e.g. occupational safety and health, protection of wages and working time), the governing principle, found in general international human rights instruments (UDHR: Art.23; ICESCR: Art.7) and elaborated in ILO standards, is that all foreign workers should be treated on equal terms with nationals. These rights include equal remuneration for work of equal value, which is a fundamental principle in the widely ratified fundamental ILO Conventions Nos. 100 and 111 on equality<sup>3</sup> and in ILO Conventions Nos. 97 and 143, and the prohibition of unlawful deductions from workers' salaries, which is a fundamental principle recognized in the widely ratified ILO Convention on the Protection of Wages, 1949 (No. 95). ILO Convention No. 111 protects *all* migrant workers against discrimination based on, among other grounds, race, colour, ethnicity, sex, or religion in respect of their conditions of work (ILO, 1999b: 369-374, 493-495).<sup>4</sup> In addition, the application of other ILO standards in the areas of occupational safety and health, working time and protection of wages is not necessarily limited to regular migrant workers. The principle of equal treatment is clearly underlined in the specific international instruments pertaining to the protection of migrant workers (Textbox VII.3).

With regard to conditions of work, few legal or administrative provisions at the national level draw distinctions between regular migrant workers and nationals based on nationality. In fact, in most cases, conditions of work are governed by the labour code or other labour legislation which applies to national and foreign workers without distinction, pursuant to the general provisions concerning their scope. However, administrative discrimination against migrant workers is most likely to occur with regard to security of employment and vocational training (see also Section VII.2.2).

Nonetheless, the equality principle also applies to vocational training and protection from dismissal. According to Convention No. 143 (Art.10), employer or state concessions for vocational training should also be available to migrant workers who are lawfully residing in the country. While this might be difficult to implement in practice, particularly if the migrant worker is

only in the country on a temporary basis, opportunities for the development of employment skills are vital in terms of labour market integration and prevention of social exclusion (Section VII.3.2) (particularly if the migrant workers were later to settle in the country) and also of their future contribution to the economy of the country of origin in the event of their return. As far as dismissal is concerned, while it is often inevitable that workers lose their jobs during downturns in the economy, distinctions between national and foreign workers in this respect should not be permissible without good reason. In Austria, however, the law provides that foreigners, or at least those who are subject to work permit restrictions, should be the first to be dismissed in the event of staff reductions.

As regards equality of treatment in respect of alternative employment, relief work and retraining, this depends on the situation of the migrant worker, as found in countries such as Australia, Austria, Czech Republic, Germany, New Zealand, and the United Kingdom. If the worker is a permanent resident, he or she will enjoy the same advantages as nationals after a certain period of time has elapsed. However, it would be impossible for a temporary resident to meet the residence requirement and hence they will have little chance of gaining access to such benefits.

A particularly important aspect of employment terms and conditions for migrant workers is the right to equal treatment with regard to rights arising out of past employment. The specific international instruments protecting migrant workers underline that this right should be protected in respect of all migrants, including irregular migrant workers (ILO Convention No.143: Art.9(1); ICRMW, Arts.25(3) and 27). In particular, equal treatment should apply to remuneration (i.e., past wages). This is especially important for irregular migrant workers, since employers often attempt to hide behind the screen of illegal employment to avoid their obligations. Equal treatment with regard to past employment rights also applies to social security benefits arising out of such employment (Section VII.5 below) and includes the possibility of reimbursement of social security contributions or the export of benefits to the migrant's country of origin.<sup>5</sup> However, it does not extend to rights the granting of which is not dependent on a period of employment.<sup>6</sup>

Equal treatment between national workers and regular migrant workers is also protected under bilateral labour migration agreements (Section IX.1.1 below), which often include provisions guaranteeing equal work and employment conditions, as well as under bilateral social security agreements enabling migrant workers *inter alia* to export benefits to their home country. This question is becoming increasingly important for returning migrant workers and their families (especially retired persons).

### VII.2.2 Vocational training, language and integration courses

The principle of equality for regular migrant workers and nationals clearly extends to access to vocational training and retraining.<sup>7</sup> However, there are two areas where administrative discrimination against migrant workers exists: vocational training and language training. Of these, equal access to vocational training is the more problematic. In Norway, access of foreigners to vocational training is subject to a residence requirement; in Canada (Province of Nova Scotia) migrant workers are required to pay fees for education and apprenticeship training, while Canadian residents of the province obtain them either free of charge or at a reduced rate.

With regard to language training, ILO standards indicate that this should take place “as far as possible during paid time” (ILO Recommendation 1975 (No. 151): para.7(1)(b)). Learning the language of the host country is essential for ensuring that migrant workers and members of their families make a smooth transition to the country of employment. Language training is the most obvious and immediate need when migrant workers and their dependants do not have a command of the local language. This can be organized by the national government or be delegated to NGOs, through the provision of government funds for that purpose.

In Germany, the Ministry of Labour and Social Affairs supports German language teaching for migrant workers through the association “German for Foreign Workers”. Some of its courses specifically take into account the needs of migrant workers and young women, and combine language training with preparation for vocational training. In particular, the

German Government reports that “courses taking account of occupational needs are becoming more and more important”. Other examples include San Marino, where “each year, the State promotes and organizes Italian and foreign language courses to assist foreign and local citizens in their everyday work”. In Italy, schools and institutions must provide courses and events in the Italian language for the benefit of non-Italian speakers. Belgium’s German-speaking community organizes a programme entitled “integration for all through reading and writing” which is directed at socially marginalized groups, including migrants and members of their families – aiming to improve their ability to read and write in German and to ensure basic knowledge of both French and German. In Norway, immigrants are offered 500 hours of tuition in Norwegian which includes basic information about the host country’s society.

An interesting example of services to support the development and integration of migrant workers is the programme of the Careers, Education and Training Advisory Board (CETAB) established by the World Federation of Khoja Shia Ithnaasheri Muslim Communities.<sup>8</sup> This organization, based in the UK, promotes the education and career development of young Muslim women and men through information provided on their website and a number of community programmes.

### VII.2.3 Trade Union rights

One of the most effective ways of preventing migrant workers from being exploited is to allow them to exercise their right to join a trade union without hindrance. Trade union rights comprise freedom of association and collective bargaining, and are recognized universally in the core international human rights instruments.<sup>9</sup> The ILO sees the right to freedom of association and collective bargaining as a fundamental concern, which is recognized by the ILO Constitution and should therefore be afforded protection by all ILO Member States, irrespective of whether they have ratified the specific conventions. This position is reiterated in the 1998 Declaration on Fundamental Principles and Rights at Work, which identifies the two specific ILO Conventions (Nos. 87 and 98) addressing trade unions rights as belonging to ILO’s eight core fundamental rights instruments (Section I.3). These instru-

ments have been ratified by 145 and 154 countries respectively, but many instances show that their application leaves much to be desired.

Convention No. 87 (Art.2) states that “workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned to join organizations of their own choosing without previous authorization”. This right “implies that anyone residing legally in the territory of a given State benefits from the trade union rights provided by the Convention, without any distinction based on nationality” (ILO, 1994: para. 63).

In general, legislation and national practice recognize the right of foreign workers to join trade unions under the same conditions as nationals. However, States such as the Czech Republic and Slovakia make citizenship a condition for taking office in a trade union, while others, such as Lithuania, require that membership of trade unions is linked to conditions of residence. Following a complaint lodged by a Spanish trade union organization in 2001, the ILO Committee on Freedom of Association, reiterated that Convention No. 87 applies to all workers without distinction. In addition, since this case referred to migrant workers in an irregular situation, it clearly stated that these workers were covered by the Convention and must have the right to join or form trade unions. The Committee also emphasized that “unions must have the right to represent and assist workers covered by the Convention with the aim of furthering and defending their interests” (ILO, 2001b).

In another case, in 2003, the ILO Committee on Freedom of Association acting on a complaint by American and Mexican trade unions contested a US Supreme Court decision in March 2002, which ruled that an undocumented worker, because of his immigration status, was not entitled to back pay for lost wages after he was illegally dismissed for exercising rights protected by the National Labour Relations Act (NLRA). The Supreme Court had overruled a decision by the National Labour Relations Board (NLRB) and a federal appeals court that granted back pay to the worker (*Hoffman Plastic Compounds v. NLRB*, 2002). The ILO Committee considered that the Supreme Court ruling was a violation of freedom of association (ILO, 2002b).

Legislation in Austria and Finland state that only nationals of the country can be elected to official trade union positions. ILO’s Committee on Freedom of Association has made comments to Finland on the issue of considering that legislation should allow foreign workers to take up trade union office. The Committee of Experts on the Application of Conventions and Recommendations also stated:

since provisions on nationality which are too strict could deprive some workers of the right to elect their representatives in full freedom, for example migrant workers in sectors where they account for a significant share of the workforce, the Committee considers that legislation should allow foreign workers to take up trade union office, at least after a reasonable period of residence in the host country (ILO, 1994: para.118).

Organizing migrants is a paramount task for trade unions, and therefore legislation preventing migrants from joining unions should be repealed, as should provisions in trade union statutes and rules which contain obstacles to membership of migrants. In addition to protecting migrant and national workers’ rights, in many countries trade unions play a key role for integrating migrants in the host country society: organizing language courses, establishing information centres for migrants and of course enabling them to participate in trade union activities (Textbox VII.4)

Equal treatment and equal opportunity, including the right to freedom of association and to hold office in trade union organizations, are also enshrined in the two ILO specific Conventions Nos. 97 and 143 protecting migrant workers. These instruments are at the centre of the trade union movement activities for migrant workers and promoting their ratification is a key objective of any trade union campaign. There is no reason why any worker, migrant or not, should be deprived of the fundamental right to freedom of association, and there are numerous reasons demonstrating that the ability to exercise this right is good for migrants, for national workers and for the economy.

Migrant workers are often to be found in dangerous occupations shunned by nationals. Indeed, one can only guess that among the 6,000 workers who die every day at work from accident or work-related diseases

## The Role of Trade Unions

How can trade unions, as one of the social partners, make a difference in labour migration concerns? A few concrete examples are provided below:

- Support from the trade unions and consultation with employers and workers' organizations led to the adoption of new rules on immigration in Spain and to the regularization of some 700,000 irregular migrant workers (Textbox VIII.5). Without the support of social partners, no government could risk embarking on such a major operation.
- Trade unions were key promoters of the ICRMW. A similar effort is now being contemplated to promote the ratification of ILO Conventions Nos. 97 and 143.
- Unions can also play a role in addressing the question of brain drain, a key issue for African countries. According to the World Health Organization (WHO), 50 per cent of African doctors are likely to leave their country of origin. Every year, Africa loses some 20,000 of its highly skilled professionals. It has been calculated that this is costing governments, employers and workers as taxpayers US\$4 billion a year. Trade unions in industrialized countries are now campaigning for ethical migration in order to avoid depriving Africa of the talents it needs to improve the welfare of its population. In a number of African countries, including Kenya, trade unions are campaigning to negotiate improvements in the health sector by promoting higher health budgets and better working conditions for nurses and doctors.
- Remittances have become a key source of financial flows to the developing countries (Section IV.4). Trade unions, such as the AFL-CIO, have negotiated arrangements with local banks to reduce the cost of transfers for migrants. This encourages both better use of remittances and more transparency in transactions.
- Bilateral and multilateral agreements between trade unions from origin and destination countries are on the increase. Union Network International (UNI), the international trade union for white collar workers, has introduced trade union passports, which allow migrant workers to keep trade union membership and services when they move to another country. Agreement between Moroccan and Spanish trade unions help combat irregular migration and the exploitation that goes with it. Trade unions in Spain and in Mauritania have an agreement to monitor the situation of Mauritanian migrants in Spain and provide them with legal and other assistance.
- In countries of origin (e.g., the Philippines), some trade unions participate in government schemes to train migrants before they depart. This enables trade unions to inform them about their rights and

to facilitate contacts with trade unions in destination countries.

- Trade unions also help migrant workers to keep in contact with their native country. In Senegal for instance, expatriates are organized in trade unions.
- Employers and trade unions are now working together to fight the spread of HIV/AIDS, which is a tragedy for Africa. Migrant workers are particularly vulnerable. ILO and others have shown that the workplace is the best starting point for prevention campaigns and that workers are keener to participate if there is union support. Unfortunately, in some countries, migrants are still barred from joining trade unions, which is therefore not only a violation of a fundamental right but also an obstacle to badly-needed campaigns to save people's lives.

*Today's challenge is to strengthen social dialogue on migration at the national level. Tomorrow's challenge will be to initiate genuine tripartite migration policy development at regional and international levels. There is certainly a will in the trade union movement to move in this direction.*

### Trade unions in countries of origin can:

- assist in offering pre-departure orientation and training;
- negotiate for standard employment contracts in accordance with international standards;
- lobby for abolition of recruitment fees;
- provide migrants with trade union contact names and addresses;
- provide referral services for migrants suffering from abuse;
- ensure migrant women's protection from discrimination and from falling victims to trafficking.

### Trade unions in destination countries can:

- lobby for legislation on equal treatment and non-discrimination in respect of employment conditions, social security, etc.;
- organize training on the rights of migrant workers;
- call for the repeal of provisions discouraging migrants from joining trade unions;
- include migrants in collective bargaining agreements;
- cooperate in identifying abusive employment agencies;
- help identify those involved in trafficking;
- establish migrant workers rights' committees;
- lobby for the inclusion of a social clause in bilateral/international treaties.

Source: ILO Bureau of Workers' Activities (ACTRAV), March 2006.

worldwide, many are migrant workers. 170,000 die each year in agriculture, and construction counts for 55,000 deaths every year. Here also trade unions and social dialogue can make a difference. Studies published<sup>10</sup> by the ILO show that when there are social dialogue mechanisms at the workplace and when the workforce is organized in trade unions, accidents can be reduced by half.

The European Trade Union Confederation (ETUC) has recently decided to adopt a more pro-active policy on labour migration and has submitted a position paper as a contribution to the consultation process on legal migration initiated by the EU. The complementarities of views became evident: while the EU addresses migration issues in terms of the need for high-skilled migration and the fight against irregular migration, the European trade unions have come forward with a position that places migrant workers' rights at the top of the agenda, together with the need to expand legal avenues for labour migrants, including unskilled workers.

Migration is a labour issue and labour is not a commodity. As one well-known Swiss intellectual commented, referring to immigration in his country, "we called for workers, and there came human beings".<sup>11</sup> Dealing with labour migration should require policies that take account of the social dimensions of the phenomenon. Enabling and respecting migrants' right to freedom of association is part of that social dimension.

### VII.3 Facilitating Social Cohesion

Social cohesion in destination countries will be facilitated considerably if discrimination against migrant workers and their families can be addressed and eliminated. Moreover, appropriate measures assisting the integration of migrants in society (see also Section VII.2.2 above) and providing possibilities for family reunification also play an important role in preventing the marginalization of migrants and promoting social cohesion.

#### VII.3.1 Addressing discrimination

Discrimination produces differential treatment in labour markets, preventing equal opportunity, provoking conflict within the working population and undermining social cohesion. Discrimination reinforces attitudes that constrain certain identifiable groups to marginalized roles and poor conditions in the workforce. The results of consistent denial of employment opportunities, relegation to ghettos, lack of education or training opportunities, absence of police protection, and multiple discriminations in community life are exclusion and ultimately, breakdown of social cohesion. Migrant workers face various forms of discrimination in employment and occupation, and discrimination suffered by migrants often begins at the recruitment stage. Difficulties in finding suitable employment often result in highly qualified men and women doing relatively menial jobs.

Discrimination prevents integration. The consequences of past policies that neither anticipated nor prevented discrimination can be seen in ethnic ghettos, high unemployment, low school attainment, higher violence and crime rates in numerous countries. It is evident that the longer migrants and their offspring live and work in a host society under discriminatory provisions, the more likely it is that this prejudice and discrimination will prevent them from reaching similar economic and educational attainments as the majority population (Taran et al., 2006). In some countries, the accumulated effects of discriminatory acts in the past have led to a contemporary environment that is itself discriminatory.

ILO research in Western Europe and North America has shown significant, consistent and disturbing levels of discrimination in access to employment in all countries surveyed (e.g. Bovenkerk et al., 1995; Goldberg et al., 1996; Colectivo IOE, 1996; Bendick, 1996; Smeesters and Nayer, 1999; Allasino et al., 2004). When all else is equal (qualifications, educational attainment, skills, language ability), persons of immigrant origin still face high net discrimination rates—solely on the basis of name or appearance. Without special attention, immigrants and their children will end up over-represented in the ranks of the long-term unemployed and at high risk of social exclusion.

Discrimination has a double impact on women. As noted in Section 3.4 of the Introduction, most job opportunities for women migrants are in unregulated sectors (agriculture, domestic services, sex industry). The demand for women migrant workers means that today, fully 50 per cent of all migrant workers are women. As noted above in Sections VII.1.1.2 and VII.1.3, the existence of occupational segregation by gender in labour markets contributes to the increase of multiple discrimi-

nation in countries of destination, resulting in high levels of abuse and exploitation of women migrant workers.

Addressing discrimination applies universally across the labour market. While integration policies may focus on “long-stayers” and permanent immigrants, no one should be subject to discriminatory behaviour, if social cohesion and labour market stability are to be maintained.

#### TEXTBOX VII.5

### The Principle of Non-Discrimination at the International, Regional and National Levels

The principle of non-discrimination (on such grounds as race, ethnic origin, sex, religion, etc.) is universally applicable and recognized in the International Bill of Rights (Universal Declaration of Human Rights, ICCPR and ICESCR), international human rights treaties addressing specific themes (ICERD, CAT, ILO Convention No. 111) or groups of persons (CEDAW, CRC and ICRMW) as well as regional human rights treaties, such as the ECHR (Art. 14; Protocol No. 12), which has been ratified by most OSCE European States. It is also generally accepted that the prohibited grounds of discrimination listed in these instruments are not exhaustive and may include other grounds of discrimination, such as nationality. Moreover, not all distinctions between groups of person on such grounds are prohibited, provided that they are prescribed by law, conform to a legitimate State objective and are justified on the basis of objective and proportionate criteria.

The European Court of Human Rights has ruled that very good reasons must be given to justify distinctions on the basis of nationality (*Gaygusuz v. Austria*, 1996; *Piorrez v. France*, 2003).

While human rights and labour rights are applicable to all without distinction based on nationality, the international instruments recognize, either explicitly or implicitly, that certain rights are applicable in large part to citizens only. For example, political rights, such as the right to vote and stand for political office, are limited to citizens (ICCPR, Art.25), although a number

of European countries (particularly the Nordic States) grant foreign residents these rights at the local level after a certain period of lawful residence in the country. EU Member States are also obliged to afford these rights to nationals of other Member States resident in their territory. Moreover, access to employment or to the labour market is considered a sovereign prerogative of States and can be limited although, in many OSCE European countries, restrictions are generally lifted after two to five years of employment. As noted above in Section VII.1.2.2 on access to employment, the specific international instruments pertaining to the protection of migrant workers address this question (ILO Convention No. 143; ICRMW).

In many OSCE countries, national labour legislation is usually applicable to all workers and makes no distinctions on the basis of nationality, but application of this legislation is problematic because it often affords no explicit protection to non-nationals and access is also difficult in practice. Applicability of anti-discrimination laws to distinctions on the grounds of nationality is also incomplete. Some laws only prohibit discrimination on certain grounds, such as race or sex, while laws relating to distinctions on the basis of nationality are often limited. In the UK, for example, under the amended Race Relations Act 1976, protection against discrimination on the grounds of race and ethnic origin is now stronger than protection against discrimination on the grounds of nationality.

Based on proven experience worldwide, a comprehensive and effective agenda to prevent discrimination and ensure social cohesion must include the following policy elements:

- an explicit legal foundation based on relevant international standards;
- outlawing racist and xenophobic discrimination, behaviour and action;
- outlawing sex discrimination and gender inequalities in the labour market;
- administrative measures to ensure full implementation of legislation, and accountability for all government officials;
- an independent national human rights/anti-discrimination institution with powers to address discrimination against non-citizens;
- respect for diversity and multicultural interaction;
- emphasis on positive images of diversity and of migration in news and communications media;
- inclusion of multi-cultural and diversity training in educational curricula;
- cooperation with civil society and community groups.

The UN Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of Discrimination Against Women (CEDAW), and ILO Convention on Discrimination (Employment and Occupation), 1958 (No.111) provide most of the necessary standards for national legislation (Textbox VII.5); most OSCE participating States have ratified these instruments. The three specific instruments addressing migrants, discussed in Section I.2 above, provide the additional norms concerning foreign workers.

As also noted in Chapter I, the relevant sections of the Durban Declaration and Programme of Action of the 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (the Durban Declaration and Plan of Action (UN, 2001)) provide a more detailed policy framework of structures, measures and actions to be put in place in order to act effectively against discrimination against migrant workers and other foreigners.

An excellent national model of implementation is the recently adopted Ireland National Action Plan

against Racism, titled appropriately *Planning for Diversity*. This official commitment was drawn up by the Department of Justice, Equality and Law Reform on the basis of the Durban Declaration and Programme of Action, following extensive consultation with employers' organizations, trade unions, civil society groups and migrant organizations (Ireland, 2005b).

### VII.3.2 Integration

The concept of integration of migrants in the host country is evolving and is interpreted differently in different contexts. It is all too often confused with assimilation. The European Commission has defined integration as follows:

[I]ntegration should be understood as a two-way process based on mutual rights and corresponding obligations of legally resident third country nationals [foreigners] and the host society which provides for full participation of the immigrant. This implies on the one hand that it is the responsibility of the host society to ensure that the formal rights of immigrants are in place in such a way that the individual has the possibility of participating in economic, social, cultural and civil life and on the other, that immigrants respect the fundamental norms and values of the host society and participate actively in the integration process, without having to relinquish their own identity (EU, 2003b: 17-18).

In November 2004, the EU Council of Ministers adopted Conclusions on the common basic principles of integration policy, which are supposed to guide EU Member States in the development of their policies in this field (Textbox VII.6). It is important to note both documents emphasize that integration is a "two-way" process, with responsibilities and obligations for both the host society and the migrant.

Whether labour migration is temporary or permanent in nature, integration is necessary for the following reasons:

- it guarantees health and safety in the workplace: sufficient knowledge of the language for the work in question is necessary and is particularly important in respect of dangerous work where migrants must be able to read warning signs on machinery, etc.;

### Common Basic Principles for Immigrant Integration Policy in the European Union

1. Integration is a dynamic, two-way process of mutual accommodation by all immigrants and residents of Member States.
  2. Integration implies respect for the basic values of the European Union.
  3. Employment is a key part of the integration process and is central to the participation of immigrants, to the contributions immigrants make to the host society, and to making such contributions visible.
  4. Basic knowledge of the host society's language, history, and institutions is indispensable to integration; enabling immigrants to acquire this basic knowledge is essential to successful integration.
  5. Efforts in education are critical in preparing immigrants, and particularly their descendants, to become more successful and more active participants in society.
  6. Access for immigrants to institutions, as well as to public and private goods and services, on a basis equal to national citizens and in a non-discriminatory way is a critical foundation for better integration.
  7. Frequent interaction between immigrants and Member State citizens is a fundamental mechanism for integration. Shared forums, inter-cultural dialogue, education about immigrants and immigrant cultures, and stimulating living conditions in urban environments enhance the interactions between immigrants and Member State citizens.
  8. The practice of diverse cultures and religions is guaranteed under the Charter of Fundamental Rights and must be safeguarded, unless practices conflict with other inviolable European rights or with national law.
  9. The participation of immigrants in the democratic process and in the formulation of integration policies and measures, especially at the local level, supports their integration.
  10. Mainstreaming integration policies and measures in all relevant policy portfolios and levels of government and public services is an important consideration in public policy formation and implementation.
  11. Developing clear goals, indicators and evaluation mechanisms are necessary to adjust policy, evaluate progress on integration and to make the exchange of information more effective.
- Source: EU (2004h: 15-25).

- it facilitates the exercise of migrants' rights in the workplace (employment and trade union rights) and in the host community (social and cultural rights);
- it prepares for the eventual return of the migrant to the country of origin: e.g., knowledge of the language, culture and other values learnt in the host country will assist the migrant in his or her endeavours on returning home.

Knowledge of the language and the acquisition of additional skills (e.g., through vocational training) ensure that migrants are active in the labour market of the destination country. This in turn, together with the development of improved employment prospects, knowledge of the language, culture and society of the destination country, and the right to have their family members join them (Section

VII.3.3), clearly assists migrant workers in their possible settlement in the host society. If migrant workers are more active in the labour market, the host country will benefit from reduced unemployment rates among the foreign labour force and, consequently, lower costs for the administration.

In the same way that the establishment of information and resource centres for migrants in countries of origin (Section III.3.3.1 above and Textbox III.2) can play an important role in assisting them to prepare for employment and life abroad, such centres in destination countries can assist greatly in their integration in the host society. The Information and Resource Centre for migrants in Portugal is a good example of such a body, which undertakes this task as well as other important activities (Textbox VII.7).



## TEXTBOX VII.7

### Information and Resource Centre for Migrants in Portugal

Officially opened on 5 January 2001, the project, *In Each Face... Equality in Portugal*, is financed by the European Social Fund (ESF) – European Regional Development Fund (ERDF). The project is a result of the close cooperation between IOM and the High Commissioner for Immigration and Ethnic Minorities (ACIME), based on a Cooperation Agreement between the Portuguese Government and IOM signed on 15 December 1997.

The project has five activities:

- seminars and workshops;
- interactive website;
- CD-ROM;
- television spot;
- Information and Resource Centre

The Information and Resource Centre is a result of the cooperation among the Junta de Freguesia de Benfica, the IOM Mission in Portugal, and the High Commissioner for Immigration and Ethnic Minorities (ACIME). In this protocol, the Junta de Freguesia de Benfica granted IOM the Portas de Benfica building, while IOM took care of the building's recovery works.

The Centre plays an important role in providing sustained and effective integration policies for immigrant communities and ethnic minorities. Its mission is to collect and make available information about the immigrant communities and ethnic minorities in Portugal. In particular, the Centre:

- collects, makes available and gives useful information that is relevant to the promotion of and harmonious integration of the immigrant communities and the ethnic minorities and to fighting exclusion and all forms of discrimination which they may suffer;
- cooperates with other national institutions (governmental and non-government) and facilitates the inter-institutional cooperation to achieve the goals of promotion of integration and of fighting against exclusion and all forms of discrimination against these communities;
- becomes part of trans-national networks promoting an added value in European terms to achieve these goals.

To better disseminate the information, the Information Centre created an infrastructure that would allow a network with all the information deemed useful for immigrants and ethnic minorities. Produced by IOM, ACIME and by other

public and private entities responsible for training and integration sessions, this information covers the following areas:

- legislative and other measures to fight discrimination against communities and ethnic minorities;
- legal status of the immigrant in Portugal;
- placement in the labour market, including access to training;
- access to social security, health care, the educational system and other social rights.

The Centre is also a depository of international studies about the migratory process and its management.

IOM is responsible for the management and operation of the Centre through a Commission constituted by representatives of three institutions (i.e. Junta de Freguesia de Benfica, IOM and ACIME) to handle management and operational issues.

The Centre continues to collaborate with the *Servico de Estrangeiros e Fronteiras* (SEF-Immigration) and the *Inspeccao Geral do Trabalho* (IDICT-Labour Inspection), two of the most important offices involved in the granting of the *Autorizacao de Permanencia*.\*

On 20 March 2001, a Service Office (with two officials and an inspector to ensure its operation) was created in the Centre to handle requests for *Autorizacao de Residencia and Reagrupamento Familiar* (family reunion). As of November 2003, the SEF Service Office had received 2,373 requests for *Autorizacao de Residencia* and 897 requests for *Reagrupamento Familiar*, amounting to a total of 3,328 requests. By the end of February 2004, the Information Centre had also answered 11,566 walk-in information requests and 13,264 phone inquiries.

Source: IOM (January 2005).

\* *Autorizacao de Permanencia* is granted to foreign citizens so long as they have a valid work contract in Portugal under the *Decreto-Lei* (Decree-Law) No. 4/2001 regulating the conditions for entry, residence, exit and removal of foreigners from the national territory. This law, which replaced *Decreto-Lei* No. 244/98, took effect on 22 January 2001; thus, the need to inform migrants in an irregular situation of the required documents to avail of the *Autorizacao de Permanencia* and other details relating to the process.

### VII.3.3 Family reunification

Although there is no unequivocal right to family reunification in international human rights law, despite repeated references to the family as a basic unit of society<sup>12</sup>, the specific ILO instruments protecting migrant workers and ICRMW stipulate that family reunion should be facilitated.<sup>13</sup> Clearly, this means that States should not deliberately create obstacles to make family reunification impossible or more difficult. Moreover, in practice, policy-makers find it more difficult to justify, for humanitarian reasons, the denial of family reunion to migrants who have been lawfully resident in the destination country for more than one year.

In Europe, family unity is also safeguarded by a number of Council of Europe instruments. With reference to ECHR (Art. 8), which protects the right to respect for family life, the European Court of Human Rights has found violations in cases where disproportionate restrictions have been placed on this right in the context of the expulsion of foreigners or their admission into a State party (e.g., *Boultif v. Switzerland*, 2001; *Sen v. Netherlands*, 2001). The (Revised) European Social Charter (Art.19(6)) and the European Convention on the Legal Status of Migrant Workers (ECMW) (Art.12) also contain specific provisions on family reunification, although they are based on reciprocity and thus only apply to lawfully resident migrant workers from other contracting parties. By far the strongest right to family reunion is found in European Union law, where the spouse, registered partner, dependent children up to the age of 21 and dependant relatives in the ascending line, irrespective of their nationality, have a clear right to join the EU national employed or resident in another Member State (EU, 2004b: Arts.2(2) and 3(1)). Spouses and children of third-country nationals lawfully resident in most EU Member states also have a qualified right to family reunification under Directive 2003/86/EC (EU, 2003d) (Textbox VII.8), which should have been transposed in all participating EU Member States by 3 October 2005.

As a general rule, family reunification does not appear to have given rise to significant problems for the majority of States admitting migrants for permanent

#### TEXTBOX VII.8

##### **Council Directive 2003/86/EC on the right to family reunification (EU, 2003d)**

The key features of this Directive are as follows:

- It is only applicable to third-country nationals holding a residence permit of one year or more and with “reasonable prospects of permanent residence”.
- Only the spouse and minor children have a *right* to join the sponsor (EU Member States retain the discretion whether to admit other family members).
- The right to family reunification, however, can be qualified by a number of optional conditions relating to the possession of accommodation, sickness insurance, and stable and regular resources.
- Member States may also impose a waiting period for up to 2 years and restrict the admission of family members on the grounds of public order, public security or public health.
- The Directive is not applicable in Denmark, Ireland and the United Kingdom.

The Directive also contains a number of controversial optional integration conditions, which may qualify the right to family reunification still further, and the European Parliament has challenged these provisions before the European Court of Justice as contrary to the right to family life in Article 8 of the European Convention on Human Rights (ECJ, 2003b: Case 540/03).

settlement. For example, in New Zealand, there is provision for reunification of “close family members of migrants who have obtained New Zealand residence”. Similarly, Australia reports that its immigration policy “includes a family reunion component”. The relatively liberal position in Canada is discussed in Section VI.3.1.3 above.

Countries which do not admit migrants for permanent settlement from the outset but which issue medium or long-term residence permits, do not appear to have confronted major difficulties in facilitating family reunification. For example, the UK's legislation "allows for the spouse and minor children of a person who holds a work permit for a period of more than 12 months to accompany that person". Similarly, France has enacted special measures to facilitate the arrival of family members of "permanent" migrant workers. These measures include a pre-arrival and a post-arrival visit to the family to inform them of social policy, as well as their rights and duties in France.

The notion of family reunification has caused a certain amount of friction between origin and destination countries, in particular in relation to temporary or time-bound labour migration. In this regard, ILO Members are encouraged to facilitate the family reunification of temporary and even seasonal migrants who are legally resident in the country. In adopting the Guidelines on Special Protective Measures for Migrant Workers in Time-Bound Activities, the Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration stated that "even in the case of seasonal and special purpose workers countries should favourably consider allowing family migration or reunification" (ILO, 1997: Annex I, para.6.1).

Swiss law, however, does not authorize family reunification for temporary residents, whether they are seasonal workers, trainees or other foreigners residing in Switzerland for a short period. In France, only migrants who have lived legally in the country for a period of at least two years, holding as a minimum an annual residence permit, can apply for family reunification. In Spain, a one-year waiting period for family reunification is imposed in respect of non-EU nationals, which excludes most temporary migrant workers.

While Canada's legislation provides that "dependants of temporary foreign workers who accompany the worker to Canada are allowed to work and study in Canada, ... spouses and children of workers are required to obtain employment or student authorizations, as the case may be, prior to commencing work

or study". No family reunification, however, is permitted for migrant workers entering Canada under the Seasonal Agricultural Workers Programme. Similarly, family reunification is not permitted under the UK's low-skilled temporary labour migration schemes, namely the Seasonal Agricultural Workers Scheme and the Sectors Based Scheme.

As regards which family members should be entitled to family reunification, ILO Convention No. 143 states that these should include "the spouse and dependent children, father and mother" (Art.13(2)). The ICRMW definition is broader in the sense that it applies to unmarried partners "who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage", but also narrower in the sense that it encompasses only "minor dependent unmarried children" (Art.44(2)). In this respect, the definition of family for the purpose of family reunification in the Revised European Social Charter is similar.<sup>14</sup> Several countries have difficulties with introducing a broader definition. Austria considers that "family immigration applies only to the spouse and minor children (with the exception of) nationals of (certain) third States granted favourable conditions under EU law. Similarly, in France, only the spouse and minor children born to the couple are permitted to be reunified with the migrant worker, as is the case in the United Kingdom, unless "exceptional circumstances" pertain.

Finally, eligibility for family reunification may be different for men and women migrants. While both men and women may be excluded by law from joining their family members, women may find their eligibility for family reunification affected by rules and regulations that appear neutral but are not so in their impact. For example, government policies imposing financial restrictions on persons seeking to sponsor family members, while seemingly gender-neutral, can have a disproportionately negative impact on women migrants. Due to occupational segregation in lower paid jobs, women migrants' earnings are often lower than men's and below the financial income requirements that makes them eligible to sponsor relatives.<sup>15</sup>

## VII.4 Enhancing Social Welfare

The social welfare of migrant workers and their families in destination countries is enhanced by proper access to health care, housing and education on equal terms to those afforded nationals. These areas are also manifested strongly in important social rights protected in international human rights and labour law and to which nearly all OSCE participating States are committed.

### VII.4.1 Health care

General international human rights law provides for the right to health care without any distinction based on nationality or legal status.<sup>16</sup> In this regard, Article 12(1) of the ICESCR reads: “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.<sup>17</sup> In General Comment No. 14 on the right to the highest attainable standard of health, under the heading “specific legal obligations”, the UN Committee on Economic, Social and Cultural Rights emphasizes that

[i]n particular, States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy...” (UN ECOSOC, 2000a: para.34) (*Original emphasis*).

The reference to “preventive care” here is important because it underlines that the right to health is a holistic concept, which goes beyond the provision of mere medical treatment.

With regard to those international instruments specifically relating to migrant workers<sup>18</sup>, particular attention should be given to ICRMW, which stipulates explicitly that emergency medical treatment must be available to all migrant workers and their families on equal terms with nationals and cannot be denied to those in an irregular situation.<sup>19</sup> While this provision is clearly an important addition to inter-

national human rights standards in this area, because of the explicit recognition that irregular migrants should not be denied health care, its emphasis on emergency medical treatment falls short of the holistic approach defined above which guarantees access to preventive care. More extensive rights, however, appear to be afforded migrant workers in a regular situation. ICRMW’s Articles 43(1)(e) and 45(1)(c) add that regularly present migrant workers and family members, respectively, should be granted equal treatment with nationals as regards “access to ...health services”.

In countries such as Croatia and the Netherlands, migrants have equal access to health care services with nationals. In other countries such as Israel and Japan, it is the employer’s responsibility to ensure adequate health care for migrant workers, although no reference is made to members of their families. In Australia, health care provisions may also be regulated by bilateral or multilateral agreements. In Canada’s Province of Ontario, health coverage is only extended to migrant workers who have an authorization to work with a specific employer and in a specific occupation, which has been issued for at least six months.

### VII.4.2 Housing

In practice, the availability of adequate housing or accommodation for migrant workers can be a particular problem in a number of countries and regions, where accommodation is generally scarce and especially in large cities, where there is a shortage of public housing or where private accommodation is unaffordable for many migrant workers, including those with their families. The right to an adequate standard of living stipulated in international human rights law includes the right to housing and, in principle, is applicable to all persons regardless of nationality or legal status.<sup>20</sup> In its General Comment on the right to adequate housing, the Committee on Economic, Social and Cultural Rights underlines that

[t]he right to adequate housing applies to everyone... [I]ndividuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular,

enjoyment of this right must, in accordance with article 2(2) of the Covenant, not be subject to any form of discrimination (UN ECOSOC, 1992).

The Committee has adopted a broad understanding of the right to housing stating that it “should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head or views shelter exclusively as a commodity”, but that “it should be seen as the right to live somewhere in security, peace and dignity” (UN ECOSOC, 1992: para.7). Moreover, the Committee has identified a number of aspects in the concept of adequacy, including accessibility, and in this regard has emphasized that “disadvantaged groups must be accorded full and sustainable access to adequate housing resource”, that such groups “should be ensured some degree of priority consideration in the housing sphere”, and that “both housing law and policy should take fully into account the special housing needs of these groups” (UN ECOSOC, 1992: para.8(e)). In revised guidelines on state reporting under ICESCR, the Committee also urges Contracting Parties to take steps “to ascertain the full extent of homelessness and inadequate housing within its jurisdiction” and that detailed information should be provided in state reports about “those groups within society that are vulnerable and disadvantaged with regard to housing” (UN ECOSOC, 1992: para.13).<sup>21</sup> In these guidelines, the Committee’s list of disadvantaged and vulnerable groups includes, inter alia, migrant workers and “other especially affected groups” (UN ECOSOC, 1992: 100).

Since the adoption of the ESC Committee’s General Comment, the UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living has welcomed the attention given to housing and discrimination issues in the Durban Declaration and the Programme of Action of the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (UN, 2002: para.40). The Programme of Action “recommends that host countries consider the provision to migrants of adequate social services, in particular in the areas of health, education and adequate housing, as a matter of priority” and urges all states to prohibit discriminatory treatment

against foreigners and migrant workers, including in the field of housing (UN, 2002: paras.33 and 81).

Equality of treatment in respect of accommodation is specifically provided for in ILO Convention No. 97 (Art.6(1)(a)(iii)) and covers the occupation of a dwelling to which migrant workers must have access in the same conditions as nationals. On the other hand, this provision cannot be taken to refer to access to home ownership or consequently to the various forms of public assistance which may be granted with a view to facilitating property ownership. Under these circumstances, the provisions of national legislation reserving for nationals the benefit of various subsidies and other forms of public assistance for the purpose of acquiring the ownership of their own homes, as well as national regulations limiting or restricting the right to foreigners to acquire immovable property, do not come within the scope of this article.<sup>22</sup>

ICRMW also includes an equality provision for lawfully resident migrant workers aiming at “access to housing, including social housing schemes, and protection against exploitation in respect of rents” (UN, 1990: Art.43(1)(d)). However, governments are not required to give project-tied or specified-employment workers access to social housing on an equal footing with nationals (Arts.61(1) and 62(1)).

In the EU, equality of treatment between nationals and citizens of EU Member states with regard to housing applies both to the occupation of housing and access to home ownership (EU, 1968: Art.9(1)).

In some countries such as Canada (Province of Ontario) and Switzerland, migrant workers must meet residence requirements in order to obtain public housing. Under its bilateral and multilateral agreements (Canada-Caribbean and Mexican Seasonal Agricultural Workers Programme, NAFTA, the Canada-Chile Free Trade Agreement, and the General Agreement on Trade in Services (GATS)), Canada makes provisions for accommodation. In Asia, Singapore has introduced guidelines to encourage employers to improve the standards of accommodation for migrant workers, including schemes to promote dormitory housing and subsidized public housing. Italy provides accommoda-

tion services to its non-EU documented migrant workers urgently requiring accommodation, whereas in some countries like Cyprus, employers are bound to provide minimum standards of accommodation, which are subject to inspection. In the UK, agricultural employers are responsible for the provision of clean and sanitary accommodation to migrant workers under the SAWS (Textbox VI.12).

### VII.4.3. Education

Universal human rights standards proclaim that everyone has the right to education and that, at a minimum, access to primary or elementary education should be free to all children without any distinction whatsoever (UN, 1948: Art.26; UN, 1966a: Art.13; CRC, 1989: Arts.2 and 28(1)(a); UNESCO, 1960: Art.4(a); ICRMW, 1990: Art.30). In practice, however, most OSCE participating States also apply this latter obligation in respect of secondary school children because of legal compulsory schooling requirements. The Committee on Economic, Social and Cultural Rights emphasizes the role of education as a human right and its integral connection with the enjoyment of other human rights:

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities (UN ECOSOC, 1999: para.1).

ICESCR stipulates that the right to education is to be enjoyed by “everyone”. There are no qualifications precluding non-nationals from benefiting from this right (UN, 1966a: Art.13).<sup>23</sup> In its General Comment on the right to education, the Committee on Economic, Social and Cultural Rights confirms that “the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, *including non-nationals, and irrespective of legal status*” (1999: para.34) (emphasis added). Although mainly concerned with civil and political rights, ECHR also provides for a right to education. The first sentence of Article 2 of the First Protocol to ECHR stipulates unequivocally that “[n]o

person shall be denied the right to education”. When read in conjunction with Article 14 (the non-discrimination clause), this provision clearly applies on a non-discriminatory basis to both nationals and non-nationals who are within the territory of a Contracting Party unless there is an objective and reasonable justification for the differential treatment (Textbox VII.5).

Despite the existence of these clear international and regional human rights provisions guaranteeing education to all persons irrespective of nationality and legal status, the children of irregular migrants in particular face legal, administrative and practical obstacles in accessing education in their country of residence. These obstacles include the refusal of school principals to enrol the children of irregular migrants in primary and secondary schools; the existence of obligations on official institutions, which are also applicable to teachers, to denounce or report irregular migrants; difficulties encountered with the recognition of the education of such children, both in the destination country and on their return to the country of origin under readmission agreements or otherwise; and the greater mobility of irregular migrants and the poorer conditions in which they frequently live, which may adversely impact on their children’s educational development (Cholewinski, 2005:36-38). Needless to say, some of these obstacles, particularly those relating to problems with recognition of prior education and poorer living conditions, are also applicable to the children of lawfully resident migrant workers.

## VII.5 Social Security

The world community, through widely accepted international human rights standards, recognizes the right to social security for everyone, including social insurance (UN, 1948: Art.22; UN, 1966a: Art.9).<sup>24</sup> Social Security<sup>25</sup> was also confirmed as a basic human right during the General Discussion on Social Security at the International Labour Conference in 2001 (ILO, 2001a: para.2).

Migrant workers are confronted with particular difficulties in the field of social security, as social se-

curity rights are usually related to periods of employment or contributions or residency. They risk the loss of entitlements to social security benefits in their country of origin due to their absence, and may at the same time encounter restrictive conditions in the host country with regard to their coverage by the national social security system. Migrant workers have specific interests in:

- obtaining equal access to coverage and entitlement to benefits as national workers;
- maintaining acquired rights when leaving the country (including the export of benefits);
- benefiting from the accumulation of rights acquired in different countries.<sup>26</sup>

### VII.5.1 Restrictions to migrant workers' social security rights

Migrant workers often face difficulties with regard to social security coverage and entitlement to benefits, which national workers do not face. These difficulties are due to a number of factors, such as the principle of *territoriality*, which limits the scope of application of social security legislation to the territory of a country, with the consequence that its nationals working abroad are not covered by such legislation and therefore not entitled to benefits. Migrant workers' rights can also be affected by the principle of *nationality*, the application of which may result in the exclusion of foreigners from coverage or entitlement to benefit. While such discriminatory rules can be found in some countries, few go so far as to deny any social security coverage to foreigners. Discrimination can also be attributable to the *lack of bilateral or multilateral social security agreements*, through which social security rights, acquired in the country of employment, are maintained and which provide for the export of benefits from the country of employment to the country of origin.

### VII.5.2 ILO standards for the protection of migrant workers' social security rights

ILO Conventions Nos. 97 and 143 provide for equality of treatment between regular migrant workers and nationals in the area of social security, subject though to certain limitations. Further guidance

#### TEXTBOX VII.9

### Specific ILO Standards Protecting the Rights of Migrant Workers to Social Security

- *The Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19)* specifically establishes the right to equality of treatment for foreign workers of any other State which has ratified the Convention, in respect of workmen's compensation for industrial accidents and provides for the export of benefits of foreign workers covered by the Convention, but only insofar as the ratifying State provides for such export of benefits for its own nationals.
- *The Equality of Treatment (Social Security) Convention, 1962 (No. 118)* provides for the right to equality of treatment with regard to all nine branches of social security. For each of the nine branches that it accepts, a State party to the Convention undertakes to grant within its territory to nationals of any other State that has ratified the Convention equality of treatment with its own nationals. It also provides for some flexibility by permitting the exclusion of non-nationals in cases where benefits or parts of benefits are payable wholly out of public funds. The Convention further provides for the maintenance of acquired rights and the export of benefits. In essence, a State party to Convention No. 118 has to ensure the provision of benefits abroad in a specific branch for its own nationals and for the nationals of any other State that has accepted the obligations of the Convention for the same branch, irrespective of the place of residence of the beneficiary.
- *The Maintenance of Social Security Rights Convention, 1982 (No. 157)*, and Recommendation (No. 167) institute an international system for the maintenance of acquired rights and rights in the course of acquisition for workers who transfer their residence from one country to another, and ensure the effective provision of the benefits abroad when they return to their country of origin. Under this Convention, the maintenance of acquired rights has to be ensured for the nationals of other States parties to the Convention in any branch of social security in which the States concerned have legislation in force. Within this context, the Convention provides for the conclusion of bilateral or multilateral social security agreements. In addition, the Recommendation contains model provisions for the conclusion of such agreements.

Source: ILO, Social Security Department (SECSOC), March 2006.

in this regard is provided by ILO social security standards. All current ILO social security standards<sup>27</sup> define personal scope of coverage irrespective of nationality and almost all contain similar clauses on equality of treatment between nationals and foreign workers in the host country,<sup>28</sup> and most of them contain special non-discrimination clauses, such as, for example, the Social Security (Minimum Standards) Convention, 1952 (No. 102).<sup>29</sup> In addition to these instruments, the ILO has adopted several

standards, which deal specifically with the protection of migrant workers' social security rights (Textbox VII.9).

Without touching the essential content of national laws, the principal objective of ILO Conventions in this field is coordination as regards the elimination of any obstacle in the way of the application of national laws. The effect of national rules is modified only insofar as it is necessary to guarantee to

#### TEXTBOX VII.10

### The Situation and Some Best Practices Regarding Social Security Rights of Irregular Migrant Workers

The bottom line with regard to access to social benefits for irregular migrant workers seems to be *emergency health care* (e.g. Belgium, Czech Republic, Finland, France, Mexico, Norway and Spain). Irregular migrant workers have the same right to urgent medical care as regular residents (or workers) in the country. However, the way in which the access to emergency health care is guaranteed can differ from country to country; the same can be said for what is understood as emergency care.

In some countries (e.g. Sweden and Turkey), an irregular migrant worker in need of urgent care can be treated by a medical doctor. However, the patient in this situation is obliged to refund the costs for the delivered health care. It should be mentioned that Turkey is currently revising its Fundamental Law for Social Services and Welfare, whereby it is planned to provide some basic social and medical support for unlawful migrant workers. Mexico will provide emergency health care to any person whose condition poses a grave threat to physical integrity or life. No limitations are imposed for reason of nationality or migratory status. In Albania, the Hospital Care Law obliges both public and non-public hospitals to give free treatment to Albanians and foreign citizens (even when the latter are illegally in Albania) if they are in need of emergency care. In the Czech Republic and Switzerland, irregular migrant workers are also granted access to emergency care, mainly through social assistance. However, in both countries irregular migrant workers are supposed to be socially insured

for health care. Social security in these countries is disconnected from the question of whether a person is regular or irregular as regards working or staying in the country. As soon as a person is staying on the territory, (whatever the legal nature of the professional activity or stay), the person is supposed to take out a public health insurance through one of the sickness funds operating in the country. In reality, a tiny minority of irregular migrant workers is socially insured for health care in those countries as either the worker refrains from self-disclosure and/or does not have the financial means to pay for health insurance. In the event of an emergency, irregular migrant workers are guaranteed health care treatment irrespective of whether they are insured or not. The costs for such treatment are borne by the local authorities through social assistance or social welfare.

In Belgium, the legislation governing employment injury compensation is a matter of public policy and hence mandatory: the nullity of a contract concluded with a worker in an irregular situation cannot be invoked in order to evade payment of compensation. If the employer is not insured, it is the Employment Injury Compensation Fund that pays and subsequently claims from the employer. If a worker who is to be paid compensation has not been affiliated to the scheme, the employer is liable to pay contributions in arrears.

Sources: ILO, Social Security Department (SECSOC), March 2006; Schoukens and Pieters (2004).



migrant workers complete and continuous protection on the basis of effective equality.

### VII.5.3 Social security standards and irregular migrant workers

Relevant ILO social security instruments are silent regarding the protection of irregular migrant workers. One exception, however, can be found in ILO Convention No. 143, which stipulates that irregular migrant workers shall have the same rights as regular migrant workers concerning social security benefits arising out of past employment (Art.9(1)). This provision particularly must be understood for the purpose of acquiring rights to long-term benefits. Within this context, it appears that the wording “past employment” refers to past periods of legal as well as illegal employment.<sup>30</sup> In practice, some social security rights and particularly access to medical treatment are afforded irregular migrant workers in a number of countries (Textbox VII.10).

### VII.5.4 Social security protection through social security agreements

The best way to ensure migrant workers’ social security protection is through the conclusion of multilateral or bilateral social security agreements. Multilateral agreements, in comparison to bilateral agreements, have the advantage of generating common standards and regulations and so avoiding discrimination among migrants from various countries of origin who otherwise might be granted differing rights and entitlements through different bilateral agreements. In addition, a multilateral approach also eases the bureaucratic procedures by setting common standards for administrative rules implementing the agreement (Holzmann et al., 2005: 25). A number of best practices can be identified.

EU Regulations related to the portability of social security benefits are probably the most comprehensive example, at least insofar as it concerns the rights of EU citizens. Regulation 1408/71/EEC (EU, 1971)<sup>31</sup> ensures far-reaching portability of social security entitlements within the EU, to the extent that EU citizens do not suffer any disadvantages in terms of social security entitlements by moving from one Member state to an-

other. Regulation 859/2003/EC (EU, 2003a) extends the provisions of Regulation 1408/71/EEC to third-country nationals so that they enjoy now the same rights as EU nationals with regard to the portability of social security coverage and benefit entitlements when moving within the EU.

Best practice examples are also the European-Mediterranean agreements from the 1990s between the EU, its Member States, and the Maghreb countries of Algeria, Morocco and Tunisia (Section IX.1.3.3 below), which contain far-reaching provisions on the portability of social security benefits for migrant workers from the Maghreb countries who live and work in the EU. The EU also fosters cooperation in the area of social security with other neighbouring countries. The Barcelona Declaration in 1995 founded the European Mediterranean Partnership (EMP), making ten Mediterranean countries official partners of the EU.<sup>31</sup> Since then, the EU has negotiated multilateral Association Agreements with all Euro-Mediterranean partners. As the sections on the coordination of social security use more or less the same wording in the agreements, they can serve as a blueprint for further association agreements with other countries and the EU (Holzmann et al., 2005: 11-12).

Another comprehensive multilateral agreement is the Caribbean Community and Common Market (CARICOM) Agreement on Social Security (1997: 39), which was signed with a view to harmonizing the social security legislation of its Member States. It explicitly refers to ILO Conventions in its Preamble and is based on the three fundamental principles stated therein: equality of treatment for residents of the Contracting parties under their social security legislation; maintenance of rights acquired or in course of acquisition; and protection of and maintenance of such rights notwithstanding the changes of residence among their respective territories. The provisions of the Agreement are largely based on the model provisions for the conclusion of bilateral or multilateral social security instruments set out in ILO Maintenance of Social Security Rights Recommendation, 1983 (No. 167), and the Agreement entered into force in 1997. Thirteen Member States have so far signed and ratified the Agreement, while twelve of these Member States have enacted domestic legislation to give legal effect to it.

## VII.5.5 Unilateral measures for the protection of migrant workers' social security rights

Social security protection of migrant workers and their families can best be achieved through ratification of the above social security conventions and their implementation through the conclusion of social security agreements. In the absence of ratification of the relevant conventions and conclusion of social security agreements, some countries have developed unilateral measures for the protection of migrant workers' social security rights, which comprise provision of:

- equality of treatment for national and migrant workers as regards coverage of and entitlement to social security benefits;
- a requirement (liability) on recruitment agencies to pay social security contributions to the national social security system for each worker recruited for employment abroad (e.g. the Philippines, Indonesia);
- voluntary coverage for nationals working abroad (e.g. France, Jordan, Philippines);
- the possibility of payment of retroactive contributions for returning migrant workers for periods abroad;
- waiving long qualifying periods in favour of migrant workers;
- crediting periods of insurance completed in another country for the purpose of giving migrant workers immediate access to benefits;
- medical coverage for family members of migrant workers who are left behind.

### VII.5.5.1 Unilateral measures of destination countries: health care benefits for retired returning migrant workers

Migrant workers who, upon retirement, return to their country of origin and do not qualify for a pension in the country of origin are not covered by the statutory health care scheme there. In order to overcome this gap in protection, some destination countries in Europe reimburse retired migrant workers for their medical care expenses in their home countries, in a similar way to the reimbursement of their own nationals who temporarily travel or reside abroad. The Austrian health system (Holzmann et al., 2005: 29), for example, reimburses up to 80 per cent of the medical costs which Austrian hospitals (or medical doctors) charge the Austrian public health insurance. However, since the Austrian health system is heavily subsidized, the costs that hospitals charge to the public health insurance are only notional and do not reflect the actual, much higher, costs.

### VII.5.5.2 Unilateral measures of countries of origin to extend social security coverage to their nationals working abroad

In the absence of social security agreements, migrant workers are often excluded from the social security coverage of the country of employment and even if they are covered by the statutory social security scheme of that country, they are often unable to receive their benefits when returning to their country of origin. Therefore, several countries have extended statutory social security coverage to their nationals working abroad, either through compulsory insurance or through voluntary insurance (Textbox VII.11).

## TEXTBOX VII.11

### Unilateral Measures by Countries of Origin Protecting the Social Security Rights of their Nationals Working Abroad

Some countries have used recruitment agencies as a lever to ensure that their migrant workers continue to be given at least some social security protection. A very good example is provided by the Philippines where agencies, which recruit and provide Philippine seamen for the manning of foreign ships, are held responsible under a Memorandum of Agreement of 1988 for paying quarterly contributions to the social security system. These contributions provide comprehensive coverage under Philippine laws on social security, medical care and employee's compensation. Imposing on recruitment agencies a liability to pay social security contributions was facilitated by the fact that, under the Philippine law, contracts for overseas employment have to be approved by the Department of Labour and Employment, with the result that it was possible to impose the registration of seamen with the Philippine social security system as one of the contract conditions.

Another example is provided by Pakistan, where migrants are protected by a group insurance concluded between the Bureau of Emigration and Overseas Employment and the State Life Insurance Corporation. This group insurance is financed by a premium paid by applicants on registration with the Bureau. It provides coverage in the event of two contingencies – disability and death – for a period of two years. The benefit is a lump sum, payable to the disabled worker or to the

surviving designated beneficiary, as the case may be. Pakistan is now carrying out a feasibility study on the introduction of a pension scheme for migrant workers abroad. One possibility may be the setting up of a social security scheme for migrant workers based on voluntary contributions to individual accounts both for long-term and short-term benefits such as health care for members of the migrant workers' families who stay in the home country.

Another possible way of extending national social security coverage is to offer migrant workers the possibility of voluntary insurance in their home country. Jordan should be mentioned as an example for providing voluntary social insurance to its nationals working abroad. Voluntary insurance can be offered in different ways, either in the form of continuous optional insurance after a period of previous mandatory coverage or by allowing returning migrant workers to cover retroactively the periods during which they were employed abroad. The latter option may be particularly attractive where migrant workers have received a lump-sum payment of the social security rights, which they have acquired in the country of employment.

Source: ILO, Social Security Department (SECSOC), March 2006.

## ENDNOTES

- 1 Pregnancy tests are, for example, required in Singapore and Malaysia.
- 2 ICRMW states: “Without prejudice to the terms of their authorization of residence or their permission to work and the rights provided for in Articles 25 and 27 of the present Convention, migrant workers shall enjoy equality of treatment with nationals of the State of employment in respect of: (a) protection against dismissal; (b) unemployment benefits; (c) access to public work schemes intended to combat unemployment; (d) access to alternative employment in the event of loss of work or termination of other remunerated activity, subject to Article 52 of the present Convention” (UN, 1990: Art. 54). On the regional level of the Council of Europe, ECMW stipulates: “If a migrant worker is no longer in employment, either because s/he is temporarily incapable of work as a result of illness or accident or because s/he is involuntarily unemployed, this being duly confirmed by the competent authorities, s/he shall be allowed for the purpose of the application of Article 25 of this Convention [re-employment] to remain on the territory of the receiving State for a period which should not be less than five months. Nevertheless, no Contracting Party shall be bound, in the case provided for in the above sub-paragraph, to allow a migrant worker to remain for a period exceeding the period of payment of the unemployment allowance” (Council of Europe, 1977: Art.9(4)).
- 3 With 162 and 164 ratifications respectively.
- 4 The 2000 Observations of the CEACR on the application of Conventions Nos. 97 and 111 by Spain address the working conditions of migrant workers, including those with an irregular status.
- 5 European Union law provides for a system of harmonizing and aggregating social security benefits in Member States and EU rules now apply to third country nationals moving within EU territory (EU, 2003a; 1972a; 1971), as well as to other third country nationals by virtue of Association Agreements that the EU has adopted with certain third countries (e.g. Bulgaria, Romania, Turkey and the Maghreb countries of Algeria, Morocco and Tunisia).
- 6 For more details, see ILO (1999a: paras. 306-309); moreover, Convention No. 97 (Art. 9(1)) only applies to rights which the worker has acquired by virtue of his or her employment and by fulfilling the other qualifying conditions required in the case of regular migrant workers.
- 7 ILO Recommendation No. 151 indicates, in para. 2, that documented migrant workers should be accorded equality of opportunity and treatment in terms of (a) access to vocational training and employment of their own choice on the basis of individual suitability for such training or employment, account being taken of qualifications acquired outside the territory of and in the country of employment; and (b) retraining. It has been recognized by ILO that, when temporary exceptions, allowed and authorized under Convention No. 143 (Art.14(a)), are taken into account with regard to access to employment, it may in practice be more difficult to provide equality of treatment in respect of vocational training to certain categories of migrant workers, for example, seasonal workers (see ILO, 1999a: para. 378).
- 8 See <http://www.world-federation.org/CETAB>
- 9 E.g., ICCPR (UN, 1966b: Art.22(1)); ICESCR (UN, 1966a: Art.8); ICRMW (UN, 1990: Art.26 and 40).
- 10 See articles in ILO (2002c).
- 11 Max Frisch commenting on the European “guestworker programmes” in the 1960s.
- 12 See e.g. ICCPR: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State” (UN, 1996b: Art.23(1)).
- 13 ILO Convention No. 143 (Art.13(1)) calls on every Contracting Party “to take all necessary measures which fall within its competence and collaborate with other Members to facilitate the reunification of the families of all migrant workers legally residing on its territory”. ILO Recommendation No. 151 (para.14) provides that “representatives of all concerned, and in particular of employers and workers, should be consulted on the measures to be adopted to facilitate the reunification of families and their cooperation sought in giving effect thereto”. ICRMW (Art.44(2)) stipulates that “States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children”.
- 14 See the Appendix to the Revised European Social Charter (Council of Europe, 1996) regarding interpretation of Article 19(6) relating to family reunification.
- 15 For more details on gender differences with regard to family reunification in the context of migration, see UN (2004: paras. 92-107).
- 16 Health care is also recognized as one of the traditional branches of social security, which is discussed in Section VII.5 on social security below (see also Textbox VII.9 which includes information on the access of irregular migrant workers to emergency health care provision).
- 17 See also UDHR (UN, 1948: Art.25(1)): “Everyone has the right to a standard of living adequate for the health of himself/herself and of his/her family, including food, clothing, housing and medical care and necessary social services.”
- 18 The provision of adequate health care to migrant workers and members of their families outside employment is an area which is not addressed by either ILO Convention No. 97 or Convention No. 143. ILO Recommendation No. 86, para.12, stipulates that “in the case of migrants under government-sponsored arrangements for group transfer, medical assistance should be extended to such migrants in the same manner as provided for nationals”, but no provision extends this access to other categories of migrants. ILO Recommendation No. 151, para.2(i), refers to equality of opportunity and treatment in respect of conditions of life, including “health facilities”.

- 19 See ICRMW: “Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment” (UN, 1990: Art. 28).
- 20 See UDHR (UN, 1948: Art.25(1)) and ICESCR (UN, 1966a: Art.11(1)). The latter provision reads: “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself/herself and his/her family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent”.
- 21 The General Comment cites UN ECOSOC, 1991: 88.
- 22 ILO Recommendation No. 86 stipulates in paragraph 10(a) that “migration should be facilitated by such measures as may be appropriate to ensure that migrants for employment are provided in case of necessity with adequate accommodation”, whereas paragraph 16 of ILO Recommendation No. 151 also provides that: “with a view to facilitating the reunification of families as quickly as possible ... each Member should take full account of the needs of migrant workers and their families in particular in its policy regarding the construction of family housing, assistance in obtaining this housing and the development of appropriate reception services”.
- 23 In this regard, see also UNESCO (1960: Art.3(e)), which explicitly requires State parties “[t]o give foreign nationals resident within their territory the same access to education as that given to their own nationals”.
- 24 For relevant Council of Europe instruments, see Council of Europe (1964, 1972, 1990).
- 25 Social security can be understood as “the protection which society provides for its members, through a series of measures, against the economic and social distress that otherwise would be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death; the provision of medical care; and the provision of subsidies for children”. ILO, 1989: 3).
- 26 Social security benefits are traditionally divided into nine different branches: medical care, sickness cash benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit, and survivors’ benefit. For a detailed overview of the ILO instruments on social security, see Humblet and Silva (2002: 41-45).
- 27 Social Security (Minimum Standards) Convention, 1952 (No. 102); Employment Injury Benefits Convention, 1964 (No. 121); Invalidity, Old-Age and Survivors’ Benefits Convention, 1967 (No. 128); Medical and Sickness Benefits Convention, 1969 (No. 130); Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168); and Maternity Protection Convention, 2000 (No. 183),
- 28 Their applicability to migrant workers is demonstrated, inter alia, by the fact that the ILO supervisory bodies have made specific reference to migrant workers in the context of the regular supervision of, for example, the Employment Injury Benefits Convention, 1964 (No. 121), and the Medical Care and Sickness Benefits Convention, 1969 (No. 130).
- 29 Article 68 of this Convention, applicable to all branches of social security, states that nationals and non-nationals should have the same rights to social security. It also provides for some flexibility by permitting the exclusion of non-nationals in cases where benefits or parts of benefits are payable wholly out of public funds.
- 30 Recommendation No. 151, which accompanies Convention No. 143, recommends that migrant workers, irrespective of their status, who leave the country of employment, should be entitled to employment injury benefits (para. 34(1)(b)).
- 31 Regulation 883/2004/EC was adopted in 2004 as a follow-up to Regulation 1408/71/EEC. However, both a new implementing regulation and supplements and appendices to the new regulation have not yet been completed.
- 32 Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Syria, Tunisia, Turkey and the Palestinian Authority. Cyprus and Malta were also part of the original EMP, but joined the EU as full members in 2004. Libya has observer status.

# *VIII. Measures to Prevent or Reduce Irregular Labour Migration*

Before examining the measures that can be advanced to prevent or reduce irregular labour migration,<sup>1</sup> it is necessary to consider a number of preliminary issues, such as the rationale for preventing or reducing irregular labour migration; the need to understand the group of persons in question and the numbers involved; the response of the international community to the problem of irregular migration; and the necessity of a comprehensive and coordinated policy approach which attempts to tackle all the dimensions of the phenomenon.

## *VIII.1 The Need to Prevent or Reduce Irregular Labour Migration*

There are a number of reasons which can explain why irregular migration should be reduced or prevented. The following is by no means an exhaustive list:

- To ensure that migration is successfully managed and the credibility of legal immigration policies is maintained. It is difficult to obtain public support for legal immigration policies, if no measures are taken to deal with irregular migration or if it is in effect tolerated by the authorities.
- To ensure satisfactory salary levels and working conditions for national workers and lawfully resident migrant workers. The presence of irregular migrants in the economy can depress wage levels and working conditions, particularly in the low-skilled sectors of that economy.
- To avoid the creation of entire employment sectors and enterprises wholly dependent on irregular migrant labour. It has been argued that the availability of irregular migrants to some employers enables their businesses to survive, because they gain an unfair advantage over their competitors in terms of lower labour costs, and therefore they have no incentives to restructure, modernize and improve working conditions, etc. (Ghosh, 1998: 150-151).
- To prevent exploitation of irregular migrants by employers, employment intermediaries or agents, smugglers and traffickers. The exploitation of irregular migrants is well documented. They are paid lower salaries than national or lawfully present migrant workers; if dismissed they are often unable to obtain money owing from employers; and they are rarely protected by social security legislation. Moreover, they can also be exploited by smugglers and traffickers, which, in the latter case in particular, can place them in a position akin to slavery or forced labour. Increasingly, (and this is particularly evident in respect to the entry of irregular migrants into the European Union), the irregular migration of labour is controlled by organized crime, which is an obvious negative feature of this phenomenon.

Clearly, the involvement of organized crime in irregular labour migration, and particularly in the highly exploitative context of trafficking, can constitute a national security concern. Similarly, the irregular entry into and presence of a large number of foreign nationals in a country as well as their sudden return to

the country of origin in the event of an economic downturn can lead to serious concerns about security: for example, during the Asian financial crisis in the late 1990s, large groups of irregular migrant workers in countries such as Malaysia were required to leave, and this resulted in considerable tensions between countries in the region.

Nevertheless, it cannot be denied that irregular migrants do meet labour demands in destination countries, particularly in low-skilled sectors. They provide low-cost labour not just because they earn less money (and employers do not make social security contributions), but also because they are usually young and less in need of health care. They also create a flexible workforce which can easily be dispensed with during downturns in the economy. It has been contended that governments often turn “a blind eye” to irregular migrant labour, because they recognize the short-term advantages of such a flexible workforce for employers and the national economy.

## VIII.2 Who are the Irregular Migrants?

By and large irregular migrants comprise two groups of persons. First, there are those who arrive clandestinely (i.e. passing the “green” frontier at night, crossing the sea in small rickety boats between North Africa and EU Member States, or hiding in sealed containers of articulated trucks) sometimes with tragic

consequences.<sup>2</sup> The second group are irregular migrants who arrive legally (for example, with tourist or student visas) and overstay the period for which their visas are valid.

It is widely acknowledged that the majority of irregular migrants fall into the second group. In the EU 15 Member States (prior to enlargement in 2005), approximately 10 million EU/Schengen visas are issued annually to third-country nationals for short-term stays of no more than 3 months. However, it is unclear how many of these persons overstay, even though all third-country nationals (visa and non-visa nationals) must now have their passports stamped on their entry into and exit from EU territory (EU, 2004j). Moreover, as observed in Section VI.4.3 above, the proliferation of temporary labour migration schemes and the increasing complex rules that govern these schemes increases the risk that migrant workers originally admitted lawfully into the country will fall into irregular status. Similarly, past regularization procedures (Section VI-II.4.5) have frequently been linked closely to migrant workers remaining in employment, which means that such migrants will again find themselves in an irregular situation if they lose their job.

Can irregular migrants be counted? Most official documents refer to the “problem” of irregular migration and that it is “significant”, but there have been very few serious attempts to verify whether this is indeed the case. Estimates frequently differ significantly, according to the messenger (government or media) or indeed the situation when they are published. Most of the available data refers to the number of persons ap-

prehended trying to enter clandestinely (although often this includes figures for people apprehended more than once) and of persons detected and expelled. However, this kind of data gives an incomplete picture and frequently reflects the extent of the resources assigned to and the level of effectiveness of immigration enforcement agencies. A further difficulty is that very little available data is disaggregated by sex and age. The absence of sex-disaggregated data on irregular migration prevents an accurate gender analysis of migration policies and programmes. Moreover, it has been difficult to obtain accurate EU-wide figures since some Member States are reluctant to publish their figures for fear that such information might be useful to those who facilitate irregular migration, such as smugglers and traffickers. The European Police Office (EUROPOL) has estimated that, before the recent EU enlargement, 500,000 irregular migrants enter the EU annually (EU, 2000b: 13), although the intractability of this issue is best reflected in a European Commission report on the links between legal and irregular migration, where it recognized the difficulties in counting irregular migrants and was only prepared to estimate that the numbers of irregular migrants entering the EU each year was probably over six figures (EU, 2004d: 11). ILO estimates that irregular migrants represent 10 to 15 per cent of the total migrant stocks and flows (2004: 11), which indicates that irregular migration does not represent a major share of labour migration.

Perceptions are also particularly important. Negative perceptions are presented when the terminology “illegal” migration and “illegal” migrant is used. The notion of “illegality” carries with it the stigma of “criminality” and many irregular migrants, even though they may have contravened immigration laws on admission and residence, are not normally perceived as “criminals” in the ordinary understanding of this term. Most international and regional organizations, such as IOM, ILO and the Council of Europe use the terminology “irregular migration”. Indeed, only the EU persists in using the terms “illegal immigration” and “illegal immigrants”.

Another issue of perception concerns rich and poor migrants. Irregular migrants are normally considered as persons with a low level of education from poorer

countries with high unemployment or structural underemployment seeking a better life for themselves in countries which are more economically advanced. Governments and the media often convey similar perceptions of irregular migrants. But this is not necessarily the case. Often such migrants have a higher level of education and are not the poorest in their country of origin. Indeed, if their irregular movement has involved the “services” of smugglers, many must have been able to find the resources to pay for such services, either alone or with the assistance of their families, friends and home community.

### *VIII.3 Response of the International Community*

How has the international community responded to the perceived increase in irregular migration? In the 1970s, the phenomenon of irregular migration came to the attention of the international community after some horrific incidents involving trafficking. One incident in particular caught the headlines: some 50 Africans from Mali were discovered in terrible conditions in a truck in the Mount Blanc tunnel. Concerns over such incidents eventually resulted in the adoption of several UN General Assembly and Economic and Social Council resolutions against the abuses connected with irregular migration as well as the International Labour Conference’s adoption of ILO Convention No. 143, which is discussed in Section I.2.1 above. The first part of this Convention is dedicated to preventing the abuses connected with the migration process and requires ratifying States to take measures to detect, eliminate, and apply sanctions for the clandestine movements of migrants in abusive conditions and illegal employment, including labour trafficking. It also contains a number of provisions protecting the rights of irregular migrant workers, particularly their basic human rights as well as their rights arising out of past employment (unpaid wages, etc.) (Arts.1 and 9(1)) (Section I.2.3 above).

ICRMW was drafted during the 1980s and adopted in December 1990. It entered into force on 1 July 2003 (Section I.2.2 above). Its aim is to ensure that the rights of *all* migrant workers and their families are protected and in-



cludes a chapter on the protection of the rights of all migrant workers, including irregular migrants (Part IV). However, the ICRMW also contains a number of provisions aimed at preventing and eliminating movement of illegal or clandestine migrants and employment of migrant workers in an irregular situation (Part VI, Art.68). Its philosophy is that a comprehensive approach to preventing irregular migration cannot ignore the basic needs and rights of those already in an irregular situation.

In 2000, the UN General Assembly adopted the International Convention against Transnational Organized Crime (ICTOC), which includes two protocols relating to the links between organized crime and migration: the Protocol against the Smuggling of Migrants by Land, Air and Sea; and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UN, 2000b, 2000c, 2000d). The Convention and both Protocols have now entered into force. In addition to establishing a framework for dealing with these crimes, the Protocol on Trafficking also contains a number of provisions focusing on the protection of victims of trafficking. However, it should be emphasized that these are not human rights instruments, having been adopted in a criminal law enforcement context.<sup>3</sup>

In addition to these international responses, there have also been regional responses to addressing the phenomenon of irregular (labour) migration. In particular, EU law and policy on irregular migration has expanded rapidly in recent years under new EU competences afforded by the 1997 Treaty of Amsterdam, which amended the EU Treaty. The EU has adopted a series of legal “soft law” and operational measures to combat irregular migration, including trafficking and smuggling of human beings.<sup>4</sup>

### VIII.4 The Need for a Comprehensive Approach

A comprehensive or holistic approach is necessary to address the problem of irregular labour migration. Four governing principles should underpin action to prevent or reduce irregular migration:

- An isolationist approach is bound to fail. Strengthening dialogue, cooperation and partnerships between all countries affected by irregular migration (i.e. origin, transit and destination countries) is critical.
- It is necessary to adopt a set of measures that are both comprehensive and complementary. A holistic approach to preventing or reducing irregular migration is therefore required.

#### TEXTBOX VIII.1

##### The Informal Economy in the Russian Federation

“The scale of the informal economy is ... [significant] in Russia. The most conservative estimate of the contribution the informal sector makes to the economy is 22.4 per cent of Gross National Product (GNP). The greatest numbers of informal workers are in trade (market sales) or are working for individuals, for example, as domestic workers. Many also work in agriculture and construction. By mid-2001, an estimated 10 million persons were engaged in the informal sector. Of these, 6.5 million worked solely in the informal sector. It is also estimated that 3.3 million were involved in trade and catering, 2.7 million in agriculture, about 1 million in industry and more than 0.5 million in construction.

The scale of the informal economy ... [contributes] towards the proliferation of labour exploitation, both for national and migrant workers. Irregular migrants are particularly vulnerable. Demand for informal labour promotes irregular migration .... Moreover, ... the presence of a great number of irregular migrants (estimated at around 4 to 5 million) in the country who cannot obtain official employment stimulates the development and prosperity of the informal sector.

The wide use of ... migrants [in the informal economy] is an important feature of labour migration in Russia. Using migrant workers allows employers to increase flexibility and decrease costs in the form of social security contributions, taxes and wages. Yet the situation is dual edged. Migrants’ lack of rights increases their vulnerability to exploitation; however, their own willingness to enter into flexible situations exacerbates the problem. A vicious circle ensues, escape from which might only be possible given a well-planned policy to regulate the informal economy.”

Source: Tyuryukanova (2005: 56-57) (footnotes omitted).

- Control or restrictive measures alone are insufficient.
- A cross- or multi-sectoral approach is essential, engaging not merely the participation of governments in the countries affected by irregular labour migration, but also the social partners and civil society. In particular, the problems of the informal labour market cannot be adequately addressed without the participation of employers and unions.

With regard to controls and restrictive measures, there are significant differences in the positions of policy-makers: for example, ICRMW underscores this point, although it has not secured wide support from OSCE participating States. It recognizes that irregular migration often leads to exploitation and abuse and therefore strongly supports actions to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation (Part VI). At the same time, it accepts the fact that irregular migrant workers exist and supports the protection of their fundamental human rights and social rights, including employment rights (Part IV) (Section VIII.4.4 below). A similar approach is adopted in ILO Convention No. 143.

Consequently, protection should be an important ingredient in the comprehensive set of measures required to prevent or reduce irregular labour migration. Such protection can also be a useful tool in combating the informal labour market, which is more prevalent in some OSCE countries (e.g. southern European countries and the Russian Federation – Textbox VIII.1) than in others and serves as a significant pull factor for irregular labour flows.

A series of comprehensive measures to prevent or reduce irregular labour migration can therefore be envisaged at all stages of the migration process: activities in countries of origin; border controls and articulation of a viable visa policy; measures and sanctions against those who facilitate irregular migration; safeguards for irregular migrant workers; regularization or legalization programmes; return measures; opening up more legal channels for labour migration; and inter-state cooperation. This broad range of measures is considered below.

## VIII.4.1 Activities in countries of origin

Activities to discourage irregular labour migration movements should be taken in the countries of origin of potential irregular migrants (Section III.3.3.1 above). These activities may include public information and/or education campaigns on the risks of irregular migration, particularly on the dangers of falling into the hands of traffickers, smugglers or unscrupulous labour migration intermediaries or agents; and knowledge of laws and practices in destination countries.<sup>5</sup> In this re-

### TEXTBOX VIII.2

#### ILO Activity to Prevent and Reduce Trafficking in Women

The ILO technical cooperation project “Employment, vocational training opportunities and migration policy measures to prevent and reduce trafficking in women in Albania, Moldova and Ukraine” provides assistance and guidance to the Ministries of Labour, State Migration Authorities and National Employment Services of these countries in the formulation of gender-balanced migration policy measures and the strengthening of migration and employment management capacity. The project activities are aimed at strengthening the institutional structures and policy measures to regulate legal labour migration, especially out-migration, and reducing trafficking of young women by providing domestic employment alternatives and by enhancing access to legal migration channels.

An ILO special booklet addresses the causes, consequences and mechanisms of trafficking and its gender dimensions. It provides guidelines for policies and other actions to prevent and address trafficking and support for and protection of victims and prosecution of traffickers. The Guide has been translated in several languages and is widely used by ILO constituents and civil society organizations working on migration. It has proven to be a valuable tool in assisting constituents in countries of origin to formulate their migration policies and programmes and raise awareness on migrant workers’ rights.

Sources: ILO International Migration Programme (MIGRANT), March 2006; ILO (2003c).

gard, IOM undertakes numerous activities in countries of origin with a view to informing potential migrant workers of the risks of leaving in an irregular manner. Moreover, such activities may include capacity-building measures to strengthen institutional structures in this area. It is also important that any such measures in countries of origin are not focused solely on deterring labour migration altogether. Legal labour migration opportunities should also be promoted (Textbox VIII.2). The aim should be to ensure that as many migrants as possible move in a lawful manner. For example, with specific regard to women migrants, the *ILO Information Guide on Preventing Discrimination, Exploitation and Abuse of Women Migrant Workers (2003)* contains comprehensive guidelines, outlined in several distinctive booklets, to help potential migrants to decide and prepare for employment abroad, to prevent and address abuse in recruitment, to improve the situation of women migrants, including irregular women migrants, in the countries of destination, and to assist and support their return. The negotiation of bilateral labour agreements between origin and destination countries and their effective implementation (Section IX.1.1 below) can also play an important role in reducing irregular labour migration flows between the countries concerned.

#### VIII.4.2 Border controls and visa policy

In discussing external measures to be taken to prevent or reduce irregular migration, the most common provisions mentioned are those relating to prevention of entry to irregular migrants. Border controls need to be efficient and fair, since the propensity to try irregular methods tends to increase if migrants are unsure whether a corrupt border guard will demand payment of a bribe or make life difficult for them. Efficiency at the border is enhanced when there is trust based on cooperation among border officials of all the countries involved in the migration process, and particularly between countries with common borders. Unfortunately, in some regions, it is not uncommon for border guards to attempt to pass responsibility for irregular migrant workers (particularly those transiting through their country) to officials in the other country, rather than to work together to address the problem. The EU has adopted comprehensive measures to ensure that common rules are applied at EU external borders and has established a European agen-

cy to enhance cooperation between EU Member States at these borders (EU, 2004f).

A viable visa policy enabling the migrant to enter the country to take up employment, with a minimum of bureaucratic obstacles and/or red tape, is also essential to ensuring that fewer migrants enter the country without authorization. Unfortunately, visas issued for admission into a country for other reasons (such as tourism or study) are abused in many countries as well as EU Member States applying the three-month EU/Schengen visa for short-term visits, although often such abuse is exacerbated by the lack of sufficient legal avenues to take up employment.

#### VIII.4.3 Actions against those who facilitate irregular migration: addressing illegal recruitment, trafficking and smuggling, and employer sanctions

A recognized method of preventing or reducing irregular migration is to regulate more effectively the recruitment of migrant workers with a view to countering illegitimate recruitment practices and to penalizing those who assist and facilitate the movement and placement of irregular migrant workers.

Regulation of recruitment in countries of origin is discussed in Section III.2 above. Recruiters or private employment agencies (PEAs), in the form of temporary work agencies or other labour providers, also operate in destination countries and regulation of their activities is necessary. Ireland offers a good example of how to develop a regulatory framework for PEAs, as it has become a prime country of destination in a relatively short period of time (Textbox VIII.3).

To ensure that the regulatory framework operates successfully, monitoring and enforcement mechanisms should also be introduced. Monitoring mechanisms may include pre-licensing checks and on-the-spot inspections after issuance of the licence by the licensing authority or by labour inspection units, including unannounced visits following complaints or reports of suspicious practices from a wide range of sources. Enforcement activity may range from warnings to improve behaviour to administrative and/or penal sanctions, such as fines, revocation or withdrawal of licenc-

### TEXTBOX VIII.3

## The Development of the Regulatory Framework for PEAs in Ireland

Ireland is an interesting example of how a government adopted legislation on the operation of PEAs according to the changing nature of the labour market. The Employment Agency Act of 1971 laid down the principles for licensing recruitment agencies and introduced a licence procedure that established certain financial and managerial conditions, including inspection of suitable premises. Otherwise, the overall regulation was relatively liberal in its approach. It has to be borne in mind that, when the Act was adopted, recruitment agencies in Ireland were mainly engaged in recruiting Irish citizens for overseas work, primarily to the UK. The boom in the Irish domestic labour market led to labour shortages in the 1990s. In a relatively short period, Ireland changed from being a labour-sending country to a country of destination and this in turn led to an increase of the number of PEAs operating in Ireland and in other countries in order to recruit for the Irish labour market.

Faced with these developments, the Irish Department of Enterprise, Trade and Employment (DETE) prepared a discus-

sion paper for the Review of the Employment Agency Act 1971 in May 2004. After receiving comments from organizations of employers (including the recruitment industry) and workers, individual PEAs, Revenue Commissioners, and the Immigrant Council of Ireland, the DETE published a “white paper” on the matter in June 2005 in which it recommended the drafting of a new Bill during 2006.

The proposed legislation is based on ILO Convention No. 181 and is expected to replace the current system of licensing with a registration procedure which includes a Statutory Code of Best Practices. A newly established Statutory Advisory/Monitoring Committee (comprised of representatives of DETE, social partners, and the National Recruitment Federation) will be responsible for monitoring and implementation of the Code. It is also planned to introduce a new complaint procedure.

Source: Ireland (2005c).

### TEXTBOX VIII.4

## The UK Gangmaster Licensing Authority (GLA)

Until recently, recruitment agencies, known as “gangmasters” provided labour for the agriculture and food-processing sector in the UK but functioned essentially without regulation. In 2003, as the result of a tragic incident which led to the death of some 20 migrant cockle pickers recruited through gangmasters, the government decided to change the UK system. This led to the drafting of a voluntary code of conduct by the multi-stakeholder Temporary Labour Working Group (TLWG). Enacted in 2005, the Gangmasters (Licensing) Act makes it compulsory for gangmasters to be licensed and to comply with the TLWG code of conduct. The Gangmasters Licensing Authority (GLA) was established in the same year and is responsible for licensing existing and prospective gangmasters. The Act introduces a criminal offence for gangmasters operating without a licence and penalties for employers (“labour users”) resorting to the services of non-licensed gangmasters.

GLA is required to recover the full cost of its licensing procedure and this will no doubt have an impact on the level of fees. It will make use of inspections at the application stage and after the

licence has been issued. However, application inspections for all labour providers would be very costly and, for this reason, GLA is seeking to implement a risk-assessment approach at the application stage. On the basis of a statistically sound risk profile, which is currently being developed, GLA will audit only those gangmasters whom it sees as constituting a medium to high risk of future non-compliance. In addition, GLA is seeking to follow a proportionate scoring system for compliance, using categories such as critical (safety), critical (other), reportable and correctable. In addition, compliance and the possible risk factor will be assessed on the basis of, for example, interviews with workers and labour providers, data collected from labour providers, and evidence collected by GLA officers. The risk assessment process is aimed at lowering the cost of the overall licensing regime, since labour providers who comply with the regulations will not be burdened with inspection and auditing costs and only those labour providers which are believed to constitute a risk to the rights of affected workers will be targeted for assessment.

Source: UK (2005a).

es, imprisonment, and seizure of assets. The UK Gangmaster Licensing Authority (GLA), established in 2005, is an interesting example of a recent initiative to monitor compliance of recruitment agencies in the agriculture and food-processing sector (Textbox VIII.4).

In addition to the efforts undertaken to halt illegitimate recruitment, punitive measures against a range of diverse actors, such as transport carriers (principally airlines, but also bus and shipping companies),<sup>6</sup> labour migration intermediaries or agents, migrant smugglers and traffickers, and employers, should be introduced. The imposition of sanctions on those who facilitate irregular migration is also supported in pertinent international standards: ILO Convention No. 143 (Part I), ICRMW (Part VI), and the Protocols to the recently introduced UN ICTOC discussed in Sections I.2 and VIII.3 above.

As is evident from the definitions found in the ICTOC Protocols and the recently adopted EU measures, there is now a consensus on the important conceptual difference between migrant smuggling and trafficking. First, trafficking, in comparison to smuggling, does not necessarily involve crossing international borders and second, trafficking should be considered a more serious criminal offence due to the use of coercion, deception, fraud, and violence.<sup>7</sup>

While the imposition of sanctions on those who facilitate irregular migration is considered to be a just method for tackling the abuses that occur, it is important that the penalties are sufficiently substantial to deter the activity. Often, the international criminal organizations involved in trade in human beings factor sanctions into the operation of their illicit business as a manageable loss.

It is important that any punitive measures adopted are uniform, in order that such organizations will not merely shift their operations to a country with the least effective controls and lower sanctions. It is also very important that laws already in place are properly enforced. For example, the number of successful prosecutions of persons facilitating irregular migration is very low in some countries.<sup>8</sup> However, increasing criminalization of this area also raises a number of problematic policy questions. Carrier and employer sanctions have been criticized for “privatizing” immigra-

tion control. For example, carrier sanctions have been denounced by the UNHCR as putting considerable obstacles in the way of refugees fleeing persecution so as to undermine the right “to seek and enjoy asylum” under Article 14 of the Universal Declaration of Human Rights. Employer sanctions have been criticized as increasing the risk of racial and ethnic discrimination against all workers, including national and lawfully resident migrant workers. There has also been some criticism of the type of sanctions imposed against smugglers and traffickers, particularly in the failure to distinguish between serious offences (which are related to international organized crime) and less serious offences. Finally, the criminal offences, if drawn too widely, might also criminalize charitable organizations, NGOs and individuals, providing humanitarian assistance to irregular migrants in destination countries.

#### VIII.4.4 Protection

As observed above, part of the comprehensive approach to prevent or reduce irregular migration should also include measures to ensure the protection of irregular migrant workers, who often face exploitation during travel or transit and in the workplace and who run the risk of serious violations of their human rights. Therefore, minimum guarantees for the protection of irregular migrants should be put into place and implemented as an integral aspect of a preventive approach,<sup>9</sup> without which a restrictive policy to prevent or reduce irregular migration would lack credibility. Importantly, such measures should take into account the gender different needs and concerns of male and female migrants with respect to the violations of their human rights (ILO, 2003c: Booklet 3, 39-97).

As underlined in Section I.1 above, fundamental human rights are conferred upon all persons without distinction in international human rights law. Consequently, irregular migrant workers should, for example, always be protected from slavery-like practices, forced labour,<sup>10</sup> and inhuman and degrading treatment, while being ensured their liberty and personal security (i.e., freedom from arbitrary arrest and detention). According to the Platform for International Cooperation on Undocumented Migrants (PICUM), a NGO involved in the protection of irregular migrants in Europe,<sup>11</sup> the four most important aspects of fair employment conditions

for irregular migrants relate to:

- the right to a fair wage;
- the right to compensation for work accidents;
- the right to defend these rights in the labour courts or tribunals of the country of employment;
- the right to organize.

A particularly exploitative practice concerns the inability of all migrants, whether lawfully resident or irregular, to claim their rights arising out of past employment, such as payment of past wages/remuneration and reimbursement of social security and other contributory benefits. ILO Convention No. 143 calls for equal treatment between irregular migrants and regular migrants in this area (Art.9(1)) (Section I.2.3). Effective implementation of the right to claim past wages would send a message to employers that labour standards will be enforced in respect of all their employees regardless of whether they are national workers (both those employed in the formal and informal labour markets), lawfully resident migrant workers, or irregular migrant workers. With regard to social security, it is not possible, in the absence of bilateral agreements (which, in any event, are normally only applicable to lawfully resident migrant workers), to recover contributions that have been paid. This is also the position for many third-country nationals working in EU Member States. However, where social security contributions have been made, their reimbursement in these circumstances would give irregular migrants a financial incentive to leave the territory voluntarily.

Proclaiming the rights to which irregular migrants should be entitled and securing those rights in practice are two entirely different matters. There are a number of legal and practical obstacles to the enjoyment of these rights. In many countries, criminalization of the provision of assistance to irregular migrants is a significant legal obstacle to the ability of irregular migrants to secure adequate accommodation. Moreover, the legal obligation imposed on officials to denounce irregular migrants (e.g. in Germany) to the immigration authorities can mean that irregular migrants are less able to rely on their rights. In practice, there is also inadequate information available to irregular migrants to enable them to assert their rights. For example, while access to emergency health care is available in most European countries to all persons without distinction

of any kind, including legal status, irregular migrants are rarely informed of this right and doctors are frequently unaware whether such health care can be provided and to what degree (Cholewinski, 2005: 50-52).

Irregular migrants also fear coming forward to the authorities because disclosure of their identity will often trigger actions to remove or expel them from the territory. Clearly, removing these legal obstacles and informing irregular migrants about their rights constitute part of the solution to securing these rights in practice. Moreover, the immediate expulsion or removal of irregular migrants is obviously counter-productive, particularly in cases where action is taken to investigate and prosecute those who have exploited the migrant concerned.

A similar dilemma exists in respect of victims of trafficking or human smuggling. State authorities should consider delaying their removal, by granting them a period for recovery and reflection and a residence permit, depending on the victim's circumstances. Indeed, such measures are supported by the UN Protocol against Trafficking (Art.7(1))<sup>12</sup> and the Council of Europe's recent Convention on Action Against Trafficking in Human Beings (Council of Europe, 2005a: Arts.13-14). The EU has produced a Directive to this effect (2004c), which has to be transposed into the laws of Member States by 6 August 2006. The OSCE Action Plan to Combat Trafficking in Human Beings (APCTHB) also recommends "a reflection delay" for victims of trafficking to give them time to decide whether to act as a witness and the provision of temporary or permanent residence permits on a case-by-case basis taking account of factors such as the safety of the victim (2003: Part V, para.8). A further possible course of action would be to regularize the stay of those irregular migrants who make credible complaints to the authorities, especially employment tribunals and labour inspection authorities (Section VIII.4.5). It should also be possible to encourage irregular migrants to instigate court proceedings against employers by offering anonymity or by granting a power of attorney to their representatives, such as trade unions, to act on their behalf in such proceedings (Cholewinski, 2005: 56). Court proceedings of this kind are possible in Switzerland, for example.

### VIII.4.5 Regularization

Regularizing the situation of irregular migrants poses a dilemma for host countries. On the one hand, regularization sends a signal that clandestine entry with a view to finding illegal employment or overstaying

can be rewarded and may thus serve to encourage further irregular migration. In fact, this outcome is frequently assumed although there is not much evidence to support it. On the other hand, particularly where irregular migrants cannot be removed from the territory for legal, humanitarian or practical reasons (e.g. those

#### TEXTBOX VIII.5

### Recent Regularization Measures in Southern European Countries

#### Italy

Regularization was introduced by a decree-law dated 6 September 2002, initially for the domestic workers market (i.e., nannies and care-workers for the elderly and disabled). It was then extended to other migrants working in illegal employment whose employers were willing to offer them an employment contract. Over 700,000 applications were received during the period between 11 September and 11 November 2002, of which just under 50 per cent were submitted by women domestic workers. A preliminary analysis of applications by nationality indicates: Ukrainians (27%), Romanians (19.3%), Ecuadorians (7.6%), Poles (7.3%), and Moldovans (6.9%). Applicants in other forms of employment were mainly men, of whom Romanians accounted for 22.4%, Moroccans 11.9%, Albanians 11.4%, and Chinese 8.5%.

Sources: OECD (2004a: 218; 2005: 212-213).

#### Portugal

During 2001, Decree Law No. 4/2001 of 10 January 2001 introduced a regularization programme which legalized the position of many irregular migrant workers in Portugal. This regularization programme enabled undocumented or irregular migrant workers, who were offered or had signed a valid employment contract, to regularize their situation. Between 10 January 2001 and 31 March 2003, 179,165 one-year renewable resident permits were issued under this programme. In practice, the regularization programme applied mostly to East Europeans (Ukrainians, Moldovans and Romanians), Russians and Brazilians.

Source: OECD (2005: 254).

#### Spain

The most recent regularization programme in Southern Europe was undertaken in Spain. The programme was one of the reforms introduced to the immigration legal framework by a Decree of 30 December 2004. The objective of the reform was to meet existing demands for labour by broadening legal channels and by also putting in place tougher measures against illegal

employment. A summary of the 2005 regularization programme is provided below. The data collected from the 690,679 applications received indicates that the top three countries of origin were Ecuador (21%), Romania (17%) and Morocco (13%). Most of the applicants were employed in lower-skilled jobs. Moreover, 6 out of 10 applicants were male and the majority of female applicants were working in domestic services.

#### Summary of the Regularization Programme

Primary Objective: Reduce illegal employment by regularizing foreign workers

#### Eligibility Criteria:

- Residence (and registration) in Spain since 8 August 2004;
- No criminal record;
- Future employment contract for at least six months (three months in agricultural jobs).

Application period: 7 February 2005 to 7 May 2005

Number of Applications Received: 690,679

Status Granted: One-year residence and work permit (renewable)

#### Noteworthy Characteristics:

- Employers responsible for regularizing foreign workers (except in the case of independent domestic workers);
- Unprecedented cooperation between Ministry of Interior and Ministry of Labour and Social Issues;
- Consensus and support from employer organizations, unions, and NGOs;
- All other immigration applications and benefits procedures suspended until 8 August 2005;
- Regularization programme part of a larger, more comprehensive immigration reform.

Source: Arango and Jachimowicz (2005).

who have established economic and social ties with the host society), regularization is a viable policy option and should be seriously considered, as it serves to prevent their further marginalization and exploitation.<sup>13</sup>

There are clearly economic benefits for the host country in regularizing its irregular migrant labour force, in terms of increased taxes and social security contributions. Moreover, regularization can serve to combat the informal labour market by affording a legal status to irregular migrant workers who are gainfully employed in the shadow economy. A number of OSCE countries have resorted to regularization measures, particularly in Southern Europe (Greece, Italy, Portugal, and Spain, see Textbox VIII.5), where such meas-

ures have been introduced periodically. The most recent programme took place in Spain in 2005, where nearly 700,000 irregular migrants applied to legalize their status (Arango and Jachimowicz, 2005).

Given the large number of migrants working illegally in the Russian Federation, a pilot regularization was carried out in 10 regions in 2005. The scheme applied to migrant workers who had resided unlawfully and worked in the country for more than three months. Approximately 7,400 irregular migrant workers were legalized. The results of the scheme are currently being assessed with a view to determining whether more general regularization measures should be established (Textbox VIII.6).

#### TEXTBOX VIII.6

### **Pilot Regularization of Illegally Employed Migrant Workers who had entered the Territory of the Russian Federation on a Visa-free Basis (September – December 2005)**

Given the considerable volume of migrants in an irregular situation in the Russian Federation, where 80-90 per cent of all irregular migrants are labour migrants, prompt measures are necessary to reduce this phenomenon. Regularization is the most effective procedure, since it leads to a rapid and considerable reduction in the number of irregular migrant workers while undermining associated illegal activities.

In order to develop a methodology for regularization of irregular migrant workers and to draw up proposals regarding its implementation throughout Russia, the Federal Migration Service, together with the Federal Tax Service and ROSTRUD (Employment Service), carried out a pilot regularization programme for irregular migrant workers who had entered the territory of the Russian Federation on a visa-free basis in ten regions\* between 22 September and 1 December 2005.

For the first time, a new liberal procedure was adopted: all the services involved in the pilot project travelled to the action sites, and were thus able to regularize many illegally resident foreign citizens in a short period of time. In the course of the pilot process, approximately 7,400 irregular migrant workers employed in 403 com-

panies and organizations were regularized. However, several factors hampered the operation, including:

- unreasonably time-consuming procedures for lodging an official application, due to the existence of additional and non-legal bureaucratic barriers in a number of Russian regions. These were caused by the presence of inter-agency commissions, which consider questions relating to the issuance to employers of permits to employ foreign labour;
- fixed rates of State tax regardless of the duration of the migrant's employment;
- complicated temporal residence registration procedures for migrant workers because of the unavailability of suitable housing, as provided for by law.

The findings of the pilot project demonstrated that, in order to create favourable conditions for the legal employment of foreign workers, the following steps are required:

- pursuit of liberalization and amendment of the legal normative acts providing for the use and employment of foreign labour;
- establishment of national and international ex-



## TEXTBOX VIII.6

### Pilot Regularization of Illegally Employed Migrant Workers who had entered the Territory of the Russian Federation on a Visa-free Basis (September – December 2005)(continued)

changes of foreign labour within the CIS region, the Common Economic Area and the Eurasian Economic Community;

- introduction of immigration inspections operating in close cooperation with the national body responsible for labour migration.

The pilot project also demonstrated that the liberal approach for filing official papers for employment resulted in employers taking a greater interest and assisting a significant number of migrant workers in their regularization. It also showed that there would be benefits for the national economy if regularization procedures were extended to the whole of the Russian Federation.

According to the Federal Migration Service, over one million irregular migrant workers could be legalized in a large-scale regularization exercise. This would lead to:

- a decrease in the number of migrant workers residing in the country without legal status;
- a reduction of the adverse impact of irregular labour migration on the labour market, on informal employment in general, and on other areas of the national economy and social life, including crime rates and corruption;
- a more efficient commitment to the potential that

labour migration offers for Russia's economic and demographic development, in particular by increasing revenues for federal and regional budgets, due to the legalization of incomes earned by regularized migrant workers. Indeed, this regularization pilot programme injected approximately RUB 29.5 million into the budget through the payment of State duties following the issuance of work permits for 7,364 foreign workers. In addition, the budget will receive:

- o approximately RUB 10 million per month in income tax;
- o approximately RUB 20 million in individual social security tax payments.

For every year of regularized work, migrant workers will contribute approximately RUB 350 million to the State treasury, a figure which increases to nearly RUB 380 million, when State duties are included.

\* The City of Moscow, the Moscow Oblast, Saint Petersburg, Ekaterinburg, Krasnoyarsk Krai, Omsk, Irkutsk, Primorski Krai, the Sakhalin Oblast and Krasnodar Krai.

Source: IOM Moscow, March 2006.

## TEXTBOX VIII.7

### Regularization – The Right to Earned Adjustment

“Countries would be better off regularizing the status of workers whom they cannot send back home. This benefits not only the migrants but the country as a whole. In this connection, a principle that seems to have wide implicit resonance in the regularization policies of many countries is that of earned adjustment. Migrant workers with irregular status may be said to earn a right to legal status if they meet certain minimum

conditions: they must be gainfully employed, they must not have violated any laws other than those relating to illegal or clandestine entry, and they must have made an effort to integrate by (for example) learning the local language”.

Source: ILO (2004: 120, para. 399).

As an alternative, or a complement, to more general ‘unique’ regularization measures, ILO has argued in favour of an individual right to “earned adjustment” for irregular migrant workers who cannot be removed and who have demonstrated that they have a prospect of settling successfully in the country concerned (Textbox VIII.7).

### VIII.4.6 Return

An important component in preventing or reducing irregular migration is ensuring that irregular migrants leave the country in which they are residing in an irregular manner. This is frequently identified as an integral part of a well-managed and credible policy on legal migration.

Voluntary return is widely regarded as the “most dignified and least costly return option” (IOM, 1999:19; 2003d; 2004a), in contrast to measures of forced return. IOM implements a number of programmes, in cooperation with its Member States, to assist the voluntary return or departure of irregular migrants, unsuccessful asylum-seekers, as well as other migrants who wish to return home but experience difficulties in doing so. The assistance provided by IOM takes the

form of a comprehensive range of measures applicable to the whole return process and may include:

- information dissemination within immigrant communities;
- counselling services for migrants interested in eligibility and reintegration options/support, particularly those who have been away from their countries of origin for a considerable period of time;
- assistance with documentation and travel arrangements, including during transit;
- reception on arrival, referrals and in-country onward transportation home;
- provision of further reintegration assistance in the home country, including financial, and/or in-kind support;
- monitoring of the reintegration process of returnees (IOM, 2006).

The OSCE Action Plan to Combat Trafficking in Human Beings also favours voluntary return in the context of repatriation (2003: Part V, para.5.1).

In practice, however, many of the measures adopted by individual countries relate to forced return, ei-

#### TEXTBOX VIII.8

### Proposed Directive on common standards and procedures for returning illegal residents (EU, 2005c)

#### Key points

- It responds to a call by the European Council in the Hague Programme (December 2004) to establish common standards for persons to be returned in a humane manner and with full respect for their human rights and dignity.
- “Effective return policy is a necessary component of a well managed and credible policy on migration. Clear, transparent and fair rules have to be agreed which take into account this need, whilst respecting the human rights and fundamental freedoms of the person concerned”.

#### Main features:

- A return decision is to be issued to any third-country national staying illegally on the territory.
- Voluntary return should be possible during an initial period of 4 weeks.

- A two-step procedure (return decision followed by a removal order) should be applicable.
- Forced return measures are to be applied proportionately.
- A re-entry ban is to apply for a maximum of 6 months.
- Minimum procedural safeguards should be put into place.
- Limited temporary custody (detention) is permissible where there are serious grounds to believe that there is a risk of the irregular migrant absconding and where application of less coercive measures is not sufficient to prevent this.
- Detention of irregular migrants should only take place on the basis of a temporary custody order issued by judicial authorities which should be subject to further judicial review at least once a month. Member States are obliged to ensure that third-country nationals in custody are “treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law”.

ther expulsion or deportation. In the EU, it can be argued that insufficient attention has been devoted to voluntary return, where efforts have focused on promoting cooperation and facilitating forced returns.<sup>14</sup> Moreover, there are currently no harmonized standards for the return of irregular migrants and the law and practice relating to procedures and norms applicable in the return process differ from EU Member State to Member State.<sup>15</sup> However, in September 2005, the European Commission submitted a proposal to the Council of Ministers and the European Parliament for a Directive which, if adopted, will provide for common approach among EU Member States on this important question (Textbox VIII.8) (EU, 2005c). It is currently under deliberation by the EU Council of Ministers.

OSCE countries have concluded readmission agreements among themselves and with third countries. The EU and its Member States have also adopted EU-wide readmission agreements with third countries. One agreement with Albania, an OSCE participating State, has now come into force, and the agreement with the Russian Federation was initialled in October 2005 (EU, 2005e).<sup>16</sup> These agreements include reciprocal arrangements for contracting parties to take back their own nationals found residing without authorization in the other Contracting party and other irregular migrants arriving from the territory of that party.<sup>17</sup> Readmission agreements are considered necessary by destination countries as countries of origin are often reluctant to take back individuals, in the case of return enforcement, usually because of a lack of consensus on the evidence necessary to prove that the person is a national of that country or, if not a national, that he or she has indeed come directly from that country's territory.

#### VIII.4.7 Opening up more legal channels for labour migration

As observed in Sections VIII.1 above, irregular migrants clearly fill a gap in the labour markets of destination countries, particularly by undertaking those difficult and unattractive jobs that nationals no longer wish to perform (e.g. agriculture, construction, catering, cleaning, domestic services). Many countries and employers actively seek migrant workers for highly-skilled positions and increasingly for work in low-skilled sectors. While not necessarily a panacea for reducing irregular labour migration flows, these de-

mands need to be addressed and opening up more legal channels for labour migration should be an integral part of a comprehensive policy-coordinated approach to irregular labour migration. Moreover, it is important that policies establishing legal migration routes are equitable and sufficiently attractive (for example, by accommodating more than nominal numbers of migrant workers and involving a minimum amount of bureaucratic procedures) to deter potential migrants from travelling by irregular means.

#### VIII.4.8 Inter-state cooperation

A further important component of these measures is bilateral and multilateral cooperation. On the multilateral level, as discussed in Section IX.1.7.1 below, ICRMW and ILO instruments on migrant workers specifically promote such cooperation between States, including on migration policies and regulations, conditions of work as well as measures to address irregular migration.

The adoption of readmission agreements (Section VIII.4.6 above) clearly forms part of this approach, although, in the EU context, it has been recognized that there are very few incentives for third countries to enter into such agreements. Although such agreements are reciprocal in nature, as they apply to both contracting parties, the principal beneficiaries are destination countries. To encourage third countries to enter into readmission agreements and promote more effective bilateral cooperation between origin and destination countries, readmission agreements could be combined with legal labour migration channels by setting up quotas for migrant workers from third countries. For example, Italy has reserved a fixed number of places in its annual immigration quota for nationals of certain countries with which it has concluded readmission agreements (Textbox VI.1). It has also adopted bilateral labour migration arrangements with these countries. The UK Government is also planning to restrict low-skilled legal migration routes to countries with which it has organized effective return arrangements (UK, 2006b: 29). On the EU level, facilitated admission for short-term visits and other purposes is being offered to third countries as part of an overall package deal on readmission. Thus, in concluding a readmission agreement with the Russian Federation, the EU also initialled a visa facilitation agreement

### EU-Russian Federation Agreement on Visa Facilitation

This agreement eases procedures for issuing short-stay visas (i.e., for intended stays of no more than 90 days) for Russian and EU citizens travelling to Schengen Member States (EU Member States except the UK, Ireland and Denmark) and the Russian Federation. The following facilitations are covered by the agreement:

- In principle, for all visa applicants, a decision on whether or not to issue a visa will be taken within 10 calendar days. This period may be extended by up to 30 days where further scrutiny is needed. In urgent cases, the period for taking a decision may be reduced to 3 days or less.
- The documents to be presented have been simplified for some categories of persons: close relatives, business people, members of official delegations, students, participants in scientific, cultural and sporting events, journalists, persons visiting military and civil burial grounds, drivers conducting international cargo and passenger transportation services. For these categories of persons, only the documents listed in the agreement can be requested for justifying the purpose of the journey. No other justification, invitation or validation provided for by the legislation of the Parties is required.
- Visa fees applied by Russia have been substantially reduced and aligned to the Schengen visa fee (35 €). This fee will be applied to all EU and Russian citizens (including tourists) and concerns both single and multiple-entry visas. It is possible to charge a higher fee (70 €) in case of urgent requests, where the visa application and supporting documents are

submitted by the visa applicant three days or less before his/her departure. This does not apply to cases relating to travel for humanitarian reasons, health, and death of relatives. Moreover, for certain categories of persons the visa fee is waived: close relatives, officials participating in government activities, students, persons participating in cultural and educational exchange programmes or sporting events and humanitarian cases.

- Criteria for issuing multiple-entry visas are simplified for the following categories of persons:
  1. for members of national and regional governments and parliaments, Constitutional and Supreme Courts and spouses and children visiting citizens of the EU or the Russian Federation, who are legally resident but with limited duration for the validity of their authorization for legal residence: visa of up to five years;
  2. for members of official delegations, business people, participants in scientific, cultural and sporting events, journalists, drivers and train crews, provided that during the previous two years they have made use of 1 year multi-entry visas and that the reasons for requesting a multi-entry visa are still valid: visas for a minimum of 2 years and maximum of 5 years.
- Both Parties agree to undertake measures as soon as possible with a view to simplify registration procedures.
- Holders of diplomatic passports are exempted from the visa requirement for short stays.

Source: EU (2005g).

(Textbox VIII.9), and visa facilitation is currently being negotiated with the Ukraine.

Another form of bilateral cooperation is the exchange and posting of “immigration liaison officers”. This has been taking place throughout the EU and in neighbouring countries and is now covered by EU Council Regulation 2004/377/EC (EU, 2004a). These immigration liaison officers are usually seconded to the other country’s Interior or Foreign Ministry (but they can also be posted to the Labour or Overseas Employment Ministry) and may assist in identifying and preventing potential irregular flows of migrant workers, returning irregular migrants, and organizing legal labour migration.

A broader approach to inter-state cooperation on preventing and reducing irregular migration involves the integration of migration issues in regional cooperation and development activity, which is something that the EU has increasingly included in the external relations dimension of its migration policy (EU, 2005b). Relevant measures here may include promoting “brain circulation”, enhancing the impact of remittances on development, harnessing the potential of the Diaspora to promote development in countries of origin, and targeting development assistance with a view to creating employment opportunities in regions in the country of origin identified as having a high potential for irregular migration.

## ENDNOTES

- 1 For the purpose of this section, irregular migration encompasses migrant workers who enter a country clandestinely or illegally and those who have entered lawfully but who engage in employment without authorization. This understanding conforms to the definition in ICRMW (UN, 1990: Art.5), which stipulates that migrant workers and members of their families are considered to be in a non-documented or irregular situation if “they are [not] authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party”.
- 2 For example, 58 Chinese nationals died when they suffocated in an articulated lorry transporting tomatoes to England in 2000 (Reid et al., 2000).
- 3 For a recent human rights approach, see the Council of Europe’s Convention on Action against Trafficking in Human Beings (2005a), which was opened for signature in May 2005. To date, 25 countries have signed this Convention, but not one has ratified it.
- 4 See Council Framework Decision 2002/629/JHA (EU: 2002b) on combating trafficking in human beings; Council Directive 2002/90/EC (EU, 2002d) defining the facilitation of unauthorized entry, transit and residence and Council Framework Decision 2002/946/EC (EU, 2002e) on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence. For “soft law” measures, see Proposal for a Comprehensive Plan to Combat Illegal Immigration and Trafficking of Human Brings in the European Union (EU, 2002a) and the EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings (EU, 2005a).
- 5 ICRMW contains provisions obliging States Parties to inform migrant workers of their rights under the Convention and job conditions in the country concerned (Art.33).
- 6 However, policy-makers, especially in poorer OSCE countries, should seriously consider whether the introduction of carrier sanctions (as introduced in EU Member States and elsewhere) would dissuade foreign airlines from operating, leading to an adverse impact on their economic development.
- 7 See the definition of “trafficking in persons” in UN (2000d: Art. 3(a)): “‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”. The OSCE Action Plan to Combat Trafficking in Human Beings is also based on this definition (2003: Part II).
- 8 E.g. in the UK, there were only 8 successful prosecutions against employers in the period 1998-2002 and, in 2002, only 53 employers were fined for immigration violations in the whole of the US (Ruhs, 2005: 214) (references omitted).
- 9 As noted in Sections I.2.2 and VIII.3 above, ICRMW adopts a dual approach to addressing irregular migration: it seeks to prevent and discourage clandestine movements and illegal employment (Part VI), while underlining the necessity of protecting the basic rights of irregular migrant workers and members of their families (Part IV).
- 10 The right not to be subjected to forced labour practices is also one of the fundamental human rights protected under the ILO Constitution, the Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105), which, according to the 1998 ILO Declaration on Fundamental Principles, should be adhered to by all ILO Member States irrespective of whether they have accepted the relevant instruments (Section I.3 above).
- 11 For more information on PICUM’s activities, see <http://www.picum.org/>. See also LeVoy and Verbruggen (2005).
- 12 Trafficking victims can also obtain residence status in a number of jurisdictions, such as Belgium and Italy, and victims of workplace exploitation can also be protected in this way in Spain.
- 13 E.g. the European Commission recognized (EU 2003b: 26) that regularizing irregular migrants who correspond to these criteria made sense from the standpoint of integration and the fight against social exclusion.
- 14 See e.g. the EU Council’s Return Programme (EU 2002f: para. 12): “Notwithstanding the importance to be attached to voluntary return, there is an obvious need to carry out forced returns in order to safeguard the integrity of the EU immigration and asylum policy and the immigration and asylum systems of the Member States. Thus the possibility of forced return is a prerequisite for ensuring, that this policy is not undermined and for the enforcement of the rule of law, which itself is essential to the creation of an area of freedom, security and justice. Moreover the major obstacles experienced by Member States in the field of return occur in relation to forced returns. Therefore the programme to a large extent focuses on measures facilitating forced returns, although some of the measures are also relevant with regard to voluntary return”.
- 15 However, a number of common safeguards relating to forced return (including detention) have been agreed at the level of the Council of Europe (Council of Europe, 2005b).
- 16 Agreements with Macao and Hong Kong have also entered into force, while negotiations with Algeria, China, Morocco, Pakistan, Turkey, and Ukraine continue.
- 17 Readmission agreements have been criticized by civil society organizations on the grounds that they may permit the return of persons to the other Contracting party based on limited evidence and that they contain insufficient guarantees against the return of those who may be in need of international protection.

# IX. Inter-State Cooperation

This chapter of the *Handbook* focuses on cooperation between destination and origin countries in managing labour migration. Dialogue and cooperation among states involved in labour migration processes is essential if international labour migration is to benefit all the stakeholders involved (i.e. destination and origin countries, the migrant workers themselves, employers, trade unions, recruitment agencies, civil society, etc.). This chapter provides a broad overview of inter-state cooperation in managing labour migration outlining the different levels of cooperation, both formal and informal, in which States are involved at the bilateral, regional and global level.

## IX.1 Formal Mechanisms

Formal mechanisms of inter-state cooperation are essentially legally binding treaty commitments relating to cooperation on labour migration, which states have concluded at the bilateral, regional and global level. These agreements may take the form of treaties solely concerned with this subject, as is the case with bilateral labour agreements<sup>1</sup> discussed in Section X.I.I below, or broader agreements, such as the specific regional and international conventions relating to the protection of migrant workers, which also include provisions on inter-state cooperation. The various forms of formal cooperation are also inter-linked. For example, a regional or international agreement will sometimes place obligations on contracting parties to cooperate (or at least encourage them to do so) at the bilateral level where success in a particular field is most likely to

be achieved. This is a common approach in regional and international treaties on the protection of migrant workers and their provisions relating to social security (Section VII.5.4 above).

### IX.1.1 Bilateral labour agreements

Bilateral labour migration agreements (BLAs) formalize each side's commitment to ensure that migration takes place in accordance with agreed principles and procedures. OECD countries alone have negotiated more than 170 wide-ranging BLAs currently in force (OECD, 2004d). However, access to labour markets is not the only reason for BLAs. The principal purposes are:

- **Economic:** as described in Section IX.1.1.1 below, BLAs on short-term employment of less than a year (seasonal employment) exist between a number of countries. Economic sectors with seasonal labour requirements (e.g. agriculture, tourism, construction) can find human resources lacking in the domestic labour market, while the migrant and the country of origin benefit from increased earnings.
- **Political:** BLAs may also be motivated by political reasons, whether to confirm friendly relations or reinforce cooperation in managing irregular migration (e.g. Italy and Spain). Such agreements may include quotas.
- **Development:** BLAs may be aimed at preventing indiscriminate international recruitment in sectors, such as health services, which have a direct bearing on development in poorer countries (e.g. health agreements with the UK).

BLAs can set up procedures for regulating the whole labour migration process from entry to return, with advantages for both destination and origin countries. For countries of origin, in particular, they ensure their nationals obtain employment and are adequately protected in the destination country.

#### IX.1.1.1 Inter-state BLAs<sup>2</sup>

Bilateral labour agreements offer an effective method for regulating the recruitment and employment of foreign short- and long-term workers between countries. They can take the form of formal treaties or less formal memoranda of understanding (MoUs), or even very informal practical arrangements, e.g. between national employment agencies. An important difference between BLAs as formal treaties and MoUs is that the latter are not legally binding, although the effectiveness of a bilateral agreement or a MoU is determined less by its legally binding nature, than by how it is implemented and enforced in practice. Moreover, any absence of references to labour protections in MoUs should not be seen as reducing the safeguards already in place under national labour legislation or the commitments contracted at the regional and international levels. Indeed, MoUs may contain explicit statements defining the application of national labour legislation to the employer-employee relationship.

Most global labour flows take place outside the scope of BLAs, whether through immigration or emigration programmes set up unilaterally by destination countries, or through regional arrangements (Section IX.1.3-6). Moreover, as noted in Chapter VIII above, many labour migration flows are irregular and clandestine in nature.

BLAs allow for greater state involvement in the migration process and offer human resource exchange options tailored to the specific supply and demand of the countries involved. By encouraging orderly movement of labour, they promote good will and cooperation between origin and destination countries. They can also address issues relating to temporary labour migration by including terms and procedures for return and flexible visa arrangements, where long-term or permanent options exist.

BLAs can provide arrangements for temporary employment of seasonal and low-skilled foreign labour. Industrialized countries requiring foreign labour enter into bilateral agreements with partner states for targeted labour exchange programmes that steer inward flows to specific areas of labour demand. However, as discussed later in this section, not all BLAs have been successful in meeting their objectives.

Countries began to negotiate BLAs during the second half of the 20th century, when large emerging economies in the New World chose to meet their huge needs for labour through immigration. They sought to establish bilateral agreements with countries of origin in order to overcome labour scarcity in the period following the Second World War. Between 1942 and 1964, the US admitted some 5 million farm workers under the Bracero programme signed with Mexico (Martin, 2003: 7). Canada, Australia and Argentina admitted large numbers of migrants, principally through agreements with European countries. In the 1950s and 1960s, European countries, such as Germany and France, actively recruited so-called guest workers,

mainly from Portugal, Spain, Turkey, and North Africa. These programmes came to an end with the economic downturn of the 1970s, triggered by the oil crisis.

During the last ten years or so, there has been renewed interest in BLAs. Among OECD countries, their numbers quintupled in the 1990s, and today stand at 176 (Bobeva and Garson, 2004: 12). In Latin America, half of the 168 agreements signed during the last 50 years were concluded after 1991. After the collapse of the Soviet Union, Central European, East European and Central Asian countries developed a wide range of agreements, some within the region or with neighbouring EU Member States, others with EU countries that had evolved from emigration countries to immigration countries, such as Portugal or Spain. A number were also signed with overseas countries, for example an agreement between Ukraine and Argentina.

In the CIS region, the 1994 regional framework Agreement on Cooperation in Migration for Employment and Social Protection of Migrant Workers, discussed in Section IX.1.6 below, was expected to be implemented through BLAs between the contracting parties. Armenia, Belarus and the Russian Federation have to date concluded the largest number of agreements with other countries in the region.<sup>3</sup> These BLAs may include clauses which:

- identify the competent authorities in each country responsible for fulfilling the obligations in the agreement;
- specify the rights and obligations of the contracting parties;
- confirm the rights of migrant workers which are to be protected;
- include provisions on preventing irregular migration.

As an example of a BLA, the main provisions of the recent agreement between the Russian Federation and Tajikistan are summarized in Annex 6.

BLAs abound between neighbouring countries (e.g. a BLA between Switzerland and EEA countries on the free movement of persons, which entered into force in 2002; a BLA signed by Argentina and Bolivia and Peru in 1998), or between countries on different continents

#### TEXTBOX IX.1

### 24 Basic Elements of a Bilateral Labour Agreement

1. the competent government authority;
2. exchange of information;
3. migrants in an irregular situation;
4. notification of job opportunities;
5. drawing up a list of candidates;
6. pre-selection of candidates;
7. final selection of candidates;
8. nomination of candidates by the employers (possibility for the employer to provide directly the name of a person to be hired);
9. medical examination;
10. entry documents;
11. residence and work permits;
12. transportation;
13. employment contract;
14. employment conditions;
15. conflict resolution mechanism;
16. the role of trade unions and collective bargaining rights;
17. social security;
18. remittances;
19. provision of housing;
20. family reunification;
21. activities of social and religious organizations;
22. establishment of a joint commission (to monitor the agreements' implementation);
23. validity and renewal of the agreement;
24. applicable jurisdiction.

Source: Geronimi (2004: 23-26).

(Spain with Ecuador (see Annex 8), Colombia, Morocco in 2001, and with the Dominican Republic in 2002).

Since the adoption of the Migration for Employment Convention 1949 (No. 97),<sup>4</sup> ILO has been promoting BLAs and offers governments a ready-made model for temporary and permanent migration (Migration for Employment Recommendation (Revised) 1949 (No. 86), Annex) (Textbox IX.6), which has been used by various states (Argentina, Austria, Barbados, Chile, Cyprus, Colombia, Korea, UAE, Ecuador, France, Guatemala, India, Kenya, Lebanon, Mauritius, Myan-



mar, Portugal, Romania, Rwanda, Tajikistan and Uruguay). ILO has identified 24 basic elements of a bilateral labour agreement ranging from the identification of the competent authorities to the working conditions of migrant workers (Textbox IX.1).

Some items included in the model, such as social security or irregular migration, tend to be dealt with by states in separate agreements. Examples can be found in bilateral social security agreements signed by the US with 20 countries and readmission agreements signed between several European countries and countries of origin.

#### IX.1.1.2 Sector-specific MoUs

In addition to inter-state agreements, “bilateral arrangements”, usually in the form of MoUs, have been adopted between the government of a country of origin, whether at the national or regional level, and representatives of the specific employment sector in the destination country for the recruitment of foreign workers for that sector. This type of MoU has been adopted between the Philippines Government and the UK Department of Health.

Such MoUs may involve agreements between associations of employers in a certain sector and local or regional governments in the host country. In Canada, employer associations in the tool machinist and construction industries and the Ontario provincial government signed MoUs with a two-year time-limit, in 2001, and there is currently a MoU to facilitate the admission of temporary foreign workers for employment on projects in the oil sands of the province of Alberta.<sup>5</sup>

A disadvantage of this second form of sector-based MoU, from the perspective of the country of origin, is that it is wholly internal. Its government is not involved in the negotiations for its adoption and thus not in a strong position for ensuring that worker protection guarantees are included. Bilateral labour agreements and inter-state MoUs, on the other hand, are part of external relations between the States parties, although the bargaining power of the two countries involved in the negotiations may differ considerably.

Provisions in sector-based MoUs may include the identification of longer-term measures to be taken by

employers in that sector for filling labour shortages domestically. Consequently, they may provide for temporary foreign labour migration in the short-term, but preclude such migration becoming a permanent solution over the long-term. Moreover, employers may be subject to obligations to guarantee security in the workplace and provide basic language training necessary for undertaking the work. This latter obligation is also an important feature in terms of security, particularly in “dangerous work places” where it is important for migrant workers to be able to read warning signs, and safety documents.

#### IX.1.1.3 Destination country perspective

For the destination country, BLAs can meet labour market needs quickly and efficiently, whether for low-skilled seasonal workers in the agriculture, tourism and construction sectors or for more skilled medical, educational, and other personnel needed to meet more structural labour market shortages. In addition, they can usefully support broader regional, commercial and economic relations by aiding the development of the country of origin and facilitating its regional integration. Notable examples of this are the various agreements for temporary labour migration signed by Germany (Section VI.4.3.1 above), and other EU Member States with Central and Eastern European countries.

BLAs can help prevent or reduce irregular migration by offering alternative legal channels to migrate for employment, which, in turn, can provide a negotiation tool to secure country of origin willingness to cooperate on managing irregular migration (particularly on readmission of their nationals). In 1997, Italy and Albania signed a labour agreement in parallel with a readmission agreement, in which Albania accepts the return of its irregular nationals.

BLAs may also contain special provisions on return. For example, Spanish labour migration agreements with a number of countries require migrant workers to report to Spanish consular authorities on their return to their country of origin.<sup>6</sup> The purpose of this provision is to give migrants an incentive to return home by promising them a prospect of obtaining longer-term residence status in Spain, if they are offered employment in the future.<sup>7</sup>

Some agreements between Argentina and its neighbours (Bolivia, Peru) also offered regularization for undocumented workers. In July 2003, a bilateral agreement signed between Portugal and Brazil created a specific legal mechanism for reciprocal regularization of the nationals of each country residing without authorization in the other's territory.<sup>8</sup>

Finally, BLAs help strengthen ties between countries that share some cultural or historical links. The UK and other Commonwealth countries have mutual "Working Holiday Maker" programmes,<sup>9</sup> which allow young persons to live and take on part-time or casual work for an extended holiday of up to two years, though these are not always strictly-speaking BLAs.

#### **IX.1.1.4 Country of origin perspective**

Countries of origin see BLAs as a useful vehicle to increase access to the international market for their workers and to negotiate appropriate wages, living conditions, and job security for their nationals abroad. They offer the certainty of agreed definitions and terms of implementation and monitoring of workers' rights and entitlements. They can also facilitate the acquisition or enhancement of vocational skills and qualifications, such as training programmes for young professionals.

BLAs can also provide a basis for sustained remittance flows, technology transfers, and the general development of human capital, all of which constitute important contributions to the development of countries of origin. Agreements can also include measures for return migration or the repatriation of skills and knowledge. BLAs signed by Spain with Colombia and Ecuador, for example, provide for projects to facilitate the voluntary return of temporary migrants through training and recognition of the experience acquired in Spain, as well as through creation of small and medium bi-national enterprises, development of human resources and transfer of technology.

Agreed quotas for highly skilled workers can also form an integral part of the country of origin's human resource development strategy. They give the country a share in the international labour market, while managing the depletion of scarce human resources needed at home. In 2002, the Dutch and Polish Ministers of

Health signed a letter of intent for the implementation of a project entitled "Polish Nurses in The Netherlands, Development of Competencies", in order to prepare nurses for employment in the Dutch health care system for a maximum period of two years, and to facilitate their return and reintegration into the Polish health care system after return. Thus, BLAs can give employers an opportunity to arrange pre-departure training for their labour immigrants, as foreseen in the agreements signed by Spain and in Italy's "second-generation" agreements, which were signed after the conclusion of a readmission agreement.

The Philippines has entered into 12 labour agreements (not including those on maritime and social security) with various host countries of Filipino labour. Of these, four are with European countries and these agreements tend to be more focused. The agreement with Switzerland involves an exchange of professionals and technical trainees for short-term employment; that with the United Kingdom aims to facilitate the recruitment of Filipino health professionals; while the Philippines-Norway agreement will develop cooperation in order to reduce the need for professionals in Norway's health sector and to promote employment opportunities for Filipino health personnel. The Philippines has recently entered into a labour cooperation agreement with Indonesia, itself a labour-sending country, in order to enhance the effective management of migration and thus promote and protect the welfare and rights of Filipino and Indonesian migrant workers (IOM, 2003b).

#### **IX.1.1.5 Duties to cooperate in international and bilateral agreements**

International and regional treaties for the protection of migrant workers often refer to bilateral agreements. As discussed in Section IX.1.1.1 above, ILO Recommendation No. 86 includes a model bilateral agreement, as an Annex, and this has been used by a number of countries to develop their own agreements.

A governing principle in many international and regional instruments is that the provisions therein are subject to the more favourable standards found in other multilateral treaties, bilateral agreements or national legislation.<sup>10</sup> Some specific international instruments on migrant workers also refer to bilateral agreements

with a view to broadening the categories of protected migrants or augmenting rights. For example, the definitions of self-employed migrant workers or dependant relatives of migrant workers in the UN Migrant Workers Convention can effectively be extended by virtue of bilateral agreements (Arts.2(h) and 4 respectively). Similarly, IRCMW imposed important obligations on States of employment with regard to giving family members an authorization to stay in the country after the death of a migrant worker or, if this is not possible, a reasonable time to settle their affairs before departure, yet these are subject to the more favourable provisions in bilateral agreements (Art.50(3)).

In a few instances, IRCMW also refers to bilateral agreements in the context of limiting rights (Art.52(3)(b)). For example, States parties are instructed to consider granting family members of migrant workers or seasonal workers, who have worked in the State of employment for a significant period of time, priority over other workers seeking access to the labour market, although these provisions are subject to applicable bilateral and multilateral agreements.<sup>11</sup>

Finally, specific ILO instruments on migrant workers, IRCMW, the European (Revised) Social Charter, the European Convention on the Legal Status of Migrant Workers and ILO and Council of Europe social security instruments recognize that the right of migrant workers to social security on a basis of equality with nationals cannot be adequately protected without further inter-state cooperation on the bilateral level.

#### IX.1.1.6 How effective are bilateral agreements?

The effectiveness of bilateral agreements is difficult to measure, as they often pursue several objectives simultaneously and give different weight to the various policy priorities. There has been little research on the implementation and impact of these agreements. The past failure of temporary labour migration programmes, which operated on the basis of BLAs, to prevent overstay has been documented (Textbox VI.17). Other programmes, however, have been more successful in this regard.

Do BLAs improve the management of labour migration? They can create more transparent mechanisms by involving the key players at different stages of design and implementation of the agreement, as seen in the

way Italy has involved employers' groups, trade unions and other interested parties in setting quotas. The Spain-Ecuador/Colombia agreements involve selection committees in the country of origin, which include embassy and employer representation. Built-in encouragements for temporary migrants to return, such as in Canada's seasonal agriculture workers programme, which allow the migrants to be re-selected by the previous employer, seem also to have had a positive effect on potential irregular migration.

Nevertheless, some 25 per cent of bilateral agreements in OECD countries are apparently not implemented. The most operational seem to be those that obey the demand-supply imperative, as opposed to pursuing political objectives. These include the Canadian seasonal agriculture programme and the UK agreements on recruitment of foreign nurses with Spain, India and the Philippines. The extent to which employers will take advantage of BLAs depends on the efficiency of the system, geographic location of the workers (where the travel cost is borne by the employer), number of available irregular migrants, and employer-friendly nature of other immigration programmes.<sup>12</sup>

BLAs may also constitute a restraint on migrant workers or even exclude them from regular migration programmes, because of age limits, quotas and language requirements. The Hungary-Romania labour agreement does not seem to have been entirely successful since most Romanian applicants seem to prefer to commute over their common border to undeclared jobs in Hungary.

Negotiating a BLA is often a lengthy and time-consuming process. According to the Philippines government, although bilateral labour agreements have proved to be effective in addressing issues and concerns affecting the employment of workers, they take a long time to be developed and implemented. Thus, in recent years, the Philippines has steered away from the formulation of general agreements and worked towards the adoption of more focused agreements which are easier to negotiate and make operational in host countries.

Some major destination states are not particularly interested in entering into specific agreements, especially those in Asia which (with some exceptions) do not seek to engage the states of origin in bilateral or multilateral

### IOM Assistance in the Implementation of Bilateral Labour Arrangements

IOM assists migrants, employers and governments in facilitating regular labour migration. It has facilitated two such initiatives with the Italian Government, one with Sri Lanka and the other with Moldova. Under both programmes, IOM offers its technical assistance for pre-selection, selection, vocational training/orientation, travel assistance and support to the social integration and labour insertion of migrant workers.

Both projects are supported by the Italian Ministry of Labour within the framework of the Italian Governmental Decree on Migratory Flows 2004, which envisages special entry quotas for Sri Lankan and Moldovan

migrant workers, among others, and the Italian Law assigning a “preferential entry right” to workers trained abroad.

IOM has also established a third programme for the Canadian Province of Québec which assists the recruitment and transfer of Guatemalan agricultural workers on behalf of Québécois employers. This programme has been successful achieving circulation of labour and return of migrant workers to Guatemala after completion of their employment in Québec (Textbox VI.13)

Source: IOM, Labour Migration Division.

agreements to establish rules governing international labour migration. Without particular leverage or special relationship with the concerned destination country, many states of origin find negotiating BLAs in order to obtain privileged access to foreign labour markets particularly difficult to achieve.

Nevertheless, in the absence of a global regime for international labour migration, BLAs are an important mechanism for inter-state cooperation in protecting migrant workers, matching labour demand and supply, managing irregular migration, and regulating recruitment. Where BLAs have worked as a mechanism for the temporary employment of foreign workers, the main reasons seem to be that:

- they target specific sectors with a severe labour shortage;
- there is a quota or ceiling;
- recruitment is organized;
- employers are engaged;
- above all, there is circulation of labour (Baruah, 2003b).

The involvement of employers and their organizations in the implementation of BLAs contributes significantly to their efficiency.

Once established in principle, BLAs require special administration to ensure their smooth opera-

tion, including promotion of the programme in countries of origin, recruitment, testing and certification of applicants for the programme, timely data flow and information sharing between the two countries, migrants and consular offices concerned, and efficient travel logistics. IOM supports government efforts to put these elements into place or provides the services directly (Textbox IX.2).

#### IX.1.2 Regional integration and regional agreements: overview

As observed earlier, regional cooperation for the management of labour migration can be divided into formal mechanisms of regional integration and regional agreements, including free movement of labour initiatives and obligations to cooperate in regional treaties, and less formal mechanisms, such as regional consultative processes and other informal arrangements.

As far as formal regional mechanisms of integration are concerned, the free movement of labour regime of the European Union is the most comprehensive. It is discussed in some detail in Section IX.1.3 below. Other formal regional integration mechanisms are NAFTA (Section IX.1.4 below) and the Association of Southeast Asian Nations (ASEAN) free trade block in south-east

Asia. These play an important role in facilitating labour migration, although, as discussed below with reference to NAFTA, they are generally limited to business persons and highly-skilled professionals.

Visa-free arrangements applicable to OSCE participating States also exist on both intra-regional and inter-regional levels. A good example on intra-regional arrangements is the visa-free regime operating between the Russian Federation and other CIS countries, (see Section IX.1.5 below).<sup>13</sup> On the inter-regional level, the EU has adopted a “positive” list of countries, operational in 23 Member States.<sup>14</sup> Nationals from listed countries can travel to the EU without a visa for up to 3 months within a six-month period. The list includes Canada and the US, and countries set to join the EU, such as Bulgaria, Croatia and Romania.<sup>15</sup>

Labour migration is facilitated to a greater or lesser degree by regional integration processes, which are usually driven by economic factors, such as the establishment of free trade arrangements between countries in the region, with a view to optimizing the potential of markets and economic opportunities. They normally include provisions for the facilitation of the movement of nationals from participating Member States or Contracting parties for the purposes of employment and residence.

Such arrangements may range from extensive free movement regimes applicable to all categories of persons, including workers, as in the EU, to more limited provisions focusing on the movement of business visitors, professionals, other highly-skilled persons, and service providers, which is the position under NAFTA. The next section focuses in some detail on these two regimes and on developments in the Commonwealth of Independent States. Another example can be found in South America (Textbox IX.3).

### IX.1.3 Regional integration: European Union

Labour migration in the European Union (EU) is examined on three levels:

- free movement of EU citizens for the purposes of employment;

#### TEXTBOX IX.3

### Regional Integration and Free Movement in South America: the Andean Community and MERCOSUR

The Andean Community members (Bolivia, Colombia, Ecuador, Peru and Venezuela) have decided to work together to ensure that their inhabitants will be able to move freely through the sub-region, whether for purposes of tourism, work, or for a change in their customary place of residence. The “Andean Labour Migration Instrument” (Decision 545) was signed on 25 June 2003 with as its main objective the establishment of provisions which will progressively and gradually permit the unhampered movement and temporary residence of Andean nationals in the sub-region for employment purposes as wage workers. The unhampered movement of people is one of the preconditions for the gradual formation of the Andean Common Market, which was scheduled to be in operation by 31 December 2005.

MERCOSUR (Southern Common Market) Member States (Argentina, Brazil, Paraguay and Uruguay) signed the “Agreement on Residence for Nationals of MERCOSUR States, Bolivia and Chile” on 6 December 2002. The agreement has the objective of permitting nationals of one signatory member to obtain legal residence in another signatory State, if they so wish. Through the accreditation of their nationality and presentation of documentation, petitioners can obtain temporary residence for a maximum period of two years, which can be transformed into permanent residence after this initial period. The agreement provides for the right to family reunification and equal treatment of migrants with nationals concerning all civil, social, cultural and economic rights.

Sources: ILO, International Migration Programme (MIGRANT) (March 2006); Andean Community (2003) MERCOSUR (2002: Arts. 1, 4, 5 and 9).

- changes in this regime, as a result of the recent enlargement of the EU; and
- position of non-EU nationals or third-country nationals regarding admission to the labour market and treatment within EU Member States.

#### IX.1.3.1 EU citizens

The EU has the most extensive regional integration system for labour migration. Free movement of labour in the EU applies presently to 15 Member

States and will apply in full to the enlarged EU of 25 Member States by 1 May 2011. According to the transitional arrangements provided in the Accession Treaty (see Textbox IX.4) (EU, 2003c), it will not be possible to impose any limits on free movement of workers after this date. Free movement of workers in the EU covers all forms of employment:

- salaried or wage-earning employment (free movement of workers);
- self-employment (freedom of establishment);
- provision of services (freedom to provide services).

Free movement of EU nationals for the purpose of employment is accompanied by an extensive set of free movement rights, enshrined in the EC Treaty (Part III, Title III), based on the principle of equal treatment with nationals (or non-discrimination on the grounds of nationality) (Art. 12 EC).<sup>16</sup> These rights apply directly in Member States' laws and can be relied upon by individuals in domestic courts. Their application is interpreted and supervised by the European Court of Justice (ECJ), which is entrusted by the EC Treaty to ensure the consistent and uniform application of EU law. ECJ rulings are binding on all the Member States. The equal treatment principle goes beyond the context of employment to encompass other aspects relating to the legal status of migrant workers. Whereas the admission and residence of EU nationals (as well as their departure from the territory) is addressed by Council Directive 2004/38/EC (EU 2004b), which had to be transposed into the laws of all Member States by 30 April 2006, the following five areas relating to the equal treatment of EU workers while employed in other Member States and nationals continue to be covered by Council Regulation 1612/68/EEC (EU, 1968):

- work and employment conditions, in particular as regards remuneration and dismissal, and trade union rights;
- vocational training;
- social and tax advantages (including welfare benefits);
- housing;
- education of children.

EU rules also provide for social security entitlements (i.e. aggregation and transfer of benefits) to ensure that

EU nationals who move for the purpose of employment are not disadvantaged as a result (Council Regulation 1408/71/EEC) (EU, 1971).

The EU free movement of workers regime is accompanied by liberal family reunion rules which give the worker's spouse or registered partner, dependent children (under the age of 21) and dependent parents of the worker or spouse the right to join the worker. Admission of other dependant relatives living with the worker should also be facilitated. Moreover, the spouse and children of EU workers have free access to employment as soon as they arrive in the Member State.<sup>17</sup>

These free movement rights are supported by strong safeguards against expulsion. EU workers can be expelled from (or refused entry to) another Member State only if they constitute a serious threat to the public policy, public security or public health of that State (EU, 2002c, Art.39(3) EC). These criteria have been defined further in secondary legislation,<sup>18</sup> and interpreted restrictively by the ECJ, which has ruled that EU Member States can only expel citizens of other Member States if they constitute a present and serious threat to the fundamental interests of society. Criminal convictions alone are insufficient to constitute such a threat (ECJ, 1975, Case 36/75: para.22; ECJ, 1977, Case 30/77: para.28).

### IX.1.3.2 EU enlargement and labour migration

EU enlargement to 25 Member States as of 1 May 2004 was preceded by the adoption of transitional arrangements under the Accession Treaty for free movement of workers with a view to protecting existing Member States (EU15) from disruption to their domestic labour markets for a period of a maximum of seven years. The arrangements apply to nationals of the new Member States in Central and Eastern Europe (CEEC)<sup>19</sup>, but not to nationals of Cyprus or Malta. National restrictions can be retained by Member States for an initial period of two years, then for a further three years and, exceptionally, for a further two years (i.e. 7 years in total). Freedom of establishment (including self-employment) and freedom to provide services in other Member States are generally unaffected by these arrangements, although Austria and Germany can apply restrictions on the provision of cross-border services in certain

sensitive employment sectors involving the posting of temporary workers.

A8 nationals who were already employed in an existing Member State on the date of accession (1 May 2004) on the basis of a work permit or other authorization valid for 12 months or longer benefit from unrestricted access to the labour market of the Member State concerned.

Member States applying the transitional arrangements (Textbox IX.4) are required to give preference to A8 workers and service providers from the new Member States over non-EU nationals regarding access to their labour markets.

Even though the current enlargement is the largest to date and wage differentials between existing and new Member States are considerable, the European Commission concluded that, although mobility of EU workers has increased since enlargement, it has not been

large enough to have a significant impact on the EU labour market in general (EU, 2006: 6, 13), which is in line with assessments of previous EU enlargements. Furthermore, there is no indication that migrant workers from new EU Member States are displacing or substituting national workers or competing for similar jobs. Indeed, there is some evidence that they are contributing in a complementary way to labour markets in the EU15 Member States by meeting labour shortages in certain areas (EU, 2006: 12, 14).

The UK *Accession Monitoring Report* observes that most nationals from the new Member States have come to work in the UK for short periods of time, as a form of *de facto* circular migration. The vast majority of A8 nationals are young and single persons, who are in full-time employment and do not have dependants living with them in the UK. As a result, they make few demands on the welfare system or public services. They fill gaps in the labour market in a broad range of employment sectors, but particularly in administration,

#### TEXTBOX IX.4

### EU Accession Treaty Transitional Arrangements concerning Free Movement of Workers

Of the EU15 Member states, only **Ireland, Sweden** and the **UK** provide free access to their labour market for nationals of A8 nationals, although the UK is applying nominal restrictions through the implementation of a Workers' Registration Scheme which requires the worker to register with the Immigration and Nationality Department with details of the job, wage conditions, etc. The purpose of this registration scheme is to assist the UK authorities to determine how many new Member States nationals are employed, assess the impact of their employment on the national labour market, and protect workers from exploitation, for example by ensuring that they are paid at least the national minimum wage.

The remaining EU15 Member States are applying national restrictions for two years in the form of a work permit scheme, sometimes combined with quotas. **Hungary, Poland** and **Slovenia** are applying reciprocal restrictions to nationals from the EU15 Member States. However, these countries will have to review their posi-

tion before the first two-year period has expired and notify the European Commission before 1 May 2006 if they wish to continue with these restrictions. **Greece, Finland, Portugal** and **Spain** have announced that they will no longer apply national restrictions from that date.

It is expected that some countries, particularly **Austria** and **Germany**, will retain restrictions for the full 7 years, although after 5 years they will have to convince the European Commission that there are "serious disturbances on [their] labour market or threat thereof" and to justify this requirement objectively.

The European Commission has recommended that all Member States consider opening up their labour markets after the initial two year post-enlargement period has elapsed on 1 May 2006.

Sources: EU (2006); EURES <http://europa.eu.int/eures/home.jsp?lang=en>

business and management, hospitality and catering, agriculture, manufacturing and food, fish and meat processing (UK, 2005d).

Moreover, it is expected that economic conditions in A8 Member States will improve and thus reduce pressures to migrate. Consequently, labour migration to the EU15 Member States is likely to peak and then drop off gradually. In the medium- to long-term, however, economic growth in the new EU Member States is likely to result in the creation of labour migration opportunities for EU nationals and for third-country nationals. Indeed, as noted in Section VI.3.3 above, one A8 Member State, the Czech Republic, is already actively seeking highly-skilled workers from specified third countries.

### IX.1.3.3 Non-EU and third country nationals

While EU rules on free movement of workers relate to EU nationals taking up employment in another EU Member State, non-EU or third country nationals can also benefit from “derived rights” under EU law, because of their connection with the EU worker or company. As noted above, the non-EU

spouse and children of EU workers benefit from all EU free movement rights. Therefore, a non-EU national spouse will have free access to the labour market in the Member State in which the EU worker is employed. The ECJ has also ruled that EU companies can move their non-EU workers to another EU Member State on a temporary basis in the context of the provision of services. Thus a Belgian company employing Moroccan workers, who were lawfully resident in Belgium, was permitted to deploy those workers to a construction project in France without first having to seek work permits for them.<sup>20</sup>

The EU Council of Ministers recently adopted Regulation 859/2003/EC extending the EU rules on social security provision to non-EU nationals resident in one Member State moving to another Member State to take up employment there (EU, 2003a). Moreover, third-country nationals who have acquired long-term resident status have the right to reside in another EU Member State for a period longer than three months and to take up employment there, although authorities in the second Member State retain the discretion to

#### TEXTBOX IX.5

### European Commission’s Policy Plan on Legal Migration (December 2005)

In December 2005, in response to the European Council’s Hague Programme, the Commission presented its Policy Plan on Legal Migration, which defines a road-map for policy-making in this field for the period 2006-2009. The Policy Plan describes the current situation and prospects of labour markets in the EU as a “need” scenario, thus clearly recognizing that the admission of both highly-skilled and less-skilled migrant workers from third countries should be facilitated. It proposes the adoption of a general framework directive guaranteeing a common set of rights to *all* third country nationals in legal employment in EU Member States. These rights would not be limited by reference to their length of stay although, at this stage, the level of the rights to be protected has not been specified.

The Policy Plan also recommends the adoption of four specific directives governing the conditions of entry and

residence for highly-skilled workers, seasonal workers, Intra-Corporate Transferees (ICT) and remunerated trainees.

Other proposed actions include:

- establishment by the end of 1997 of an EU Immigration Portal on EU policies, news and information;
- extension of the services provided by the European Job Mobility Portal and the EURES network to third-country nationals;
- assistance to Member States on integration;
- cooperation with third countries, including the adoption of arrangements for managed temporary and circular migration and the provision of professional training and language courses in the country of origin for those leaving to work in the EU.

Source: EU (2005f).



apply the EU preference principle regarding access to the labour market (Textbox VI.3).<sup>21</sup>

Association agreements which the EU and its Member States have concluded with third countries constitute an important source of rights for nationals from these countries employed in EU territory. It is important to note that, in general, no EU Association Agreements can override the sovereignty of Member States regarding the control of admission of non-EU nationals into their territory for the purpose of employment. The rules are mainly concerned with workers who are already lawfully resident and employed in the territory. The agreement with Turkey (Ankara Agreement) dates back to 1963 (EU, 1963) and provides for the most extensive set of rights.<sup>22</sup> EEC-Turkey Association Council Decision 1/80, adopted under the Agreement, contains incremental rights concerning access to the labour markets of EU Member States for Turkish migrant workers already lawfully working in their territory. Employment restrictions are to be lifted gradually and free access to employment is to be provided after 4 years of lawful employment (EU, 1980: Art.6). The strong EU safeguards against expulsion mentioned earlier are also applicable (ECJ, 1997, Case 340/97).

In addition to these arrangements with Turkey, the EU has converted Co-operation Agreements with three Maghreb countries (Algeria, Morocco and Tunisia) into fully fledged Euro-Mediterranean Association Agreements, which provide for equal employment conditions with nationals and social security rights for lawfully resident Maghreb migrant workers in EU territory.<sup>23</sup> Moreover, the EU has entered into “Europe Agreements” with Central and Eastern European countries to prepare for their eventual accession to the EU. Since many of these countries became EU Member States in May 2004, such agreements apply only to Bulgaria and Romania, scheduled to be admitted to the EU in 2007. The Europe Agreements provide lawfully resident workers from these countries equal treatment with nationals in respect of employment conditions and social security rights, and facilitate their right of establishment (EU, 2004e; Arts.38-39, 45-55).

The EU is also developing a common policy on migration and asylum towards third country nationals. Numerous measures have been adopted on asylum and

irregular migration (Chapter VIII), but to date few on legal migration, with the exception of measures relating to family reunification, status of third country nationals who are long-term residents, and admission of students and researchers (see respectively EU, 2003d, 2003e, 2003i, 2005d). However, in its December 2004 Hague Programme on Strengthening Freedom, Security and Justice in the EU, which outlines the elements of a new multi-annual programme in this field for 2005-2009, the European Council, invited the Commission “to present a policy plan on legal migration including admission procedures capable of responding promptly to fluctuating demands for migrant labour in the labour market before the end of 2005” (EU, 2004g: Annex I). In December 2005, the Commission duly presented the Policy Plan, which refers to future proposals for the adoption of legally binding measures in this area, as well as other pertinent activities (Textbox IX.5).

While the explicit recognition of the need in the EU for migrant labour from third countries is a positive development, Member States will have to demonstrate considerable political will to ensure the speedy adoption and effective implementation of the legally binding measures and actions proposed in the Policy Plan.

#### **IX.1.4 Regional integration: North American Free Trade Agreement**

##### **IX.1.4.1 NAFTA and intra-regional movement of goods, capital, and persons**

Canada, Mexico and the United States signed the North American Free Trade Agreement (NAFTA) in 1994. It prescribes measures to facilitate the cross-border movement of goods, capital and services and to promote free and fair trade among the three countries. NAFTA operates on the presumption that freer trade generates greater economic opportunity and productivity.<sup>24</sup> Proponents also believed that the creation of a regional free trade area would maximize the continent’s market power in relation to other states (Johnson, 1998). NAFTA also provides for greater movement of persons in connection with trade, although, as in most regional trade agreements, it does not enable general freedom of movement for all persons,<sup>25</sup> which is the principal difference between NAFTA and the EU regime.

NAFTA's impact on migration is limited to providing for the temporary entry of certain categories of persons and outlining members' obligations regarding the admission of nationals from the other two signatories. NAFTA addresses the temporary entry of both business persons and persons involved in the provision of services (Chapters 16 and 12 respectively). In addition, a side agreement, the North American Agreement on Labour Cooperation (NAALC), espouses deepened cooperation on the labour front, particularly with regard to enforcing labour laws.

#### **IX.1.4.2 Temporary entry for business persons**

Chapter 16 of NAFTA is dedicated to the temporary entry of business persons and contains the provisions that affect migration most directly. Mindful of the parties' commitment to facilitate and manage temporary entry, and to ensure border security and protection of domestic labour markets and permanent employment, Chapter 16 obliges parties to admit four categories of business persons:

- business visitors;
- traders and investors;
- intra-company transferees (ICTs);
- professionals.

NAFTA obliges parties to admit such individuals upon proof of citizenship and documentation of the purpose of entry and of the nature of the engagement, provided the individual would otherwise be allowed entry under domestic policy.<sup>26</sup>

Concerning entry of persons in all four categories, no party may require labour certification tests (Section VI.3.2.2 above) or similar procedures, or impose a numerical limit on the number of admissions.<sup>27</sup> In addition, parties may not require prior approval procedures, petitions, or similar procedures from business visitors and professionals. However, the Chapter allows visas to be required, prior to admission for each category, after consultation with the party whose business persons would be affected "with a view to avoiding the imposition of the requirement" (Annex 1603.D.3).

Appendices to these provisions lay out the categories of business visitors and professionals who may be admitted, together with minimum educational requirements for individuals in the professional category,

which is the broadest category of business persons under NAFTA. Generally, they must have a Bachelor's degree or technical training or certification.<sup>28</sup> In practical terms, employment of professionals in other parties' territories is contingent on recognition of their qualifications. Some agreements and measures exist to facilitate recognition of qualifications where they are needed, but they facilitate movement between the US and Canada, rather than between the other parties.<sup>29</sup> NAFTA Chapter 12, discussed below, also addresses professional services and qualifications, but with a view to eliminating "unnecessary barriers to trade" rather than to creating employment opportunities (Ch. 12, Arts.1201 and 1210).

#### **IX.1.4.3 The Trade NAFTA visa**

Under Chapter 12, the US exercises the option to require visas of Mexican professionals seeking to temporarily enter its territory. The Trade NAFTA (TN) visa, commonly called the NAFTA Professional visa, allows admission for up to one year and may be extended by periods of one year, without limit. However, it is a non-immigrant visa and not for permanent residence. Individuals in designated professions, as evidenced by the attainment of specified minimum education requirements and credentials, may apply for the visa at US consulates.

The TN visa procedure imposes more requirements on Mexican professionals than on Canadians. Canadian citizens are not required to have a non-immigrant visa prior to entering the US and need only present proof of citizenship and professional employment at the border. Further, no numerical limitation was imposed on the number of TN visas granted to Canadians. Mexicans, contrarily, face tougher requirements. Applicants must schedule an interview, which includes a fingerprint scan, present the application forms, a letter of employment written by the employer,<sup>30</sup> and demonstrate that their stay is indeed temporary, along with a valid passport and photograph.<sup>31</sup> TN visas had an annual cap of 5,500 for Mexican nationals. Pursuant to the Agreement, however, that cap was removed in January 2004 (Condon and McBride, 2003: 277).

#### **IX.1.4.4 Movement of persons in relation to provision of services**

Chapter 12 applies to all measures regulating

cross-border trade in services, excluding financial services, air services, government procurement, government subsidies and grants, and services not covered by Chapter 11 on Investment. The text clearly distinguishes migration policy from the entry of service providers, stating that the chapter imposes *no obligation* on the parties to grant any rights regarding employment market access (Art. 1201). Chapter 12 is also not intended to affect the parties' capacity to provide social services or perform other government functions, such as law enforcement.

Chapter 12 attempts to reduce the barriers to trade imposed by states' licensing and certification requirements with regard to cross-border service providers through national treatment and Most Favoured Nation (MFN) treatment, and a prohibition on requiring local presence. Accordingly, states must provide other parties' service providers treatment no less favourable than their own or those of other states and cannot require another party's service provider to establish or maintain an office or residency in its territory as a condition for the provision of a service.

However, Chapter 12's liberalizing measures are tempered by caveats. Reservations to the above three principles were allowed and listed in Annex I of Chapter 12. Annex II specifies certain sectors, sub-sectors and activities where parties may retain or adopt more restrictive non-conforming measures as well. In addition, the MFN treatment requirement does not require any party to recognize qualifications (including education, experience, licenses and certifications) obtained in the territory of one party when it recognizes, either unilaterally or by agreement, qualifications obtained in another party or in a non-party. However, the admitting party must give the other party an opportunity to demonstrate that qualifications earned in its territory should also be recognized or to enter into a comparable agreement for their recognition.

Further, quantitative restrictions, licensing requirements and performance requirements are allowed, but the parties must commit to negotiate the liberalization or removal of such restrictions. Parties must ensure that licensing requirements are based on objective, transparent criteria (such as competence), are not more burdensome than neces-

sary to ensure quality, and are not disguised restrictions on the cross-border provision of services. Chapter 12 describes the steps towards establishing mutual professional standards and specifically addresses legal, engineering, and bus and truck transportation services. NAFTA required all parties to eliminate citizenship and permanent residency requirements for the licensing or certification of professional service providers of another party within two years of its enactment, and to consult for the removal of such requirements for the licensing and certification of other service providers.

### IX.1.5 Regional integration: Commonwealth of Independent States

Regional integration in the Commonwealth of Independent States (CIS) has been pursued at various levels, although the results have been mixed. In 1992, an Agreement on the free movement of CIS citizens through the territory of the Commonwealth was concluded, although half of the CIS countries, including the Russian Federation and Kazakhstan, subsequently denounced this agreement, preferring to adopt bilateral arrangements. Today, all CIS countries, with the exception of Georgia and Turkmenistan, have visa-free arrangements with Russia, although they only apply to admission to the territory and do not extend to a right to take up employment.

More recent developments have largely focused on further economic integration in the region. In May 2001, the Eurasian Economic Community (EAEC) was established comprising Belarus, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, and Uzbekistan.<sup>32</sup> EAEC's primary objectives are to develop a full-scale customs union and a common market. A further objective, relating specifically to migration, aims at developing common guidelines on border security.<sup>33</sup> EAEC is expected to merge with the Central Asian Cooperation Organization (CACO), established in 1991 as the Central Asian Commonwealth. CACO comprises the same Member States as EAEC, with the exception of Belarus, and its principal objective is to further economic integration in the region.<sup>34</sup>

The CIS countries have also adopted regional agreements relating to labour migration and the prevention

of irregular migration and these are discussed below.

### IX.1.6 Regional agreements and inter-state cooperation

With regard to formal cooperation on labour migration at the regional level, Council of Europe instruments relating to protection of migrant workers, such as the (Revised) European Social Charter and the European Convention on the Legal Status of Migrant Workers (ECMW), include a number of provisions requiring contracting parties to cooperate with one another. For example, the (Revised) European Social Charter, in Article 19 on the right of migrant workers and their families to protection and assistance, requires States parties “to promote co-operation, as appropriate, between social services, public and private, in emigration and immigration countries” (Art.19(3)). ECMW provides for cooperation between contracting parties on the exchange and provision of appropriate information to prospective migrants, *inter alia*, on:

- residence, conditions of employment and opportunities for family reunion, the nature of their employment, social security, housing, transfer of savings, etc;
- vocational training and retraining schemes to ensure that they cater as far as possible for the needs of migrant workers with a view to their return to their country of origin;
- arrangements, so far as practicable, for the teaching of the migrant worker’s tongue to the children of migrant workers to facilitate, *inter alia*, their return to their country of origin;
- provision of information to migrant workers about conditions in their country of origin on their final return home (Arts.16, 14(5), 15 and 30 respectively).

ECMW also links certain contracting parties’ obligations with the adoption of further multilateral or bilateral agreements in areas such as the transfer of savings, social security, social and medical assistance and double taxation (Arts. 17, 18, 19 and 23 respectively).

In 1994, all CIS Member States signed the Agreement on Cooperation in Labour Migration and Social Protection of Migrant Workers (15 April 1994). This

agreement is based on ILO principles and contains the following provisions:

- mutual recognition of diplomas, other job evaluation documents and work records;
- rules of employment in the destination country;
- elimination of double taxation;
- equal treatment between migrant workers and nationals in respect of social security, social insurance, and medical care;
- transfer of earnings and savings.

However, the agreement is limited in scope since it only applies to lawfully resident migrant workers and excludes members of their families. It is also to be implemented through bilateral agreements and to date, these have not been extensively adopted (Section IX.1.1.1 above).<sup>35</sup>

In addition to the 1994 agreement, CIS countries elaborated a draft Convention on the legal status of migrant workers and members of their families in 2003, the first international document in the region aimed at protecting the rights of migrant workers and members of their families. The draft Convention contains a clause prohibiting discrimination on the same grounds as those defined in international human rights instruments. It also includes provisions protecting the fundamental rights of migrant workers, such as protection from torture and degrading treatment, slavery, and forced labour. The draft Convention provides for equal treatment of migrant workers and nationals, in respect of payment of wages, employment conditions, social security, access to the courts, etc. It also provides for special measures relating to the protection of migrant women and children. The text of the Convention has still not been finalized and work is ongoing, but it has received support from the International Confederation of Free Trade Unions, which conducted a special seminar on labour migration in the CIS and the protection of migrant workers in Moscow in November 2004.<sup>36</sup>

In 1998, the CIS countries also adopted an agreement on combating irregular migration, which contains provisions on the suppression of irregular migration, expulsion, readmission and exchange of information. It also defines an irregular migrant as including persons in illegal employment.

### IX.1.7 Global level agreements

It should be noted at the outset that there is no comprehensive international migration regime operating at the global level. The admission of persons to States for the purpose of employment is regulated principally by national laws and policies. However, a number of formal mechanisms have been developed at the global level, under the auspices of international treaties, with a view to enhancing inter-state cooperation on labour migration or the movement of persons within the context of the international trade in services.

#### IX.1.7.1 Inter-state cooperation in international treaties

As discussed in some detail in Section I.2 above, a number of international conventions have been adopted with a view to protecting the rights of migrant workers in the migration process, namely IRCMW and the pertinent ILO instruments. But there are also important parts and provisions in these treaties dealing with inter-state cooperation.

While IRCMW establishes a principled framework for the protection of the human rights of all migrant workers and their families irrespective of status, it also acknowledges in a number of places and particularly in Part VI that such a human rights framework cannot be effectively applied without consultation and cooperation between states. This involves not only inter-state consultation and cooperation at the bilateral, regional and multilateral level, but also government consultation and cooperation with pertinent stakeholders, such as employers, trade unions and other organizations. In this way, therefore, consultative and cooperative processes on labour migration and acceptance of legally binding standards on the protection of the rights of all migrant workers and their families are viewed as mutually reinforcing, with the potential to benefit both migrants and the states concerned.

Part VI on the promotion of sound, equitable, humane and lawful conditions in connection with international labour migration is the principal section in IRCMW addressing inter-state consultation and cooperation. States parties are under the general obligation, by virtue of Article 64, to consult and cooperate “with a view to promoting sound, equitable and hu-

mane conditions in connection with international migration of workers and members of their families” and “[i]n this respect, due regard shall be paid not only to labour needs and resources, but also to the social, economic, cultural and other needs of migrant workers and members of their families involved, as well as to the consequences of such migration for the communities concerned”. Part VI also discusses consultation and cooperation between States parties in respect of the following areas:

- consultation, exchange of information and cooperation between the competent authorities of States parties involved in the international migration of workers and members of their families (Art.65(1)(b));
- cooperation in the adoption of measures regarding the orderly return of migrant workers and members of their families to the State of origin, when they decide to return, or their authorization of residence or employment expires, or when they are in the State of employment in an irregular situation (Art.67(1));
- cooperation with a view to promoting adequate economic conditions for the resettlement of regular migrant workers and to facilitating their durable social and cultural reintegration in the State of origin (Art.67(2)).

IRCMW also attaches considerable importance to the role of bilateral, regional and multilateral arrangements and agreements, particularly in the context of furthering the rights of migrant workers and members of their families (Preamble). Indeed, if bilateral and other multilateral instruments in force for the State party concerned grant more favourable rights and freedoms to migrants, such instruments must be respected (Art.81(1)) (Section IX.1.1.5 above).

With regard to ILO instruments, there are also provisions imposing obligations upon States parties to cooperate with one another with a view to preventing abuses in the migration process and recommending further cooperation at the bilateral and multilateral level concerning the facilitation of legal labour migration and equality of treatment in respect of social security as well as maintenance of acquired social security rights (Textbox IX.6).

To date, however, these specific multilateral instruments have not received the wide-ranging acceptance, which would enable the development of a comprehensive framework for multilateral cooperation.

More informal cooperation at the global level has occurred, more generally, through the so-called Berne Initiative, a State-led process, supported by the Swiss

Government and facilitated by IOM and, more specifically with regard to international labour migration, under the auspices of ILO in the context of the adoption of the Multilateral Framework on Labour Migration (ILO, 2005), which are discussed in Section IX.2.3 below.

#### IX.1.7.2 General Agreement on Trade in Services

The General Agreement on Trade in Services

#### TEXTBOX IX.6

### ILO Instruments and International Cooperation on Labour Migration

Several ILO instruments relevant to migrant workers stress the importance of international cooperation in the area of labour migration, including the adoption of bilateral agreements. For example, ILO Convention No. 143 calls for the Member States concerned to adopt, where appropriate in collaboration with other Members, a number of measures to determine and suppress clandestine movements and illegal employment of migrant workers. At the international level, systematic contacts and exchanges of information on these matters is to take place between the Member States concerned. One of the purposes of this cooperation is to make it possible to prosecute authors of trafficking for the purpose of labour whatever the country from which they exercise their activities.

Although it is questionable whether bilateral agreements have been effective as a means for addressing structural labour shortages and curbing irregular migration, the conclusion of bilateral agreements [Section IX.1.1] may be a useful solution for providing better protection of migrant workers, either in respect to certain areas such as social security, or with regard to more vulnerable categories of migrant workers, such as domestic workers.

Increasingly, many States are turning to such agreements to regulate the most significant emigration and immigration flows as well as social matters of migration such as social security. Such a solution is also recommended by a number of ILO instruments: the *Model Agreement on Temporary and Permanent Migration for Employment, including Migration of Refugees and Displaced Persons, annexed to Recommendation No. 86 on Migration for Employment (Revised), 1949*, offers a useful framework for guidance on the kind of mat-

ters that could be regulated in bilateral or multilateral migration agreements. The Model Agreement provides for measures concerning, inter alia:

- > exchange of information;
- > action against misleading propaganda;
- > conditions and criteria for migration;
- > organization of recruitment and placing of migrants;
- > information and assistance to migrants;
- > transfer of earnings;
- > adaptation of permanent migrant workers;
- > settlement of disputes;
- > equality of treatment in a number of areas;
- > contracts of employment;
- > employment mobility
- > the return of migrants;
- > measures on the methods for cooperation and consultation between States parties.

It provides that bilateral agreements should include provisions concerning equal treatment of migrants and nationals and appropriate arrangements for acquired rights in the area of social security. In addition, Conventions Nos. 118 and 157 concerning equality of treatment in social security and maintenance of acquired social security rights also explicitly provide that ratifying States may give effect to provisions of the Convention concerning the maintenance of acquired rights and provision of benefits abroad through the conclusion of bilateral and multilateral agreements.

Source: ILO, International Labour Standards Department (NORMES) (March 2006).

(GATS) (WTO, 1994) operates under the auspices of the World Trade Organization<sup>37</sup> and contains some limited globally applicable rules of relevance to the mobility of workers in the context of the trade in services. These rules are found in Mode IV of the Agreement and enable “natural persons” to cross an international border from Member State A to Member State B for the purpose of providing a service, which is recognized as one of the four possible ways of trading a service under GATS. However, these rules are limited in practice in the Member State schedules to a narrow category of migrants, primarily to those working for multinational companies, such as executives, managers and specialists, and intra-company transferees. Further, this movement can only take place on a temporary basis, e.g. business visitors are generally permitted to stay for up to 90 days. Permanent presence in the country is therefore expressly excluded.<sup>38</sup> Moreover, GATS does not apply to measures concerning individuals independently seeking access to a Member State’s labour market and it does not exempt natural persons from fulfilling any visa requirements.

In the context of recent WTO trade negotiations, delegations from developing and least developed countries (LDCs) have sought greater access to labour markets in developed countries, particularly by broadening the categories of persons who can enter and by simplifying admission rules. However, progress has been slow as revealed by the most recent round of trade negotiations (Textbox IX.7).

Outside of these negotiations, however, there have been concerted attempts to bring together trade and migration policy-makers and practitioners, as well as other stakeholders from business and civil society, with a view to realizing the potential that the mobility of persons might bring to the growth of the global economy by:

- exploring the links between international trade and migration;
- identifying the ways of improving the effectiveness of existing trade commitments under GATS Mode 4 regarding the temporary movement of persons as service providers;
- discussing possibilities for progress in the current GATS negotiations and for further trade liberalization in this field (Klein Solomon, 2006).

#### TEXTBOX IX.7

### WTO Hong Kong Ministerial Conference, December 2005

At the Hong Kong Ministerial Conference on the Doha Work Programme, held on 13–18 December 2005, ministers from the WTO’s 149 Member governments approved a 44-page Declaration. The principal merit of the Declaration is to put the Doha round trade negotiations “back on track”. With regard to services, the text in reality satisfies neither those WTO Members who wanted the language in the Services Annex of the draft Declaration to be made more ambitious (e.g. the EU, in exchange for limited commitments on agriculture), nor those who sought to weaken the text.

Annex C on Services was the most controversial part of the Declaration. Specifically, on Mode 4, the text refers to “new or improved commitments on the categories of Contractual Services Suppliers, Independent Professionals and Others, de-linked from commercial presence”, and of “Intra-corporate Transferees and Business Visitors, to reflect *inter alia* removal or substantial reduction of economic needs tests and indication of prescribed duration of stay and possibility of renewal, if any”. This wording is not as strong as that suggested in the “alternative annex C” advanced by the G90 (including the group of African, Caribbean and Pacific countries, the LDC group and the African Union), which requested WTO Members to ensure that any negotiated commitments reflect “improvements in all four modes of supply both in terms of *market access and national treatment* and in particular Mode 4 liberalization in categories de-linked from commercial presence”. Some trade analysts consider that the positive gains from Mode 4 along these lines will be limited, and for most developing countries will be outweighed by pressures to open up their markets in Mode 3. In this regard, the text calls for “enhanced foreign equity participation” and for “allowing greater flexibility on the types of legal entity permitted”.

Sources: IOM, Migration Policy, Research and Communications Department; WTO (2005).

In this connection, three seminars have been organized since 2002:

- (i) a Symposium, sponsored by the WTO and the World Bank, on Movement of Natural Persons (Mode 4) under GATS in April 2002 (World Bank, 2002; WTO, 2002);
- (ii) a seminar, jointly organized by the OECD, World Bank and IOM, on Trade and Migration in November 2003 (OECD, 2004c; World Bank, 2003; IOM, 2003e); and
- (iii) a follow-up seminar in October 2004, co-hosted by the IOM, the World Bank and WTO, entitled “Managing the Movement of People: What can be learned for Mode 4 of the GATS” (IOM, 2004b; World Bank, 2004; WTO, 2004).

## *IX.2 Less Formal and Consultative Mechanisms*

Reaching formal commitments in focused bilateral labour agreements, regional integration mechanisms, and regional and international conventions is important for facilitating orderly labour migration and protecting migrant workers. When these agreements are difficult to achieve, as is often the case, other solutions can prove an effective tool for interstate cooperation. These include non-binding consultative mechanisms such as regional consultative processes, joint commissions on labour, and working groups.

### **IX.2.1 Regional consultative processes**

Less formal regional arrangements, as opposed to the more formal mechanisms considered in Section IX.1 in the context of regional integration regimes and legally binding treaties, are regional consultative processes (Swiss Federal Office for Migration, 2005; IOM, 2005e). Regional consultative processes (RCPs) are an example of non-binding fora bringing together migration officials of states of origin and destination to discuss migration-related issues in a cooperative way.

IOM has been engaged in promoting dialogue and cooperation in managing migration among countries of or-

igin, transit and destination at the regional and sub-regional levels, such as the Puebla Process for Central and North America, initiated in 1996. The Puebla Process (Regional Conference on Migration) was initiated by Mexico and its main goal is the management of irregular migration in and through the region. A Plan of Action was agreed in 1997, and new goals discussed in 2000. The Plan of Action was largely achieved: seminars on specific topics have been held, information exchange has occurred, technical assistance carried out, and there have been many instances of one-off assistance among states. IOM provided the Secretariat (von Koppenfels, 2001).

There are two basic characteristics common to RCPs. They are informal and the results, though consensual, are non-binding. Although the focus of regional processes depends on the interests of the parties involved, a key in the successful functioning of an RCP is the basic acknowledgement of a shared interest in migration management, despite national interests and experiences. The most important role RCPs can play is to encourage government representatives of various countries to talk to each other and address issues in a multilateral setting. Talking and sharing experiences serves to develop relationships, enhance knowledge and mutual understanding, and build the confidence and trust that are essential, in view of the complexity of the issues being addressed. As a result of a step-by-step approach to confidence building, areas of potential cooperation begin to expand. In this regard, regional consultative processes serve as a focal point for enhancing the understanding of the causes and effects of factors leading to migration trends, and also as a practical vehicle for maintaining and sharing reliable and up-to-date data and documentation on trends, programmes and policies related to these factors.

The most recent regional process, which focuses specifically on labour migration, is the Ministerial Consultations on Overseas Employment for Countries of Origin in Asia (Textbox IX.8)

A RCP in the OSCE European region that is proving significant is the Söderköping process,<sup>39</sup> established in early 2001 and involving ten countries along the eastern EU enlarged border.<sup>40</sup> The process is supported by EU, IOM, the Swedish Migration Board and UNHCR, and its objective is to support cross-border cooperation between



## TEXTBOX IX.8

### Ministerial Consultations on Overseas Employment for Countries of Origin in Asia: The Colombo Process

In response to a request from several Asian countries of origin, IOM organized ministerial level consultations in 2003, 2004 and 2005. The ten original participating States (Bangladesh, China, India, Indonesia, Nepal, Pakistan, the Philippines, Sri Lanka, Thailand and Vietnam) made recommendations for the effective management of overseas employment programmes and agreed to a regular follow-up.

The aim of the Ministerial Consultations is to provide a forum for Asian labour-sending countries to:

- share experiences, lessons learned and best practices on overseas employment policies and practices;
- consult on issues faced by overseas workers, countries of origin and destination;
- propose practical solutions for the well-being of vulnerable overseas workers;
- optimize development benefits;
- enhance dialogue with countries of destination.

Achievements so far have included:

- identification, at ministerial and senior official levels, of policy challenges and needs, and exploration

of the range of possible responses and exchange of experiences in programme development;

- development of training curriculum for labour attachés and administrators and implementing joint training courses;
- preparation for establishing a common Overseas Workers Resource Centre;
- implementation of recommendations at the national level.

The third Ministerial Consultations at Bali Indonesia were greatly enriched by the participation of countries of destination, with delegations from Bahrain, Italy, Kuwait, Malaysia, Qatar, Republic of Korea, Saudi Arabia and the United Arab Emirates. Afghanistan was welcomed as a new member to the group after participating as an Observer in 2004. International and regional organizations participating in the Consultations included ADB, ASEAN, EC, GCC, DFID, ILO, UNIFEM and World Bank.

Source: Labour Migration Division, IOM.

participating countries on asylum, migration and border management issues. Another RCP is the newly established Pan-European Dialogue on Migration Management, the objective of which is “to set a platform for multilateral regional dialogue in order to shape coherent and transparent migration-related policy and programming priorities between the EU Member States and their neighbours”.<sup>41</sup> There are also relevant inter-regional processes, such as the “5 + 5”, involving the 5 countries of Southern Europe and 5 North African countries,<sup>42</sup> and the Inter-governmental Consultations for Migration and Asylum (IGC), which comprises 12 western European states and four new immigration countries.<sup>43</sup>

With the exception of the Colombo Process, none of these RCPs focus exclusively on labour migration, although this subject is becoming either an integral aspect or an increasingly important agenda item. For example, the Road Map of the Söderköping Process 2005-2007 refers to regional harmonization on labour migration and

remittances as one of the aims of the process and identifies “support in regulating labour migration including ensuring access to information on foreign employment and travel opportunities” as an information-related need for beneficiary countries (Söderköping Process, 2005: 2, 4). IGC is also shifting its attention to non-asylum issues, and is discussing labour migration.

Another RCP of particular relevance to the OSCE European region is the Budapest process, which focuses on cooperation to prevent and reduce irregular migration, including trafficking and smuggling in human beings. The International Centre for Migration Policy and Development (ICMPD) acts as the Secretariat for the Budapest Group of countries.<sup>44</sup> At the recent Ministerial Conference of the Budapest Group, held at Rhodes in June 2003 (ICMPD, 2003), a number of important measures were proposed of particular relevance to labour migration. The Ministers invited destination countries “to assess the impact of current labour market policies with

regard to the prevention of irregular migration”; reaffirmed “the need for effective and deterrent sanctions on employers to suppress the employment of illegal migrants”; and recommended the initiation of a dialogue among Central and Eastern European countries on the “harmonization of rules for the admission of various categories [of migrants, such as *inter alia*] ... employed and self-employed persons [and] students”.

Under the auspices of the Budapest Process, ICMPD is currently running a project on a re-direction of the process towards countries of the CIS region, with the objective of “furthering the development of an informal process for addressing irregular migration challenges in the CIS region, thus paving the way for a structured dialogue on these issues, both among the countries of the region and the neighbouring EU countries as well as other European countries of destination”.<sup>45</sup>

## IX.2.2 Other informal meetings

When effectively implemented, BLAs can promote orderly migration and protect migrant workers. In general, and particularly in the Gulf, countries of destination are increasingly inclined to establish less formal mechanisms for cooperating with countries of origin on the management of labour migration. Joint commissions on labour (JCLs) are now being held by Asian governments for achieving greater cooperation from governments of Arab states, as well as from Asian countries of employment (Abella, 2000). In essence, they provide a mechanism for informal consultations between administrative authorities of the countries of origin and destination (usually Ministries of Labour and Employment) on mutually agreed issues. Abella (2000) offers examples of how JCLs contributed to the reversal of rules found to be unfair to migrant workers.

Other formats for non-binding consultations between countries of origin and destination are round tables and study committees or working groups. There are still no established structures for regular consultations at a multilateral level among countries of labour origin and destination in Asia. In the past, ILO has organized round table meetings, with the aim of providing an opportunity for a frank exchange of views on contentious issues without pressure to agree or arrive at a formal conclusion. The three Arab-Asian Round

Table Meetings held probably achieved this, but there was no follow-up machinery (Abella, 2000).

The formation of working groups, task forces, or what in international trade negotiations has been used to good effect, study committees can perhaps emerge as a way of achieving follow-up. The establishment of a multilateral working group or study committee on labour migration would be a non-contentious and practical way of coordinating migration policies of the major countries of origin and destination in a region.

## IX.2.3 Global initiatives

### IX.2.3.1 The Berne Initiative

The Berne Initiative was launched by the Swiss Government with the International Symposium on Migration on 14-15 June 2001. It is a State-owned consultation process with the objective of obtaining better management of migration at the national, regional and global levels through enhanced co-operation between states. The process assists governments in sharing their different policy priorities and identifying their longer-term interests in migration with a view to developing a common orientation to migration management.<sup>46</sup> The IOM provides a Secretariat for the Berne Initiative.

The most important outcome of the Berne Initiative has been the development of the International Agenda for Migration Management (IAMM) (Swiss Federal Office for Migration, 2005a; IOM, 2005d). IAMM is a non-binding source and broad policy framework on migration management at the international level, which was developed through a series of consultations involving interested states, as the main actors in this field with the advice and support of pertinent regional and international organizations, NGOs and independent migration experts (Nielsen, 2006).

IAMM sets out a number of common understandings and effective practices for a planned, balanced and comprehensive approach to the management of migration, including labour migration and the human rights of migrants. With regard to the latter, it emphasizes that “respect for and protection of the human rights and dignity of migrants is fundamental to effective migration management” (IOM, 2005d: 45).<sup>47</sup> The

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“Domestic economies throughout the world are dependent on migrant workers, whether in countries of destination to fill skills or workforce gaps, or in countries of origin as sources of skills acquisition, training, investment and foreign exchange earnings through remittances. The demands of an increasingly global economy and workforce coupled with persistent disparities in demographic trends, development, wealth, political stability and wages, result in persons seeking work outside their own country on a scale that exceeds the capacity of existing and officially sanctioned labour opportunities abroad. The result has been a growing dependency of many employers and economies on the work of migrants in an irregular situation, as a cheap and reliable source of labour.

Migrants in an irregular situation are vulnerable and at risk of exploitation. Regulated labour migration may help to ensure the availability of labour when the host country needs it, provide safety and security for the migrants and regularize the inflow of migrant workers’ remittances. In addition, it can contribute to preventing or stemming irregular migration. The challenge for policy-makers is to assess national workforce requirements and to develop a flexible and transparent labour migration policy to meet domestic needs, in view of changing international realities and the benefits of cooperation between countries of origin and destination in addressing these needs. The significant economic impact and potential of labour migration, and the challenge of how to manage it to best effect, needs however to take into account the human dimension.

### Effective practices with regard to labour migration:

- Consideration of developing national measures that regulate supply of and demand for human resources that are linked to bilateral and multilateral efforts and are developed in consultations with key stakeholders.
- Consideration of labour migration schemes for highly skilled, skilled and lower skilled migrant workers that are systematically developed to meet labour demand in countries of destination and respond to labour supply and unemployment in countries of origin.
- Consideration of bilateral programmes in order to meet the specific needs of both source and destination countries, addressing the rights and responsibilities of all parties and providing for the protection of migrant workers including by ensuring access to consular officials of the country of origin.
- Transparency of legislation and procedures defining categories of labour migrants, selection criteria as well as length and conditions of stay.
- Consideration of consultation both at the national and international level bringing together relevant officials to address

labour market and labour migration issues.

- Enhanced information-sharing and consultations on policy, legislation and procedures more systematically to identify surplus and deficits in respective labour markets and possibilities for matching labour demand and supply.
- Consideration of measures to prepare potential migrant workers for entry into foreign labour markets, and arrange for pre-departure assistance, such as language and cultural orientation, and vocational training as needed.
- Provision of information to departing migrant workers on working conditions, health and safety, their rights and sources of support potentially available in the country of destination.
- Exploration of measures for the mutual recognition of qualifications.
- Consideration of programmes to foster skills development and savings and investment schemes that will provide incentive for and assist migrants returning to their home countries.
- Protection of migrant workers through implementation of public information campaigns to raise awareness of migrants’ rights, and ensuring that migrants receive the social and employment benefits that they are due.
- Promote the enjoyment by authorized migrant workers of the treatment accorded to citizen workers, such as access to training, minimum wage, maximum hour rules, prohibition of child labour and right to establish unions.
- Adoption of measures to ensure respect for the rights of female migrant workers.
- Provision of full access for temporary migrant workers to consular assistance.
- Adoption of measures for the integration of migrant workers in order to encourage cultural acceptance, and to ensure that the rights of migrants and members of their families are respected and protected.
- Implementation of measures to recognize and facilitate the use by highly skilled workers of their skills in the country of destination.
- Consideration of providing information on employment vacancies to potential migrants, on the recognition requirements for occupational qualifications and other practical information, such as taxation and licensing.
- Promotion of research and analysis on the impact of migrant workers on the local labour market.”

\* Labour or economic migration can be temporary or permanent, and consequently is addressed here as a separate section in addition to being treated under the temporary migration section [Chapter 4a, pp. 35-38].

Sources: Swiss Federal Office for Migration (2005a), IOM (2005d) 40-42.

IAMM devotes a whole chapter to labour migration (Textbox IX.9).

While the IAMM represents the views of migration officials and experts from all regions of the world, it remains a unique document because it has not been “adopted” on the basis of negotiations between states, and therefore does not purport to constitute a form of ‘soft’ law. Rather, it has been designed as a practical tool for State administrators to assist them in the development of coherent migration policies.

### IX.2.3.2 The ILO non-binding multilateral framework on labour migration

Following a review of the main ILO Conventions and Recommendations relating to labour migration by the Committee of Experts on the Application of Conventions and Recommendations (ILO, 1999), the Governing Body decided in 2002 to place on the agenda of the 92nd Session of the International Labour Conference (ILC) a general discussion on migrant workers based on an “integrated approach”. This reflected the explicit recognition by ILO constituents of the crucial importance of international labour migration and the value of working on migration issues from a tripartite perspective. This general discussion, the first high-level international tripartite debate on labour migration since the International Conference on Population and Development in 1994, revealed the complex challenges, as well as the enormous opportunities, raised by the expansion of cross-border migration for employment in today’s world. The Conference adopted by consensus a Resolution *concerning a fair deal for migrant workers in a global economy*, which called upon ILO and its constituents to implement, in partnership with other relevant international organizations, a plan of action on labour migration (ILO, 2004b: para.20-22).

A major element in this plan was “the development of a non-binding multilateral framework for a rights-based approach to labour migration which takes account of labour market needs, proposing guidelines and principles for policies based on best practices and international standards”. The six other elements of the plan relate to the application of labour standards and other relevant instruments, employment promotion, capacity building and technical assistance, social dialogue, development of a knowledge base and a follow-up mechanism. In identi-

fying the elements of the plan, Members of the ILO have underlined the need for a comprehensive and integrated approach to international labour migration.

In November 2004, the ILO Governing Body decided to convene a Tripartite Meeting of Experts, from the 31 October to 2 November 2005, to discuss the “ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration” (ILO, 2005) and approve it, prior to its submission to the Governing Body in March 2006. The Framework underlines the importance of international cooperation in dealing with labour migration. There are four broad themes in the Framework:

- decent work for all;
- management and governance of labour migration;
- promotion and protection of migrant rights;
- migration and development.

The Framework is composed of 15 broad principles, each with corresponding guidelines and a follow-up mechanism. Annexes I and II contain, respectively, a list of international instruments relevant to labour migration and a compilation of examples of best practices in labour migration policies and programmes drawn from all regions.

The Framework has been developed within the overarching framework of the ILO “decent work” agenda. It deals only with international labour migration and addresses the concerns of both origin and destination countries, and of men and women migrant workers themselves. It takes a positive perspective on labour migration emphasizing its contribution to economic growth and development in countries of origin and destination and to the welfare of migrant workers themselves, when labour migration is properly organized. The Framework brings out the benefits of international cooperation in the organization of labour migration. Because of the special vulnerability of migrant workers due to their status as non-nationals in the countries where they work, the Framework is concerned with ensuring respect for their human and labour rights.

The principles and guidelines on migration policy included in the Framework are firmly grounded in international instruments adopted by the UN and

ILO (Chapter I) and in best practices observed in both countries of destination and origin. It recognizes the role of social dialogue and the importance of the participation of employers' and workers' organizations in the formulation and implementation of labour migration policies. In short, it is a response to the current global concerns with international labour migration.

Members of the ILO have decided that the Framework will be non-binding. Therefore, the text focuses on the principles and guidelines that should assist Member States in formulating labour migration policy measures and in implementing them. It is a flexible tool kit, which can be adapted to the diverse conditions facing different states.

The text presented by ILO and adopted by the Tripartite Meeting of Experts and Governing Body strictly adheres to the Organization's mandate in the world of work. Its focus is on issues of employment, labour and human rights, social protection and social dialogue, as they relate to labour migration. It does not deal with the sovereign rights of Member States to manage labour migration in accordance with their interests and priorities.

The Framework also rigorously follows the parameters set by the ILC Resolution in 2004. Paragraph 24 of the Conclusions, adopted by this Resolution, identifies 20 areas on which the guidelines should at least focus. The nine major issues in the Framework reflect ILO's concerns, as expressed in the ILC Resolution. They thus deal with:

- decent work;
- international cooperation;
- a global knowledge base;
- effective management of labour migration;
- protection of migrant workers;
- prevention of and protection against abusive migration practices;
- the migration process;
- social integration and inclusion;
- labour migration and development.

The Framework also includes a follow-up mechanism. Under each heading, one or more principles are proposed for each labour migration policy area,

followed by specific guidelines for formulating policy measures.

The Multilateral Framework will contribute to rising to the challenges of international labour migration and to place the opportunities it opens at the service of Governments, employers and workers. ILO is confident that this Framework will further strengthen the foundations of a sustainable labour migration order.

### IX.3 Concluding Remarks

In general, it can be concluded that inter-state cooperation is vital to an orderly and managed labour migration system. In the absence of a widely accepted international migration system for labour migration (i.e., expansion of GATS to encompass broader categories of service providers thus increasing worker mobility and further ratification of ICRMW and of relevant ILO instruments), there is a need to expand and develop concurrently international, regional and bilateral cooperation through formal and informal mechanisms on the basis of existing best practices. Cooperation should take the interests of all stakeholders into account: those of countries of origin and of destination, government at all levels (central, regional and local), migrant workers, social partners (employers, trade unions), and civil society.

## ENDNOTES

- 1 Formal bilateral cooperation can also take place on a deeper level and work towards integration of the labour markets. For example, in 1996, Belarus and the Russian Federation, concluded an agreement on equal rights for their citizens in respect of employment, wages and the provision of other social and labour guarantees. As a result, citizens of one Contracting party are not considered “foreigners” in the territory of the other, they do not need to obtain a work permit, and they can freely change their job or place of residence. Information provided by IOM Moscow (March 2006).
- 2 This section is based in large part from Textbox 12.2 in IOM (2005a: 248-251).
- 3 Armenia has concluded BLAs with Russia (1994), Ukraine (1995), Belarus (2000); Belarus has concluded BLAs with Moldova (1994), Russia (1993) Ukraine (1995), Kazakhstan (1997); and Russia has concluded BLAs with Kyrgyzstan (1996; Additional Protocols 2003, 2005), Tajikistan (2005) and Ukraine (1993). There is also an agreement between Azerbaijan and Kyrgyzstan. Information provided by IOM Moscow (March 2006).
- 4 Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) and accompanying Recommendation No. 151 also emphasize the importance of bilateral cooperation, a position supported by the ICRMW (UN, 1990; Section IX.1.1.5 below).
- 5 Memorandum of Understanding for the Entry of Temporary Foreign Workers for Projects in the Alberta Oil Sands, <http://www.sdc.gc.ca/en/epb/lmd/fw/mouforOilAlberta.pdf> (visited March 2006).
- 6 E.g. Art.11 of the Agreement between Spain and Colombia for the regulation and control of labour migratory flows (21 May 2001); Art.12 of the Agreement between Spain and Ecuador for the regulation and control of migratory flows (29 May 2001) (see Annex 8); and Art.11 of the Agreement between Spain and Romania for the control of labour migratory flows between both States (23 January 2002). The agreements with Ecuador and Romania stipulate that migrant workers must report to Spanish consular authorities within a maximum period of one month of their return to the country of origin.
- 7 This is stated explicitly in the Labour Agreement between Spain and Morocco (25 July 2001) (Art.13), which stipulates that applications for residence and one-year and renewable work permits submitted by Moroccan workers who have exercised an activity as temporary workers for a period of four years, whether consecutively or not, will be examined with special benevolence by the Spanish authorities. See also Articles 14 of the Agreement between Spain and the Dominican Republic for the regulation and control of labour migratory flows (17 December 2001).
- 8 The deadline was set for 11 July 2003. By early September 2003, approximately 30,000 Brazilian migrant workers had registered to regularize their situation in Portugal (OECD, 2004a: 258).
- 9 For details on the UK programme, see UK Home Office, Immigration and Nationality Directorate, [http://www.workingintheuk.gov.uk/working\\_in\\_the\\_uk/en/homepage/schemes\\_and\\_programmes/working\\_holidaymaker.html](http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/schemes_and_programmes/working_holidaymaker.html).
- 10 E.g., ICRMW, Art. 81(1); ECMW, Art. 32.
- 11 See ICRMW, Art. 59(2). Similarly, in Article 53(2), access to employment for migrant workers can be limited for up to a period of five years in pursuance of policies granting priority to nationals or persons assimilated to them for these purposes, by virtue of bilateral or multilateral agreements or national legislation.
- 12 Despite the existence of a BLA between Spain and Ecuador (see Annex 8), the number of Ecuadorians who went to work in Spain was lower than expected by the Ecuadorian government. This was due to the system allowing employers to choose a worker from a country having signed a bilateral agreement with Spain or any other country. Apparently, Spanish employers prefer to hire temporary workers from countries closer to Spain, such as Poland, than from Ecuador. This choice is dictated more by the cost of travel (for which they are responsible) than by cultural and linguistic links with the country of origin.
- 13 Another example of a visa-free regime was set up by the Economic Community of the West African States (ECOWAS), agreed by 16 member countries in 1979. It came into force in 1980 with the first provisions for visa-free entry. However, implementation of this regional framework has been slow and patchy.
- 14 Ireland and the UK do not participate in this measure.
- 15 Council Regulation 539/2001/EC (EU, 2001) lists third countries whose nationals must be in possession of visas when crossing external borders and those whose nationals are exempt from that requirement.
- 16 Rights to free movement are covered by Articles 39-42 EC (free movement of workers), Articles 43-48 (establishment), and Articles 49-55 (services), and are implemented by secondary legislation (Regulations and/or Directives).
- 17 Council Directive 2004/38/E (EU, 2004b) (Arts. 2(2) and 3(1)). The inclusion of registered partners is covered by Art. 2(2)(b) of this Directive.
- 18 Formerly Council Directive 64/221/EEC (EU, 1964), but superseded by Directive 2004/38/EC (EU 2004b), as of 30 April 2006.

- 19 Referred to as the Accession 8 (A8) states: Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovak Republic, Slovenia.
- 20 ECJ 1993, Case 42/93, and see also ECJ 1989, Case 113/89 and ECJ 2003a, Case 445/03.
- 21 Council Directive 2003/109/EC (EU, 2003e), Art.14.
- 22 See also the 1970 Protocol to the Ankara Agreement (EU, 1970).
- 23 See Euro-Mediterranean Agreements (1998, 2000, 2002), Title VI (Cooperation in Social and Cultural Matters).
- 24 The parties anticipated that Mexico, which had the lowest GDP of the three, would gain the most from NAFTA and that this rise in its GDP would create opportunities in its domestic labour market. See Martin (1998: 426).
- 25 At the time, public and political opposition to increased Mexico-US immigration was high in the US. NAFTA was seen as a means for reducing the flow of undocumented migrants, while ensuring that migration policies did not encumber trade (Johnson, 1988: 419; Cornelius, 2001).
- 26 Admission may be denied for reasons of public health and safety, and of national security or to those whose entry might have implications for an ongoing labour dispute (NAFTA, Art. 1603).
- 27 However, parties were permitted to establish numerical limitations on the admission of certain classes of professionals, unless the parties agreed not to establish such limits (NAFTA, Annex 1603.D.4). US limits on the entry of Mexican professionals were permitted for the longer of ten years after enactment or the duration of a similar policy between the US and another party, besides Canada, or non-party.
- 28 The categories of professionals are: medical professionals (dentists, registered nurses, pharmacists, vets, teaching and research doctors but not medical practitioners); scientists; teachers (employed in a college, seminary or university, but not schoolteachers); and a general category encompassing a number of professions, such as (this list is not exhaustive) accountants, architects, computer systems analysts, economists, engineers, hotel managers, interior designers, lawyers, librarians, research assistants, and social workers (NAFTA, Ch. 16, Appendix 1603.D.1).
- 29 E.g. Mexican lawyers and accountants have faced, or continue to face, greater procedural hurdles to practicing their profession in the US than Canadian lawyers and accountants (see Condon and McBride, 2003: 280).
- 30 The letter must describe the employment activity, purpose of entry, length of stay, qualifications or credentials, compliance with Department of Homeland Security regulations and/or State law, and arrangements for compensation. Proof of licensure is optional (see US State Department at [http://travel.state.gov/visa/temp/types/types\\_1274.html](http://travel.state.gov/visa/temp/types/types_1274.html)).
- 31 In January 2004, the procedure for Mexicans was simplified by the removal of the requirement for petition approval and the filing of a labour condition application.
- 32 There are also three observer states: Armenia, Moldova and Ukraine.
- 33 See <http://www.photius.com/eaec/>
- 34 See Wikipedia – the Free Encyclopedia at [http://en.wikipedia.org/wiki/Central\\_Asian\\_Cooperation\\_Organization](http://en.wikipedia.org/wiki/Central_Asian_Cooperation_Organization). A related development concerns the Agreement on the Common Economic Space (CES), signed by Belarus, Kazakhstan, Russia and Ukraine in Yalta on 19 September 2003. CES is defined in the Agreement (Art.1) as a “common economic space uniting the customs territories of member countries which apply economic regulating mechanisms based on uniform principles providing [for] the free movement of goods, services, capital and labour resources within a common economic space, a single foreign policy and agreed tax, monetary and financial policies as required for assuring fair competition”. CES’ main objectives are: co-operation in trade and investment to ensure sustainable development of the economies of member countries; promotion of business; increase of economic potential in order to strengthen the competitiveness of these economies in international markets; and coordination of terms and conditions for joining the World Trade Organization (WTO) (Section IX.1.7.2 below) (Rakhmatulina, 2004). However, the changed political climate in Ukraine has muted development of the CES.
- 35 Information provided by IOM Moscow (March 2006).
- 36 Information provided by IOM Moscow (March 2006).
- 37 With the exception of Armenia, Georgia, Moldova and Kyrgyzstan, the remaining CIS countries are not members of the WTO. However, one of the objectives of the Agreement on the Common Economic Space for the four countries (Belarus, Kazakhstan, Russia and Ukraine) is to coordinate the terms and conditions for joining the WTO (Section IX.1.5 above).

## ENDNOTES

- 38 GATS, Annex on Movement of Natural Persons Supplying Services under the Agreement (1994).
- 39 For the website of the Secretariat (based in Kiev, Ukraine), see <http://soderkoping.org.ua/site/page2864-ns0.html>
- 40 Belarus, Estonia, Hungary, Latvia, Lithuania, Moldova, Poland, Romania, Slovakia, and Ukraine.
- 41 See the website of IOM Brussels at <http://www.belgium.iom.int/pan-europeandialogue/PanEuropeanDialogue.asp>
- 42 For more information, see IOM's website at <http://www.iom.int/en/know/dialogue5-5/index.shtml>
- 43 The IGC Members are Australia, Austria, Belgium, Canada, Denmark, Finland, Germany, Ireland, Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, UK and USA.
- 44 See ICMPD's website at: <http://www.icmpd.org/default.asp?nav=budapest&folderid=376&id=-1>.
- 45 See ICMPD's website at <http://www.icmpd.org/default.asp?nav=budapest&folderid=376&id=-1&subfolderid=468>.
- 46 More information on the Berne Initiative is available from website of the Swiss Federal Office for Migration at <http://www.asyl.admin.ch/index.php?id=226&L=3> and the IOM's website at <http://www.iom.int/en/know/berneinitiative/index.shtml>
- 47 IAMM emphasizes also that "migrants in an irregular situation are entitled to protection of their human rights" (Swiss Federal Office for Migration, 2005a; IOM 2005d: 46), although it recognizes that they "are particularly vulnerable in practice to discrimination and to exploitation and do not enjoy access to a range of social services and other forms of protection of the host society". With regard to the principle of non-discrimination, IAMM recommends, as an effective practice, the "implementation of measures to ensure the appropriate treatment of migrants, regardless of their status, and to prevent racist or xenophobic actions and policies and to eliminate discriminatory practices against migrants" (Swiss Federal Office for Migration, 2005a; IOM 2005d: 47).





## X. Conclusions

Of the estimated 191 million migrants worldwide, more than 86 million are thought to be labour migrants. This figure is much higher, if one takes into account accompanying dependents. Management of migration flows is therefore crucial, given this magnitude and the likelihood that international labour movements will increase in the future.

Countries of origin and destination face both common and different priorities and issues, in terms of emphasis, in formulating labour migration policy. The key issues in countries of origin are:

- protection of their nationals while working abroad, in accordance with recognized international human rights and labour standards;
- opening of more legal avenues for their citizens to gain access to labour markets in destination countries;
- optimization of the benefits of labour migration with a focus on enhancing development;
- inter-state cooperation.

While in countries of destination, the key issues relate to:

- attracting and managing labour inflows;
- ensuring the rights of migrant workers, including those of the increasing numbers admitted under temporary labour migration programmes;
- taking into account the concerns of the host population to labour immigration, particularly with regard to the admission of migrant workers and their integration in the host society, while also addressing the negative and harmful aspects of such concerns as intolerance, discrimination, and xenophobia.

Women comprise half of all migrants contributing enormously to national and host country development as well as support of their families. At the same time women are often concentrated in occupations that are low paid and more open to abuse or non-respect of their basic rights as women and migrant workers.

The *Handbook* has attempted to provide some direction for policy-makers in countries of origin and of destination as they seek to respond to these issues by providing information on effective policies and practices which have evolved in countries with substantial experience in this field, taking account of the local context.

The primary concern for countries of origin is to ensure as far as possible the protection and welfare of their migrant workers, particularly those more vulnerable to abuse. To resolve this issue, countries of origin have two concrete policy options at their disposal: regulatory measures, and the provision of support services. The *Handbook* describes a range of policy strategies in both these two areas, including regulation of recruitment, development of model employment contracts, information dissemination and on-site assistance through the establishment of welfare funds, and creation of posts for labour attachés.

An equally important concern of countries of origin is optimizing the development benefits from organized labour migration. An increasing number of developing countries and countries with economies in transition seek to adopt policies, legislation and structures which promote foreign employment for a section of their workforce and thus generate remittances, while providing safeguards to protect their migrants. Al-

# conclusions

though job creation at home is the best option, a growing number of countries see overseas employment as part of a national development strategy to avail themselves of global employment opportunities and to generate foreign exchange. The *Handbook* describes policies to optimize the benefits of organized labour migration, including marketing and the expansion of labour migration, extension of the development benefits of remittances, skills development, and mitigation of the emigration of skilled human resources.

These policy objectives can only be met, however, if there is adequate institutional capacity and inter-ministerial coordination to carry out these objectives. These include giving due priority to labour migration in terms of overall development and foreign policy and of resource allocation. The *Handbook* outlines the key elements in the effective administration of labour migration.

Despite all the efforts made by countries of origin to protect migrant workers, they continue to experience numerous problems in destination countries, particularly vulnerable groups of migrants, such as female domestic workers, entertainers and lower skilled workers. There are clear limits to what a state of origin can do to protect its citizens working abroad without the active cooperation of the states of employment. In addition, inter-state cooperation is essential for expansion of organized labour migration and for reductions in irregular movements. Inter-state cooperation is important for both countries of origin and countries of destination and may be achieved through formal as well as informal mechanisms.

While most states are often predominantly countries of origin or of destination, as emphasized in the introductory chapter, international labour migration is a dynamic process and today's countries of origin may tomorrow become countries of destination. Moreover, to some extent, most countries of origin are also countries of destination in that they receive inflows of labour (even if these are limited to corporate, business, and humanitarian workers). Some middle-income countries are also destination countries and are seeking ways to improve the management of their labour inflows. Moreover, many high-income countries, while having established long-standing migration policies, have to make continual adjustments to meet labour market needs, attract skilled migrants, whether on a permanent or temporary basis, reduce irregular migration, and mitigate brain-drain in countries of origin. Establishing effective policies to manage labour inflows is a complex task and the *Handbook* has endeavoured to provide a range of policy options that appear to work, while also discussing those which have been less successful. Countries that have achieved relative success in managing labour migration have done so because they have been prepared to admit past policy failures and to experiment with new approaches.

Observations and assessments of recent policy-making on labour migration at the national level indicate that, given the demographic and welfare imbalances in most European countries, serious consideration has to be given increasingly to certain forms of permanent employment-based immigration. Some countries, such as the Czech Republic, Germany and the United Kingdom, have already initiated programmes for this purpose. The Canadian points sys-

tem, which assesses applicants wishing to be admitted for the purpose of employment based on objective criteria, has served as a model for the development of fledgling employment-based immigration systems in these European countries.

At the same time, a considerable majority of migrant workers, who are lawfully employed in European countries, have been admitted in the context of temporary labour migration schemes, sometimes facilitated by bilateral labour arrangements. Policy-makers now face challenges in making these programmes work, while simultaneously protecting the interests of their national workforce (both nationals and lawfully resident migrants) and providing sufficient safeguards for migrant workers admitted under these schemes. The *Handbook* has considered these questions with reference to specific policy examples and has also advanced a number of policy suggestions in this area with a focus on the effective return and rights' dimensions of such programmes.

Given the transnational nature of labour migration, a policy framework developed solely at the national level, irrespective of how innovative or meticulously crafted, will be insufficient to meet all the challenges posed. Consequently, such a framework should be firmly rooted in bilateral, regional and multilateral mechanisms, both of a formal and informal co-operative nature, which inform and supplement national approaches. In this regard, it is important to underline the role of the international legal framework, both that relating to the protection of the human and labour rights of both male and female migrant workers and that concerned with securing greater mobility for workers in the context of service provision un-

der Mode 4 of the GATS, as well as the diverse forms of inter-state cooperation.

After the launch of the *Handbook* in May 2006, it is proposed to organize specialized regional and/or national workshops to allow decision-makers and practitioners from interested countries to discuss specific areas covered by the *Handbook* in more detail. The aim will be to assist participants in these workshops not only to familiarize themselves with effective practices carried out in other countries, but also to discuss how particular policies presented in the *Handbook* might be adapted or developed to suit their specific migration management situations, and to identify key steps to be undertaken by their respective governments to address specific labour migration needs and concerns.

It is hoped that the *Handbook* and subsequent workshops will also help to create a basis for future dialogue and co-operation among various national authorities and other stakeholders, and directly facilitate the exchange of information among states, in the OSCE area and beyond, on effective policies and practices related to labour migration management.

Governments, employers' and workers' organizations, parliamentarians, and civil society organizations in all countries, which are participating States of the OSCE, and Member States of the ILO and IOM, have a fundamental role to play in assuring a regulated and effective approach to international labour migration. This approach offers the best route to ensuring that labour migration becomes truly an instrument of development, regional integration, and social welfare in home and host countries, as well as for migrants themselves.



X.



# Annexes

## *ANNEX 1: Activities of OSCE, ILO and IOM on Labour Migration*

### **1. Organization for Security and Cooperation in Europe (OSCE)**

The OSCE, a regional, values-based organization under the United Nations' Charter, plays a leading role in promoting security and democratization across the Euro-Atlantic and Eurasian States. Specifically, it helps to provide: early warning, conflict prevention, crisis management and post conflict rehabilitation. It tackles this security mandate in a co-operative and comprehensive way. Its 3,500 staff in 18 field operations and three specialized institutions are committed to fostering security in the region for its 55 participating States and 11 Partners for Co-operation.

Due to recent labour migration trends and patterns in the OSCE area, a number of OSCE participating States have accommodated significant numbers of migrants. Issues related to the human rights of migrants and migrant workers, in particular, have been receiving increasing attention of the OSCE over the last years. The OSCE has developed a number of important commitments on migration, freedom of movement, treatment of migrant workers, and treatment of citizens of other participating States. The OSCE institutions and field presences assist OSCE participating States in their efforts towards compliance with these commitments.

Despite ongoing efforts by governments, the private sector and civil society to address the need to im-

prove the socio-economic conditions and reduce economic differences between countries, there are still serious challenges related to demographic developments, socio-economic disparities, limited income opportunities as well as obstacles to protecting the human rights of migrants in the OSCE area. Moreover, there are persistent negative stereotypes and perceptions about the impact of migrants. A lack of information on migration as a phenomenon and on migration laws and policies of other participating States presents a challenge to citizens and governments alike and needs to be overcome. Another challenge is the growing perception in one group of OSCE States that the other part of the region is erecting a “paper curtain” of onerous visa requirements that would divide the region and its citizens, thereby preventing them from learning more about each other and from reaching mutual understanding.

#### **The main issues**

1. **Supporting the development of improved income opportunities:** Globalization, liberalization and technological change offer new opportunities for trade, growth and development, but these changes have not benefited all the participating States and their citizens equally, thus contributing, in some cases, to deepening economic and social disparities between and also within the OSCE participating States. Poverty, unemployment, lack of opportunities, ecological disasters resulting from natural and man-made causes in countries of origin, and increasing labour demand in countries of destination are some of the key factors driving migration. The migration movements have brought with them growing irregular migration and associ-

# annexes

ated criminal activities such as smuggling and trafficking of human beings. To address some of the challenges, activities are needed to promote strengthening of the investment and business climates to stimulate economic growth and job creation, support entrepreneurship development, raise local awareness about alternative ways for use of remittances, and promote regional economic cooperation. To underpin informed decision-making, there is also a need for more quality research on the social and economic effects of migration in the OSCE participating States.

**2. Supporting initiatives on treatment of migrants and migrant workers and protection of their rights:** The analysis of the migration situation in the OSCE area indicates a growing number of migrant workers. Citizens of OSCE participating States also migrate internally to the richer and economically developed regions and large cities seeking jobs and better living conditions. The lack of tolerance in the host society towards migrants and proper legal mechanisms for the protection of their rights can cause conflicts. The elaboration and implementation of programmes focused on safeguarding the rights of migrants, regularization of migrant workers, and their integration into society support the development of human-oriented migration policies. Additionally, there is an urgent need to promote dialogue and establish co-operative mechanisms among OSCE participating States on the issue of labour migration to prevent discrimination, ill-treatment, and other situations where the rights of migrant workers are violated.

### 3. *The right to free choice of place of residence:*

Despite the fact that more than 15 years have passed since the collapse of the Soviet Union, the Soviet-era regulations on registration of both nationals and foreigners, known as the *propiska* system, have not been changed in a number of countries in Eastern Europe and Central Asia, thereby restricting the freedom of individuals to choose their place of residence within their own countries. Moreover, the *propiska* system poses a significant barrier to finding durable solutions to the problems of all migrants, including migrant workers and internally displaced persons, results in the denial of social services, and impedes access to jobs, as well as creates obstacles to migrants' participation in elections and integration into society.

#### **Programme on internal migration**

Assistance in reforming the *propiska* system by:

- helping in the development of a conceptual and legal basis for the reform of population registration;
- providing expertise in drafting of new legislation;
- organizing conferences, seminars, technical workshops in order to discuss concepts and draft laws on reforms of population registration.

#### **Programme on cross-border migration**

Promoting inter-state cooperation on labour migration, migration-related information, and the human rights of migrants, through:

- facilitating bilateral and multilateral cooperation and exchange of information and experiences on migration, labour migration and the human rights of migrants;

- assisting in the establishment of concrete bilateral and multilateral cooperation mechanisms on migration issues;
- assisting OSCE participating States in the development of migration policies and legislation in line with OSCE commitments;
- in close cooperation with other organizations and agencies, facilitating inter-state and intra-state cooperation on the collection and exchange of migration-related data and development of policy-oriented research on labour migration issues, including irregular migration, and the economic impact of migration;
- organizing training programmes to provide government officials and the public at large with the information and skills needed to implement international standards and ‘good practices’ in the field of migration, including services to migrants and the treatment of migrants, at both national and regional levels;
- promoting the establishment of migrant resource and information centres;
- organizing training programmes and raising awareness among migrants and their families about remittances’ use and investment ;
- supporting the publication of reference guides and other materials for policy makers and the public at large on migration issues and the human rights of migrants, and organizing awareness-raising seminars and workshops;
- promoting good governance and preventing corruption in dealing with labour migrants.

### **Programme on environmentally induced migration**

Assistance to environmentally induced migration:

- assisting in background research identifying the root causes, geographical areas, challenges and possible solutions;
- discussing the findings at the preparatory Conference to the OSCE 15th Economic Forum and developing specific actions (seminars, technical workshops, project activities, awareness raising and information exchange/dissemination).

Source: OSCE (OCEEA and ODIHR) (April 2006).

## **2. International Labour Organization (ILO)**

The protection of migrant workers and improvement of their working conditions have been concerns of the ILO since its establishment in 1919. The emergence of international labour migration as an important global phenomenon compels ILO to increase its role in this area. The 92nd Session of the International Labour Conference (ILC) in June 2004 adopted by consensus a “Resolution and Conclusions concerning a fair deal for migrant workers in a global economy”. This decision noted that:

The ILO’s mandate in the world of work as well as its competencies and unique tripartite structure entrust it with special responsibilities regarding migrant workers. Decent work is at the heart of this. The ILO can play a central role in promoting policies to maximize the benefits and minimize the risks of work-based migration.

The ILC 2004 outcome reiterated and reinforced the ILO operational mandate in this area by calling on the Office and its constituents to carry out a Plan of Action on migrant workers. This Plan of Action reflects and strengthens the ongoing work of the ILO. Its components are:

- development of a non-binding multilateral framework for a rights-based approach to labour migration, taking account of labour market needs and sovereignty of States;
- wider application of international labour standards and other relevant instruments;
- support for implementation of the ILO Global Employment Agenda at national level;
- upholding of social protection for migrant workers;
- capacity building, awareness raising and technical assistance;
- strengthening of social dialogue;
- improving the information and knowledge base on global trends in labour migration;
- ILO and constituent participation in relevant international initiatives on migration.



### 1. The Multilateral Framework on Labour Migration is described in the *Handbook* (Section IX.2.3.2).

### 2. Wider application of international labour standards and other relevant instruments

ILO activities include:

- promoting ratification of ILO Convention No. 97 and Convention No. 143, as well as other relevant international Conventions for migrant workers;
- producing training and educational material on migrant worker instruments for use by concerned government agencies, social partners, and NGOs;
- assisting Member States in conforming national labour migration policies and programmes to these standards;
- providing assistance in drafting legislation to regulate private employment agencies, as requested by numerous countries.

### 3. Implementation of the Global Employment Agenda

- Supporting Member States in mitigating the circumstances driving migration through the generation of decent work opportunities in countries of origin;
- promoting gender-sensitive employment and vocational training policies to reduce migration of vulnerable groups and help local labour market integration;
- promoting human resource development on issues of migration of skilled labour including brain drain and skills shortages;
- implementing a special action programme on international migration of health-care workers;
- identifying good practices regarding skills training of migrant workers; promoting international recognition of qualifications and experience;
- facilitating migrant worker remittances through adoption of measures to reduce costs and risks, and leveraging remittances for investment via links to micro lending programmes.

### 4. Social protection of migrant workers

- Offering advisory services on formulation and implementation of labour migration policies based on the ILO Multilateral Framework on Labour Migration;
- reviewing implications of demographic change for social security systems, including in the International Labour Office contribution to the Second World Assembly on Ageing;
- promoting establishment of bilateral or multilateral social security agreements on portability of social security and pension rights for migrant workers;
- reviewing conditions of work, and promoting safe work for migrant workers;
- combating discrimination and promoting integration through dissemination of effective practices, indicators of integration and evaluation tools;
- ensuring that national labour legislation and social regulations cover all male and female migrant workers, including domestic workers and other vulnerable groups.

### 5. Capacity building, awareness raising and technical assistance

Current and planned technical cooperation activity is:

- assisting Member States to update laws and regulations in harmony with international standards, undertake practical measures on labour migration, and improve the functioning of administrative arrangements and enforcement mechanisms;
- building capacity for monitoring labour migration at the national level;
- strengthening capacity of workers' and employers' organizations to participate in formulation and implementation of policies;
- supporting development of gender-sensitive national migration policies;
- promoting measures and activities to combat racism, discrimination and xenophobia.

## 6. Strengthening social dialogue

- Facilitating participation of employers' and workers' organizations in relevant international, and national forums and establishment of national tripartite consultative mechanisms to ensure social dialogue on all aspects of labour migration;
- promoting consultation with employers' organizations on practical opportunities and challenges they confront in the employment of foreign workers;
- exploring complementary partnerships with important civil society and migrant associations that promote the rights and welfare of migrant workers.

## 7. Improving the information and knowledge base

- Supporting improvement of migration statistics, particularly with the ILO International Labour Migration Database; currently providing data from more than 80 countries;
- improving government capacity and structures for collecting and analysing labour migration and related labour market data, and applying it to labour migration policy;
- testing in selected countries new census and household survey modules to measure the labour situation of migrants and immediate descendents;
- collecting and disseminating information and profiles of 'best practices' in relevant categories of labour migration management and in integration policies;
- conducting research on labour migration issues, including long-term labour market developments, irregular migration, migration and development, the impact of emigration on countries of origin, and contributions of immigration to countries of destination;
- developing models for future information exchange between destination and origin countries on job openings and skills needs for foreign workers.

## 8. Policy cooperation and dialogue

- Collaboration with UN bodies, intergovernmental agencies and regional bodies;
- active participation in the Global Migration Group;
- cooperation with global and regional social partner organizations;
- contributions to the UN High Level Dialogue on international migration and development.

Source: ILO, International Migration Programme (MIGRANT) (March 2006).

## 3. International Organization for Migration (IOM)

Established in 1951, the IOM is the principal intergovernmental organization in the field of migration. It has 116 Member States and over 1,400 active projects, several of which are in the field of labour migration, in over 280 field locations in more than a hundred countries, carried out by IOM's 5,000 employees worldwide through an operational budget of more than a billion dollars annually. IOM is dedicated to promoting humane and orderly migration for the benefit of all. It does so by providing services and advice to governments and migrants and promoting international cooperation on migration issues. IOM works in four broad areas of migration management: migration and development, facilitating migration, regulating migration and addressing forced migration. Cross-cutting activities include the promotion of international migration law, policy debate and guidance, protection of migrants' rights, migration health and the gender dimension of migration. Labour migration is a critical cross-cutting issue.

IOM's purpose in labour migration is to facilitate the development of policies and programmes that can individually and mutually benefit the concerned governments, migrants and societies by:

- providing effective protection and support services to labour migrants and their families;
- fostering economic and social development; and
- promoting legal forms of labour mobility as an alternative to irregular migration.

With its global presence in both countries of emigration and immigration, IOM is well placed to bring together all parties to put in place labour migration mechanisms that balance the different interests.

IOM programmes in labour migration include:

- government capacity-building;
- pre-departure orientation for migrants, awareness raising and provision of information;
- facilitation of bilateral labour arrangements and the implementation of labour migration programmes;
- enhancement of the development impact of labour migration;
- assistance with inter-state dialogue and cooperation.

The programmes are carried out in partnership with various governments and international organizations.

### **Capacity-building in labour migration management**

An increasing number of developing countries and countries with economies in transition seek to adopt policies, legislation and structures to promote the foreign employment of part of their workforce and generate remittances, while providing safeguards to protect their migrants. Some middle-income countries are also destination countries and are seeking ways to better manage their labour inflows. IOM helps strengthen the labour migration management capacity in such countries.

### **Pre-departure training and orientation of labour migrants and information**

Many migrants face difficulties in the host countries due to lack of preparation before departure. IOM offers pre-departure orientation services to inform the migrants about their future living and working environment and assist in developing language training curriculum to facilitate migrant integration in the destination countries. IOM has focused on awareness raising of migrants on risks and realities associated with labour migration and on improving migrants' access to information on immigration and labour legislation.

### **Facilitating bilateral labour programmes**

States requiring foreign labour are increasingly entering into bilateral labour agreements with partner states or developing special labour migration programmes. These programmes are designed to steer labour flows to specific areas of demand and reduce the need for irregular migration by providing legal alternatives. IOM supports government efforts to put these elements into place and provides a full range of services to home and host countries and to individual migrants to this end.

### **Migration and development: A focus on remittances**

The most direct link between migration and development is through remittances – the funds migrants send home. Recognizing that remittances are private and family funds, IOM's purpose in the remittance area is to facilitate the development of policies and mechanisms that:

- improve remittance services to migrants;
- enhance the development impact of remittances.

A third area of interest, given the poor quality of data available on remittances, is:

- baseline and policy oriented research.

### **Regional dialogue**

IOM promotes inter-state regional dialogue on migration, including labour migration, in partnership with other international and regional organizations as well as other pertinent stakeholders, with a view to sharing information, experiences and best practices on such questions as the protection and provision of services to vulnerable migrant workers, optimizing the benefits of organized or legal labour migration, enhancing capacity-building and promoting further dialogue between the countries involved. The Ministerial Consultations on Overseas Employment for Countries of Origin in Asia (Textbox IX.8) constitute an example of such activities promoted and undertaken by IOM.

Source: IOM Labour Migration Division.

## ANNEX 2: *Environmentally-Induced Migration*

Environmental sustainability and (irregular and labour) migration are closely linked. The main explanation lies in the fact that poverty, which pushes many people to migrate, is directly linked with the environment's sustainability in order to provide them with an income. In particular, agricultural communities face the risk of environmental degradation as their income depends on the land being able to provide them with goods to sell. Further, poverty may worsen local environmental problems, as it forces workers to deplete water, forest and soil resources to the point where it is difficult for nature to regenerate ecosystems.

Among the main factors that may lead to environmentally-induced migration are:

- falling ground water levels as a result of unsustainable water management;
- salinization of the land as a result of over-irrigation;
- desertification as a result of salinization, deforestation and/or pollution;
- natural disasters as a result of earthquakes, deforestation and/or climate change;
- industrial/nuclear waste and accidents;
- climate change which may cause oceans to rise and alter rain patterns.

Various international agencies note growing numbers of displaced people as a result of environmental problems such as drought, soil degradation, desertification, deforestation and natural and man-made disasters. The Red Cross and Red Crescent World Disasters Report 2003 estimates that 25 million people have become 'environmen-

tal migrants'. The uncertainty about the numbers stems from the difficulty of assessing how environmental degradation actually influences a person's decision to migrate. Environmental factors are closely intertwined with other factors, such as poverty, institutional constraints, population pressures and political instability – all of which are given as reasons for migration.

The existence of environmental refugees/migrants was first recognized and categorized in 1985 in a UN Environmental Programme (UNEP) report. The publication defined environmental refugees as "those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural or man-made) that jeopardized their existence and/or seriously affected their quality of life" (El-Hinnawi, 1985: 964).

This definition does not correspond to the official definition of "refugees" by the 1951 UN Convention Relating to the Status of Refugees, which protects only those who have crossed an international border and have a "well-founded fear" of being persecuted. The plight of millions of forced environmental migrants does not fulfil the second of these criteria and often not the first one either, as many people move within their country. This exclusion raises serious ethical and legal questions. Some experts opine that adding environmental migrants to the definition of refugees would be unhelpful, as it would overload the existing refugee apparatus. The result is that no UN agency is currently mandated to help them. Being thus unofficially classified as 'environmentally induced migrants', national governments have a responsibility on the one hand to prevent environmental degradation and on the other, to assist those people affected by it.

Source: OSCE (April 2006).

## *ANNEX 3: Sample Employment Contract Philippine Overseas Employment Administration*

This employment contract is executed and entered into by and between:

A. Employer:

Address and Telephone no:

B. Represented by:

Name of agent/company:

C. Employee

Civil Status:

Passport no:

Address:

Place and Date of Issue:

Voluntarily bind themselves to the following terms and conditions:

1. **Site of employment**
2. **Contract duration** \_\_\_\_\_ commencing from employee's departure from the point of origin to the site of employment.
3. **Employee's position**
4. **Basic monthly salary**
5. **Regular working hours:** maximum of 8 hours per day, six days a week
6. **Overtime pay**
  - (a) Work over regular working hours
  - (b) Work on designated rest days and holidays
7. **Leave with full pay**
  - (a) Vacation leave
  - (b) Sick leave
8. **Free transportation** to the site of employment and, in the following cases, free return transportation to the point of origin:
  - (a) Expiration of the contract
  - (b) Termination of the contract by the employer without just cause
  - (c) If the employee is unable to continue to work due to connected or work-aggravated injury or illness
9. **Free food or compensatory allowance** of US\$ \_\_\_\_\_, free suitable housing.
10. **Free emergency medical and dental services** and facilities including medicine.
11. **Personal life and accident insurance** in accordance with the host government and/or \_\_\_\_\_ government laws without cost to the worker. In addition, for areas declared by the \_\_\_\_\_ government as war risk areas, a war risk insurance of not less than \_\_\_\_\_ shall be provided by the employer at no cost to the worker.

12. In the **event of death** of the employee during the terms of this agreement, his remains and the personal belongings shall be repatriated to the \_\_\_\_\_ at the expense of the employer. In case the repatriation of the remains is not possible, the same may be disposed of upon prior approval of the employee's next of kin and/or by the \_\_\_\_\_ Embassy/Consulate nearest the job site.
13. The employer shall assist the employee in remitting a percentage of his/her salary through the proper banking channel or other means authorized by law.
14. **Termination:**
- A. **Termination by employer:** The employer may terminate this Contract on the following just causes: serious misconduct, willful disobedience of employer's lawful orders, habitual neglect of duties, absenteeism, insubordination, revealing secrets of the establishment, when employee violates customs, traditions, and laws of \_\_\_\_\_ and/or terms of this Agreement. The employee shall shoulder the repatriation expenses.
- B. **Termination by employee:** The employee may terminate this Contract without serving any notice to the employer for any of the following just causes: serious insult by the employer or his representative, inhuman and unbearable treatment accorded the employee by the employer or his representative, commission of a crime/offense by the employer or his representative and violation of the terms and conditions of employment contract by the employer or his representative. Employer shall pay the repatriation expenses back to \_\_\_\_\_.
- B1. The employee may terminate this Contract without just cause by serving one (1) month in advance a written notice to the employer. The employer upon whom no such notice was served may hold the employee liable for damages. In any case, the employee shall shoulder all the expenses relative to his repatriation back to his point of origin.
- C. **Termination due to illness:** Either party may terminate the Contract on the ground of illness, disease or injury suffered by the employee. The employer shall shoulder the cost of repatriation.
15. **Settlement of Disputes:** All claims and complaints relative to the employment contract of the employee shall be settled in accordance with Company policies, rules and regulations. In case the employee contests the decision of the employer, the matter shall be settled amicably with the participation of the Labor Attaché or any other authorized representative of \_\_\_\_\_ Embassy or Consulate General nearest the site of employment. In case the amicable settlement fails, the matter shall be submitted to the competent or appropriate body in (host country) or \_\_\_\_\_ if permissible by the host country laws at the option of the complaining party.
16. The employee shall observe employer's company rules and abide by the pertinent laws of the host country and respect its customs and traditions.
17. **Applicable law:** Other terms and conditions of employment, which are consistent with the above provisions, shall be governed by the pertinent laws of \_\_\_\_\_.

## **ANNEX 4:** ***Inter-Agency Coordination and Cooperation in the Philippines***

Although agencies like the Philippines Overseas Employment Administration (POEA) are vested with the authority to manage their overseas employment programme, they can only do so successfully in cooperation and coordination with an array of other national government agencies. The following presents an outline of the kind of inter-agency and intra-agency cooperation and coordination that POEA has established:

- (a) Department of Foreign Affairs (DFA)
  - Passport issuance of overseas workers;
  - Investigation of illegal recruitment networks overseas;
  - Assistance to distressed victims of illegal recruitment at the receiving country;
  - Corrective measures in cooperation with labour-receiving countries.
- (b) Department of Justice (DOJ)
  - preliminary investigation and inquest proceedings in illegal recruitment cases;
  - prosecution of illegal recruitment cases;
  - court appearances of POEA personnel in aid of prosecution;
  - monitoring of illegal recruitment cases/incidences nationwide.
- (c) Philippine National Police (PNP)
  - investigation of illegal recruitment and related cases;
  - institution of criminal actions against offenders;
  - apprehension of suspects and service of warrants for arrest;
  - closure of illegal recruitment establishments;
  - conduct of orientation sessions for PNP personnel nationwide;
  - provision of operational funds to be utilized by the PNP in anti-illegal recruitment operations.
- (d) National Bureau of Investigation (NBI)
  - as for PNP
- (e) Bureau of Immigration (BI)
  - control of entry by alien recruiters;
  - investigation of illegal recruitment cases involving aliens;
  - prevent departure of aliens engaged in illegal recruitment;
  - prevent exit of undocumented workers.
- (f) Local Government Units and Non-Governmental Organizations
  - monitoring of illegal recruitment activities through the barangays (smallest government unit);
  - supervision of local police units through local chief executives;
  - cancellation of permits of business establishments used by illegal recruitment establishments;
  - assistance in investigation and apprehension of suspected illegal recruiters;
  - institutionalization of role of local government units and NGOs in partnership with PNP in anti-illegal recruitment campaigns.
- (g) Department of Tourism (DOT)
  - closure of unscrupulous travel agencies;
  - regulation of travel agencies;
  - investigation of travel agencies engaged in the smuggling of overseas workers disguised as tourists and of illegal recruitment activities.
- (h) Judiciary
  - service of warrants for arrest;
  - criminal proceedings in cases involving illegal recruitment;
  - publication of convictions involving illegal recruitment and related cases;
  - monitoring of illegal recruitment cases;
  - representations to the Office of the Court Administrator for a speedy and visible disposition of illegal recruitment cases.

(i) Representations with both Houses of Congress  
➤ development of proposals for the legislative agenda enabling Congress to produce legislative measures for strengthening the government's campaign to protect and promote the welfare of migrant workers.

(j) Coordination with Public Information Agencies  
➤ support for mutual commitments to maximize the impact of information drives.

(k) Regional Offices of the Department of Labour  
➤ coordinate and assist POEA regional offices in implementing rules and regulations of overseas employment.

(l) Securities and Exchange Commission  
➤ registration of corporations with recruitment as its primary activity.

These are, amongst others, the primary agencies with which POEA works in order to carry out its mandate. Without the close cooperation and coordination of each and every agency listed above, it cannot succeed.



## ANNEX 5: Databases

There are a number of data sources available for people looking for information on international migration statistics, though there are fewer for those exclusively interested in labour migration. This section only discusses examples of popular sources and is not an exhaustive list. The national statistical organizations (NSOs) of most countries have publicly accessible tables and data on international migration available on their respective websites.

One source for international migration data is the International Labour Migration Database (ILM) maintained by ILO. The ILM focuses on labour migration and covers a greater variety of countries than many other migration databases, with data from nearly one-hundred countries. Examples of tables in this database include the stock of immigrants and migrant workers by employment status, in-flows of immigrants and migrant workers, by sector of employment, and the stock and out-flow of nationals abroad. Unfortunately, the database is not regularly updated and contains much missing data.

<http://www.ilo.org/public/english/protection/migrant/ilmdb/>

The IOM Statistical Information System on Migration in Central America (SIEMCA) project, designed to provide adequate, timely and compatible migration data from various sources through an Information System on Migration for the Central America region, also compiles existing household data on remittances in Costa Rica and El Salvador.

<http://www.siemmes.iom.int/>

A Data Sharing Mechanism (DSM) is being created upon the initiative of the governments of Eastern Europe and Central Asia, with the support of IOM. The DSM is a tool for collecting and sharing agreed upon migration-related information and data in the region. It also provides documentation on the sources and definitions of data as well as general information about legal and policy issues in each participating State.

[https://www.dsm-migration.net/dsm/cms/artikelShow.do?menu\\_id=1&parent\\_id=0](https://www.dsm-migration.net/dsm/cms/artikelShow.do?menu_id=1&parent_id=0)

International migration and asylum data for over thirty countries in Europe is available from the Statistical Office of the European Communities (EUROSTAT), including information on labour migration. These data come from the NSOs of their respective countries. Examples of data include information on the acquisition of citizenship, asylum applications and decisions, workers by citizenship and economic activity, immigration by sex and previous country of residence, emigration by sex and next country of residence, and population by sex and citizenship.

<http://epp.eurostat.ec.eu.int/>

The Organization for Economic Cooperation and Development (OECD) maintains a number of tables with information on migration data among member countries. They also have a database on immigrants and expatriates, which is primarily drawn from the 2000 round of Census data. This database includes information on the stock of foreign born and foreigners, the stock of foreign born and foreigners by educational attainment, and emigration rates by country of birth and for the highly educated. OECD migration data can differ from that found from NSOs since they often independently employ outside experts to calculate migration figures.

<http://www.oecd.org/>

The United Nations Statistics Division (UNSD) publishes a demographic yearbook which often contains international migration data. International migration characteristics are expected to be released in June of 2006, including tables on the native and foreign born population by age, sex, and urban/rural residence, population by citizenship, sex, and urban/rural residence, foreign-born population by country or area of birth, and the economically active foreign-born population by occupation and sex.

<http://unstats.un.org/unsd/demographic/products/>

The United Nations High Commissioner for Refugees (UNHCR) collects and publishes asylum and refugee statistics on an annual basis in their Statistical Yearbook.

<http://www.unhcr.org/cgi-bin/texis/vtx/statistics>

The International Monetary Fund (IMF) publishes remittance data in their *Balance of Payments Statistics Yearbook*, available for purchase from IMF. More information on balance of payments and remittances is available at:

<http://www.imf.org/external/np/sta/bop/bop.htm>

Additional information on migrant remittances is available from the **World Bank**, who sponsors a number of household surveys, which include migration and remittance modules to learn more about household and migrant characteristics of remittance senders.

<http://econ.worldbank.org/external/>

## **ANNEX 6:**

### ***Bilateral Labour Agreement between the Russian Federation and Tajikistan***

Reference in Section IX.1.1.1

**Agreement between the Government of the Russian Federation and the Government of the Republic of Tajikistan on labour activity and social protection of citizens of the Russian Federation in the Republic of Tajikistan and citizens of the Republic of Tajikistan in the Russian Federation (23 December 2005)**

#### **Summary of select key provisions:**

Preamble – temporary labour migration is identified as an important area of Russian-Tajik cooperation and a reference is made to the 1994 Agreement on Cooperation in Labour Migration and Social Protection of Migrant Workers and the CIS Convention on Basic Human Rights and Freedoms (26 May 2005).

Article 1 – regulates the temporary labour activity of the citizens of the States parties on each others' territories.

Article 2 – the Agreement is applicable to the citizens of Russia and Tajikistan who are permanently resident in their own country and who are in work permit employment on the territory of the other Party.

Article 3 – the competent authorities responsible for implementing the Agreement are identified: in the Russian Federation, as the Ministry of Internal Affairs and the Ministry of Labour and Social Development and, in Tajikistan, as the Ministry of Labour and Social Protection of the Population. Article 3 also requires the competent authorities in each Party to exchange information, inter alia, on their laws on the employment of foreigners, workers' living conditions, the situation of the labour market in each Party, and the organizations which have licenses for the employment of workers abroad in accordance with the laws of the Parties.

Article 4 – migrant workers must be in possession of an appropriate document (i.e. work permit) to exercise a temporary employment activity on the territory of the receiving Party. The work permit should not be issued for more than one year, but can be renewed for a further year.

Article 5 – the admission, departure and stay of migrant workers is realized in accordance with the receiving State's laws and the present Agreement. Each Party is responsible for determining the number of migrant workers to be admitted to its territory.

Article 6 – the employment record of migrant workers, in accordance with their qualifications and profession, is mutually recognized by the Parties. On completion of their employment, migrant workers should receive an appropriate document containing information on the duration of their employment and their monthly wage. Workers also have the right to social protection in accordance with the laws of the receiving State.

Article 7 – States parties are obliged to promote the development of legal migration processes and the creation of mutually acceptable conditions for the labour migration of their citizens. Each Party is to take measures to prevent illegal recruitment of migrant workers; the publication in the media of misleading information related to employment, working and residence conditions on their territories; and the illegal labour activities of another Party's citizens.

Article 8 – migrant workers have to right to leisure time; medical care is to be provided at the employer's expense, in accordance with the receiving State's laws and at a level equal or higher to that of its own citizens; and social insurance is to be regulated by a separate agreement between the Parties on social insurance.

Article 9 – remuneration and other work conditions are to be regulated by the contract of employment. The contract is to be concluded in writing and the conditions in the contract must be in accordance with the receiving State's labour laws and include the requisite provisions related to the worker's labour activity in the receiving State. The remuneration of migrant workers must not be lower and the working con-

ditions must not be less favourable than those of the receiving State's citizens in similar jobs, professions or skills and performing similar work.

Article 10 – migrant workers must be over 18 years of age and be in appropriate health for the assigned work.

Article 11 – workers must submit appropriate documents demonstrating their skills and qualifications, which are recognized mutually by each State party.

Article 12 – migrant workers must perform the salaried employment for which they have a work permit; otherwise the work permit will be annulled.

Article 13 – if the employer terminates the migrant worker's contract prematurely, he or she must pay the worker the compensation provided for in the contract. In such cases, the migrant worker may conclude a new employment contract with another employer in the receiving State until the expiration of the original work permit on the condition that at least three months remain before the expiration of the permit and that the new employer possesses a legal permit to hire migrant workers.

Article 14 – if the work permit is officially annulled, the migrant worker must leave the territory of the receiving State within 15 days.

Article 15 – in the event of the migrant worker's death, the employer in the receiving State is responsible for the organization of the transportation of the body to the State of permanent residence and for the expenses relating to such transportation. If the death of the migrant worker is the fault of the employer or the worker suffers an employment injury, the employer is responsible for the payment of compensation in accordance with the laws of the receiving State.

Article 16 – migrant workers have the right to transfer and export funds in foreign currency to their State of permanent residence in accordance with the receiving State's laws. The income tax paid by the migrant worker is determined in accordance with the law of the receiving State.

Article 17 – the import and export of portable tools and other portable equipment necessary for conducting the migrant worker's temporary labour activity is to be conducted in accordance with the laws of the receiving State.

Article 18 – State parties may open missions of the competent authorities in their respective territories.

Article 19 – the present Agreement is in force for a term of five years and will be automatically prolonged for subsequent periods of three years if none of the Parties declares its intention to stop its validity through written notification to the other Party at least six months prior to the expiration of the appropriate period.

Source: IOM Moscow (March 2006).

## **ANNEX 7:**

### ***Outline of Pre-departure Orientation and Language Training Organized by IOM for Labour Migrants to Italy***

#### **1. Legal orientation**

The legal orientation module aims to create and improve awareness of the laws which regulate the entry and stay of foreign nationals in Italy, including:

- entry rights and work related legislation;
- visas and residence permits;
- citizenship rules;
- legislation regarding health;
- social welfare and temporary protection;
- minors and education;
- expulsions.

#### **2. Labour market orientation**

The module aims to facilitate the labour insertion of migrants in line with their vocational skills and employment objectives. It also provides trainers with guidelines to assist migrants in the job search process. At the end of this course, trainees should be able to compose a CV, identify their future vocational training needs or make career plans.

#### **3. Cultural and social orientation**

The cultural and social orientation module is intended to provide a comprehensive overview of the “way of living” in Italy with particular attention to:

- general rights and obligations of citizens;
- public health services;
- the education system;
- the Italian social welfare system;
- the institutions of the Italian State;
- public administration;
- housing;
- transportation.

#### **4. Psycho-social orientation**

The psycho-social training module is aimed at developing a better understanding of how the psychic, cultural and social migratory dynamics are being perceived by migrants from different origins and of various cultural backgrounds, who are working and living in wide-ranging labour and social environments in Italy.

#### **5. Linguistic orientation**

This module aims at granting participants the initial cultural and linguistic tools in order to develop or improve their individual communication skills by:

- providing some fundamental communicative functions for the labour and social insertion;
- oral and written communicative skills;
- a specialized lexicon and some basic linguistic structures.

The duration of the orientation course for the first four modules is 40 hours. The language training is 80 hours. The total orientation model is 120 hours.

Source: Ugo Melchondia, IOM Rome.

## **ANNEX 8:**

# ***Agreement between the Kingdom of Spain and the Republic of Ecuador for the Regulation and Control of Migratory Flows***

Note: Translated by the World Bank.

*Provisional entry in force of the Agreement between the Kingdom of Spain and the Republic of Ecuador for the regulation and control of migratory flows, signed in Madrid on May 29, 2001.*

The Government of the Kingdom of Spain and the Government of the Republic of Ecuador, hereinafter the contracting parties, inspired by their shared desire to reaffirm their special historical and cultural bonds through the fluid and permanent contact of their people, on the basis of the Agreement on Dual Citizenship between both states on March 4, 1964, amended by the Protocol of August 25, 1995, the Agreement on the elimination of visas in October 1963, and the Agreement on Social Security in 1960; seeking to regulate the existing migratory flows from Ecuador to Spain in an orderly and coordinated manner; pursuing the objective of enabling Ecuadorian workers who come to Spain to enjoy the rights guaranteed by international instruments to which both states are party; convinced that migration is a social phenomenon that enriches its people and can contribute to economic and social development, foment cultural diversity, and stimulate technological transfer; aware of the need to respect the rights, duties, and guarantees set forth in their domestic legislation and international agreements to which they are party; joining in efforts in the international sphere to promote respect for human rights, prevent clandestine migration and labour exploitation of illegal workers, regulate reentry, and in the context of common Ibero-American interests, have agreed as follows:

## **PRELIMINARY CHAPTER**

### **Article 1**

For the purposes of this agreement the competent authorities shall be:

For Spain, the Ministries of Foreign Affairs, Interior, and Labour and Social Affairs, as their respective responsibility in the area of immigration may lie.

For Ecuador, the Ministry of Foreign Affairs, Political Division, General Office of Ecuadorians Residing Abroad.

### **Article 2**

For the purposes of this agreement, migratory workers are Ecuadorian citizens authorized to work on their own account in Spain.

## **CHAPTER I**

### **Notification of offers of employment**

#### **Article 3**

1. The Spanish authorities, through the Spanish Embassy in Quito, shall notify Ecuadorian authorities of the number and type of needed workers, taking into account existing job offers.

Ecuadorian authorities shall notify the Spanish authorities, through the Spanish Embassy in Quito, of the possibility of meeting this demand with Ecuadorian workers willing to go to Spain.

2. The job offer shall include at least:

- a. The sector and geographic zone of the activity.
- b. The number of workers to be hired.
- c. The deadline for their selection.
- d. Duration of the work.
- e. General information on working conditions, wages, housing, and in-kind benefits.
- f. Dates when the workers selected must arrive at their workplace in Spain.

3. The Ecuadorian authorities shall notify the Spanish authorities of job offers they may have received from Spanish employers.

## CHAPTER II

### Evaluation of qualifications, travel, and acceptance of migrant workers

#### Article 4

Evaluation of qualifications and travel of migrant workers shall be governed by the following rules:

1. Pre-screening of qualified candidates shall be done by a Hispano-Ecuadorian Selection Committee in Ecuador. Candidates meeting the skill requirements shall undergo a medical exam and if necessary a training period.

The Selection Committee shall be composed of representatives of the contracting parties' governments, and may include the employer or his agents, and shall be responsible for selecting the best qualified workers for the existing job offers, conducting any training courses that may be needed, and advising and assisting workers throughout the process.

If both parties so request, representatives of social actors, intergovernmental and nongovernmental organizations active in the field of migration and cooperation for development designated by the contracting parties may participate in the committee as advisers.

2. Workers who are selected shall sign a contract, generally within no more than 30 days, and shall receive travel documents upon request. A copy of the work contract shall be provided to Ecuadorian authorities. The work contract may be replaced by a similar document depending on the nature of the work, as determined by the joint committee established in Article 21 of this agreement.

3. Requests for temporary or resident visas in the framework of this agreement shall be processed with high priority by the appropriate Spanish consular office. The visa stamped in the passport shall specify its type, purpose, and duration of authorized stay in Spain. When the duration is six months or less, the visa shall suffice to document that stay.

#### Article 5

1. Ecuadorian officials, together with those of Spain, within their respective areas of competence, shall provide all possible facilitative assistance to the work of the Selection Committee. They shall contribute insofar as possible in the processes of training of the selected workers, if needed, and for their travel to Spain by the established deadlines.

Administrative procedures in connection with the trip from Ecuador to Spain shall be borne by the interested parties, or, if not, by the contracting companies.

2. Before traveling, the workers shall receive information needed to reach their destination, and everything they need to know about conditions for their stay, work, lodging, and wages.

3. The appropriate Spanish authorities shall give the immigrants the necessary permits for their stay and work.

## CHAPTER III

### The migrant workers' labour and social rights and conditions

#### Article 6

In accordance with its domestic legislation and international law, once the required residence or work permits are issued each party shall give the citizens of the other party all facilities for undertaking remunerative labour or skilled or unskilled work for themselves or others, on an equal footing with citizens of the state of residence.

The Ecuadorian migrant workers shall enjoy the right to maintain their family group, as provided in Spanish law.

#### Article 7

The migrant workers' pay, and other working conditions, including their participation in the social security system, shall be set forth in their contract, in accordance with the collective agreements, if any, or with existing legislation on Spanish workers doing the same work with similar qualifications.

#### **Article 8**

The migrant workers shall be subject to the obligations and enjoy the benefits established in the Hispano-Ecuadorian Social Security Agreement of April 1, 1960, supplemented in the additional agreement of May 8, 1974, and in the domestic regulations of both parties.

#### **Article 9**

Any differences that may arise between employers and migrant workers shall be resolved in accordance with Spanish law and the bilateral agreements in force, including the Agreement on Dual Citizenship between both states of March 4, 1964, amended by the protocol of August 25, 1995.

### **CHAPTER IV Special provisions for seasonal workers**

#### **Article 10**

A temporary worker is an Ecuadorian citizen authorized to enter and leave Spain in the framework of this agreement in order to do seasonal or project-related work, and who has a work contract whose duration is commensurate with the nature and time of said projects.

#### **Article 11**

Selection of seasonal workers and their travel to and treatment in Spain shall be governed by the general rules established in this agreement.

The temporary workers' pay and other working conditions shall be set forth in their contract, in accordance with the collective agreements, if any, or with existing legislation on Spanish workers doing the same work with similar qualifications.

#### **Article 12**

Before seasonal workers are hired, they shall sign a commitment to return to Ecuador when their permit expires, and shall be required to report within one month of their return to their country to the same Spanish consular office that issued their last visa with a temporary permit, presenting the same passport in which their last visa was stamped. Failure to fulfill this obligation shall disqualify them from any future contracts in Spain, and shall be taken into account when considering any applications

for work permits or residence that they may lodge with Spanish authorities, who shall notify Ecuadorian authorities for the appropriate purposes.

If seasonal workers lose their passports in Spain, their new travel document shall show the number of the previous passport, with an indication that the bearer is a seasonal worker. Loss or theft of the passport shall be communicated promptly to both Spanish police and the appropriate Ecuadorian officials in Spain, who shall notify the Spanish consulate in Quito to take due note of this situation.

### **CHAPTER V The migrants' return**

#### **Article 13**

The contracting parties undertake to adopt coordinated measures to organize voluntary repatriation programs for Ecuadorian migrant workers to their country of origin.

To this end steps shall be taken to promote reentry of migrant workers in Ecuador with the value added from their immigration experience as a factor for economic, social, and technological development. The contracting parties shall thus encourage the development of projects with their own resources and resources from international cooperation organizations for vocational training of the migrant and recognition of the vocational training received in Spain; to promote the establishment of small and medium enterprises of migrants who return to Ecuador; to create binational corporations linking employers and workers; and in other areas of economic and social development, to encourage activities that promote the training of human resources and the transfer of technology.

#### **Article 14**

1. With full respect for the rights and guarantees contained in each country's legislation, each contracting party shall readmit to its territory, at the request of the other contracting party, any person who while in the territory of the requesting party violates or fails to comply with entry or residence requirements in force, provided that it is demonstrated or clearly presumed that the person is a citizen of the contracting party to which the request is addressed.



2. The requesting contracting party shall readmit the person in question provided it is demonstrated that he or she was not a citizen of the contracting party to which the request was addressed at the time of departure from the territory of the requesting contracting party.

3. Notwithstanding the provisions of paragraph 1 of this article, the authorities of the requesting contracting party undertake to facilitate the departure and gradual and voluntary repatriation of undocumented persons in their territory, so that those who so request are guaranteed that the respective embassy will provide fast-track treatment for their residence and work visas, with the guarantee of a job in the requesting contracting party.

The provisions in this section shall apply to applications submitted prior to March 1, 2001.

#### **Article 15**

1. Each contracting party shall readmit to its territory, at the request of the other contracting party, any citizen of a third country or stateless person who has violated or not complied with the entry and residence conditions in force in the requesting contracting party, provided that it is demonstrated or presumed that said citizen entered that party's territory after remaining in, residing in, or transiting the territory of the contracting party to which the request is addressed.

2. The obligation to readmit established in the preceding paragraph shall not apply to a citizen of a third state or a stateless person who enters the requesting contracting party's territory in possession of a visa or residence permit issued by that contracting party, or who is issued a visa or residence permit by that contracting party after his or her entry.

#### **Article 16**

1. Each contracting party, upon written request of the other contracting party, shall authorize airport transit with or without escort to citizens of third states when admission in the state of destination and any states en route is guaranteed.

The requesting contracting party shall guarantee to the contracting party to which the request is addressed that the person, whose transit is authorized, has a valid ticket and travel document for the state of destination.

2. The requesting state shall assume full responsibility for citizens of a third country until they reach their final destination.

3. If the movement is conducted with escort, the escorts shall not leave the international area of the airports of the requesting contracting party.

4. Transportation costs to the state of destination, including expenses in transit, such as those resulting from the return of a citizen of a third state, shall be borne by the requesting contracting party.

#### **Article 17**

1. The requesting party shall pay for travel expenses of the person whose reentry has been requested until he or she reaches the border or airport of the contracting party to which the request is made.

2. For the purposes of paragraph 3 of Article 14 the requesting contracting party undertakes to offer any necessary facilitative assistance for the process, after case-by-case consideration of the requests for such assistance.

### **CHAPTER VI**

#### **Provisions for application and coordination of this agreement**

#### **Article 18**

1. The Spanish Ministry of the Interior, through the Government Office for Foreign Citizens and Immigration [Delegación del Gobierno para la Extranjería y la Inmigración], and the Ecuadorian Ministry of Foreign Affairs, through its Political Division, shall jointly establish procedures for application of this agreement, and shall cooperate and consult with each other directly as required for its application.

2. Prior to the entry in force of this agreement the contracting parties shall notify each other through diplomatic channels of the names of the authorities

designated by those specified in Article 1 who will carry out the procedures established in the agreement.

3. Should difficulties arise in the application of this agreement there shall be consultations through diplomatic channels.

#### **Article 19**

Spanish and Ecuadorian authorities undertake to intensify bilateral cooperation for the control of migratory flows, especially in order to ensure that the basic rights of Ecuadorian migrant workers are respected.

This cooperation shall also embrace closer coordination in the fight against illegal immigration, exploitation and violation of social rights, document fraud, and especially, illicit trafficking in persons.

#### **Article 20**

As an element of the cooperation mentioned in the previous article, the contracting parties shall mount and carry out educational campaigns for potential migrants to inform them of their rights and social obligations and prevent the risks and consequences of illegal migration and the use of counterfeit or altered documents, and to discourage the use of networks that traffic in human beings.

#### **Article 21**

A Joint Coordination Committee shall be established to:

- a. Follow up on the execution of this agreement, and determine necessary measures for that purpose.
- b. Propose amendments where appropriate.
- c. Make provisions in both countries for timely dissemination of the contents of the agreement.
- d. Settle any difficulties that may arise in its application.

The Committee shall meet alternately in Ecuador and Spain, at the request of either of the contracting parties, under the conditions and on the dates set by mutual agreement, at least once each year. The competent authorities of each country shall designate the members.

#### **Article 22**

1. Each contracting party shall notify the other contracting party when the domestic legal requirements for entry into force of this agreement are met.

2. This agreement shall enter into force on the first day of the second month after both parties have notified each other that the domestic legal requirements for entry into force of this agreement have been satisfied.

3. This agreement shall be applied provisionally after 30 days from the date of its signature.

4. This agreement shall have indefinite duration.

5. Each contracting party may totally or partially suspend the application of this agreement for a definite time, for reasons of state security, public order, or public health. The adoption or cancellation of this measure shall be reported with all due speed by diplomatic channels. Suspension of the application of this agreement shall enter into force on the date of notification to the other contracting party.

6. Either contracting party may renounce this agreement in writing through diplomatic channels.

The agreement shall terminate 90 days after notification of renunciation.

Signed in Madrid, in two equally valid copies in the Spanish language, this twenty-ninth day of May in the year 2001.

For the Republic of Ecuador  
Francisco Carrión Mena, Ambassador of the  
Republic of Ecuador

For the Kingdom of Spain  
Enrique Fernández-Miranda y Lozana, Delegate  
of the Government for Foreign Citizens and  
Immigration

This agreement is applied provisionally as of June 28, 2001, 30 days after its signature, as established in Article 22.3

The public is hereby officially notified thereof.

Madrid, June 1, 2001 – Technical General Secretary  
Julio Núñez Montesinos

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# List of Abbreviations

ASEAN	Association of Southeast Asian Nations	IGC	Intergovernmental Consultations for Migration and Asylum
BLA	Bilateral labour migration agreement	ILC	International Labour Conference
CACO	Central Asian Cooperation Organization	ILO	International Labour Organization
CARICOM	Caribbean Community and Common Market	IOM	International Organization for Migration
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	IRENE	International Restructuring Education Network Europe
CEDAW	Convention on the Elimination of Discrimination Against Women	JCL	Joint commission on labour
CIETT	Conférence internationale des entreprises du travail temporaire (International Confederation of Temporary Work Agencies)	MATM	International Association on Labour Migration (CIS)
CRC	Convention on the Rights of the Child	MFA	Ministry of Foreign Affairs
DOL	Department of Labor (United States)	MFI	Micro-finance institution
EAEC	Eurasian Economic Community	MoU	Memorandum of Understanding
ECATHB	European Convention on Action against Trafficking in Human Beings	MRC	Migrant resource centre
EC	European Community	MRCI	Migrant Rights Centre Ireland
ECHR	European Convention on Human Rights	MTO	Money transfer organization
ECJ	European Court of Justice	MWF	Migrant welfare fund
ECOWAS	Economic Community of the West African States	NAALC	North American Agreement on Labour Cooperation
ECMW	European Convention on the Legal Status of Migrant Workers	NAFTA	North American Free Trade Agreement
ETUC	European Trade Union Confederation	NGO	Non-governmental organization
EU	European Union	NSO	National statistical organization
FERME	Fondation des entreprises de recruitment de main-d'oeuvre agricole étrangère (Foundation of Recruiting Enterprises of Foreign Agricultural Labour), Canada	N/SVQ	National/Scottish Vocational Qualification (UK)
FMS	Federal Migration Service (Russian Federation)	OAS	Organization of American States
GATS	General Agreement on Trade in Services	OEC	Overseas Employment Certificate
GLA	Gangmasters Licensing Authority (UK)	OEP	Overseas Employment Programme
HRSDC	Human Resources and Skills Development Canada	OPF	Overseas Pakistani Foundation
HSMP	Highly Skilled Migrant Programme (UK)	OSCE	Organization for Security and Cooperation in Europe
HTA	Home town associations	OSCE-APCTHB	OSCE Action Plan to Combat Trafficking in Human Beings
IACHR	Inter-American Commission on Human Rights	OWWA	Overseas Workers Welfare Administration (Philippines)
ICCPR	International Covenant on Civil and Political Rights	OWWF	Overseas Workers Welfare Fund (Sri Lanka)
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination	PEA	Private Employment Agency
ICESCR	International Covenant on Economic, Social and Cultural Rights	PES	Public Employment Service
ICFTU	International Confederation of Free Trade Unions	PICUM	Platform for International Cooperation on Undocumented Migrants
ICPD	International Conference on Population and Development	POEA	Philippines Overseas Employment Administration
ICTOC	International Convention against Transnational Organized Crime	PSA	Public service announcements
IFT	Informal fund transfer systems	RESPECT	European Network of Migrant Domestic Workers
ICMPD	International Centre for Migration Policy and Development	RCP	Regional Consultative Process
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	SLBFE	Sri Lanka Bureau of Foreign Employment
		SMS	State Migration Service (Tajikistan)
		SWOT	Strengths, Weaknesses, Opportunities and Threats analysis
		TLWG	Temporary Labour Working Group (United Kingdom)
		UN	United Nations
		UNI	Union Network International
		USCIS	US Citizenship and Immigration Services
		WHO	World Health Organization