EMPLOYING FOREIGN WORKERS
A MANUAL ON POLICIES AND PROCEDURES OF SPECIAL INTEREST TO MIDDLE- AND LOW-INCOME COUNTRIES

W. R. BÖHNING

EMPLOYING FOREIGN WORKERS

INTERNATIONAL LABOUR OFFICE GENEVA
Foreword

The International Labour Office has frequently been approached in recent years by governments of developing countries and of countries undergoing the transition to a market economy for help in the design and implementation of labour migration policies in the broad sense of that term. With the intensifying globalization of the world economy that draws more and more countries into ever closer exchanges of goods, services and people, requests for help of this kind are bound to increase. This situation has led the ILO to put some of its expertise into a comprehensive but brief volume and thereby make it available to its own staff, consultants and, more important, to decision-makers in developing countries or transition economies who are confronted with questions such as: would the country be well advised to permit local employers to hire foreign workers? What procedures should be put in place if migrant labour is needed? What role should the State play and what role could private recruitment agents assume if the answer to the first question is positive? What procedure should be put in place to check whether employers really need migrant labour? What rights should be accorded to foreigners? How should one deal with illegal migration and employment?

These are among the key issues set out in the following pages in the form of a manual or guidelines. This publication is meant not necessarily to provide a definitive answer to each question, but to indicate, where possible, the pros and cons that could be associated with a range of responses – options – that policy-makers ought to sift through before taking a decision.

In the Appendix interested readers will find a brief explanation of the ILO’s information system for legislation concerning migrant workers, which they can make use of for their own benefit, and a table listing the world’s major migrant-receiving countries at the beginning of the 1990s.

A companion volume on policies and procedures regarding the employment of citizens abroad, which is aimed at labour-sending countries, is in preparation. It has a similar style and presentation. Both manuals are products of the ILO’s interdepartmental project on migrant workers carried out in 1994-95.

K. J. Lönnroth
Director, Employment Department
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Abbreviations

ILO C.19 = ILO *Equality of Treatment (Accident Compensation) Convention, 1925* (No. 19)

ILO C.97 = ILO *Migration for Employment Convention (Revised), 1949* (No. 97)

ILO R.86 = ILO *Migration for Employment Recommendation (Revised), 1949* (No. 86)

ILO C.118 = ILO *Equality of Treatment (Social Security) Convention, 1962* (No. 118)

ILO C.143 = ILO *Migrant Workers (Supplementary Provisions) Convention, 1975* (No. 143)

ILO R.151 = ILO *Migrant Workers Recommendation, 1975* (No. 151)


UN Convention = International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
Introduction

This manual explores key issues that policy-makers and administrators face in assessing whether they should have a policy to admit foreigners for the purpose of employment, which policy might be appropriate in different circumstances and what kind of procedures could most usefully be put in place to achieve policy objectives.

This introduction considers some of the basic contradictions that may arise between economic interests and administrative convenience. It refers to international standards that will guide much of the presentation; and it draws attention to the wide range of types of migration that decision-makers may have to deal with and for which different policies may be required.

The manual is aimed at what are, in World Bank parlance, middle- or low-income countries such as Argentina or Kenya. Long-standing migrant-receiving countries in the high-income range, for example Switzerland or the United States, are not the subject of this manual because they have had well-developed policies for many decades. Their experience is, however, drawn upon to illustrate policies, procedures and institutional set-ups that are judged to provide particularly inspiring models for other countries to consider adapting to their national circumstances and traditions.

The table in the Appendix, which lists the world’s major migrant-receiving countries, contains 67 entries. At the beginning of the 1990s, the increasing globalization or interdependence of the various parts of the world had led to a situation where not merely a few very well off countries but one-third of all countries of a certain size (more than 200,000 inhabitants) had become significant receiving/immigration countries. Two-fifths of them could indeed be classified according to World Bank criteria as high-income countries (GNP per capita above US$6,000). An even greater proportion would fall into the range of middle-income countries (GNP per capita US$501-6,000), including successor States to the former Soviet Union. Nine of the entries in the table are low-income countries (13 per cent). Practically all of them are African and are included in the table because the remittance indicator reveals the presence of a significant number of non-nationals on their territory. The fact that

1 One exception is Japan. In H. Shimada’s: Japan’s “guest workers”: Issues and policies (Tokyo, University of Tokyo Press, 1994), readers will find an examination of many of the issues in the light of that country’s situation which are dealt with in this manual in relation to middle- or low-income countries.
they appear in the table reflects the presence of expatriate managers, administrators, technicians, foreign aid personnel, and so forth. This is one aspect of globalization. It is not new but is growing in extent. Several other African and Latin American countries would also have appeared in it if reliable up-to-date statistics had been available.

At any rate, international economic migration is a growing phenomenon that tomorrow will involve more countries than today and a broader range of skills than in the past, even in low-income countries. To address the issues that arise is the purpose of this manual.

The manual builds upon various countries’ experiences and internationally inspired legal standards. Longish descriptions of individual countries’ experiences, flow charts and diagrammatic representations of explanations have been placed in boxes to permit readers either to skip them if they do not need them or to focus on the information contained in them.

Some clarifications of terminology are necessary. The expression most frequently used will be “migrant”. According to international usage, a migrant is someone who leaves a country of which he or she is a national, or who has left it (an “emigrant”). This person may be called an “immigrant”, “non-national”, “foreign passport holder” or simply an “alien” or “foreigner” in the country where gainful employment is sought. “Migrant”, “immigrant”, “foreigner” and so forth will be used interchangeably throughout this manual.

1.1 Focus

Looking at migration for employment purposes means focusing on economically oriented policies. Not of interest here is demographically justified immigration or the humanitarian admission of refugees. Although population-based policies or the humanitarian acceptance of asylum seekers are not by any means devoid of important economic implications or procedures, they are not as such based on economic criteria – the impact on production, distribution or costs – that provide the yardstick for judgements expressed in this manual. And while it can be extremely difficult to make valid distinctions between economic migrants and refugees in respect of the causes of their movements and the motivations that actuate them, policy-makers and administrators have to impose distinctions when they are faced with the question of how to channel the inflow of foreigners or if they set targets or upper limits. Asylum-seekers and political refugees as defined by the 1951 Convention on the Status of Refugees and various regional instruments are excluded from consideration in this labour import-oriented manual.

2 Typically economic procedures are in operation under basically population-oriented policies, as is the case in Australia, Canada and the United States. For a recent evaluation of high-income countries’ policy problems in the field of immigration, see W. A. Cornelius et al. (eds.): Controlling immigration: A global perspective (Stanford, California, Stanford University Press, 1994).
The perspective adopted here is one of demand-driven labour import, i.e. demand for migrant labour expressed by private or public employers in migrant-receiving countries. That there may be non-national workers who knock at these countries' doors even though there is no demand for them (supply-driven immigration) is a fact but it need not concern us in this manual. Irregular immigration and employment, including informal sector employment, are dealt with in Chapter 8.

1.2 What is temporary in labour import?

It should be understood at the outset that there is nothing intrinsically short-term or temporary in economic concepts of admitting foreigners for the purpose of employment. Countries' administrative control mechanisms specify manageable periods such as six or 12 months or two years in order to fix the duration of foreigners' contracts. But the underlying economic demand may be long-term, recurrent, permanent, temporary, steadily evolving along a predictable path or discontinuous in nature. The two are distinct and overlap only where employment is inherently limited in time. Overlap is exceptional and occurs solely in the case of:

(i) seasonal activities, which are defined by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (the UN Convention) as work that "by its nature is dependent on seasonal conditions and is performed only during part of the year" (Article 2(b)); and

(ii) project-tied work such as the building of a bridge or the digging of a canal, i.e. the carrying out of a project during a planned period of time that will not be repeated in the same place. Project-tied work is geographically discontinuous and limited in time. That it can take place repeatedly in different locations in terms of the actual activities performed by employers, managers or workers is another question. Where foreign managers or workers are involved, their inter-country moves constitute project-tied migration (see also section 1.2).

Except in the case of seasonal and project-tied work, there are no abiding economic reasons to restrict foreigners' admission to the labour market to a pre-defined period of six or 12 months or some such administratively convenient period. One can deal with a request for employing foreigners on ordinary jobs by granting them (or their employers) an authorization to work that (a) is limited in time

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3 This type of migration might be defined along the following lines: Project-tied migration encompasses workers who have been admitted to the receiving country for a specific, limited period of time either individually or on the basis of an employment relationship with an employer carrying out in that country defined projects which by their nature are limited in time.

The UN Convention defines this phenomenon more loosely in Article 2(f): The term project-tied worker refers to a migrant worker admitted to a State of employment for a defined period of work solely on a specific project being carried out in that State by his or her employer.

A more restricted notion of project-tied migrants can be found in the ILO's Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), in Article 11(e): employees of organizations or undertakings operating within the territory of a country who have been admitted temporarily to that country at the request of their employer to undertake specific duties or assignments, for a limited and defined period of time, and who are required to leave that country on the completion of their duties or assignments.

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and of short duration, and therefore likely to require renewal procedures; or (b) is limited in time and of long duration but not meant to constitute permanent settlement, and that can similarly be subject to renewal procedures; or (c) constitutes a permit to enter the country and stay there for good.

The decision whether to opt for (a), (b) or (c) may be influenced by non-economic criteria as much as by cost evaluations. But it makes no economic sense to assume a priori that cost considerations would in all cases favour rotation, revolving pool or temporary admission policies over policies envisaging indefinite stay or rapid settlement; indeed, the opposite could be the case if repeated recruitment, training and language costs and so forth were taken into account.

That said, however, for analytical purposes this manual will proceed as though middle- and low-income countries would prefer a policy designed to admit migrant workers for a brief and limited period of time. The ramifications of such a case are much more instructive to explore as a policy option than those of settlement-oriented policies, under which migrants are normally free economic agents once they have secured entry into their country of destination.

1.3 What is user-friendly?

The manual focuses on user-friendly policies in a triple sense. First, policies must be "friendly" to migrants in that they must respect their human needs, sensitivities and rights. Labour is not a commodity! Second, they must be "friendly" to employers in the sense that institutions and procedures must provide efficient and valuable services for them so that they are encouraged to make use of them rather than circumvent them. Third, they must be "friendly" to the country's administrators - that is, clear in conception and easy to put into practice, designed to reduce friction, red tape, and so forth.

As regards "user-friendly" policies for migrants, the manual takes its cues from existing international minimum standards, notably from the following Conventions and Recommendations of the International Labour Organization:

- the Migration for Employment Convention (Revised), 1949 (No. 97), hereafter referred to as ILO C.97;
- the accompanying Migration for Employment Recommendation (Revised), 1949 (No. 86), which like all Recommendations goes into greater detail than Conventions do but is not a binding instrument. It is hereafter referred to as ILO R.86;
- the Equality of Treatment (Social Security) Convention, 1962 (No. 118), hereafter referred to as ILO C.118;
- the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), hereafter referred to as ILO C.143;
- the accompanying Migrant Workers Recommendation, 1975 (No. 151), hereafter referred to as ILO R.151;
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- the Maintenance of Social Security Rights Convention, 1982 (No. 157), hereafter referred to as ILO C.157; and
- the Maintenance of Social Security Rights Recommendation, 1983 (No. 167), hereafter referred to as ILO R.167;
as well as from the UN Convention already mentioned.

This manual will quote extensively from those instruments so as to document the internationally elaborated consensus on the subjects under review and to help administrative or parliamentary draftsmen who may be called upon to define categories, rights, procedures and so forth to find suitable formulations.

1.4 Overview of types of economic immigration

To set the scene for the exploration of how to design specific labour-import policies, it will be helpful to spell out the basic categories of contemporary international economic migration. The following typology, which is summarized in box 1, highlights the economic substance of various moves and leaves aside the images that migrant-receiving countries project or the intentions that individual migrants may have. It reflects the world of intensifying globalization and increasing heterogeneity of movements rather than the neat categories that have prevailed until recently.\(^5\) This typology disregards certain categories that are not of universal relevance, namely:

(a) nomads and pastoralists who, to this day, can be found (mostly in Africa) crossing borders without much control by either emigration or immigration countries;

(b) transit migrants, i.e. persons who are on their way to a country of final destination and who may be present only for a few hours or days. Their entry, presence and departure rarely call for intricate laws and regulations except where the phenomenon becomes long-lasting and troublesome;

(c) petty traders, who may be conceptualized as “persons who travel from their homes for short periods to buy and sell, informally, goods of negligible quantity and quality in the receiving state”\(^6\) and

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\(^4\) The following categories of international economic migration encompass regular migration in so far as the individuals who move or have moved are authorized to enter or to stay in the migrant-receiving country and, if they are economically active, to engage in a remunerated activity in that country pursuant to its laws and regulations. Many other individuals move to foreign countries without the requisite authorizations; or if they have moved there as tourists or visitors, they stay on without permission to do so. This constitutes irregular migration, involving as it does illegal entry, stay or economic activity on the part of the non-national, and is dealt with in Chapter 8.

\(^5\) For an in-depth introduction to the subject of international labour migration in the contemporary world, see P. Stalker: The work of strangers: A survey of international labour migration (Geneva, ILO, 1994).

\(^6\) C. Aktar and N. Ogelman: “Recent developments in East-West migration: Turkey and the petty traders”, in International Migration (Geneva), Vol. XXXII, No. 2 (1994), p. 346. These two authors

(Note continued overleaf.)
Box 1. Major types of regular international economic immigration

Broad range of admission categories conceived in terms of economically relevant distinctions that a government may consider providing for in its legislation

Admission for the purpose of training.

Admission for professional or business purposes, or purposes of providing services:
- individual salaried worker to be admitted as a transferee within a transnational enterprise (whether as a specified-employment worker, for project-tied activities or to take up broader, recurrent functions);
- individual to be admitted temporarily as a specified-employment worker outside a transnational enterprise, whether as a salaried, own-account or self-employed worker.

Admission tied to a project:
- professional, manager or ordinary worker to be admitted under the auspices of an enterprise or a subcontractor, as an individual or in a group, with a view to performing a one-off assignment.

Admission for ordinary employment purposes under contract auspices:
- person to be admitted under the auspices of an enterprise or a subcontractor, as an individual or in a group, with a view to performing activities that are recurrent rather than tied to a specific project;
- person to be admitted as an individual to take up an ordinary industrial or service job;
- person to be admitted, as an individual or in a group, to carry out seasonal activities.

Admission for ordinary employment purposes under settlement auspices:
- unskilled, skilled, technical, professional or other highly qualified wage or salary earners;
- entrepreneur, investor, etc., to be admitted on the condition that employment is created after entry into the country.

Migration of dependants

Nuclear or extended family members accompanying or joining a primary migrant.

exemplify a category in relation to Turkey which, as they observe, has become widespread in central and eastern Europe since the late 1980s and especially since the dissolution of the USSR. They explain that petty traders “travel for purely entrepreneurial economic purposes... On their own initiative, petty traders sell the merchandise they bring into Turkey in return for either goods or money with which they return home. Neither Turkish, nor any other states’ firms, governments or regulatory agents are held accountable for the petty traders’ wages or social security. They bear the burden of economic and social risks. Their sojourn is therefore characteristically short” (p. 346). One unnecessary and empirically questionable element of their definition is the stated “negligible ... quality” of the goods bought or sold. While many of the goods are indeed cheap and made with old technology, some petty traders do sell high-quality goods – cheaply.
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(d) persons who, although usually holders of a foreign passport, are readily admitted into certain countries by virtue of blood lineage or political decision – "privileged ethnics" as they have been labelled in western Europe.\(^7\)

Seamen, owing to the special nature of their jobs and of the hiring procedures used for them, are also left out of account here.

The typology furthermore disregards certain kinds of people who are generally exempted throughout the world from employment-related immigration controls, such as diplomatic and consular personnel; civil servants employed by foreign governments or international bodies; sportspeople, artists and entertainers on short-term assignments; ministers of religion; journalists and television crews.

What, then, are the basic categories that policy-makers may have to cater for?

The first is a numerically small but economically attractive one: admission for the purpose of training, whereby one country's citizens are invited to spend several months or years in a private or public enterprise of a more advanced country to acquire new skills and familiarize themselves with modern technologies. Its aim is usually to provide trainees with experience that they can make use of upon return not only in a general way but also by drawing upon the equipment, work or management methods, materials, etc., of the enterprise or country which provided the training. It takes place spontaneously, driven by entrepreneurial design, through private business channels and without state supervision. However, three countries have established sizeable government-inspired schemes: Germany for central and eastern European countries, and Japan and the Republic of Korea for Asian countries in their geographical area.\(^8\)

Professional, technical and managerial workers as well as businesspeople and persons providing cross-border services of all kinds are admitted temporarily without much hindrance most of the time. Some stay for months or years, and a few may actually decide to settle if they have the opportunity. In addition to individual professionals or businesspeople who move of their own volition, a great many managers and technicians move within transnational enterprises, following career patterns or business demands.

A professional or technical worker or the like who crosses borders as a staff member of a transnational enterprise or under the auspices of a consultancy firm, or who is self-employed, frequently carries out a very specific and a pre-defined task. The UN Convention refers to such a person as a *specified-employment worker*, i.e. a migrant

(i) who has been sent by his or her employer for a restricted and defined period of time to a State of employment to undertake a specific assignment or duty; or


\(^8\) For the first two countries' policies, see C. Kuptsch and N. Oishi: Training abroad: German and Japanese schemes for workers from transition economies or developing countries, International Migration Papers No. 3 (Geneva, ILO, 1995). Shimada, op. cit., also provides a great deal of information on Japan's migration-for-training scheme.
(ii) who engages for a restricted and defined period of time in work that requires professional, commercial, technical or other highly specialized skills; or

(iii) who, upon the request of his or her employer in the State of employment, engages for a restricted and defined period of time in work whose nature is transitory or brief. (Article 2 (g).)

**Admission for the purpose of project-tied work** is well entrenched in the construction industry but by no means limited to it. Contractors move senior professional, technical or managerial personnel across borders along with skilled manual workers or unskilled labourers. While the highly skilled workers are almost always nationals of the country in which the firm has its headquarters, many of the labourers tend to come from other, low-wage countries. Companies from the Republic of Korea perfected this form of migration in the mid-seventies in the Middle East. Today, foreign contractors can be found in most countries of the world and foreign workers along with them.

The admission of contractors or subcontractors can frequently be characterized as project-tied in the narrow sense just defined. But contractors or subcontractors need not be tied to specific projects at all or not all the time. They may simply be doing ordinary work such as maintaining roads, cleaning buildings or repairing plumbing systems without this being part of a project in gestation, in which case contract migration rather than project-tied migration would be the appropriate designation.

**Admission for ordinary employment purposes under contract auspices that are limited in time** first took on large-scale dimensions when individuals from the then backward Mediterranean countries moved north to countries such as Belgium, France or Germany. Contract migrants can now be found in many other countries. For example, Arab States tend to admit most Arab workers and all workers from non-Arab countries as contract workers with limited-duration permits which are sometimes renewable, and sometimes not. Contract migration in various forms occurs throughout the world where unskilled or semi-skilled labour is needed at least temporarily – in countries with as diverse immigration regimes as Singapore, the United States and Venezuela.

Seasonal admission for employment purposes is a distinct subform of international contract migration. It is practised in various parts of the world – in plantations in Côte d’Ivoire and Malaysia, the sugar fields of Florida, the vineyards of France, the construction sites of Switzerland and the hotels of the Caribbean, and in many other places too.

**Admission for ordinary employment purposes but under settlement auspices** is mentioned here for completeness’ sake only. It is the preferred form of admission in Australia, Canada, the United States and New Zealand generally, and for highly qualified workers in Singapore. The same applies to admission for the purpose of creating employment, whereby those countries seek to attract foreign entrepreneurs under conditions designed to have them physically establish a business or put their money into portfolio investments with a view to creating employment not only for themselves but also for others.
A government faced with the question of whether or not to institute a foreign labour policy could draw on the preceding categories to design procedures and to determine principles of post-admission treatment. Not all categories need necessarily be catered for at the same time; and other categories – such as foreign transport workers, sportspeople, ministers of religion, and so forth – or more specific ones may have to be defined to take care of a particular country’s situation. But the categories introduced here present a good starting-point.

A related but distinct way of conceptualizing an admissions policy is to personalize categories such as specified-employment workers, project-tied persons, and foreign workers admitted subject to limited-duration contracts. In this manual the subject-oriented is preferred to the person-oriented approach.

The preceding categories are relevant not only to strictly national policies but also to policies that countries agree upon in the context of regional economic groupings, such as MERCOSUR in South America, ECOWAS in West Africa or ASEAN in Asia. While regional cooperation among middle- and low-income countries does not currently envisage wholesale liberalization of labour movements across borders, it may be decided at some time in the future that it would be beneficial to lift restrictions on certain kinds of labour migration. The types of migration identified here and the issues examined in this manual are helpful not only to national but also to regional or international policy-makers.
Why have an economy-driven labour-immigration policy?

Although the question that forms the title of this chapter is rarely posed in such simple and clear terms, it will pay to stop and consider briefly under what circumstances a country might want to opt for a labour-immigration policy or what conditions ought to be fulfilled to continue it or to phase it out.

Importing labour from abroad is a much more political decision than, say, importing bananas or carburettors. People are involved, and this arouses feelings that are largely absent when goods or services are imported. The innermost feelings of people may be aroused - for or against foreigners. Economic arguments can also be marshalled for or against allowing migrant workers into the country. They will turn on the question of whether foreigners are economically beneficial to the economy and society - that is, whether they increase the welfare of many or all nationals more rapidly and more durably than would be the case if the borders remained closed to foreigners. This decision is an eminently political one since the political system can decide that the maximization of per capita income is not the first priority of the country or that it can be achieved through increased trade in goods and services instead of through importing labour. Democratic societies will discuss the conflicting views in their political parties, in parliaments and in consultation with representative groups of employers and workers. Those whose views do not carry the day will respect the decision of the majority, and sanctions can be imposed on them if they do not.

Should one expect a consensus to emerge quite naturally as regards the economic arguments for or against importing foreign workers? There is no universally applicable economic model that would tell a low- or middle-income country whether or when to institute a policy of admitting migrant workers. Although the demographic transition model provides a few broad hints - those to the effect that during the early stages of the transition there would be no need to admit foreigners other than highly qualified ones1 - these are too unspecific to be useful for policy purposes. Besides, exogenous factors may upset the economic relevance of the

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demographic transition model. One such factor is the sudden profitability of natural resources, oil in the Arabian desert being the best-known example. Another is the allocation of certain kinds of activities, usually socially despised and poorly remunerated work, to particular population groups; cases in point are plantation labour in the Caribbean and domestic work in South Africa.

The increasing globalization of the world economy and the concomitant dominance of efficiency criteria make it inevitable that government administrators will be faced with requests by domestic employers to admit certain persons from abroad. The question of designing and implementing a policy arises only when individual requests become so frequent or widespread as to be no longer an individual phenomenon but the reflection of more broadly based needs. These needs may manifest themselves in vacancies that are difficult to fill or in rising wages.

In today’s world of nation States, pressure by private or public employers would not by itself be sufficient for the adoption of an admissions policy in their favour. There will have to be good reasons – something that is of wider societal relevance and benefit – for society to agree to requests by private employers or, for that matter, by the government to import foreign labour.

2.1 Absolute shortages of labour

To assess these broader reasons, it is worthwhile to distinguish between absolute and relative shortages of national workers, which are usually at the origin of employers’ requests and may in fact occur simultaneously. An absolute shortage means that a country simply does not have a sufficiently numerous population, its socio-economic development may not have drawn enough people into gainful economic activity, or its education and training systems may not have produced (or not yet have produced) particular skills or qualifications. In other words, the requisite population or skills are not now physically present relative to the given technological and production possibilities, nor will they be so in the foreseeable future.

An absolute shortage of labour generally extends to the whole of the economy. Gabon and Saudi Arabia are examples of this phenomenon, as were several countries in western Europe in the period following the Second World War.

Absolute shortages can be specific to particular occupations where a country has not been able to produce needed skills. These are usually very modern skills and qualifications at the high end of the skills range. Mobility incentives would not be able to attract national workers from within the country because the workers are insufficient in number, and will remain so until such time as the education and training system has caught up with current economic requirements.

One can, of course, decide to disregard absolute shortages of labour and forgo production opportunities by not admitting migrant workers, either into the economy as a whole or even into occupations characterized by a physical shortage.

Under conditions of efficiency-based globalization and given levels of technology, economic reasoning suggests that absolute shortages should be satisfied
by the import of foreign labour, otherwise a country would fail to attain desired levels of production and the distribution to its population of the gains deriving therefrom. Ecological considerations may provide a different perspective, and beliefs concerning national cohesion may impose strict limits on the number of foreigners to be admitted, but these matters are beyond the scope of this manual.

2.2 Relative shortages of labour

A relative shortage obtains where, although there are sufficient numbers of nationals on the country's territory, they are unwilling to fill all the vacancies offered by employers in the quest to satisfy their production needs. Economic and social determinants rather than population phenomena are responsible for this unwillingness.

Relative shortages can be economy-wide but are more typically associated with certain sectors (low-wage industries, services or plantations), occupations (notably work that is despised), regions (economically unattractive or remote areas), employers (those whose enterprises are small in size and which operate at the margin of profitability or who offer below-standard wages and working conditions) or simply the fact that citizens of well-off societies are economically in a position to shun bottom-wage dead-end jobs and to work in others or get by through other means.²

Relative labour shortages can be short-term, passing phenomena, but they can also be ingrained, structural expressions of factors that are invariable over long periods of time. Examples are the employment of Colombian housemaids in Venezuela, Haitian sugar-cane cutters in the plantations of the Dominican Republic, Bolivian masons in the Argentine construction industry, Turkish garbage collectors in German towns and Mexican gardeners in the suburbs of Los Angeles.

In principle, relative shortages can be tackled by appropriate wage and mobility incentives, by the reorganization of the production process and sometimes by automation or relocation of the work abroad. In practice, there are considerable limits to all these alternatives, notably in a market-driven economic system where the role of the State does not extend much beyond setting minimum standards at the level of regulation and good examples at the level of its own enterprises or activities. If, for example, a pronounced labour shortage occurs in the construction sector and planners or labour administrators scrutinize statistics for untapped labour supplies, they might come across female labour force participation rates that are lower than those in other countries or greater proportions of retired workers. Neither young women nor housewives nor old-age pensioners, however, will be attracted by the geographically shifting, hard, physical, outdoor work – and the frequently low pay – with which construction workers have to put up; and the incentives at the government’s disposal will not go far towards making employment palatable in that sector.

2.3 When does a country gain by importing labour?

The question of whether or not, or to what extent, to open the borders is bound up with the point mentioned earlier: there will have to be good reasons for the country as a whole to permit employers to engage foreigners from abroad. Removing the labour supply constraint will allow employers to achieve higher levels of output. But this may conflict with other goals or values held dear by society.

It is obvious that private or public employers will benefit from importing the foreign labour they seek to hire. If it were not in their interest to do so, they would not ask for non-nationals. In a situation where borders are in principle closed, agreeing to employers’ requests amounts to doing them a favour – it is akin to a subsidy.

Countries’ wage- and salary earners will benefit according to many scenarios. But not all national workers may benefit all the time, and some may suffer. The import of labour will usually increase the wealth that everyone can share in, at least in the short run. But some groups of national workers may be in a competitive situation relative to similar groups of foreigners, under conditions of both absolute and relative shortages. Competition may impact negatively on the rate of growth of their wages or salaries. For other nationals, migrants may represent non-competing groups that they do not have to worry about as far as their wages or salaries are concerned.

Under what circumstances could the import of labour become a countrywide gain? Essentially such gains arise in a situation where the economy is launched on a growth trajectory, when labour market bottlenecks occur sooner or later that will throttle the economy’s growth if the domestically available labour is insufficient in number or not willing to fill vacancies. Underfilling vacancies by employing national workers insufficiently qualified to perform tasks would have the same effect but on a smaller scale. Wages would tend to rise relative to the growth of productivity and the cost of capital; employers would be obliged to intensify capital-intensive production methods or accept production losses; and accelerated structural adjustments would be forced upon the economy. Few sectors may want to see either of these developments take place, or at least not at the pace they threaten to occur. Without the admission of migrant workers, a given growth potential could not be fully exploited; particular labour-intensive sectors producing tradable goods would decline if they could not find the workers they needed; and labour-intensive non-tradable sectors – such as construction and many services – would also suffer.

Keeping the economy growing to the fullest extent possible would not only benefit the employers seeking to import foreign labour. It would also help other employers to exploit their potential and ease the adjustment process that will take place in any case. National workers, some of whom might be in a situation of more or less direct competition with the additional workers admitted from abroad, would perhaps experience slower but steadier wage growth than if the economy went through turbulent times with larger frictional unemployment and when some workers, especially in the labour-intensive sectors, could lose their jobs without much hope of qualifying for others. Last but not least, a high-growth trajectory would boost the government’s revenue.
The first steps to be taken to formulate a policy

When the key political actors, including various ministries, employers, workers and parliamentarians favour the admission of foreign labour of one kind or another, what institutions and mechanisms do they have to think of setting up in order to start importing labour?

A country should take great care in deliberating and deciding upon three questions before implementing a new policy. The first is what mechanism it would need in order to flesh out the principles of that policy and to ensure coherent implementation through coordination, including with non-governmental organizations representing employers, trade unions, social welfare bodies, and so forth. The second is to determine the role that the public employment service or a special immigration service and the private sector should play. The third is how to link up with the labour supply abroad that one wishes to make use of. In the absence of explicit and well-formulated decisions or clear-cut procedures, contradictory measures will ensue whose net effect will be to give local administrators more discretion to satisfy employers’ requests than they should have. That scenario will give rise to excessive immigration and, probably, human rights abuses.

3.1 Domestic policy coordination mechanism

The import of labour involves many ministries and governmental agencies. Although one of them should have overall responsibility, all should be brought together under the auspices of a coordinating body to determine the principles of the policy and to agree on the role to be played by each institution. The actual implementation or operationalization could rest with designated ministries or agencies.

The ministry responsible for employment, labour or social questions would appear to be the department best suited to overseeing and implementing the country’s labour-import policy. It is the government’s eyes and ears as far as the labour market is concerned and its operational arm in this field. It may not be covering all labour market segments or skill levels equally well; usually the public employment service knows the low-skill end of the market better than the high-skill range; but it is more familiar with any of the issues involved than any other arm of the government.
Unsuited to the economy-driven import of foreign labour are agencies that form part of a country’s security system, which is usually incorporated in the Ministry of the Interior or of Defence. This is a natural inclination in some countries for historical reasons or because illegal immigration was prevalent in the past. One example of this is the Argentine Act No. 22,520 of 1981 that placed the primary responsibilities for the formulation and execution of immigration policies in the hands of the Ministry of the Interior in general and its subordinate Dirección Nacional de Migraciones in particular. Other examples are the Dominican Republic’s Dirección Nacional de Migraciones and Gabon’s Ministère de la défense nationale, de la sécurité et de l’immigration. The pervasive security concerns, working habits, interpersonal relationship patterns, lack of appropriate training and absence of labour market expertise of the staff of these kinds of government department make them inappropriate as key players in this field, all the more so where the Ministry of Labour or its employment service is relegated to a totally subservient or marginal role, or where the financial or human resources allocated to it are utterly insufficient, as is the case at present with the Unidad de Migraciones Laborales of the Argentine Ministry of Labour.

A government could, however, establish a special service to take charge of immigration policy. That service could even be elevated to ministerial level, as was done in the Russian Federation shortly after its Federal Migration Service was set up following the demise of the USSR. The special immigration body could additionally be charged with the policy coordination of the other dimension of the migrant labour question – emigration. And it is, of course, possible to accord it both policy coordination and policy-executing functions. The Russian Federal Migration Service was established with this two-sided (immigration plus emigration) brief and comprehensive function.

It would be important for a special service of that kind to establish the closest possible working relationships with the public employment service, since the latter will play the key role in determining whether absolute or relative shortages exist in occupations or sectors where employers want to hire foreigners.

No matter who is accorded the leading role, many ministries or agencies are involved, and their work needs to be coordinated by what will be called in this manual the policy-coordinating mechanism. Its basic purpose must be to avoid overlap of functions and contradictions or rivalries in policy design and implementation. The coordinating mechanism should have wide-ranging powers to take decisions and to ensure that they are implemented by line management in a coordinated and frictionless manner.

The implementation of the critical decisions of relevance to the labour market and employment should be placed in the hands of the country’s employment service1 or of its immigration service, provided in the latter case that the relevant department is staffed by people drawn from public labour exchanges, Ministry of Labour and other agencies.

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1 For an up-to-date introduction to the functions of contemporary employment services, see Sergio Ricca: Introduction to public employment services: A workers’ education manual (Geneva, ILO, 1994).
Labour departments concerned with employment policies, and so forth. This manual will henceforth refer to the implementing body generically as the **public employment or immigration service**.

As regards governmental agencies concerned with immigration questions, these include the *Ministry of Foreign Affairs* because links ought to be established with one or several foreign governments. That ministry may also handle the issuing of entry visas, unless that is the task of the *Ministry of the Interior*. The latter may grant residence permits, unless the entry visa or work permit automatically provides for the right to enter and stay for the duration of the proposed employment. The *Ministry of Labour/Employment/Social Affairs*, as already emphasized, should play a key role because it would normally be the line department operating in the labour market and employment field. The *Ministry of Health* would be concerned if medical examinations had to be undertaken before or after the foreigners’ entry. The *Ministry of Education* might be involved if questions arose, notably for more skilled or highly qualified workers, about testing their skills or ascertaining the equivalence of foreign education or of migrants’ diplomas, certificates and so forth. If there are general limits on exporting earnings or savings (remittances of migrant workers) the *Ministry of Economics* or the *Ministry of Finance* or the *Central Bank* should be involved. The *Ministry of Transport* may also be called upon to act. This list is meant to be illustrative rather than exhaustive. In any event, coordination is indispensable.

Since the country’s **employers** and **workers** are directly concerned by any sizeable labour import, their representative organizations should have a say in the formulation of policy principles and procedures, as well as in their implementation. Policies decided over their heads would be unlikely to be as willingly and scrupulously implemented as policies on which they have been consulted and to which they may be able to subscribe without reservation. They should therefore form an integral part of the policy-coordinating mechanism. If small-scale employers disproportionately require foreign labour, relevant associations should form part of the policy-coordinating mechanism rather than large corporations alone. If project-tied labour immigration is to be pursued, the government should seek to draw together representatives of the sectors or enterprises chiefly involved, without leaving the country’s other employers and workers totally unrepresented in such consultative or coordination mechanisms as it may establish for project-tied labour imports.

Furthermore, at the level of individual enterprises or industries, employers and workers might well want to meet to agree among themselves on the maximum number and composition of foreigners to be admitted to the enterprise or sector in question during a defined period of time, depending on their own appreciation of the evolution of labour demand. Austria followed such principles during the years when it imported large numbers of foreign workers (see box 2). The policy coordination mechanism would have to be informed of this agreement, which it could then take into account in its overall decisions for the country as a whole. Taking it into account, however, does not mean being bound by it. The policy coordinating mechanism could

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2 On general tripartite consultation and negotiation in various countries in the last 20 years, see Anne Trebilcock et al.: *Towards social dialogue: Tripartite cooperation in economic and social policymaking* (Geneva, ILO, 1994).
EMPLOYING FOREIGN WORKERS

Box 2. Austria: Involvement of the social partners

The Austrian social partners, i.e. the employers and the trade unions, have traditionally had their say in the determination of the country's economic and social policy. This was also the case when the question of hiring foreigners became acute in the early 1960s. Since they generally expected the need for foreign labour to be sizeable, and because a voluminous as opposed to an exceptional individual intake of migrant labour could have strained the public employment service's vacancy testing system, the social partners and the Ministry of Labour agreed on a simplified and rapid procedure for admitting foreign workers. It set aside the normal individual-by-individual labour market admission test in favour of ceilings or quotas, specifying the number of foreigners abroad to be granted access to jobs in the coming year. That number was jointly agreed upon by the employers' representatives and the workers' representatives of a particular industry or of agriculture in each administrative region of Austria. Employment permits were granted by Austrian embassies or recruitment offices in selected migrant-sending countries, without testing the labour market situation in the sector and region concerned, for as many foreigners as were foreseen in the relevant quota. The ceiling could be adjusted by joint agreement of the social partners in the course of a year.

Not all sectors of the economy were covered by the joint determination of ceilings. In sectors not covered, the Ministry of Labour carried out individual vacancy tests for individual employers' requests; and that same mechanism could exceptionally also be activated in sectors covered by the bipartite fixing of ceilings.

This represents a flexible mechanism close to economic realities. It permits an effective control of the overall number and of the sectoral as well as the regional distribution of first-time entrants from abroad. It presupposes, however, fairly accurate labour market information and reliable forecasting of economic developments. The Ministry of Labour undertook much of the preparatory work in those respects. Moreover, while it generally played the role of intermediary between the social partners, it reserved the right to cap the numbers in the broader national interest, should the need arise.

At the beginning of the 1990s, Austria modified its ceiling system to add population concerns to the previously exclusively economic determination of the sectoral numbers and regional distribution. Now the immigration law demands that a percentage of foreign workers be set for the country as a whole, subject to revision at specified dates. That ceiling, in turn, is based on percentages of foreign workers by administrative region. Each region's percentage is a reflection of its actual employment of foreign workers plus its appreciation of the need for further intakes on population or other grounds. For example, "Vorarlberg with the highest share of foreigners in the population and the workforce (16 per cent) does not consider a further increase in its interest, while Wien [Vienna], second in line as to foreign worker shares (14 per cent), wishes to increase its population through migration from abroad in order to alleviate the perceived problems resulting from the aging of its population." (G. Biffl: "The Austrian migration system", paper for the Conference on Migration and International Cooperation: Challenges for OECD Countries, Madrid, March 1993 (Paris, OECD, 1993), p. 8.)

It should be noted that, in the new system, the social partners still play an important role in the determination of ceilings: they are part of the decision-making mechanism together with the federal Ministry of Labour and the regional governments.
fix a lower number or modify the composition in the light of its own criteria. Or it could set a higher target or provide for a nationwide, sectoral or enterprise-level reserve to be called upon in case of need, duly consulting the social partners in the determination of that need. Consultation does not necessarily result in agreement, but it makes for a higher degree of commitment on the part of the social partners.

In the context of testing skills or the equivalence of qualifications, nongovernmental agencies such as the accreditation bodies of professions (doctors, engineers, accountants etc.) may likewise have to be consulted. ILO C.143 stipulates that a country may

after appropriate consultation with the representative organizations of employers and workers, make regulations concerning recognition of occupational qualifications acquired outside its territory, including certificates and diplomas. (Article 14(b).)

In addition to establishing a central policy coordination mechanism, it might be necessary and would certainly be useful to establish a coordination body at a lower technical level or at the level of constituent regions, to ensure that policy principles and procedures are harmoniously implemented and that problems are ironed out, or new or unanticipated ones are jointly examined and resolved. As such questions depend very much on the cultural and political traditions of a country, they are not pursued further here.

3.2 The public employment or immigration service vs. private recruitment agents

A migrant-receiving country can organize the arrival and employment of foreign workers (i) through its public employment or immigration service in an exclusive operational capacity; (ii) by permitting the private sector – either employers directly or recruitment agents – to undertake the functions of matching demand and supply, with the public employment or immigration service acting only in a supervisory capacity; or (iii) by a combination of both. The country can, of course, set up a special public body to carry out operational and/or supervisory functions, as for example the Russian Federation and many migrant-sending countries have done, but that practical question can be disregarded here for the purpose of simplifying the presentation.

This manual refers to the public employment or immigration service in a broad generic sense as an institution whose responsibilities include all labour market functions as well as functions of control over foreign workers as far as their entry and residence are concerned. While the latter tend to be in the hands of ministries of foreign affairs or of the interior, one could argue that because labour exchange officials already handle the administrative decisions in respect of permission to work, their familiarity with questions concerning foreign workers makes them highly suited to handling also the related administrative decisions concerning entry, stay or residence.

The advantages of entrusting all tasks concerning the matching of job offers with jobseekers to the public employment service are many. Its officials are familiar
EMPLOYING FOREIGN WORKERS

with a large portion, perhaps the whole, of the labour market. They are trained in matching vacancies with candidates for employment. They are not supposed to be influenced by characteristics of employers or workers unrelated to the technical question of bringing the two together; that is, they are not supposed to discriminate or to be susceptible to corruption. They also render a service for which, according to existing international standards, they should not charge workers a fee. Giving the public employment service a monopoly was the policy of the Federal Republic of Germany for approximately 15 years when it operated a contract labour system with recruitment offices in several Mediterranean countries, whereby that service was directed by a tripartite body of government officials and representatives of employers' and workers' organizations.

Public bodies need not, however, enjoy a monopoly of recruitment activities, especially where highly qualified workers such as professionals, managers and university personnel are concerned. Employers, hospitals, universities and the like have their own networks, newsletters or personal relationships that they can draw on when they are looking for foreign specialists. If middle-income and, particularly, low-income countries do not have a well-functioning public employment service, they may not want to involve it at all in matching job offers and migrant workers, preferring to leave this task entirely to the private sector for the whole range of manpower or at least for certain types of labour import. The government would still have to assume supervisory functions in respect of employers wishing to engage foreigners directly, or of agents engaging them on their behalf, for without supervision, employers and recruitment agents would effectively run the country's immigration system.

The latter has been the case in Arab States of the Gulf region which, following the oil price rises since 1973, admitted first non-national Arabs and later Asian workers on a massive scale in the absence of public institutions overseeing the labour market. Private middlemen or sponsors, called kafeels in Saudi Arabia, took their place. A sponsor performed matching functions on the basis of personal relationships, i.e. knowledge of what manpower an employer needed or how many domestics a head of household wanted, rather than on the basis of processed labour market information. This was perhaps inevitable in the circumstances of the mid-1970s. Payment in return for matching services was natural and a willed component of the within-country redistribution of the oil revenues. Sponsors initially took such payments from the large, often foreign employers; over time, they increasingly exacted fees from the migrants for whom they found jobs. Their key role has led to a situation where the governments' repeated attempts at reducing their economies' dependence on migrants have run up against the sponsors' opposing private interest in arranging employment for as many migrants from abroad as possible.

3 See the ILO's Employment Service Convention, 1948 (No. 88), Article 1 (1), and ILO C.97, Article 2.

Supervision, then, is indispensable.\(^5\) It should extend to:

- verifying the actual need for a foreign worker (which will be treated in greater detail in Chapter 5), i.e. agreeing to or refusing requests for labour import, unless that question is settled in a quantitative way by fixing an upper limit or quota of admissions during a specified period on a first come, first served basis until the quota is exhausted;
- overseeing the granting of the requisite authorizations to enter and stay or reside (unless that will be done separately through the Ministry of the Interior), as well as of the requisite permission to work; and
- regulating the activities of recruitment agents with a view to combating malpractices on their part and abuses of workers.

The involvement of private recruitment agents will be dealt with at length in section 3.4.

The immigration country can also permit reputable recruitment agents of emigration countries to perform legitimate matching functions on its territory, or at least to act as suppliers of foreign workers to the public employment or immigration service, to domestic agents or to employers directly. In this case too, the government of the immigration country has to exercise some supervision over the foreign agents or entrust an appropriate non-governmental body, such as the Chamber of Industry or Commerce or a bilateral association of employers, with the task of licensing and control.

Since public employment services tend to be more effectively present at the low-skill end of the labour market, the government has the option of reserving to its service the whole range of matching and entry-cum-employment control functions for that portion of the labour market while at the same time assuming merely a supervisory role for the upper end of the skill range. This would fit well a situation where unskilled workers are expected to be needed on a massive scale, whereas highly qualified workers are likely to represent fewer individual cases. Furthermore, the dangers of irregular entry and employment are minimal with regard to highly qualified personnel even where private agents or channels are involved, because their moves are rarely a massive supply-driven phenomenon, and because they tend to look for jobs corresponding to their skills, which not only are part of the formal sector but also relate to structures such as large engineering or service firms, hospitals or universities, whose activities are in the public eye.

### 3.3 Linking up with the foreign labour supply

Having a clear picture of the domestic mechanisms for a labour-import policy, the government then has to decide how it should link up, or how its employers and recruitment agents should link up, with the one or several migrant-sending countries from which it is desired to hire workers. The government could forge links

\(^5\) See ILO C.97, especially Annexes I and II, on the question of supervision.
with foreign governments or recruitment agents or both, irrespective of whether its own employment or immigration service assumes operational or merely supervisory functions. Box 3 sets out the different options which a government has in the context of operational and supervisory functions.

The government may merely want to conclude a framework agreement or broad understanding with the other country, as several Arab States have done. In such an agreement, the two governments would pledge to cooperate with the aim of getting country A's labour employed in country B, and they might refer to favourable treatment, questions of return, and so forth, but without going into detail. The alternative to a framework agreement is an operational bilateral recruitment agreement. This would use in the preamble the kind of wording one finds in a framework agreement and then lay down, article by article, how to regulate the flow of labour and the treatment of migrant workers. The contents of a bilateral recruitment agreement are outlined in the next chapter.

What the schematic presentation in the box makes clear is that there is more than one possibility of tapping foreign labour unless the government wants its employment or immigration service to be the sole operational actor (option 1b in conjunction with 2 or option 5 in conjunction with 2). If there is a decision to leave recruitment operations partially or entirely to the private sector, options 3 and 6 assign a direct hiring function to employers, whereas options 4 and 7 indicate the role of private agents, who may link up with foreign governments (4) or private agents (7) and transfer the labour directly to employers (8) or to the public employment or immigration service for further deployment. Under options 3, 4, 6 and 7 the government exercises only supervisory functions.

One can operate the various channels of recruitment simultaneously except if there is to be a public monopoly (option 1b and/or option 5). Even where the employment or immigration service has complete operational control, the government can involve domestic employers or recruitment agents in the final selection of candidates, for example by permitting them to test the skills of candidates.

### 3.4 Involving private recruitment agents

Quite a number of countries allow private agents to play a role in seeking, selecting, recruiting and transporting foreign workers to be employed by domestic employers, going so far as to leave practically all relevant operations in their hands, as is the case, for example, in Arab migrant-receiving countries and the Republic of South Africa. Even in countries where the public employment service once enjoyed a quasi-monopoly in recruitment operations, as in the Federal Republic of Germany during the 1960s, employers or their representatives were permitted to test candidates' skills in recruitment offices located in foreign countries.

It is easy to imagine how the public employment or immigration service can link up with a foreign government's counterpart service. If the foreign counterpart supplies the workers in the numbers and with the skills required, the recruitment operations may proceed satisfactorily for everyone involved. (The next chapter outlines a bilateral migration agreement in which both governments play a decisive, if
Box 3. Links between receiving and sending countries' major institutions involved in transferring labour

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<tr>
<th>Migrant-sending country</th>
<th>Migrant-receiving country</th>
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<tr>
<td><strong>Policy coordination mechanism</strong></td>
<td><strong>Policy coordination mechanism</strong></td>
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<td><strong>Supervision</strong></td>
<td><strong>Supervision</strong></td>
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<tr>
<td><strong>Private recruitment agents</strong></td>
<td><strong>Operational</strong></td>
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<td><strong>Operational</strong></td>
<td><strong>Public employment or emigration service</strong></td>
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<td><strong>Operational</strong></td>
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<td><strong>Operational</strong></td>
<td><strong>Private or public employers</strong></td>
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<tr>
<td><strong>Operational</strong></td>
<td><strong>Private recruitment agents</strong></td>
</tr>
</tbody>
</table>

1. Agreement and exchange of information between the two countries' highest policy bodies concerned with labour migration.
1a. Framework agreement, which expresses the two countries' desire to work together but does not go into operational details.
1b. Operational bilateral migration agreement, which sets up direct government-to-government recruitment.
2. Receiving country's government channels migrant labour to local employers, either by supplying workers offered by foreign government (link 1b), or through foreign recruitment agents (link 5).
3. Local employers, under the supervision of the government, link up directly with foreign government to obtain migrant labour.
4. Local recruitment agents, under the supervision of the government, link up directly with foreign government to obtain migrant labour.
5. Receiving country's government obtains migrant labour from foreign agents, and supplies it to local employers (link 2).
6. Local employers, under the supervision of the government, link up directly with foreign agents to obtain migrant labour.
7. Local recruitment agents, under the supervision of the government, link up directly with foreign agents to obtain migrant labour.
8. Local agents forward the labour they recruit to local employers.
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not exclusive, role.) However, governments of middle- or low-income countries may not have the requisite personnel or financial resources, or they may not have a developed employment or immigration service to call on. Furthermore, officials staffing public employment or migration services in most parts of the world tend to wait for clients to address their wishes to them rather than going out to search for clients and to resolve their problems. Whether they serve a dozen or a hundred clients a day, whether they serve only people who live nearby or others who live far away, whether they finish the job today or tomorrow – none of these is of crucial importance to them. By contrast, private agents are naturally keen on having as many clients as possible; they want to satisfy the employer who is their customer as quickly as possible and with the best possible candidate for the job. Furthermore, the range of services associated with recruitment operations, including health checks and the arrangement of housing or the provision of residence permits, is so wide and varied that the government’s employment or immigration service cannot perform all of them satisfactorily and simultaneously. Moreover, private agents do not arouse mistrust if they search for suitable workers on another country’s territory, or at least not as much mistrust as would be incurred by immigration countries’ public officials if they were to go round scouting for desirable emigration candidates.

The question then is how to involve private agents. Given that private employment agents are both a subject about which reliable information is scarce and a controversial matter in view of the abuses that are often – rightly or wrongly – attributed to them, this manual will take a broad-based approach that looks first at the various kinds of relationships that can exist between foreign workers, domestic employers and the immigration country’s government on the one hand, and domestic private recruitment agents on the other hand, before considering the question of regulating and supervising their activities in more detail.6

To start with, it may be helpful to define private recruitment agencies. They are service enterprises under private law which undertake, under contract and in exchange for financial compensation (a fee or subsidy), operations on behalf of individual clients or client enterprises with the aim of easing or speeding up access to employment or career progression or filling a vacancy – by a foreigner in the case under consideration here.

The terms used in this definition warrant clarification. The concept of “private” refers to the area of law which governs the operations of these agencies. Thus the term does not necessarily reflect the source of the capital used in their activity, which can come from the state budget in the form of a subsidy or participation in the initial investment. Nor does it reflect the objective of their activity, as the definition covers both for-profit and non-profit agencies. An important element of the definition is the concept of a contractual relationship between agency and client. This implies the signing of written contracts which are enforceable in civil law or administrative law courts in the event of disputes.

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3.4.1 Legal relationship between agencies and clients

Agencies’ relationships with their clients – domestic enterprises or foreign workers – may take one of five legal forms, with the agencies acting:

(i) as intermediaries. This is the oldest form, characteristic of any brokerage operation. The agencies assist in the conclusion of a private two-sided employment contract by bringing the contracting parties together. It is in this legal form that the agencies conduct their placement and recruitment activities;

(ii) as providers of a service. The agencies sign a bilateral contract to provide certain clearly defined services for which they are remunerated. Remuneration may vary not only according to results but also depending upon the time spent on supplying the service;

(iii) as representatives. This applies to an agency’s contract with a client – a domestic enterprise or a foreign worker – in which certain powers are delegated. The client transfers to an agency his or her right to enter into a contract with, and to make a legal commitment to, a third party;

(iv) as parties to an enterprise contract. The agency and the enterprise may enter into a contract which provides not only for the supply of a specific service but also for the continuous provision of goods or services, or which delegates a particular function; or

(v) as an employer. The agency signs an employment contract directly with the worker. This legal relationship is the kind usually established between the individual worker and contract labour agencies.

3.4.2 Legal relationship between agencies and public authorities

Agencies may have one of five different types of legal status with regard to the public authorities:

(i) a status under civil law. Just like any other service enterprise, recruitment agencies acquire legal status by being entered in the trade register (or, depending upon national legislation, by registration with the Chamber of Commerce or the courts), and by declaring themselves to the tax authorities;

(ii) the status of registered agency. The agency registers with the labour administration, the public employment or the immigration service. Registration implies the agency’s acceptance of special regulations relating to the supervisory role generally assumed by the relevant public body. Even if the latter has powers to prosecute in the event of infringement of these regulations, it need not necessarily have the authority to grant or withdraw a licence to operate;
(iii) the status of authorized agency. This is the legal status recommended by the ILO's Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96). The agency applies to the supervisory authority (generally the labour administration, the public employment or the immigration service) for authorization to operate. If the authority judges that the applicant meets certain criteria, it grants authorization in the form of an operating licence (or approval), which requires periodic renewal and may be withdrawn at any time in the event of infringement of the regulations in force;

(iv) the status of franchise-holding agency. This is applicable to countries where there is a public monopoly of placement. The government may delegate to a (generally non-profit) agency the power to share this monopoly for a particular trade or clientele. Rights and obligations are laid down in a schedule of conditions that the franchiser undertakes to observe and enforce. The franchise may be withdrawn at any time in the event of an infringement detected by the supervisory authorities or after due notice has been given; or

(v) the status of government-contracted agency. This status is based on the concept of a contract. In exercising their functions, the public authorities (i.e. the public employment or immigration service) may enlist the assistance of private operators who are given responsibilities for specific categories of the workforce, a trade or a region and for a particular period of time. The authorities sign an agreement with the agency; its text lays down both parties' objectives, rights and obligations. It also states the conditions for the agreement's cancellation or renewal.

3.4.3 Regulation and control of private agencies

Private recruitment agencies are not keen on working in a legally uncertain situation. An analysis of their conduct demonstrates that they seek the backing of some law recognizing their activity and affording them the means of barring unscrupulous operators from access to the profession. Nevertheless, although they appreciate the protection and guarantees inherent in law, they take exception to the constraints this may entail, i.e. any provisions likely to restrict their freedom of movement and initiative.

The first and most traditional relationship between the public service and private agencies is one of authority, in which the State acts as guardian of the law. However, the State may choose to exercise its supervisory authority in a more flexible, more varied and certainly more effective fashion than the traditional pattern of legislation-inspection-sanction. By breaking down the act of supervision into its three components (Who exactly carries out the supervision? What exactly is supervised? How is the supervision carried out?) it will be easier to appreciate its scope.

As to who carries out the supervision, it is preferable that this role should not be entrusted to the public employment or immigration service but rather to its superior authority, i.e. usually the Minister of Labour, Employment or Social Affairs acting on behalf of the government. The public employment service, or the special immigration
service, is required to interact with private agencies in a spirit of both competition and understanding. If that service is to avoid being justifiably criticized for being both judge of the case and party to it, it will have to be relieved of this supervisory function.

As to what is to be supervised, the growth of the market, its fluidity and the rapid changes it is undergoing suggest a move away from the regulations placed on agencies as such towards the regulation of their activities and operations, irrespective of the type of agency. The regulation of operations could well be aimed at the employment management tools and methods used by the various private agencies. For example, provisions could cover (a) the confidential treatment of personal data held by agencies; (b) testing and selection techniques; (c) the veracity of job offers appearing in the press (some agencies use such offers as "bait" enabling them to compile and operate computerized databases of candidates); (d) the recognition of the acquired rights of workers recruited by agencies in the event of such agencies defaulting; and (e) inquiries made by agents into the candidate's private life before a recruitment decision is made.

Regulations could also define and give official recognition to the professions of employment manager or consultant, and protect access to them. They could lay down minimum standards of training, competence and conduct to be met by practising or aspiring professionals, both in the public sector and in private agencies. Protection of the profession could be ensured by instituting a professional certification system or by registration in a professional body, as is the practice for accountants and lawyers, for example.

As far as the manner of supervision is concerned, ensuring compliance with legislation is the oldest and most common approach used, and should be neither underestimated nor overlooked. However, it should not be the sole approach. Supervision may be carried out indirectly, in particular by the State's providing encouragement and awarding a "stamp of approval" for self-regulation efforts. In itself, self-regulation is a very useful supplement to regulation by the public authorities. Self-regulation by federations that group together recruitment agencies would involve provisions regulating the agents themselves and their operating methods. If the State were to provide its stamp of approval for codes of good conduct, the contents of these codes would obviously have to be approved by the public authorities or, better still, be negotiated with them. Public backing of self-regulation might be secured in two ways. The State could require observance of the codes as a prerequisite for practising as an employment manager; or it could set up joint committees with representatives of the profession taking responsibility for guaranteeing application of the codes and, in particular, handling complaints and imposing the penalties laid down by the codes for infringement of their provisions.

There is one aspect of regulation to which the immigration country will have to give most careful consideration: deciding whether private recruitment agencies will have to obtain approval or a licence from the public authorities before practising their profession. Institution of an approval system offers unquestionable advantages: it allows the State to identify agents operating in the market; it makes it easy to collect information when granting of approval is linked to the obligation of regularly
supplying data on the way private agents are carrying out their activities; it ensures
close monitoring of the application of regulations; and it allows prior screening of
individuals or enterprises wishing to operate in the profession, thus making it easier to
avoid problems by barring entry to those that seem the most dubious. However, such a
system has serious drawbacks: it is considered costly and constraining, and
encourages agents to sidestep it by claiming that the regulations are not applicable to
them; it generates suspicion between private agents and public authorities, and
compels the State to assume an authoritarian role, thus undermining its credibility
when it wishes to be user-friendly; and it discourages individuals or enterprises from
drawing up long-term strategies and making investments, especially when approval
has to be renewed each year.

In earlier decades, national and international laws stipulated that the State
should conduct its supervision by requiring agencies to submit their scales of fees and
expenses and to apply annually for the renewal of their licences. This kind of control is
seen today by many as being much less important than other forms. Adopted at a time
when price control was the customary tool used by the State to enforce its authority
over the market, the submission of scales is a measure which is perhaps useful in
certain situations to avoid the most flagrant forms of abuse, but is superfluous in many
other cases since market mechanisms normally keep these scales within a range
acceptable to clients. Moreover, regular licence renewal places the agencies in a
persistently precarious position and discourages the investment required to enhance
performance. In this way the principle of annual renewal runs counter to the objectives
of professionalism and reliability.

Obviously, an immature market under constant assault from profiteers and
speculators needs regulation more than others. The government must therefore
continue to enforce provisions on the granting of approval. On the other hand, in a
market showing signs of maturity, and which demonstrates its capacity for self-
regulation, such a measure would be unnecessarily restrictive. When instituted,
approval or licensing and renewal should not be presented as unchangeable and final,
but rather as measures which may be relaxed depending on the way the markets
develop and conduct themselves. Approval might thus gradually lose its more
restrictive aspects and be reduced to a mere obligation for private recruitment agencies
to register with the public authorities. This registration would have two effects: it
would make it possible to identify agents; and it would imply an undertaking on their
part to abide by the current regulations.
Contents of a bilateral immigration agreement

This chapter lists the most basic and typical questions that should be dealt with and resolved in operational bilateral recruitment agreements suited to the circumstances of a wide range of middle- and low-income countries.

Irrespective of whether a government has sole or shared responsibility for the recruitment of migrant workers (although this would of course influence many of the subjects to be regulated), the following points could usefully be considered for inclusion when an agreement aims at facilitating large-scale migration for training or contract migration in respect of ordinary industrial or service jobs, or at facilitating the seasonal employment of migrant labour. Several of the matters touched upon here will be taken up in greater detail in subsequent chapters in the context of post-entry treatment of migrant workers. An internationally elaborated model agreement can be found in the annex to ILO R.86, which despite its age provides to this day wholly relevant guidelines and inspiration.

The following items constitute only the minimum number of questions that may have to be dealt with:

(1) *Competent authority.* Which ministry or body is responsible for what in the sending and in the receiving country? Should one country’s ministry or body establish an office in the other country? If so, who bears the costs of the premises?

(2) *Exchange of information.* Should general information on working and living conditions be transmitted from the immigration to the emigration country and vice versa, including information on wage systems, social security contributions, tax deductions etc., as well as information not exclusively relevant to the work situation such as information on cultural habits, religious doctrine etc.?

(3) *Irregular migrants.* Should one seek to regularize the status of migrants whose entry, stay or employment is illegal? If so, under what conditions? Should they be returned? Would the emigration country have an obligation to re-admit them?

(4) *Vacancy notification.* How should individual vacancies, or groups of identical or similar vacancies, be made known to the emigration country? Should notifications include details of the skills required of applicants, the nature of the prospective employment, any special conditions attaching to it, and its envisaged
duration? Should general age limits apply to unskilled or highly qualified workers, or would this infringe privacy laws or principles of equal treatment?

(5) List of candidates. How should emigration countries list jobseekers who desire employment in the other country? Should lists contain details of their trades, past employment and the kind of work they are looking for? Should their marital status be specified?¹

(6) Pre-selection. Is the competent authority of the sending country (or its private agents) to be responsible for pre-selecting from the list of candidates such persons as are deemed suitable for notified vacancies? Should candidates have a clean police record?

(7) Final selection. Is the competent authority of the receiving country (or its employers or private agents) to have the final say about who is actually to be permitted to migrate?

(8) Designation by employers. Should employers or their agents be permitted to request a nominated person – for example, someone who was previously recruited by them or who is a friend or relative of someone already known to them?

(9) Medical examinations. Should the candidates’ health be examined before selection? Which country’s doctors should carry out the examination? Who is to bear the costs? Should danger to public health be a reason for excluding candidates for emigration? If so, who determines the criteria for assessing what constitutes a danger to public health in the immigration country? The latter country? Or should there be joint determination?

(10) Entry documents. Which identity cards, visas, passports or other documents are required for the move?

(11) Residence and work permits. Are migrant workers to be obliged to obtain permits to stay and work in the receiving country? Who issues them? Should there be one or several permits? Should the permits be granted before arrival or should the worker (employer or agent) be responsible for obtaining them after arrival? What are the standard conditions of renewal?

(12) Transport. Which kind of transport should generally be envisaged? Who should pay for it? If the worker has to return to his or her home country – prematurely or after the expiry of his or her work contract – who should pay for the journey?

(13) Employment contract. Should a general or model employment contract be appended to the agreement? Should it be in several languages, including a language the migrant can understand? Should the domestic employer and the foreign worker sign a contract before the move takes place? Should the agreement contain provisions

¹ The ILO's Discrimination (Employment and Occupation) Convention, 1958 (No. 111), while not specifically prohibiting discrimination in access to employment on the ground of marital status, nevertheless requires ratifying States to eliminate such discrimination on the basis of sex.
on the normal duration of contracts for seasonal or ordinary jobs? Should it set out
general guidelines for the renewal of contracts and what happens if an employer
wishes to terminate the employment relationship, or goes bankrupt, before the expiry
of the contract? How should one deal with cases where an employer finds a worker
unsuitable after arrival?

(14) Terms and conditions of employment. Should the agreement specify
that non-national workers’ terms and conditions should be the same as those in force
for comparable national workers, for example those deriving from public wage
minima or relevant collective agreements, as well as those concerning night work of
women, hours of work, overtime, weekly rest, holidays with pay, and termination of
employment?

(15) Grievance and dispute settlement. Should the agreement stipulate that
migrant workers, on the same conditions as national workers, should have the right to
submit any grievance concerning relations between employer and worker or the terms
and conditions of employment to an appropriate procedure within the enterprise or to a
procedure provided for in collective agreements, conciliation or arbitration by the
competent public authorities, and that they should have the right to recourse to a
labour court or other judicial authority of the immigration country?

(16) Right to organize and bargain. Would migrant workers, as well as
domestic trade unions, not be able to defend themselves better against unscrupulous
employers and agents if the bilateral migration agreement reiterated the principle that
has become part of customary international law, namely that workers, without any
distinction whatsoever, 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?

(17) Social security. Should the agreement indicate that foreign workers are
to be affiliated to existing social security schemes, contributing to them on terms equal
to those on which comparable national workers contribute and, accordingly, being
entitled to benefits on the same terms as nationals? And should it leave to a separate
social security agreement the special problems associated with rights in the course of
acquisition, the maintenance of acquired rights and the payment of benefits abroad? Or
should this subject be regulated in a different way?

(18) Remittances. Should the migration agreement lay down the principles
and limits of migrants’ transfer of their earnings and savings?

(19) Accommodation. Who is to be responsible for finding accommodation
when the worker moves to the immigration country? Is a foreign worker entitled to
access to publicly supported housing schemes upon arrival?

(20) Family migration or reunification. Which principles and conditions
should apply for a worker to be accompanied or joined by a spouse, children and
others?

2 Internationally agreed minimum standards are set out in ILO C.118, ILO C.157 and ILO
R.167.

3 On the right of migrants to transfer earnings and savings, see ILO C.97, Article 9, and the UN
Convention, Articles 32 and 47.
(21) **Welfare or religious organizations.** Should the emigration country's welfare or religious organizations be allowed access to migrant workers in the immigration country? Should the latter country's relevant organizations be designated as normal contact points?

(22) **Joint commission.** Should the two countries agree on establishing a commission whose purpose would be to oversee the implementation of the agreement and to resolve general problems that may arise in the course of its application?

(23) **Validity and renewal.** Should the agreement be valid for a defined duration and then lapse, or become automatically renewable unless either of the two parties expressly denounces it?

(24) **Jurisdiction.** In case of a dispute arising out of the application of this agreement, should the matter be settled under the legal system of the country to whose territory the dispute relates? Or should it be settled by an arbitration or court procedure outside the jurisdiction of both parties?
Operationalizing different kinds of admission policy

The questions to be explored in this chapter relate to the crucial labour market issue: when and how to give domestic employers permission to hire a foreigner who is still abroad or who already works on the immigration country's territory for another employer or who is unemployed or an economically inactive person.

At the heart of the migrant labour system is the question of how to assess an employer's need for a non-national worker. The general aspects of this question have been set out in Chapter 2. The daily question faced by officials of the public employment or immigration service is: can one legitimately agree to a particular request or should it be refused? Testing legitimacy involves the setting of criteria and applying them through appropriate procedures.

5.1 Quotas and similar limitations

An employment-driven immigration system for foreign trainees, contract migrants or seasonal workers can be implemented by pursuing an open-ended policy of permitting domestic employers to import such foreigners as pass a substantive test. This was the case in western Europe in the 1960s and in the Arab States in the 1970s as far as contract migrants were concerned. Can the system be operationalized, however, through the setting of numerical limits, targets, ceilings, quotas and so forth? These terms denote the same subject-matter and are used synonymously in this manual since one need not reflect various countries' distinctions that derive from their specific traditions or administrative convenience. Nothing actually prevents a country from combining the two: one can apply unspecified limits to certain categories of labour and set absolute numbers or percentages for others.

Quotas have advantages and disadvantages. The strongest point in their favour is that they provide a clear frame for planners, administrators, employers and, indeed, for the public at large. Public opinion often tends to be less sanguine about incoming non-nationals than employers and politicians. For ordinary citizens, it is therefore reassuring to know the upper limit of the intake even if people do not agree with the figure or fear that it will be undercut by illegal inflows and employment. As well as helping with acceptability to the public, transparency assists the managers of
employing foreign workers

enterprises, public administrations, schools and so forth. The numbers or percentages are yardsticks that can be controlled. Inflows from abroad can be curtailed or stopped when the targets have been attained. Complementary measures can be taken to facilitate inflows in line with the target.

The disadvantage associated with quotas is their potentially rigid nature. Figures tend to take on a life of their own. They may become viewed as "entitlements". The booms and busts of the economy, however, and its structural adjustments can require frequent modifications of targets in either direction - up or down. It is possible to cater for such eventualities by having the State reserve the right, in consultation with the social partners, to freeze a portion of a quota or either to allow a one-time excess or to allow excess numbers that will be deducted in subsequent years.

Who should be the object of quotas? In an employer-driven system, quotas can be fixed for:

- **the country as a whole.** This is the simplest but perhaps also the least satisfactory option. Employers would be likely to be given access to the foreign labour supply on a "first come, first served" basis until the quota was exhausted for the season or year in question. One constraint of the global quota approach in free market economies is that because the quota would tend to be rather lower than the effective demand for foreign labour, the employment or immigration service would be forced to take on a responsibility that it should in principle eschew, i.e. distributing entitlements according to some macro- or micro-economic reasoning. Distribution or allocation should be the responsibility of the market rather than of bureaucrats. If a public body is considered to be the wrong instrument of allocation, the labour-receiving country could usefully consider whether foreigners should not be given the right to act as free agents in the labour market, i.e. to take up such opportunities as they perceive. Market forces would attract foreign labour to the more productive sectors, regions and enterprises since they can pay better wages and provide better working conditions. Such a market-driven allocation system operates under permanent immigration schemes, but it goes against the grain of migration policies aimed at the import of contract or seasonal labour. It would also be impracticable if a migration for training scheme was envisaged;

- **the territory's various regions or administrative districts.** Each region's/district's quota could be strictly proportionate to its economic importance, however that may be measured, or to its population size. Alternatively, individual quotas could reflect economic or social disadvantages of certain regions/districts compared with others; that is, disadvantaged regions/districts could be favoured with a disproportionately large quota. The employers, again, could have access to territorially based ceilings until the ceilings were reached. Totting up all regions/districts would, of course, yield a quota for the country as a whole;

- **sectors of the economy.** One could set a quota as X number of foreign workers in the fruit, vegetable and horticulture sector; Y number for year-round employment in agriculture; Z numbers for the metal industry, and so on. The advantage of setting targets for different sectors of the economy is that the intake of migrant labour may closely reflect economic realities and needs. Quotas of this kind are
traditionally not fixed in relation to the size or importance of sectors, not even where countries experience absolute labour shortages. Quotas seek to satisfy differential needs, i.e. they favour some sectors, and disfavour others. If relative labour shortages are responsible for the import of labour, governments embracing quotas as a control mechanism will want to bias quota allocations in favour of sectors that have large numbers of jobs that nationals do not want. These sectors vary in the course of economic development and between countries;¹

- **specified occupations.** Many professions such as law and accountancy are fearful of being "swamped" by foreigners and of losing the remunerative edge that goes with scarcity, especially since their fees tend to be set individually rather than by collective agreements. Liberal professions - but they are not the only occupations - tend to pressure governments into setting small quotas or requiring the strictest equivalence of foreign qualifications. Others have a very different attitude. University teachers, for example, or highly qualified researchers derive much enrichment from contacts with foreign colleagues and therefore put pressure on governments to be generous in their admissions policy for their own groups;

- **individual employers or enterprises.** This is an option that can very easily be put into practice. While it does not make much economic sense to set such quotas in terms of absolute numbers because a given number would be much more beneficial to small than to large enterprises, it is less problematic to think of proportionate allocations or upper percentage limits. The argument would be that the same percentage applied to all enterprises’ workforces would favour none of them. All would have the same possibility of employing X per cent of foreigners but no one would be forced to exhaust the allocation. Employers desperately short of labour would presumably go up to the limit, whereas others would not. The disadvantages of quota allocations for individual entrepreneurs, enterprises or allocations by size of enterprise are twofold. First, they tend to cause hoarding of foreign labour in enterprises that do not really need that labour. Second, they tend to perpetuate industrial structures, methods of work organization and low productivity employment in enterprises that regularly use their quotas to the full. The reason for this is not so much the hiring of foreign workers in itself, but the continued unhindered access to the foreign labour supply combined with the fact that quotas of this kind tend to be fairly generous rather than highly restrictive.

This brings to the fore the issue of how quotas for contract migrants or even for professionals should be calculated or how they can be set in practice. Advocates of manpower planning would want to arrive at an estimate of the labour shortages to be expected in the period ahead. The pertinence and exactitude of such calculations are

questionable, at least on a countrywide basis. That does not mean, however, that such estimates could not constitute background information for policy-makers whose decisions should anticipate expected developments. Nor does it mean that this type of forecasting need be wide of the mark if it focuses on individual sectors. After all, researchers and personnel managers in medium-sized or large firms have to make such assessments, and if they are way off the mark their jobs and firms will be threatened.

Nevertheless, countrywide or sectoral economic forecasting and manpower demand and supply projections, despite their increasing sophistication, can be upset by indistinct or unexpected developments in both product and labour markets. Policy-makers, therefore, do not place confidence in them sufficient to determine what size a quota should be. Quotas are easier to fix through a bottom-up approach, such as that implemented by Austria, with it being left to the employers and to workers’ organizations of designated sectors of the economy to negotiate each year how many foreigners should be admitted from abroad (see box 2). That approach comes as close to economic and social realities as one can reasonably hope to come. The potential problem associated with it is that the social partners will decide on numbers which the government may judge to be too high for non-economic reasons, and that it may not be able to reduce the numbers in practice owing to the interplay of political forces. The government could, however, stipulate in a law that it reserves to itself the right to freeze a portion of a quota and submit the question to parliament for final determination.

In actual fact, quotas are regularly established on the basis of a political bargaining process that aims at an overall number which can somehow be rationalized better than others, and then that overall number is split up between regions/districts or sectors in line with objectively quantifiable needs, tradition and political clout. Forecasters and manpower planners ought to be given a hearing as regards the distribution of the quota rather than the overall number. More important, public and private employers must be given some assurance that their needs are reflected this year or in coming years if one wants to generate commitment to the distribution and forestall illegal immigration and employment.

If a country’s political system is decentralized and the administration of the labour import is handled by the constituent regional units, as is the case in Switzerland for example, again it is wise to reflect the felt needs of these units to the extent possible in order to commit decentralized administrations to the most faithful operation of the quota system. Switzerland has experimented over the years with various limits or quotas and has found some to be more workable than others. Box 4 summarizes that country’s experience.

One inherent tendency in distributive schemes is to satisfy important actors and thereby drive up the overall number. Where a quota system is introduced for the first time with a view to capping the number of foreigners in the country or actually reducing it, one would have to know something about the proportion of foreigners returning during any one year in order to set the number of new entrants in such a way that the quota would be reached rather than exceeded. Alternatively, new entrants could be permitted to enter on a daily, weekly or monthly basis after returns had caused the stock of foreigners to drop below the target level.
Box 4. Switzerland: Quotas of various kinds

Switzerland's economic fortunes and a liberal labour-import system gave rise to such a massive influx of migrant workers that, in the early 1960s, attempts were initiated to stabilize the foreign labour force in the country quantitatively. First a moral appeal was launched by employers' organizations and the federal Government - without success. Then the Government resorted to enterprise-based quotas by decreeing that firms' total workforces should not exceed the previous year's absolute number of (Swiss plus foreign) workers and, subsequently, that they should not exceed 95 per cent of that figure. Still, the number of foreigners in the country kept creeping up. One reason was that the placing of limits on individual firms did not necessarily have the desired effect for the country as a whole. Firms not employing foreigners could attract as many nationals as they wanted, and these nationals could be replaced in the firms they had left by new foreigners until the 95 per cent level was reached. Firms employing foreigners were tempted to hoard them even if their current needs were reduced. Additionally, a measure of this kind had to foresee several exceptions, for instance with respect to important research undertakings or jobs of exceptional public utility. The verification of the application of the measure actually proved to be quite unmanageable.

In the mid-1960s, the federal Government introduced an enterprise-based "double employment ceiling". This maintained the overall restriction on a firm's total (Swiss plus foreign) workforce and added a separate limit on the foreign component of that workforce, which employers were required to cut in the first year by 5 per cent, in the second by 3 per cent and in the third by 2 per cent. The exceptions were also tightened. That system turned out to be excessively rigid and economically counter-productive. Wages were pushed up in an inflationary environment. Expanding firms suffered unnecessarily from the restrictions, as did regions where growth had previously been slack but was now picking up. Sectors and regions that had habitually relied on a disproportionately large number of foreign labourers were hardest hit. Enforcement again posed almost insuperable problems.

In 1970 the conflict between economic imperatives and the political interest in keeping the number of foreign workers down brought into being an overall quota for the country as a whole, which was divided into allocations by type of employment and regions, i.e. cantons. Cantons are Switzerland's constituent political units responsible for the administration of the employment of migrant labour.

The overall quota, which was not applicable to migration for training and a number of specified jobs that cannot be enumerated here, covered the two major categories of employment authorization then in force: one-year permits and seasonal permits. One-year permits, which are generally for skilled and highly skilled workers, can be renewed but are subject to a vacancy test. Seasonal permits were specified by economic sector (a sub-quota of 115,000 for regular construction work; a sub-quota of 21,000 for the hotel and catering industry; and a sub-quota of 16,000 for other jobs where seasonal workers were traditionally employed, chiefly in agriculture).

Several years later, a third category was added: short-stay permits, which are intended to allow the temporary engagement of a wide variety of persons in whom Swiss employers or private individuals have a special interest (for example, highly qualified health care personnel, unskilled construction workers under project-tied auspices, trainees, au pairs). The permits are to cover employment lasting more than four and less than 18 months. They are generally not renewable.
The 1970 concept comprised two subsidiary instruments that have been in use ever since. One was to establish an out-of-quota national reserve (3,000 one-year permits) to be released under certain circumstances by the federal Government. The other laid down that one or another category's quota could be drawn upon only to a certain extent (50 per cent at that time) until a review of the situation by the relevant parties had taken place and a different percentage or full use was agreed upon.

The main organizations of employers and workers are consulted whenever the federal Government sets out to determine next year's overall quota and how it is to be allocated by category of permits. But the key players at this stage are the regions' political representatives. They too engage in a variety of consultations that include employers' and workers' organizations. Being closer to the economic and social fabric of life than the federal Government, the cantonal authorities tend to argue strongly in favour of keeping or enlarging their entitlements. Depending on the size of the canton, its authorities may call on employers' and workers' representatives to consider with them the allocation of cantonal quotas to individual districts or enterprises, with a view to enabling employers to know how many foreigners they may count on in the coming year.

This overall quota system was felt to be in need of revision some 20 years after its inception. Although economic criteria influenced the considerations of the countrywide ceiling, politics dominated, especially the desire not to slight individual cantons. This tended to inflate the overall quota. However, economic criteria were brought to bear upon the calculation of alternative methods of allocating shares of one-year, seasonal and short-stay permits to each canton. The availability of reliable statistics that were not liable to differing interpretations played a decisive role in the final selection of criteria. It is instructive to illustrate some of the criteria adopted by reference to seasonal employment permits.

The seasonal quota is composed of three sub-quotas for construction, agriculture, and the hotel and catering industry. The cantons' allocations are calculated as follows:

- The construction sub-quota reflects the canton's share in the total number of Swiss plus foreign employees in this sector.
- The same basis is used for the agricultural sub-quota.
- In the case of the hotel and catering industry, a composite indicator has been developed that reflects the number of employees (Swiss plus foreign) in the tourism industry; the number of beds installed, of beds that were actually available (many hotels close during one or several off-seasons) and of nights spent by tourists in each canton; as well as the ratio of incoming foreign seasonal workers to the total number of seasonal foreigners, which mirrors the fact that some regions' hotels open only for one season, others for two. The result is further weighted by two variables. One takes account of the fact that certain cantons can freely authorize frontier workers from neighbouring countries to enter for employment purposes. The other is designed to reflect the differential seasonal employment dependency of each canton, calculated as the proportion of seasonal in total employment.

The advantage of using economic and labour market data, rather than accepting political clout or an abstract equity criterion when one has to allocate an overall quota to individual sectors or types of jobs, is that economic developments are translated fairly rapidly into new shares on an objective basis.
As regards the admission of specified-employment workers or other groups of salaried, own-account or self-employed workers who move in reaction to employers’ requests (inside or outside transnational enterprises), quotas are actually not a very useful or advisable instrument. The demand for such professional, business or related services is exceptionally difficult to forecast and to channel for the simple reason that employers’ requests concerning workers of this sort are highly individualized (compared with, for instance, the demand for a large number of similar workers needed on an industrial production line or during the harvest). The market can be trusted to decide how many such admissions should occur during any given period.

Project-tied migration is also difficult to force into the strait-jacket of quotas. The reason is that one can carry out just about any project with different combinations of technologies and manpower. While a migrant-receiving country’s administrators may well wish to give preference to a foreign company that bids with a smaller foreign labour force than other companies, the domestic employer or initiator of the project may prefer a different foreign company on cost or efficiency grounds or because it promises more rapid completion of the project. The administrators, here too, would tend to substitute for the market, which they should not do.\(^2\)

### 5.2 Instituting a vacancy test

Labour exchange officials who receive requests by employers for specified-employment workers, contract migrants or seasonal labourers could no doubt think of a range of criteria, procedures or checks that reflect their country’s level of economic, social and institutional development; and each country’s public employment service would therefore be the best source of such ideas. In this manual, only a few general options can be considered that could be applied universally if no others were available.

One option would be to impose a waiting period and, in the meantime, to publicize the vacancy within the country. The aim would be to find out whether suitably qualified unemployed or inactive nationals, or someone who wishes to change jobs, would be interested in the job – in which case that person could be hired if the terms and conditions were acceptable to him or her. Whether the advertisement of the vacancy should be confined to a particular region, sector or occupation is not an unimportant question, but its resolution depends on a particular country’s size and circumstances.

Another option would be to request from the employer evidence that the job has already been offered to one or several nationally available workers who have,

\(^2\) Quotas are not without their use even for project-tied migration, provided they are more in the nature of targets and strictly monitored. Germany’s difficulties in this respect are alluded to in C. Kuptsch: “Short-term migration as a means of training: Schemes for temporary employment and training of central and eastern European workers in the Federal Republic of Germany”, in Kuptsch and Oishi, op. cit., Chapter 4.
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Box 5. United States: Selected labour market tests

The US Department of Labor conducts a variety of vacancy tests prior to admitting foreigners for settlement or for temporary employment. The labour market tests applied in the case of permanent immigration, which are very detailed, will be summarized first.

Permanent labour certification

The United States immigration law provides that a domestic employer seeking to hire a foreigner must pass a recruitment test within the US to obtain the right (called certification) to engage that foreigner if no American worker is able, willing, qualified and available to take and perform the job at the place of employment and if the admission of the immigrant worker will not depress the wages and working conditions of similarly employed US workers. To facilitate the processing of large numbers of requests, which can be submitted by either employers or foreigners, the Department of Labor has established two schedules:

Schedule A. This specifies, for example, physiotherapists and nurses, or aliens of exceptional ability in the arts and sciences, for whom it has been predetermined that an employer need not go through the certification procedure because their occupations are in short supply in the United States. The foreigner, however, has to meet the qualification standards of the occupation in question before he or she can be admitted to the country or to the hospital, university, etc.

Schedule B. This contains a large number of occupations requiring little skill or training and for which American workers are known to be generally available.

Occupations that are in neither schedule A nor schedule B require documentation from the employer showing that serious attempts have been made to recruit American workers, including through:

(i) the public referral and recruitment services;
(ii) local newspapers of general circulation, radio, TV or, for more specialized jobs, trade or professional journals;
(iii) private recruitment agencies, trade unions, colleges, etc.

The employer must respect the wages and working conditions prevailing for the job in the local community. This requirement is designed to ensure that the hiring of the migrant will not adversely affect wages and conditions in the area.

Generally, the employer is given 45 days to contact workers and to report the results of recruitment. Failure to contact workers promptly or to make more than minimal efforts to contact applicants may result in refusal of certification.

An employer can reject an American worker only for lawful, job-related reasons. The test for whether a worker is qualified is whether he or she, through a combination of education and experience, appears able to perform the basic tasks of the job with or without minimal training. Thus, an employer may not reject a qualified American worker because the foreigner is better qualified.

The job offer used by the employer may not describe the job with unduly restrictive job requirements, such as requirements not normal to the occupation, unless the employer adequately documents that the requirements
arise from business necessity. "Business necessity" does not include employer or customer preference or convenience. It is a requirement which, if absent, would actually undermine the employer's business. The employer must always document the business necessity for a language other than English.

Refusal of a labour certification by the appropriate employment service may be appealed by the employer to a panel of administrative law judges.

Schedule B certification is, naturally, stricter than the general procedure. Under schedule B, the employer has to perform all the tasks normally set and, in addition, has to demonstrate that he or she unsuccessfully recruited for the job as part of regular operations in the recent past.

**Temporary admission of foreign labour**

Six employment-based procedures are currently used by the US Department of Labor for the temporary employment of foreigners, covering agricultural (H-2A) or non-agricultural (H-2B) workers, nurses (H-1A), workers in specialty occupations and distinguished fashion models (H-1B), crew members performing longshore work (D), and students in work not related to their studies (F-1). (The bracketed letters and figures refer to sections of the US immigration law and visa categories.) Some of these procedures are modelled on the lines of the permanent labour certification programme. Others are designed as attestation procedures. Under attestation, the employer files a promise to meet certain procedural or substantive conditions regarding recruitment, training of American workers, wages or working conditions. The attestations are reviewed by the public employment service for completeness and obvious inaccuracies. Violations of attestations made in respect of agricultural workers, for example, can lead to exclusion of the employer from the H-2A programme.

The so-called non-immigrant nurses programme (H-1A) is notable for the requirements it has imposed, since 1990, on US health care facilities. Hospitals, old people's homes and the like seeking to employ foreign nurses temporarily are required to attest that:

- the facility has not laid off any registered nurses within the last year;
- the delivery of health care services would be substantially disrupted without the services of foreign nurses;
- the employer will pay the higher of the prevailing or facility wage to the aliens;
- the facility will take timely and significant steps designed to recruit and retain US nurses. At least two such timely and significant steps must usually be taken, such as training nurses, training others to become nurses, paying above-prevailing wages, freeing nurses from non-nursing duties or providing special perquisites;
- there is no strike or lockout at the place of employment and the hiring of the aliens is not intended to influence an election for a bargaining representative;
- a copy of the attestation and supporting documentation will be available at the facility for inspection by interested parties; and
- notice of the filing of the attestation has been sent to the appropriate union if the nurses are represented, or has been posted if they are not.

Sources: US Department of Labor: "Final report of the Secretary of Labor's functional review working group on immigration" (Washington, DC, 31 July 1992); and Instructions for filing applications for alien employment certification for permanent employment in the United States (Washington, DC, 1980).
in the end, refused it. This would constitute a much greater constraint on the employer, not only to look for workers in the domestic labour market but also to offer sufficiently attractive conditions to local workers for them to become at least interested in the possibility of filling the job. If no such evidence were provided, labour exchange officials could refuse the employer’s request for a migrant worker.

Yet another option would be to require an employer to raise the salary offered by X per cent. For example, if the employer merely offered the going minimum wage or the lowest salary compatible with the prevailing collective agreement, locally available workers might be willing to take the job if the remuneration were improved noticeably.

A further possibility would be to combine two or all three options.

Only when the test is found to be unsuccessful should the employer be permitted to engage the migrant worker.

The most sophisticated labour market tests in operation appear to be those in use in the United States, which are summarized in box 5.

5.3 Organizing a seasonal migrant labour scheme

It is useful to illustrate a seasonal employment scheme first and then to build on it to demonstrate the scope and limits of schemes concerning jobs called “ordinary” for want of a better term. Seasonal work is typically limited to parts or all of agriculture, to the tourism sector and related restaurant and catering services, and to the construction industry in countries where year-long work is impracticable for climatic reasons.

Where a country has never before instituted a seasonal employment scheme for foreigners, employers’ vacancies should be subjected to tests. If a test gives the green light for the recruitment of a migrant abroad, the public employment or immigration service, the employer or the agent acting on his or her behalf would search for a suitable candidate and bring that person to his or her workplace. The worker would be given a contract specifying the terms and conditions of work, accommodation, etc. When the season had ended, the worker would be expected to return home. Questions of transport and medical examination could be settled between the employer/agent and the worker or through a bilateral migration agreement. If there were no such agreement, the country’s policy-coordinating mechanism would have to decide how to regulate questions of entry, work permits, remittances and so forth.

If the vacancy tests revealed a persistent pattern of unfilled vacancies over a period of years, the tests could be made less stringent and the officials of the public employment or immigration service could devise easier procedures to facilitate employers’ access to workers abroad.

3 For the definition of seasonal work, see section 1.2 above.
Seasonal schemes could be administered effectively if the migrant workers were clearly given to understand that they would not be authorized to stay after the seasonal employment had ended. If workers were to stay on illegally, the migrant-receiving country would have to decide how to handle such cases.4

5.4 Is it sensible to envisage a seasonal type of labour import for ordinary jobs?

Seasonal labour-import schemes maximize economic benefits and minimize social costs, especially if tightly administered. This may lead one to the tempting conclusion that ordinary industrial, service or indeed agricultural jobs could be filled on similar lines with foreigners. They could — but such a policy would both be economically wasteful and run into human rights constraints. An exploration of the issues is illuminating for analytical purposes.

What is meant by a “seasonal type” of policy? A government could decide that, because of persistent labour shortages in a sector or region or among small-scale enterprises, foreigners should be admitted from abroad on the lines of a seasonal scheme — into the country at a certain time and out again after a pre-defined period. Box 6 gives visual expression to such a policy and incorporates the institutional framework of policy developed in the preceding chapters. It also distinguishes between a policy coordination body and an executing body, the latter being labelled “Public service” for short.

The problems with a seasonal type of policy for ordinary jobs are basically twofold: their economic inefficiency and cost, and the disregard for rights that migrants could justifiably claim to be theirs.

5.4.1 Economic doubts

A seasonal type of labour import for ordinary jobs recurrently incurs costs in the fields of transport, medical examination, bureaucratic documentation and, most of all, familiarization with and training for the work to be performed. It is wasteful for an employer to have to pay the same costs time and again because the migrant worker is required to return to the country he or she came from. This, incidentally, was the key reason why western European employers in the 1950s and 1960s asked governments for permission to keep migrants on, and requested them to extend their residence and employment authorizations year after year. What is part and parcel of the seasonal cost-benefit calculation is not necessarily acceptable to employers producing goods through ordinary jobs.

Moreover, permitting only certain sectors, regions or employers to have access to foreign labour introduces distortions into the labour market. These sectors,

4 The UN Convention and ILO C.143 provide a range of guidelines on this subject. See also Chapter 8, which examines how to cope with illegal immigrants and irregular employment.
regions or employers are actually advantaged relative to others. The favour that such a policy bestows may not be acceptable to other sectors, regions or employers. It is one thing for certain sectors, regions or employers to draw foreign labour into the country disproportionately, thus reflecting differential labour demand empirically. It is another thing to favour one part of society over others through policy decisions and institutional mechanisms.

5.4.2 Human rights concerns

As regards human rights questions, there is an international understanding that one can limit only temporarily and to a small extent the economic and social rights of workers carrying out special assignments, short-term specified-employment activities, project-tied work or seasonal employment, and that their basic human rights cannot be limited at all. Which are the rights in question? Principally the rights to:
- freedom of movement in the country of employment and the freedom to choose one’s place of residence;\(^5\)
- access to vocational guidance and placement services in the country, as well as to its bodies providing training or retraining;\(^6\) and most of all
- free choice of employment.

Since freedom to choose one’s employment is not uncontroversial and is of operational relevance in the context of an economically efficient scheme to employ foreigners, it will be discussed in greater detail in section 6.2, which deals with migrant workers employed in ordinary jobs.

The most succinct condemnation of seasonal-type restrictions on ordinary workers was recently formulated by two renowned specialists in the following terms:

*Guestworker-style restrictions on the employment and residential mobility of legally admitted aliens appear anachronistic and, in the long run, administratively unfeasible. They are difficult to reconcile with prevailing market principles, to say nothing of democratic norms.*\(^7\)

5.5 The basic procedure for engaging migrant workers for ordinary jobs

What, then, would be a sensible system of hiring foreigners for ordinary jobs that both satisfies economic efficiency criteria and conforms to human rights

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5 See ILO C.143, Article 14 (a); UN Convention, Article 39; and section 6.3 below.
6 See ILO C.97, Article 6 (a); ILO C.143, Articles 10 and 12; UN Convention, Article 43 (b) and (c); and section 6.1 below.
Box 6. A seasonal type of policy for a sector, region or size of enterprise*

Country's economic and social reality

Sector X
Employers' organization + workers' organization

Region
Employers' organization + workers' organization

Size Y
Employers' organization + workers' organization

Consultation on and formulation of policy and practices

Policy-coordination mechanism

Implementation of policies by the public employment service charged with handling individual employers' requests and foreign candidates for admission and employment

Public service

Decisions about which vacancies are to be offered to foreigners and who will be admitted from abroad

Employer

Supply of foreign labour abroad (external recruitment)

* Disregarding the role of private agents and the form of intercountry relationships.
standards? A sensible system would be one that, instead of giving preference to any sector, occupation etc., responded to requests throughout the country on the basis of strict vacancy tests and treated migrants in accordance with international human rights standards.

If a vacancy-test-based system were to lead to a larger inflow of migrant workers than the policy-coordinating mechanism judges appropriate on economic, social or other grounds, the test criteria could be made more stringent or the annual number of admissions could be capped by a quota.

Once such a system has been in operation for a few years, some migrant workers are bound to have become unemployed and some dependants will be present in the country, including persons of employable age. The longer labour import continues, the larger will be the numbers of frictionally unemployed foreigners and of inactive non-nationals, especially during economic downturns.

Common sense and cost considerations suggest that the immigration country’s public employment or immigration service should not only bring foreigners into the country from abroad when employers request them, but should also tap the foreign labour supply that already exists within the country. After all, these workers are present and already familiar to some extent with the country and its institutions. They may also have acquired a knowledge of their host country’s language. If they are unemployed, they should enjoy the same priority over foreigners outside the country as nationals do.

National laws and regulations may have to be amended accordingly, providing access by foreigners to, inter alia, the public employment service, training facilities and jobs other than those they were hired for initially. Economic and social criteria would suggest that locally available foreigners should actually be given preference in filling vacancies over those who reside abroad.

Box 7, which dispenses with the broad framework surrounding labour-import policies incorporated in box 6, summarizes how the public employment or immigration service can implement a sensible, economically efficient policy when the number of foreigners in the country starts to accumulate.

5.6 A fully fledged approval procedure summarized

Where foreigners have started to be present in a country in significant numbers, temporary employment schemes will generally make them subject to renewals of their permission to work or to vacancy tests if they want to change sectors, occupations or employers – until they enjoy free choice of employment. The vacancy tests and other approval criteria for them could be the same as for externally recruited migrants; they could be considered inappropriate, such as having employers pay fees or requiring evidence of suitable accommodation; or they could be eased, for example in the case of medical examinations. The policy-coordinating mechanism, and the technical-level coordination body that is to serve it, should be alerted to this question so that they may adopt the necessary measures.
Box 7. Operationalizing an economically efficient policy of engaging migrant workers, including those already present in the country*

* Disregarding the role of private agents and the form of intercountry relationships.
Box 8 schematically represents in flow-chart form the decisions for which the public employment or immigration service is responsible vis-à-vis both locally available foreigners and migrants to be recruited abroad. It visualizes two different sets of decisions: those that relate to testing the validity of the employer’s request, and those that relate to checking the conditions which may need to be fulfilled by, or on behalf of, the foreigner. Whether both sets of decisions are in the hands of one and the same body is a matter of domestic practicalities and immaterial here.

5.7 Visas, permits, authorizations

The entry, economic activity and stay or residence of foreigners call for a measure of control and appropriate authorizations. Three broad subject areas are involved: (i) admission to the country for first-time entrants; (ii) permission to engage in a lawful economic activity, whether as a self-employed, own-account or salaried worker; and (iii) authorization to stay or reside, which could be required in addition to (i) or (ii). Since there is no uniform national or international practice regarding terminology, certain words will be used interchangeably in this manual, including with respect to the terms “stay” and “residence”, except that the word “visa” will be used exclusively in relation to authorized border crossing, entry or admission into the immigration country.

Visas are issued to first-time entrants who have proof of a job waiting for them, for example in the form of duly concluded employment contracts; who can document a promise that they will be hired; or who as contracting or subcontracting entrepreneurs have entered into an agreement for project-tied work or for ordinary work. Entry visas may be granted to individual workers, to a group of similar workers (which would constitute a “group visa”) or to the entrepreneur who is moving project-tied or other contract workers across the frontier (which one could call “contract visas”). Neither “group visas” nor “contract visas” are indispensable instruments in a migrant-receiving country’s armoury of immigration control measures. But they are a useful administrative device to facilitate movements where controls on individuals would be considered unnecessary or cumbersome.

Dependants accompanying or later wishing to be reunited with an economically active migrant also require entry visas, for the purpose either of testing the legitimacy of their first-time entry or of ensuring that they do not encounter bureaucratic problems when they reside in the immigration country and need housing, access to schools, and so forth; i.e. when they need to demonstrate that they are present legally.

Who is to issue entry visas in these differing cases? Many countries use their embassies or consulates and have the Ministry of Foreign Affairs handle both the procedural and substantive questions to be addressed. This means asking Foreign Affairs staff to assume tasks for which they are usually not prepared. They can, of course, be trained for such purposes. A better solution would be to post abroad – in embassies, consulates or special offices – domestic staff of the employment or immigration service whose routine duty is to assess foreign economic actors’ requests
Box 8. Approval procedure for requests by employers*

Employer determines and notifies vacancy to be offered to a foreigner

Vacancy test: waiting period

Vacancy test: evidence of offers

Vacancy test: raise salary by x per cent

Verification of envisaged working conditions (do they conform with collective agreements? minimum wages? special rulings? bilateral migration agreement?)

Approval conditions: health, no criminal record, etc.

Approval conditions: provision of accommodation

Approval conditions: fee, if any, for recruitment

Instruction concerning permits/entry visa to be granted in case of external recruitment, or modification necessary (if any) to permits in case of in-country engagement

Foreigner in the country

In-country hire: modification, if any, of terms of permits

Migrant worker can start the employment relationship with the employer

External recruitment: State controls entry and residence

Foreigner who is abroad

decision information

* Disregarding the role of private agents and the form of intercountry relationships.
EMPLOYING FOREIGN WORKERS

for permission to become active in the migrant-receiving country and who can handle dependants' requests with additional training in cultural particularities, if needed.

Inflow control is comparatively easy to conceptualize. **Authorizing the employment of foreigners** is more complicated and can lead to much red tape and frustration. The first questions a country will have to answer in this context (leaving aside contractors and subcontractors until later) are whether the domestic employer is to hold the permission to hire one or X numbers of foreigners; whether it is the foreigner who will be issued with a permit enabling him or her to engage in an economic activity; whether both the employer and the foreigner need to have an appropriate authorization; and which employer or which foreigner needs one and which does not.⁸

In an employment-driven labour-import system, where vacancy tests subject employers' requests to scrutiny, it would appear normal to give employment entitlements to employers, irrespective of whether the vacancy tests relate to a particular job or group or number of jobs. One can limit the duration of an employer's permit, on a seasonal or annual basis, and one can make annual or longer-term permits subject to renewal procedures, both for first-time entrants and for foreigners already present in the country. Permission to hire a foreigner that is accorded to an employer should in principle be non-specific as regards the foreign worker's current location, i.e. whether that person is present within the immigration country's borders or is still abroad. An employment permit is given because the employer cannot fill a vacancy with a nationally available worker. Cost and equity considerations suggest that the employer should seek to fill the vacancy preferably with a foreigner already in the country who is looking for a job. Only if that cannot be done, or if it can be anticipated that it will not happen, should an employment permit relate to foreigners abroad.

Employment entitlements accorded to employers put control over foreign labour firmly in the hands of the enterprises requesting access to migrants. This has the potential disadvantage of perpetuating given patterns of employment of foreigners in industries, occupations and other areas of activity where migrant labour was first hired. An employer in one of those areas will be tempted to make use of his or her reputation for having jobs that passed vacancy tests in the past even when he or she has no real need for foreign labour during a later period but when it might be attractive to add more foreigners to the workforce. In contrast, employers who for years managed to get by without access to migrants but who are suddenly experiencing real labour shortages might be deprived of necessary labour because quotas are exhausted or the country's administrators have become worried about the growing population of foreigners. Employment permits issued to employers, therefore, can both inflate the

⁸ If the permit system is not user-friendly, it can foster irregular immigration and employment. Spain is one example of this, as indicated by Cornelius, Martin and Hollifield (op. cit., p. 25): "Spain first adopted a comprehensive immigration law in 1985. This law ostensibly sought to discourage foreign worker employment by forcing aliens to run a bureaucratic gauntlet: first obtaining work contracts from Spanish employers, then soliciting linked work and residence permits from two different government ministries. The result of this complex and inefficient system, whether intended or unintended, has been to confine an ever-growing, unauthorized foreign labour force to Spain's large underground economy or to firms that employ such aliens 'off-the-books'." Gabon is another example; see section 6.3 below.
number of migrants in the country and simultaneously impede labour market flexibility, the latter being one of the key advantages deriving from labour import. The only way to prevent unjustified use of migrant labour is to repeat vacancy tests whenever employers claim that they have jobs for which they cannot find nationals.

One point in favour of a system that gives employment permits to employers is that the country's labour administrators can easily check how employers comply with the law, i.e. more easily than where a system was instituted that grants work permits to migrants. Checking on employers' compliance with the law would have the effect of making it more difficult for them to provide illegal employment and substandard working conditions.

Where a country opts for permission to be given to the employer, the foreign worker does not have to have a separate permit to work, neither under a quota system nor under a system where individual (or groups of) foreign workers are issued with entry visas for jobs for which they are suited. If the employer has been issued with an employment permit, it would amount to authorizing the same action twice if one were to require that the foreign worker also possess a work permit. What the foreign worker may need instead is permission to stay or reside. That permission can be limited in time to take care of seasonal employment; or it can be of 12 or 24 months' or some such duration if the employer's permit is correspondingly limited in time.

It would certainly be unnecessary to envisage work permits for foreigners contracted under project-tied auspices. Here it is the foreign employer who is given a task to perform, and the employer should receive the relevant permissions. The employer will personally require a residence authorization. Similarly, the workers should be able to obtain an authorization for their temporary entry or stay in the country where the project is to be carried out. But it would make little sense to test whether each and every foreign worker occupies a post for which a nationally available worker could conceivably apply.

The waste of domestic control personnel and resources that goes with the issuing of permits, as well as the potentially frustrating or even conflictual situations that are typical of the granting or withholding of authorizations, suggest that one should minimize the number of permits to be issued. One way of minimizing frustrations or conflicts in the case of ordinary or seasonal contract workers is to foresee only one permission as far as the foreigner's economic activity is concerned, and to have either the employer or the foreigner hold it. Another possibility is to accord a permit to stay or reside to the foreigner that will, ipso facto, include the authorization to engage in permissible economic activities.

Post-entry restrictions on foreigners' activities are less than efficient from a strictly economic viewpoint. They interfere with the working of the market. The market is a better allocator of human resources than public officials. In this perspective, the decisive test takes place when the employment or migration service accords the employer the right to hire a foreigner because no national worker is available. That foreigner (leaving aside permanent immigration schemes) can initially be asked to occupy only the vacancy that was tested. The foreigner could also be asked to return to the country he or she came from if the person, without cause, were to leave the job for which admittance was initially granted.
Under a quota system, a number of foreigners corresponding to the number of employment permits foreseen in any one year could be admitted to the country without being legally bound to fill the jobs for which employers obtained permission to hire foreigners. If the foreigners were to find more productive jobs than those that have passed the vacancy test, so much the better for the economy.

Of course, non-economic factors may make a country want to put restrictions on foreigners' free choice of employment, at least during the initial years of their stay. The internationally agreed scope and limits of such restrictions will be made explicit in Chapter 6. Section 6.2.3 takes up once more the question of permits in the context of market requirements vs. protection needs by reference to the special case of developing countries' construction industries.

It suffices to regulate foreigners' economic activity by an employment permit granted to the employer short of labour. In theory, foreigners need not be required to obtain either a work or a residence permit if they have obtained a visa for the purpose of entry. Permanent settlement countries actually content themselves with entry visas and employers' permits. If for one reason or another it was judged indispensable to require that foreigners obtain post-entry permission, a system that wants to be user-friendly would do well to institute a simple, single authorization that would cover both economic activity and residence.

Foreign contractors or subcontractors and their staff may need to be dealt with differently. First of all, the foreign enterprise's legitimacy in contracting or subcontracting with a domestic enterprise may require verification, so as to ensure that the foreign entrepreneur will comply with domestic practices, safety regulations, hours of work, wages, and so forth. Further verification may be needed under quota regimes to ensure that the foreign entrepreneur's migrant workers can be accommodated within the ceilings foreseen.

Secondly, the foreign enterprise's migrants require entry visas (unless they come from countries not subject to visas), including the entrepreneur who is the person responsible for the contract or subcontract. From an economic point of view, a group visa and a group residence-cum-work authorization would seem the most efficient, flexible and least inconvenient solution. The alternative would be one visa and one authorization for each foreigner involved, with specific time limits if that corresponded to national practice.

5.8 Fees

5.8.1 Administrative fees

There are, in essence, two kinds of fees that are relevant to the import of labour. One is the administrative fee that the employment or immigration service may wish to collect from employers who request the entry and engagement of a migrant worker. Being an administrative cost-collection mechanism, the fee should reflect a portion or, at most, the whole of the expenditure of the one or several public bodies
involved in testing the legitimacy of employers’ claims, processing various
documents and possibly even establishing and running such recruitment offices as
have to be set up within the country or abroad. The government could set the fee at a
symbolic level (as some countries do when they issue passports to nationals, for
example); or it could set it at the calculated real level (when it would presumably opt
for an average fee to be paid rather than a cumbersome and costly calculation of each
request by each employer). One should refrain from exceeding the real per capita cost
so as not to turn the administrative fee into a tax levied on employers or a form of
punishment.

The foreign worker himself or herself should be exempted from having to
pay administrative fees relating to the admission or the permission to work, as
stipulated in ILO C.97:

Each Member for which this Convention is in force undertakes to maintain, or satisfy
itself that there is maintained, an adequate and free service to assist migrants for employment,
and in particular to provide them with accurate information. (Article 2.)

Furthermore, ILO C.143 stipulates that “in case of expulsion of the worker or
his family, the cost shall not be borne by them” (Article 9 (3)). This is not meant to
saddle the authorities of the country of expulsion with the travel costs up to that
country’s border or beyond; the migrants concerned or their employer could well be
asked to bear these costs. It is meant not to inflict upon migrants the costs, incurred by
the State, of the administrative or judicial procedures leading to the expulsion order or
of implementing it.

5.8.2 Economically oriented fees

Governments can oblige employers wishing to hire foreign labour to pay fees
for purposes other than those of covering the costs of public administration, i.e.
achieving economic objectives. As such fees would influence the overall costs that
employers have to bear relative to each new foreign worker, or at least the incremental
cost of every foreigner added to their workforce, they are entirely compatible with
market principles even where they are imposed by public authorities.

Fees of this kind are, in essence, designed to constitute disincentives. What
disincentives might a government want to introduce? The public authorities could
seek to dissuade employers on its territory from:

(a) hiring foreigners generally. This would call for a uniform fee to be imposed on all
employers, reflecting the numbers of foreigners to be engaged. The level of the fee
could vary in line with changing conditions in the economy or in society as a
whole. The revenue deriving from the fee could go to the State’s budget and thus
benefit all residents; or it could be targeted to migration-relevant measures such as
the training of local workers, which is a policy applied by Taiwan, China, since
1992;

(b) hiring first-time entrants from countries which the government would like
employers to avoid as a source of workers, directing them instead to preferred
source countries. This could be done by setting differential fees for nationalities or by abolishing them altogether for one or several preferred nationalities;

(c) hiring manual or unskilled workers. The reasons for this kind of measure could be to reduce employers' appetite for blue-collar or unskilled workers, or to wean them from using such labour, if one feared that an unchecked labour supply might slow down structural changes in the economy. Pacific Rim countries and areas such as Malaysia, Singapore and Taiwan, China, have fine-tuned their fee-levying policies to that end. In Singapore, for example, employers were required in April 1987 to pay a monthly fee of S$140 for every foreign work permit holder in manufacturing who earned less than S$1,500 a month; the fee was S$120 for foreign domestic maids. The manufacturing employers' fee was raised to S$300 in 1991 and the fee for domestic maids was raised to S$250. For construction and shipyard workers, one rate was set for skilled workers and another, higher rate for unskilled foreigners;

(d) hiring foreigners in sector X, in enterprises of a certain size or in region Y. The sectoral dimension was exemplified in the preceding reference to Singapore's policy. Making it costly to hire foreigners for establishments with less than a defined number of workers or which are located in a specified region is another option that the country's employment or immigration service can envisage implementing, through arbitrarily set fees or fees that reflect employers' profits or workers' wages or some other economic criterion.

Yet another kind of (dis)incentive fee has been put into operation by Taiwan, China. Not only are local employers required to pay a fee that is meant to protect local workers, but they also must deposit NT$26,000 to ensure that the foreigner leaves the island after two years of employment. The deposit, which amounts to US$1,000 at 1994 rates of exchange, is refunded only after the departure of the worker in respect of whom it was paid.9

One problem with both administrative and economically based fees is that they are passed on to the consumer or, more likely, the worker. While the government need not worry about the former, this being part of the normal pricing mechanism in a market economy, it should be vigilant about employers' temptation to pass on their increased costs directly to the foreign workers. If this would result in lower take-home pay, i.e. lower than received by other workers in respect of whom such fees are not due, it would go against the grain of internationally enshrined principles of equal pay for equal work; and it would undermine the very purpose of the government's policy, i.e. to render the employment of migrant labour more expensive than it would be without imposition of the fee.

Another danger is that employers may bypass official channels and resort to the illegal employment of foreigners. In that respect too, the government has to be watchful, using labour inspectors and whatever other means may be appropriate to curb this phenomenon, including administrative, civil and penal sanctions in its range of instruments.10

9 On this question, see also section 6.3 below.
10 See ILO C.143, Article 6, and Chapter 8.
One of the countries undergoing the transition to a market economy – the Russian Federation – has laid down basic principles for the hiring and use of foreign labour that deal with the question of fees. As such countries’ initial policies frequently have to be drawn up in great haste, they do not necessarily reflect the distinction that has been drawn here between administrative and economically oriented fees – a distinction that could be introduced later when immigration policies can be reviewed without undue haste. It is nevertheless informative to present the Russian example, which is done in box 9.

**Box 9. Russian Federation: Hiring and use of foreign labour**

To implement the Russian Federation’s state policy of attracting foreign labour while ensuring the priority right of Russian nationals to fill vacant jobs, and pursuant to Russian Presidential Decree No. 1598 of 7 October 1993, “On Legal Regulations in the Period of Phased Constitutional Reform in the Russian Federation”:

2. Fees shall be collected from employers for the issue of authorizations to hire foreigners which shall be equal to the minimum monthly wage, as set by Russian legislation, per foreign employee. The funds thus levied shall go to the revenue side of the appropriate budgets.

3. Work permits for foreign nationals who have been hired by employers within such foreign labour quotas as may be set by the appropriate authorizations shall be issued without charge.

   In cases where authorizations need not formally be obtained, employers shall pay fees for the issue of work permits to foreign nationals which shall be in such amounts, to be decided jointly by the Russian Federal Migration Service and the Russian Ministry of Finance, as will make up for the costs involved in the issue of such work permits.

4. Employers shall be liable, pursuant to Russian legislation, for hiring foreigners without appropriate authorization.

   Foreign nationals who have entered the Russian Federation for the purpose of engaging in professional activities, and who have been employed in violation of the Regulation on Hiring and Use of Foreign Labour in the Russian Federation, shall be deported from the Russian Federation by the services of the Russian Interior Ministry at the employers’ expense.

5. Employers having employment arrangements with foreign nationals who are temporary residents of the Russian Federation at the time of this Decree’s adoption shall bring such arrangements into line with the Regulation on Hiring and Use of Foreign Labour in the Russian Federation within three months.

6. This Decree shall be submitted to the Russian Federal Assembly for consideration.

...  

*Russian Presidential Decree, No. 2146 of 16 December 1993*
5.9 Monitoring and statistics

A government should want to know whether its policy works as foreseen and what level of funds and human resources it needs to implement or modify it. It has to monitor the volume, characteristics and duration of stay of foreign labour as well as the impact of admitting it, together with the working and living conditions of migrants, the effectiveness of its public employment or immigration service that is the primary executive body in this field, and so forth. A government also has to assess from time to time how to adapt its policy to changing circumstances. Therefore, it needs statistics, evaluations and studies.

Statistics can in the first instance be derived from the various administrative processes of recording entries into the country, vacancy tests, giving employers permission to engage such and such a kind of worker, and so on (see also sections 6.8.1 and 6.8.2 below). For these purposes administrators will also collect bio-personal or social data, e.g. data about sex, age, education, and date of entry into the country or of registration with the labour market or residence authorities. Unemployment registers, and housing or school records, also provide potentially useful basic data that can be exploited for broader assessments of the labour-import policy.

A government may want to know in more detail about the exact features and impacts of its policy than can be provided by broad time series derived from administrative data. In that case, it will have to resort to occasional, specially designed surveys that are targeted at the foreign population, employers of foreigners or whatever is the relevant group to be studied. There arise here innumerable problems of survey design, execution and processing which specialists will have to deal with.

Censuses of the resident population provide insights at relatively low cost. But their utility is limited because questions specifically concerning foreigners have to compete with other questions and because censuses are carried out at long intervals. This is a liability in a field such as international migration, where policy changes tend to be rather more frequent than in other fields. Illegally present persons will, of course, be very difficult to cover in broad censuses.

Whether the government's monitoring and statistical system relies on administrative sources or surveys or both, it will have to examine carefully whether they provide complete and representative coverage of the subject-matter to be reviewed and whether they are reliable and timely.11 Several of its agencies may be involved side by side in gathering and processing administrative or survey data. To avoid waste and duplication, the country's domestic policy coordination mechanism will have to issue strict instructions for collaboration.

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Post-admission policies in respect of lawfully present migrant workers

The purpose of this chapter is to set out, in the light of ILO and UN human rights standards, how countries should treat migrants after they have been admitted.

Some of the matters dealt with in this chapter have already been touched upon in earlier chapters, but they need to be spelt out in detail sufficient to enable policy-makers and administrators to have the clearest possible guidelines. The situation of illegally present migrants is the subject of Chapter 8.

The key consideration underlying the following presentation is that one has to strike a balance between the prerogatives of States and the rights of migrants as individual human beings and economic agents. That balance is reflected in contemporary international human rights instruments. It is a fairly stable balance which applies to high-income countries and middle- or low-income countries alike. It is inspired not only by human rights concepts but also by the socio-economic conviction that workers who are badly or unfairly treated will become frustrated, may contract psychosomatic and other illnesses and, as a result, will be less productive than satisfied workers. Besides, internationally questionable treatment gives the migrant-receiving country a bad reputation if it does not actually lead to strikes or riots by migrants, as has indeed happened.

Discriminating against ordinary migrant workers or, worse, having foreigners work in illegal conditions appears to be attractive to some employers and some sections of society some of the time. However, it runs counter to fundamental beliefs concerning equity and human rights in the economic and social field, and it is bound to have a boomerang effect on national workers whose remuneration and working conditions will sooner or later be undermined by unlawfully employed migrants. Labour markets in different industries, occupations, sizes of establishment, and so forth are interdependent, and increasingly so in our world of growing flexibilization and globalization. In the same way as particular categories of highly qualified personnel can pull up the salaries of categories just below them, the less than equal treatment of unskilled migrants can drag down the wages of nationals just above them. Ultimately, the illegal employment of foreign passport holders threatens the jobs of nationals. Moreover, tolerating substandard conditions and illegality will undermine all citizens' commitments to society's laws and rules.
6.1 Equality in terms and conditions of employment, vocational training and related matters

ILO C.143 enjoins every ratifying member State to pursue a national policy to promote and guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation … for persons who as migrant workers or as members of their families are lawfully within its territory. (Article 10.)¹

ILO R.151 indicates what is to be covered by this policy. Aside from matters that will be dealt with later in this manual, migrant workers are to be accorded equality of opportunity and treatment in terms of the following:

(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 … (Paragraph 2.)

The UN Convention, Article 25 (1), goes further. It lays down 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.²

Article 25 (2) adds:

It shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment …

It is not enough to grant migrant workers rights against the State or the employer. They have to have the possibility of claiming adherence to such rights if they believe that they have been violated. Therefore, grievance and dispute settlement procedures have to be open to them – on the same terms as they should be open to national workers³ – and they should have access to the immigration country’s

¹ Already in 1949, the equality principle had been enshrined in ILO C.97 in so far as matters were to be regulated by law or regulations, or were to be subject to the control of administrative authorities (Article 6 (a)).
labour and other courts. Equality in "legal proceedings" was one of the rights mentioned in 1949 in ILO C.97 (Article 6 (d)). The UN Convention of 1990 embraced this equality principle in considerable detail with respect to migrant workers and members of their families.4

Migrant workers who are in an irregular situation will tend to refrain from claiming rights that are theirs or going to civil, administrative or labour courts, for fear of having to reveal their status and being deported. There is not much one can do about that if the immigration country's government pursues a hard-line policy towards foreigners working illegally, except to look for non-governmental organizations that could act as intermediaries – trade unions, associations supporting migrant workers, favourably inclined groups of lawyers, etc.

6.2 Access to employment other than that for which a migrant was recruited

There are two kinds of eventualities that a user-friendly labour-import policy has to cater for in respect of migrant workers employed in ordinary jobs, as opposed to seasonal, project-tied, specified-employment and similar kinds of workers.5 The first concerns normal job changes to which migrant workers may aspire. The second relates to cases in which migrants involuntarily lose their jobs because of illness, or because the employer terminates the employment relationship or goes bankrupt. These two types of eventualities will be dealt with in turn. Neither national nor international law draws the distinction between them very clearly; that is, their provisions may apply to both.

6.2.1 Job changes desired by migrants

Since migrants are entitled to have access to the immigration country's public employment service,6 they can ask at any time to be placed in a different job – even on the first day after entry. The officials cannot deny them access to their services; but they can hold them to jobs in a particular industry or occupation if that is what the migrant-receiving country's government has decided and if the migrants have only recently entered the country. They can also reserve political functions entirely to nationals.

2 See also the UN Convention, Article 43, with regard to lawful migrants.
3 The range of possible procedures that ought to be available to workers irrespective of their status is indicated in the ILO's Examination of Grievances Recommendation, 1967 (No. 130). See also Chapter 4, item 15.
4 For both lawfully and irregularly present persons, see in particular Articles 16, 18 and 23; for migrant workers in a regular situation, see also Article 54 (2).
5 On these temporary migrants, see section 5.4.2 above.
6 See section 6.1 above.
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Box 10. Free choice of employment according to the UN Convention

The drafters of the 1990 UN Convention wanted to deal with the subject-matter more exhaustively than had been possible under ILO auspices in 1975. Their consensus formulation in Article 52 contains the following specifications (from which are exempted project-tied workers and specified-employment workers):

1. Migrant workers in the State of employment shall have the right freely to choose their remunerated activity, subject to the following restrictions or conditions.

2. For any migrant worker a State of employment may:
   (a) restrict access to limited categories of employment, functions, services or activities where this is necessary in the interests of this State and provided for by national legislation;
   (b) restrict free choice of remunerated activity in accordance with its legislation concerning recognition of occupational qualifications acquired outside its territory. However, State Parties concerned shall endeavour to provide for recognition of such qualifications.

3. For migrant workers whose permission to work is limited in time, a State of employment may also:
   (a) make the right freely to choose their remunerated activities subject to the condition that the migrant worker has resided lawfully in its territory for the purpose of remunerated activity for a period of time prescribed in its national legislation that should not exceed two years;
   (b) limit access by a migrant worker to remunerated activities in pursuance of a policy of granting priority to its nationals or to persons who are assimilated to them for these purposes by virtue of legislation or bilateral or multilateral agreements. Any such limitation shall cease to apply to a migrant worker who has resided lawfully in its territory for the purpose of remunerated activity for a period of time prescribed in its national legislation that should not exceed five years.

4. States of employment shall prescribe the conditions under which a migrant worker who has been admitted to take up employment may be authorized to engage in work on his or her own account. Account shall be taken of the period during which the worker has already been lawfully in the State of employment.

Article 52 does not prohibit a government 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 has.
ILO C.143 in 1975 formulated the employment restrictions that can be imposed on migrant workers as follows:

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 worker has 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;

... (c) restrict access to limited categories of employment or functions where this is necessary in the interests of the State. *(Article 14.)*

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 or during their first two years in the country. ILO C.143 does not, however, grant migrants the right to stay in the country after two years of presence or when their first contract has expired.

Job changes should be viewed with equanimity by public officials. They are a reflection of better matching as perceived by the employer or the worker, and they will tend to increase productivity rather than the reverse. In the normal run of events, employers expressing the desire to extend a foreign worker's contract act rationally where they continue to suffer from labour shortages: they will save the induction and training costs they incur with every first-time entrant, and they have tried out the worker and presumably trust him or her if they seek to extend the work contract. As far as the worker is concerned, his or her adaptation to the host society will be advantageous compared with the alternative, which is to require a first-time entrant to leave when he or she has come to the end of the work contract and to be replaced by another foreigner from abroad, who will have to start from scratch as far as adaptation to the enterprise and to society is concerned.

6.2.2 Involuntary job changes

This eventuality has been dealt with internationally on several occasions. ILO C.97 addresses in Article 8 the question of illness or injury sustained subsequent to entry, but as this provision applies only to settlement migration, it can be left aside here. ILO C.143 contains the following wording that covers all migrants legally resident for the purpose of employment:

1. ... the migrant worker shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of his employment, which shall not in itself imply the withdrawal of his authorization of residence or, as the case may be, work permit.

2. Accordingly, he 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. *(Article 8.)*

7 As regards security of employment and the provision of alternative employment, see also ILO R.151, Paragraph 2 (d), in section 6.1 above.
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The 1990 UN Convention deals with the above matter, as well as others, in the following language:

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. (Article 54 (1).)

Therefore, there is an international consensus 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.

6.2.3 Other considerations regarding the construction industry

As already suggested in the introductory chapter and touched upon in section 5.7 (dealing with permits etc.), the employment of migrant workers is fraught with tensions between employers' flexibility requirements, workers' protection needs and administrative convenience. These tensions are most intense (a) where firms are small in size, which is characteristic of enterprises in most low- and middle-income countries; and (b) where these firms are subject to much stronger and more violent fluctuations in the demand for their goods or services than derive from the underlying business cycles. Construction is a notable example. The construction industry, like seasonal agriculture, is also plagued by physical conditions that, on the supply side of labour, make it unattractive for young local workers with a certain level of education or vocational qualifications. Hence, labour shortages occur and foreigners are called upon to fill the gaps – in Argentina, Côte d'Ivoire, Gabon, Malaysia, Venezuela, etc.

The fluctuating workload of small construction firms poses them problems because public administrators are fond of imposing standard-length work permits for foreigners, of 12 months for instance, and possibly standard fees on top. Malaysia provides an example of the problems that may result. Malaysian construction firms have to lodge a security bond with the immigration department and to pay an annual levy – $420 for each unskilled worker. Although firms can hire a foreigner for up to five years, employers do not necessarily have 12 months of uninterrupted work for every foreigner for whom they have deposited a bond and paid the levy. Workloads may be shorter and discontinuous.

Should the workers themselves be able to apply for work permits, and pay the bond and levy? Few of them would fare worse than at present because, in this as in

other cases of fees that employers have to pay for workers, the cost tends to be passed on to the workers directly rather than to consumers. Should the workers, in turn, be free to move around in the country's construction sector or the country as a whole rather than being tied to one employer? Would this not be a more equitable and less costly solution compared with administratively enforced return (followed by re-entry), entitlement to unemployment benefits (until the construction firm needed workers again) or the reality of large-scale illegal migration and employment?

In Malaysia's construction sector, as in Argentina's and in many other countries', employers and migrant workers have largely chosen to ignore the official procedures. From the employers' point of view it is both simpler and cheaper to employ foreigners illegally. Regular contracts and permits do not actually provide the assurance that migrants will stay with them. The prevailing lax attitudes towards illegality make it easy for workers to change jobs when the conditions elsewhere appear more attractive to them. Absconding constitutes a violation of their work permit, but working clandestinely and changing jobs without having to ask for permission do not pose the same problem.

There would appear to be good reasons, therefore, to entice employers and workers away from illegality by means of unbureaucratic procedures and work permits that are a reflection of the economy's, or a particular sector's, labour shortage rather than of administrators' desire to put people into mutually exclusive categories and keep them there as long as possible.

6.2.4 Should domestic workers be treated differently?

Domestics or housemaids are workers who clean rooms, prepare food and serve meals, wash dishes, look after babies and children in private households. Foreigners, chiefly young women, have increasingly been filling such positions in a range of middle- and high-income countries, as live-in or non-residential maids. Abuses have been widespread since live-in domestics lack the means to defend themselves against women in the household who have the authority to tell them what to do or men who seek to exploit them sexually. Several countries' administrations have effectively created a labour market where they are captive: domestics can work and live in private households but have to leave the country if their relationship with the employer becomes untenable.

Two basic policy measures are indispensable for reducing potential abuses and doing away with captive labour markets, both on human rights grounds and for economic reasons. The first is the full extension of the country's labour laws to domestic workers where that is not yet the case (in some countries it is not even the case for nationals!). This should ipso facto include access to local labour and civil courts.

The second measure is in a sense part and parcel of the first one but worth singling out so as to underline the proposition that domestic workers should not be treated differently from other workers, either on human rights grounds or for economic reasons. Foreign domestic workers, even though their entry and work
permit could initially tie them to a named employer, should have the right to leave that employer, look for another one – in domestic service or elsewhere – and be enabled to perform such work as is available and for which the employer in question has successfully passed the vacancy test. In other words, domestics, housemaids and the like should not be treated differently from construction workers, machine operators, drivers, miners, dishwashers in the hotel or catering industry, and the like.

6.3 Residence, expulsion or normal return

Voluntary job changes by migrants, involuntary job losses and the expiry of residence or work permits pose the question of whether a particular foreigner should be allowed to stay on in the immigration country or have to return to his or her country of origin. Some light has already been shed on this subject in the preceding section, and the final chapter – on illegals – will look at it from a particular angle. But the question of ‘stay or return’ requires general exploration, which is the purpose of this section (see also box 11 on ILO R.151).

6.3.1 Residence permits

Residence permits, cards or authorizations should be given to lawfully recruited foreigners without much formality or cost. Several kinds may be judged to be appropriate according to the type of migration concerned – specific employment, seasonal work, ordinary jobs, and soon.

What would be inappropriate, especially where low- or middle-income countries draw migrants from relatively poor countries, would be to allow revenue-collecting considerations to outweigh immigration control purposes by asking foreigners to pay a considerable sum of money for the granting of a residence authorization. If poor people cannot afford the costs of legal documents they will rarely stay at home and wring their hands in despair – they will move abroad and avoid paying the costs, thereby technically becoming illegal residents.

Similarly, complicated documentation requirements that may appear to be necessary to identify foreigners correctly could cause such a problem for migrants that they will prefer to avoid it and become illegals. Gabon’s system is a case in point. Its regulations provide that, to obtain a residence card, foreign salary- or wage-earners in the private sector must present a legal antecedents certificate from their place of birth, a housing certificate from Gabon, an individual authorization from their employer there and the receipt for payment of the repatriation guarantee (see below). In addition to these four documents, 50,000 CFA francs (about US$100) have to be handed over to the Ministry of Defence’s Direction Générale de la Documentation for the initial granting and subsequent renewal of the residence card.

Financially, this sum imposes such a burden that the large-scale illegal presence of foreigners in Gabon may be partly attributed to it.
Box 11. Loss of employment according to ILO Recommendation No. 151

The Recommendation that supplements ILO Convention No. 143 includes carefully worded international minimum standards in its Paragraphs 31 to 34 that go beyond standards previously established, and beyond Article 8 of that Convention:

31. A migrant who has lost his employment should be allowed sufficient time to find alternative employment, at least for a period corresponding to that during which he may be entitled to unemployment benefit; the authorization of residence should be extended accordingly.

32. (1) A migrant worker who has lodged an appeal against the termination of his employment, under such procedures as may be available, should be allowed sufficient time to obtain a final decision thereon.

(2) If it is established that the termination of employment was not justified, the migrant worker should be entitled, on the same terms as national workers, to reinstatement, to compensation for loss of wages or of other payment which results from unjustified termination, or to access to a new job with a right to indemnification. If he is not reinstated, he should be allowed sufficient time to find alternative employment.

33. A migrant worker who is the object of an expulsion order should have a right of appeal before an administrative or judicial instance, according to conditions laid down in national laws or regulations. This appeal should stay the execution of the expulsion order, subject to the duly substantiated requirements of national security or public order. The migrant worker should have the same right to legal assistance as national workers and have the possibility of being assisted by an interpreter.

34. (1) A migrant worker who leaves the country of employment should be entitled, irrespective of the legality of his stay therein –

(a) to any outstanding remuneration for work performed, including severance payments normally due;

(b) to benefits which may be due in respect of any employment injury suffered;

(c) in accordance with national practice:

(i) to compensation in lieu of any holiday entitlement acquired but not used;

(ii) to reimbursement of any social security contributions which have not been given and will not give rise to rights under national laws or regulations or international arrangements: Provided that where social security contributions do not permit entitlement to benefits, every effort should be made with a view to the conclusion of bilateral or multilateral agreements to protect the rights of migrants.

(2) Where any claim covered in subparagraph (1) of this Paragraph is in dispute, the worker should be able to have his interests represented before the competent body and enjoy equal treatment with national workers as regards legal assistance.
6.3.2 Expulsion

As regards the expulsion of migrant workers and their families in the context of loss of occupation through illness contracted or injury sustained within five years of entry into the immigration country, the 1949 ILO Convention No. 97 declared such expulsion to be undesirable for persons admitted on a permanent basis (Article 8). The accompanying non-binding Recommendation No. 86 suggested that governments should refrain from removing [any regularly admitted migrant worker or dependant from the country's territory] on account of his lack of means or the state of the employment market, unless an agreement to this effect has been concluded between the competent authorities of the emigration and immigration territories concerned. (Para. 18 (1)).

Paragraph 18 (2) (a) of that Recommendation states that:

Any such agreement should provide ... that the length of time the said migrant has been in the territory of immigration shall be taken into account and that in principle no migrant shall be removed who has been there for more than five years.

The 1990 UN Convention also covers these and related subjects. It deals extensively with the questions of return and expulsion – questions on which a new international minimum consensus was reached that ought henceforth to inspire national policy-makers and drafters. First of all, no migrant worker or family member, not even illegally present persons, should be subject to measures of collective expulsion.9 As regards lawful migrants, Article 56 specifies that they may not be expelled from a country except for reasons defined in the national legislation of that country and in accordance with the safeguards in Article 22 against arbitrary or unfair expulsion. Article 56, paragraphs (2) and (3), add:

(2) Expulsion shall not be resorted to for the purpose of depriving a migrant worker or a member of his or her family of the rights arising out of the authorization of residence and the work permit.

(3) In considering whether to expel a migrant worker or a member of his or her family, account should be taken of humanitarian considerations and of the length of time that the person concerned has already resided in the State of employment.

6.3.3 Return

Migrant-receiving countries' measures sometimes take the form of requiring candidates for entry to possess a return ticket or to deposit a sum equivalent to the price of a return ticket. The case of Gabon has already been mentioned. Its Law No. 5/86 provides that foreigners 16 years of age or older whose repatriation is not guaranteed by the Government of Gabon or by the government of another State are required to pay a guarantee, at the time of applying for a residence card, for their repatriation to their

9 See Article 22 of the UN Convention and the procedural safeguards set forth there, as well as Article 23.

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country of origin. The amount of the guarantee is equivalent to the price of an
economy class return ticket to the airport closest to their country of origin, plus 20 per
cent of this price to cover related expenses. When the costs of the guarantee or return
ticket and of the granting or renewal of the above-mentioned residence card are added
up, it becomes apparent that the amounts required from migrant workers to acquire
legal status in Gabon are exceedingly high. Ticket prices are reported to be up to
200,000 CFA francs for Sao Tomeans and over 300,000 for Senegalese and Malians.
These amounts must be compared with the monthly wages or incomes of migrants,
which reportedly average between 60,000 and 70,000 CFA francs. The discrepancy
between obligations and incomes is surely one of the reasons why many foreign
workers prefer not to have a residence card and instead to live illegally in the
country.

Requiring return tickets or an equivalent deposit in a local bank is not an
unreasonable instrument when one wants to ensure that migrant workers return to their
country of origin once they have terminated their duties. It is a sensible instrument
when the candidates for employment are sufficiently well off not to be greatly
bothered by the expense. But it becomes counter-productive when the expense
involved is perceived as onerous. In that case, it fosters illegal entry, stay and
employment.

In actual fact, the lawfully present foreign worker constitutes less of a return
problem for the simple reasons that he or she performs authorized employment and
that his or her residence permit is in order. Such a person is easy to identify and will
have some regular income. Repatriation is a measure that low- or middle-income
countries would appear to need more often in respect of irregularly present or illegally
employed workers, and this poses the double problem of identifying the persons
involved and having them pay for their return.

On the question of normal return, the UN Convention has the following to
say:

1. States Parties concerned shall cooperate as appropriate 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.

2. Concerning migrant workers and members of their families in a regular situation,
State Parties concerned shall cooperate as appropriate, on terms agreed upon by those States,
with a view to promoting adequate economic conditions for their resettlement and to facilitating
their durable social and cultural reintegration in the State of origin. (Article 67.)

6.4 Freedom of association in the field of work

Focusing narrowly on employment means setting aside questions
concerning the establishment by migrant workers of associations to promote their
social, cultural or political interests. In the employment field, the ILO’s 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), have
become part of customary international law that prohibits discrimination on the basis
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of nationality or irregularity of status as regards both the membership of trade unions and the setting up of unions.\(^{10}\)

Paragraph 2 (g) of ILO R.151 makes it clear that migrant workers should enjoy effective equality of opportunity also as regards the "exercise of trade union rights and eligibility for office in trade unions and labour-management relations bodies, including bodies representing workers in undertakings".

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6.5 Health care and occupational safety

Before taking up the broader question of the treatment of migrant workers in respect of social security, it is worthwhile highlighting the narrower questions of medical care and occupational safety. These are issues that even the most temporary or seasonal labour-import policy will be faced with.

As regards medical care, ILO R.86 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. (Paragraph 12.)\(^{11}\)

ILO R.151, Paragraph 2 (i), refers to equality of opportunity and treatment in respect of conditions of life, including "health facilities". The UN Convention addresses the question as follows:

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. (Article 28.)

Articles 43 (1) (e) and 45 (1) (c) of the UN Convention add that regularly present migrant workers and family members, respectively, should be granted equal treatment with nationals as regards "access to ... health services".

The question of occupational health and safety is covered in ILO R.151 in the following Paragraphs:

20. All appropriate measures should be taken to prevent any special health risks to which migrant workers may be exposed.

21. (1) Every effort should be made to ensure that migrant workers receive training and instruction in occupational safety and occupational hygiene in connection with their practical training or other work preparation and, as far as possible, as part thereof.
   (2) In addition, a migrant worker should, during paid working hours and immediately after beginning his employment, be provided with sufficient information in his mother tongue or, if that is not possible, in a language with which he is familiar, on the essential elements of

\(^{10}\) Certain freedom of association rights are spelt out in the ILO's migrant workers instruments – ILO C.97, Article 6 (a) (ii); ILO C.143, Article 10; and ILO R.151, Paragraph 2 (g) – and in the UN Convention, Articles 26 and 40.

\(^{11}\) See also Article 17 (2) (c) of the Model Agreement annexed to ILO R.86.
laws and regulations and on provisions of collective agreements concerning the protection of workers and the prevention of accidents as well as on safety regulations and procedures particular to the nature of the work.

22. (1) Employers should take all possible measures so that migrant workers may fully understand instructions, warnings, symbols and other signs relating to safety and health hazards at work.

(2) Where, on account of the migrant workers’ lack of familiarity with processes, language difficulties or other reasons, the training or instruction given to other workers is inadequate for them, special measures which ensure their full understanding should be taken.

(3) Members should have laws or regulations applying the principles set out in this Paragraph and provide that where employers or other persons or organizations having responsibility in this regard fail to observe such laws or regulations, administrative, civil and penal sanctions might be imposed.

6.6 Social security matters

The ILO distinguishes nine branches of social security: (i) medical care, (ii) sickness benefits, (iii) maternity benefits, (iv) invalidity benefits, (v) old-age benefits, (vi) survivors’ benefits, (vii) employment injury benefits, (vii) unemployment benefits and (ix) family benefits.

The ILO’s social security standards basically aim to ensure the most effective equality of treatment that can be instituted. Equality is of social and human inspiration. But there are also economic grounds for pursuing equal treatment policies with respect to social security. These have to do with the fact that in contribution-based systems, governments usually require the worker and the employer, or at least one of them, to transfer a fixed proportion of their earnings or wage bills to the social security institution. If either the foreign workers or the domestic employers were freed from this obligation, this would change the competitive situation in their favour and constitute unequal treatment.

Equality was already the governing principle of ILO C.19 of 1925, one of the first and most widely ratified Conventions, which covers employment injury or, as it is called in many countries, workers’ accident compensation. Equality in this field is especially important since it reflects a liability on the part of the employer. Therefore, protection in the event of employment injury, like emergency medical care stipulated by the UN Convention’s Article 28 referred to in the preceding section, should be accorded to foreigners who are engaged by an employer in any immigration country regardless of the type or duration of employment and regardless of whether the worker is in a regular or an irregular situation as far as entry, stay or economic activity is concerned.13

12 See also ILO: Social security for migrant workers (Geneva, 1977).

13 It is praiseworthy that, for example, the Republic of Korea, whose history explains the delay in granting rights to foreigners, decided in early 1994 that it was a matter of decency and moral obligation to give foreign workers who are injured on the job or who fall ill by reason of their work such medical care and treatment as they need at the taxpayers’ expense – even illegally employed foreigners.
The problem with illegally present foreigners is that they, or their employers, may be fearful of revealing injuries or illnesses, because this might lead to their irregularities being discovered by the police or immigration authorities, and to the workers concerned being deported as a result. Privacy laws that permit one public authority, such as a hospital, to withhold information about the identity or status of persons from other public authorities are of some help; but most migrant workers do not know about such laws or do not trust promises by public officials. Non-governmental organizations established in the migrant-receiving country, whether of secular or religious origin, can play a useful role here, both by informing migrants with whom they come into contact about these laws and by addressing themselves to employers through leaflets or trade journals, for example.  

ILO C.118 provides for equality of treatment in each of the nine branches enumerated at the beginning of this section, subject to reciprocity between States. This Convention also places emphasis on the conclusion of social security agreements aimed at the maintenance of acquired rights and of rights in the course of acquisition, a subject which is comprehensively covered in ILO C.157 and ILO R.167. The maintenance of acquired rights entails the payment of benefits outside the migrant-receiving country's territory. For example, a migrant who is entitled to sickness benefits according to country A's regulations because he or she was resident and/or employed there, but who has now moved to country B, should be able to receive these benefits in country B.

The maintenance of rights in the course of acquisition is a principle that caters for situations where migrant workers or their family members move between two or more countries without completing the qualifying periods that condition several social security benefits, such as old-age pensions. If, for example, a Filipino who had worked in his own country for four years moved to Japan for three years, then to Singapore for eight years, and finally to the Republic of Korea for six years before returning to work in his own country for another five years, he would not qualify for an old-age pension in any of those countries because each of them puts the qualifying threshold higher than the length of his employment there. The injustice of this situation can be remedied if qualifying periods are added together. The amount of the old-age pension due would be calculated according to the pro-rata temporis principle; that is, a portion of the total pension would be due corresponding to the nine years spent in the Philippines, the three years spent in Japan, and so on.

To give effect to this kind of entitlement, the emigration and immigration countries interested in it have to conclude a bilateral or multilateral social security agreement. ILO C.157 and R.167 contain many guidelines for that purpose, which cannot be summarized here. Suffice it to say that the methods of paying benefit abroad vary considerably according to the nature of the schemes involved, the situation of the

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14 For the role of non-governmental organizations in the regularization of illegal migrant workers, see section 8.2 below and box 13. For the provision in the UN Convention concerning emergency medical care, see section 6.5 above.

15 Article 5 of ILO C.118 goes beyond the equality principle in providing for the payment abroad of death grants and long-term benefits such as old-age, invalidity and survivors' benefits, as well as of employment injury pensions.
workers concerned and the particular type of benefit. The methods must take account of technical problems in administrative and perhaps medical supervision of beneficiaries who are otherwise outside the control of the social security body paying the benefits.

Project-tied migrants who move with their firms, or fairly short-term moves by specified-employment workers and similar categories, may not require social security protection by the country to which they migrate, since it is generally in the interest of the worker to remain affiliated to a public or private social security scheme of his or her home country.

6.7 Housing

Suitable housing is a cornerstone of productive work. Foreigners are greatly disadvantaged when they move to another country, especially unskilled workers receiving low wages. They are unfamiliar with the country’s housing market and probably also with its language. If employers were not to organize accommodation on arrival, they would be at the mercy of private landlords or at the bottom of waiting lists for public housing. Some form of self-exploitation may also occur, when migrants want to save as much as possible.

It would appear to be to everyone’s advantage to oblige employers to provide accommodation to foreign workers who are first-time entrants and for as long as the initial contract is scheduled to last – a season, one or two years or whatever. Under permanent immigration schemes such a requirement is not in force today. It is not necessary and possibly counter-productive if one expects people to melt away, as it were, into one’s own population. That is not the case where the admission of foreign labour is tied to a project or where ordinary employment under contract auspices is the kind of migration that is planned. In the case of such temporary labour-import schemes, employers should be required to provide adequate accommodation for workers they hire as individuals or in groups. This does not mean that employers have to build housing for foreign workers, although that can be a cost-effective solution for those who foresee a long-term dependence on migrants. The alternative would be to rent housing on the open market and to sublet it to the workers. The physical adequacy of such housing and the danger of overcharging and abuse should be monitored by the appropriate public authorities.

The housing-provision requirement will be much easier for large enterprises than for small firms to comply with; and the quality of the accommodation is likely to be better in the case of large employers. One may find that large firms tend to look for foreigners when the country’s labour shortage is absolute in nature. Small firms usually suffer intensive labour shortages that are relative in nature (see sections 2.1 and 2.2 above for an explanation of different causes of labour shortages). The government therefore has to be especially watchful, and perhaps supportive in financial terms as well, when first-time entrants from abroad move into enterprises at the lower end of the size range. An alternative viewpoint would be to consider access to labour abroad as a privilege or subsidy, i.e. to exclude employers from access to first-time entrants if they are unable to provide suitable housing.
First-time entrants who terminate their employment relationship with the firm that hired them initially need not necessarily enjoy the privilege of employer-provided accommodation if they manage to secure a new work contract with another employer. Similarly, when a migrant worker has completed his or her first work contract the employer should not necessarily be obliged to be responsible any longer for the provision of accommodation. What is initially a protection measure will sooner or later assume undesirable segregation features. It would appear to be appropriate, therefore, to encourage migrant workers staying longer than the duration of their first work contract to move into the regular housing market. In that event, or if provision of accommodation by the employer has not been adopted as a policy to be pursued, lawful immigrants should enjoy treatment not less favourable than that applied to nationals (as stipulated by ILO C.97, Article 6 (1) (a) (iii), in relation to “accommodation”).

ILO R.86 lays down 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”; and ILO R.151 reiterates the principle of equality of opportunity and treatment (Paragraph 2 (i)).

The UN Convention also includes an equality provision, for lawful residents, that aims at “access to housing, including social housing schemes, and protection against exploitation in respect of rents” (Article 43 (d)). However, governments are not required to give project-tied or specified-employment workers access to social housing on an equal footing with nationals (see Articles 61 (1) and 62 (1)).

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### 6.8 Support services required for a user-friendly policy

A range of supplementary measures and support services has to be put in place to implement a user-friendly labour-import policy. Only basic ones can be listed here.

#### 6.8.1 Forms

Drawing up forms will be necessary in order to carry out vacancy tests, register candidates abroad, bring foreign workers into the country with ease, give employers permission to employ them and/or workers a permit to stay and work in the country, as well as to license private recruitment agents. Such forms could provide the raw data for the assessment of labour-import policies (see also section 5.9 above).

#### 6.8.2 Planning and monitoring

Qualitative and quantitative data analysis systems should be put in place to inform the policy coordinating mechanism about trends and developments that may
require political decisions or that could lead to identification of problems in the implementation of measures, costs associated with them, and so on.

6.8.3 Training administrators

Technically training the country's administrators, especially those in the public employment or immigration service and the labour inspectorate, might be necessary both for normal operative purposes and to combat illegal migration and employment. Sensitivity training relative to cultural perceptions would also be useful in reducing misunderstandings, hostility and so forth to a minimum.

6.8.4 Equal opportunity training

Employers as well as civil servants should also receive equal opportunity training or ethnic diversity training, as it is often called nowadays. This would be in addition to, and more than, cultural awareness courses. The purpose of ethnic diversity training is to reduce to a minimum discriminatory or dysfunctional behaviour by personnel managers, line managers, foremen, civil servants and others, and to make full use of the productive potential of foreign workers.  

6.8.5 Language training for migrants

Language training is the most obvious and immediate need when migrant workers and their dependants do not have a command of the local language. The government could organize it, or devolve the actual teaching to non-governmental organizations, providing funds to that end (see box 12 on Japan). ILO R.151 indicates that language training should take place "as far as possible during paid time" (Paragraph 7 (1) (b)).

6.8.6 Preparing local schools

Preparing primary and higher-level schools for the influx of foreign children may also be required, i.e. curriculum development, teacher training, and so on.

6.8.7 Complaint and redress mechanisms

Provision of special complaint and redress mechanisms, i.e. procedures other than those concerning grievance and dispute settlement between workers and employers, may be required – in addition to access to the immigration country's


17 On this, see section 6.1. above.
courts and trade union organizations, as well as access to the emigration country’s embassy and consular offices – in order to help migrants who feel unfairly treated by the immigration country’s administrators. Frustrated workers are unproductive workers.

6.8.8 Other integration assistance

Training social workers, and making time available on radio and television for programmes aimed at foreigners that inform them about the institutions and customs of the country they live in, also help to make migrant workers feel more at ease in the country to which they are supposed to lend their productive force.

Box 12. Reasons for public support for having foreign trainees learn the local language (Japanese)

Professor H. Shimada argues that “the Japanese Government – in other words, the taxpayers – should foot the bill for the language education of foreign workers, as part of the nation’s educational ODA, for several reasons. First, there is the humane reason that the ability to speak Japanese will make living and working in Japan safer and more pleasant for foreign workers. Second, it will be of economic benefit, by helping to increase their work capacity and efficiency. Third, there is a public merit in that acquiring the ability to speak Japanese can be considered an investment in public goods. Clearly Japanese language ability does have the character of private goods, in being of benefit to both the individual trainees and their employers. But, in contrast to visiting foreign students, whose chief objective in coming to Japan is study and research, foreign workers come mainly to work, and therefore lack the freedom, ability, or inclination to master Japanese on their own time and at their own expense. Again, there is very little economic incentive for employers to help trainees acquire more than the most basic working knowledge of the language. But if the government, through foreign aid, were to support an overall improvement in the ability of foreign workers to speak Japanese, this would bring significant social benefits by increasing the effectiveness and improving the results of the Work-and-Learn Programme. Hence, any investment in improving foreign workers’ standard of Japanese could be seen as a public investment. Finally, an overall improvement in the ability of foreign workers to speak the language would have significant social and economic utility in the sense of raising the profile and usefulness of Japanese in international business and in workplaces.” (Shimada, op. cit., p. 97.)
The question of family migration or family reunification

Some countries are keen to have family members accompany the breadwinner when the initial move takes place, or to have them join the breadwinner after a certain period has lapsed. Others have great hesitations about this. What are the issues involved?

Economically inspired admission policies tend to look with disfavour at dependants – spouses, children, siblings, fathers and mothers – accompanying or joining a breadwinner in the immigration country. Cost considerations influence judgements heavily, though they tend to be crude and partial. Non-economic beliefs may intrude as well. These have to be balanced against two other factors. First, human rights principles, particularly the fact that, as the widely ratified International Covenant on Civil and Political Rights put it, “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State” (Article 23 (1)).¹ Second, the undoubted benefits of families staying together – benefits that accrue not only to the migrant worker but also to the receiving society as a whole. An ILO report summarized these benefits as follows:

Uniting migrant workers with their families living in the countries of origin is recognized to be essential for the migrants’ well-being and their social adaptation to the receiving country. Prolonged separation and isolation lead to hardships and stress situations affecting both the migrants and the families left behind and prevent them from leading a normal life. The large numbers of migrant workers cut off from social relations and living on the fringe of the receiving community create many well-known social and psychological problems that, in turn, largely determine community attitudes towards migrant workers.²

Family migration or reunification may be viewed primarily as entailing costs for the employer or the government, since either may have to provide accommodation, school places, and so forth. However, the costs of accommodation will be recuperated by employers, private landlords or public housing systems, as the migrant workers will have to pay the rent out of their own income. That income will be taxed and will therefore add to the government’s revenue, to which migrant workers – like national

¹ See also the similar wording of Article 10 of the International Covenant on Economic, Social and Cultural Rights, and Article 44 (1) of the UN Convention.

workers – have a legitimate claim. Yet another appreciable economic factor is that a sizeable import of labour which gives rise to significant family migration or reunification creates demands for goods and services, and therefore growth. An economy that is not overheated will benefit from this, especially during times of recession.

7.1 Scope and conditions

In recognition of the centrality and sanctity of the family as well as of its social and economic role, the international community has gone a long way towards ensuring that if migrant workers cannot be accompanied by their families when they leave, their dependants should be able to join them abroad if they stay there for more than a short-term assignment, a season or a year. Although migrant workers do not have in international law an absolute right to family reunification, ILO C.143 calls on every member State ratifying that Convention 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. (Article 13 (1), emphasis added.)

ILO R.151 contains even stronger language and goes on to stipulate that a prerequisite for the reunification of families should be that the worker has, for his family, appropriate accommodation which meets the standards normally applicable to nationals of the country of employment. (Paragraph 13 (2).) It continues:

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. (Paragraph 14.)

The “appropriate accommodation” requirement in ILO R.151 is meant to encourage migrants to leave substandard housing. It should not be interpreted as giving receiving countries the possibility of endlessly preventing family reunification. Indeed, Paragraph 16 of ILO R.151 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. (Emphasis added.)

3 Article 44 of the UN Convention contains very similar notions:

(2) 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.

(3) States of employment, on humanitarian grounds, shall favourably consider granting equal treatment, as set forth in paragraph 2 of the present article, to other family members of migrant workers.
7.2 Who is to benefit?

It would appear not entirely unreasonable to argue, on grounds of practicability, that migrants taking on short-term assignments, specified employment of a brief or transitory nature, project-tied work or seasonal employment could be requested to refrain from having their families accompany or join them because this might be incompatible with their status. For seasonal workers, the reason for so requesting them would be the fact that they are present in the country of employment for only part of the year.

As regards the family members who should be entitled to reunification, ILO C.143 spells out that they should include “the spouse and dependent children, father and mother” (Article 13 (2)).

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4 The UN Convention sets forth broader criteria concerning marriage partners and more restrictive ones concerning dependants; see its Article 4 and the preceding footnote.
Coping with illegal immigration and employment

Immigration countries’ governments do not want illegal immigration and employment. But they may have to deal with these phenomena where they are incapable of preventing them. What can governments do in that event?

Illegal immigration and employment are complex problems, and there is no panacea for eradicating them. Strenuous efforts have continuously to be made to combat them, because the existence of illegal workers is bad for foreign workers, bad for national workers and bad for the country as a whole.¹

There are, in essence, three types of measures to tackle illegal immigration and employment:

(i) preventing them from occurring, or where past measures to that end have failed
(ii) expelling the foreigners involved; or
(iii) regularizing their status.

The first two types will probably have to be measures of continuous and simultaneous application. The third type is one of last resort; it would become self-defeating if it had to be repeated frequently or regularly. Yet it may have to be resorted to more than once, especially if it is inefficiently administered and not buttressed by effective prevention and expulsion. The three types of measures will now be looked at in turn.

8.1 Prevention

One should seek to prevent illegal immigration and employment in its various forms and stages. The first of these is entering a country without the permission or visa to do so. The second is unauthorized overstaying, which happens when a person who was lawfully admitted, for example as a tourist, disregards the time-limits and prohibitions on work to which he or she was subject. The third is

¹ See the introductory section in Chapter 6. The use of labour in unlawful conditions undermines honest employers who abide by the rules. Moreover, the government and the country’s social security institutions are deprived of tax revenues and social security contributions.
engaging in work outside the law, which is usually the purpose of illegal entry or overstaying, but can also happen when a foreigner who is perfectly entitled to be in the country decides to take work in the informal or black economy, or whatever term may be in use. Incidentally, many national workers do the same: they engage in economic activities which they and the employers who engage them know to be outside the law.

Preventing unauthorized entry can be attempted in the first instance by publicity and media campaigns that inform potential emigrants of the hazards and costs of having to use traffickers and having to hide from the police, labour inspectors and others, or being vulnerable to exploitative employers. Such publicity and media campaigns may not be seen by the people for whom they are intended, or if they are, not trusted by them. Nor may the prospect of harassment and poverty in a rich country stop many desperate people from moving there.

Information is likely to be heeded if it reveals clear incentives to use regular means of entry. One such incentive could relate to the cost of travelling. Traffickers tend to charge crippling fees compared with regular means of transport for the purpose of international labour migration. Another incentive is the fact that moves through regular channels ensure that the persons concerned will have their various papers in order. However, incentives can come into play only where there is a certain volume of regular migration opportunities. Malaysia vis-à-vis Bangladesh and Indonesia is a case in point. Bilateral agreements between these countries could help to provide appropriate information to emigration candidates in their country of origin rather than after they have left it and immigrated or overstayed illegally. Where no migration opportunities exist or where they are far too few to absorb much of the emigration pressure, the incentives of the kind referred to do not lend themselves to operationalization.

Another means of preventing unauthorized entry is to make it unattractive, i.e. to dissuade potential emigrants, traffickers, document forgers, etc., by the threat of pecuniary or penal sanctions. Dissuasion will work only if the fines to be paid or the sentences to be expected are severe enough and backed up by an effective search-and-enforcement mechanism.

ILO C.143 (Article 6 (1)) was the first international instrument to call for the definition and the application of administrative, civil and penal sanctions, which include imprisonment in their range, in respect of the organizers of illicit or clandestine movements and those who knowingly provide assistance thereto, whether for profit or otherwise.

Preventing overstayings is an extremely difficult task, at least in countries that are populous and culturally or socially heterogeneous. It is easier for Singapore to think of measures to counter overstaying because it is a small city state, and it is more promising for the Republic of Korea to enforce them in its homogeneous society, than it is for Nigeria to embark on such a course. Since the relevant measures are ones for the police, they are not discussed here.

Preventing illegal employment, irrespective of the exact form of illegality, is also difficult. Most employers, especially most large employers, voluntarily and fully abide by their country's laws and regulations. Others may marginally or drastically infringe them, for example by hiring workers whom they should not hire or by paying
them less than stipulated in minimum wage laws, collective agreements and the like, or by withholding social security contributions associated with employment. Employers are without doubt largely responsible for work that is done, under their auspices, outside the law. But collusion between the migrant-receiving country’s employers and both national and foreign workers may also play a role.

Offenders, of course, should be punished. This is clearly spelt out in ILO C.143, Article 6 (1), to which reference has just been made in the context of trafficking.

Labour inspectors are governments’ primary weapon for detecting the illegal employment of foreigners, especially on building sites, in hotels and restaurants, in sweatshops and similar workplaces.

Deterring employers from illegally hiring foreigners is another form of prevention, which consists in obliging them to abide by the principle of equal remuneration and working conditions, including with regard to past employment. This is well reflected in a series of provisions in both ILO C.143 and the UN Convention that have already been presented. Governmental incapability or feebleness in enforcing this principle accounts in some measure for the existence of illegal immigration and employment of foreigners. The UN Convention clearly states that governments shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle \( \textit{of equality of treatment} \) by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of any such irregularity. \( \text{Article 25 (3).} \)

### 8.2 Expulsion

If one cannot prevent the unauthorized entry, stay or employment of migrant workers, one may have to consider expelling them.\(^2\) Democratic States find it very difficult to expel illegal migrant workers on a massive scale – and with good cause! Not only are measures of collective expulsion frowned upon by international law, but under that same law the expulsion of every individual foreigner is subject to procedural safeguards, and the economic or social security rights arising out of the migrant’s past employment – irrespective of whether his or her stay in the country was lawful or irregular – are protected.

Since the international standards’ provisions dealing with the expulsion of migrant workers have already been presented, there is no need here to go deeper into the subject of expulsion.

\(^2\) See section 6.3.2 above for further details; see also the International Covenant on Civil and Political Rights, Article 13.
8.3 Regularization

When all else fails, governments may have to resort to amnesty measures to remove the threat of expulsion that hangs like the sword of Damocles over the heads of foreigners. This is especially the case when the migrant workers have spent years in the country, contributing perhaps to the wealth being created on its territory, having acquired rights to social security benefits through economic activity, possibly having been joined by family members or having married. Governments may also feel that the regularization of the illegal stay of foreigners becomes advisable when they introduce major revisions to their immigration law, and it is appropriate to “wipe the slate clean” beforehand.

Regularization conjures up the fear that further foreigners will enter the country in the expectation of one day having their status legalized. The international minimum standards reflect this fear and are therefore very prudent in their pronouncements on the subject – as governments have to be, when faced with a sizeable population of illegal immigrants. ILO C.143 of 1975, the first international instrument elaborated to “suppress clandestine movements of migrants for employment and illegal employment of migrants” (Article 3 (a)), stated only that “nothing in this Convention shall prevent Members from giving persons who are illegally residing or working within the country the right to stay and to take up legal employment” (Article 9 (4)). The accompanying ILO R.151 added a sense of urgency:

Without prejudice to measures designed to ensure that migrant workers and their families enter national territory and are admitted to employment in conformity with the relevant laws and regulations, a decision should be taken as soon as possible in cases in which these laws and regulations have not been respected so that the migrant worker should know whether his position can be regularized or not. (Paragraph 8 (1), emphasis added.)

When the UN Convention was drafted in the 1980s, the widespread existence of irregular migration and employment gave rise to a more purposeful formulation that is embodied in Article 69:

1. States Parties shall, when there are migrant workers and members of their families within their territory in an irregular situation, take appropriate measures to ensure that such a situation does not persist.

2. Whenever States Parties concerned consider the possibility of regularizing the situation of such persons in accordance with applicable national legislation and bilateral or multilateral agreements, appropriate account shall be taken of the circumstances of their entry, the duration of their stay in the States of employment and other relevant considerations, in particular those relating to their family situation.

The international community has been less hesitant about spelling out the rights to which migrant workers and their family members who are in an irregular situation are entitled – while they are in that situation, if they return voluntarily to their home country or if they are administratively or judicially expelled. The philosophy underlying the determination of such rights is that they accrue to migrants because they are human beings of moral worth equal to that of others, have participated in the country’s life and contributed to the production of its wealth.
Consequently, both ILO C.143 (notably Article 1) and the UN Convention (Articles 8 to 33) seek to protect the fundamental human rights of all migrants. ILO C.143 also tackles the delicate question of rights arising out of employment in which the worker engaged before his or her discovery:

Without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to employment in conformity with the relevant laws and regulations, the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularized, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits. (Article 9 (1)).

What the drafters had in mind was to ensure that migrants who are illegally employed nevertheless receive the wages and other benefits that are due to them for the work which they have actually performed, and at the same time to prevent employers from claiming that the irregularity of the employment - which the employers, after all, should have regularized if they were law-abiding citizens - precludes them from paying normal wages to the workers concerned or from contributing to the social security system such payments as are associated with employment.

8.4 Broad principles of regularization

If a government decides in favour of a one-off regularization or amnesty, its overriding concern should be to implement it effectively and comprehensively. If one cannot persuade migrants and their employers to put illegality behind them, or if the conditions attached to the measures are such that unlawful employment is bound to continue on a sizeable scale, those measures are hardly worth the effort except as a means of testing one’s approach and gathering information in order to do things better next time. To make both foreigners and employers respond to the maximum extent requires, firstly, clear and attractive conditions or eligibility rules; secondly, a broad-based and energetic advertising and publicity campaign; thirdly, an effort by the administration to convince migrants and employers that it wishes to “wipe the slate clean” rather than to get rid of the foreigners or to punish the employers; and fourthly, a sharing of the actual implementation with non-governmental organizations trusted by the migrants.

The UN Convention pursues a similar objective under a less precise formulation in Article 68 (2).

The following draws heavily on W.R. Böhning: “Regularising the irregular”, in International Migration (Geneva), Vol. XXI, No. 2 (1983), pp. 159-173, which is based on ILO case studies in Australia, Canada and France, later supplemented by work on Argentina and Venezuela. See also D. Meissner and D. Papademetriou: “Legalization of undocumented aliens: Lessons from other countries”, in International Migration Review (New York), Vol. 21, No. 78 (Summer 1987), pp. 424-432, which in turn is based on experiences in Argentina, Australia, Canada, France, the United Kingdom, the United States Virgin Islands and Venezuela.
8.4.1 Eligibility rules

It would be counter-productive if the rules that qualify people were restricted or flawed. To start with, the point in time when migrants become eligible for regularization should be very recent. If it were months or years back, illegality would \textit{a priori} continue to exist. If the danger arose that foreigners would flow into the country between the date of announcement of an impending regularization and a cut-off date to be fixed in the future, the government should attempt to close the gap between them as far as possible. There are bound to be a few people who will misuse any amnesty. That kind of "slippage" should be accepted as inevitable. It may be so minor as to be imperceptible except to public media hostile to any regularization.

To require of migrants that they be "employed" or even that they have "ordinary" or "stable" employment, let alone that they "possess sufficient resources" or are "assured of future employment", will inevitably lead to contentious documentation and verification procedures that will have effects opposite to those intended. The migrants will not come forward and the employers will not feel motivated to help them.

Employers, who after all have engaged in an illegal activity, are just as hesitant as migrants about revealing their misdeeds. It would be unhelpful to make regularization dependent upon employers' initiatives in declaring who is there and with what status. It would be illusory to seek their collaboration and at the same time ask them to pay taxes or social security contributions that are due to the State. Tax or labour inspectors are the means to those ends. Regularizations have a different purpose and will fail if they are overloaded with unrelated aims. Just as counter-productive would be a requirement imposed on migrants to denounce the employer(s) for whom they worked illegally.

The country's authorities implementing the regularization ought to be prepared, from the beginning, to accept all migrants who meet the cut-off point irrespective of their employment status, whether they are temporarily unemployed or pregnant or ill, and regardless of which category of migrant they belong to. If counterfeit-proof documentation cannot be furnished by either the migrants or the employers, the government should accept third-party declarations, sworn affidavits, and the like. The same holds true as regards establishing the date of entry in relation to the cut-off point.

Other eligibility rules should not be different from normal immigration requirements, e.g. having a clean police record and not being a danger to public health.

8.4.2 Publicity

Publicity is crucial. The migrant target group is usually difficult to reach and distrustful of governments. Besides local newspapers, radio and television, the authorities will have to call on trade unions and the ethnic press, where it exists, as well as on ethnic or local immigrant support bodies, presumably including religious institutions, especially where it is known that migrants already have links with them. The local news media should also be convinced of the need for regularization so that
can enlist the sympathy of the national population. The framework conditions have to be right if the migrants are to be persuaded to come forward (see box 13).

The prevailing image of repression that foreigners have of governments, and employers' hesitations about revealing that they have committed unlawful acts, should lead the authorities to set up user-friendly implementation mechanisms for regularization measures that convincingly portray different images – openness, help, "wiping the slate clean". For example, to entrust the police or even labour inspectors with implementation will not lessen migrants' or employers' reluctance. Immigration officers, depending on the country in question, may have a different image. Social workers or specially trained officials would probably be a more promising option.

Decentralization in the sense of giving power over legalization decisions to institutions at the level of regions, districts or even towns is another means of facilitating successful regularization.

Last but not least, the government must be able to convince both foreigners and employers, if need be by enacting it in law, that "information from applications of both eligible and ineligible applicants will not and cannot be used for enforcement or any purpose other than to decide legalization eligibility". ⁵

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**Box 13. Involving ethnic associations and immigrant-serving bodies in regularization**

Ethnic associations and immigrant-serving bodies should not be viewed as a mere vehicle for conveying predetermined information. The autonomy which is rightly theirs should be respected and their expertise should be drawn upon. As soon as the principle of a regularization programme has been agreed upon by the government, ethnic or immigrant-support organizations should be invited to discuss (a) the rendering of the conditions of eligibility in simple translations that guard against misunderstandings; (b) the preparation of possible pilot tests of the information material and submissions for improvements; (c) the costs of and payments for translations and specific information campaigns for which these organizations might be made responsible; and (d) reimbursement for such activities as they themselves decide to undertake, including personal outreach work and counselling services. The notable differences in response by various nationalities, which can only to a limited extent be explained by variations in education, suggest that every possible relevant ethnic organization or immigrant-support body warrants contacting, either directly or through some umbrella organization. One might also consider providing an incentive for their activities in the form of a fixed payment per migrant regularized after half the scheduled period has elapsed. Many ethnic associations are poor; and the ethnic newspapers have only a small circulation, serve a scattered community and are expensive to produce. Regularization's aim of pulling the greatest number of people out of irregular situations can be helped by these organizations, but it is hampered by their lack of funds.


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⁵ Meissner and Papademetriou, op. cit., p. 432.
8.4.3 Rights of regularized foreigners

As regards the post-regularization employment status of foreigners in countries whose general schemes admit migrants subject to an initially limited period of time, reasons of fairness towards both regular migrants and national workers suggest that the day of regularization should be counted as the day of regular entry (rather than the day of actual entry back in the past) with respect to the subsequent lifting of restrictions on employment in a particular industry or occupation. While the danger of being refused a work permit at the end of the first legal work contract or after a year or two might prevent some workers from abandoning their current unlawful status, regularization measures cannot give more rights to the target populations than ordinary law-abiding migrants have.

8.5 The informal sector

Most low- and middle-income countries have both a modern, formal sector operating within the law and an informal sector. In many African countries, the informal sector provides jobs to more people – including foreigners – than the formal sector does. One cannot simply overlook the informal sector or deal with the question of foreigners in it as though it represented normal illegal employment. For, while informal sector employment tends to be outside some labour, social or taxation law, in middle- and low-income countries this may sometimes be due to lack of awareness of regulations and the small scale and marginality of operations rather than to deliberate evasion of the law.

The issues concerning foreigners in the informal sector are no different from those concerning nationals employed in it. Where a migrant-receiving country’s administrators are faced with the question of what to do about foreigners in informal employment, they should let themselves be guided by the same principles as they apply to their own citizens. That is to say, they should help informal sector workers and local entrepreneurs to become more productive and progressively integrated into the formal economy, as well as extending labour standards and social protection (but not in such a way as to destroy the ability of the informal sector to generate employment and income). The ingenuity and dynamism characteristic of informal sector employers should be supported irrespective of whether they are of national or foreign origin, and irrespective of whether they employ national workers or foreign workers, or both.

When informally employed foreigners come to be expelled, they should of course benefit from such procedural and substantive rights as national and international law provides for.  

6 On this, see section 6.2 above.

7 See sections 6.3.2 and 8.2 above.
Conclusions

In the field of migrant workers as in others, clarity of conception, broad societal involvement and support, transparency in application and the provision of adequate financial and human resources for its implementation are the basis for an effective policy.

The means by which the policy should acquire political legitimacy and legal status is legislation. In the setting up of an effective labour immigration policy, detailed laws are far superior to brief and general administrative regulations. The legislative process by itself promotes the involvement of society’s different constituents. The half-public world of administrative regulations invites obscurity of concepts, lack of responsibility, and conflict, in the application of the policy.

Conflict between public officials, employers, workers’ organizations, courts, the media, various groups in society and the migrants themselves is the worst enemy of any labour-import policy. Lack of clear policies and of consistency in implementation can entail grave social consequences. For the import of foreign labour strikes much stronger and more emotional chords than the import of foreign fruit, shirts, car tyres or computer programmes, for example. Where foreigners are admitted to a country for economic reasons, the political elite may be certain of the economic benefits for the country as a whole. But whereas the proverbial man in the street appreciates the need to import fruit, shirts, car tyres, etc., suddenly having to put up with a new neighbour one may not really have wished to have living next door and a potential competitor for work is a rather different matter, and one on which the question of who benefits is not immediately obvious or undisputed. Moreover, foreign workers are not passive like goods: they have emotions and rights; they can contest the treatment that is being meted out to them in private personal interaction; and they can challenge the government or employers before the courts and with individual or collective acts in economic, social and political domains.

Legislators, employers, workers’ representatives, courts, communicators and other key members of society have the primary obligation of building up a durable balance of rights for nationals and non-nationals. They have to balance nationals’ legitimate expectation of some preferential treatment against the human, economic and social rights that foreigners can justifiably claim to be theirs, irrespective of their nationality or status. After all, labour is not a commodity, either within countries or when it crosses borders.

The balance of rights is not identical for all countries at all times or for all categories of migrants. But it has been broadly predetermined at the global level in the form of a minimum number of components that are contained in the international
labour standards of the ILO and the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Policy-makers in migrant-receiving countries have to add many more – and often more elaborate – components to construct complete policies and a durable balance of rights. Loading the scales on either side will have untoward consequences.
Appendix

The ILO’s information system for legislation concerning migrant workers

1. ILO’s information system

The ILO’s Labour Law Information Branch (INF LEG) of the International Standards Department has been entrusted with the dissemination of legal information relating to international labour standards. INF LEG manages LABORLEX, a legal information system that offers, upon individual request and by subscription, a package of services providing easy access to printed as well as computerized information.

2. LABORLEX

The services offered by the LABORLEX information system include a documentation centre from which documents and other types of printed information can be obtained. Two separate computerized databases are managed, ILOLEX and NATLEX. Information can be retrieved upon request in printed form or on diskette. In addition, NATLEX can be accessed on-line and ILOLEX is available on CD-ROM. ILOLEX provides easy access to the extensive body of texts in the field of international labour law that the ILO has developed. The material is available in full-text in all three official ILO languages. NATLEX is specifically designed to serve as a focal point for information on labour, social security and related human rights legislation. It is the only legislative database in the labour field that endeavours to cover all national legal systems in the world. Although most of its records consist of laws from ILO member States, the legislation of other countries is also recorded. A third of the records relate to the labour and social security legislation of developing countries.

NATLEX can be accessed from outside the ILO through its HP/3000 computer and the ILIS referral system, as well as through other means of information retrieval. It is necessary to have a terminal which communicates with the ILO information system and to have access authorization for ILIS. NATLEX operates under MINISIS, a database management system designed by the International Development Research Centre of Canada.

3. NATLEX and migrant workers

To process national legislation for inclusion in NATLEX, the ILO has used a classification system principally derived from the Classified Guide of International Labour Standards and the ILO Thesaurus (see box 14). Taking into account the relevant international labour standards and other international instruments, this classification system has been expanded and particularized to meet the needs of persons interested in questions relating to
EMPLOYING FOREIGN WORKERS

migrant workers. It is thus possible to conduct very specialized searches of legislation pertaining to migrant workers.

The material collected is accessible through the on-line NATLEX database. As with other NATLEX information, it will also be possible to download the information on migrant workers to a PC for further dissemination. In addition, the material will be retrieved and printed in two reports: one sorted by country and subdivided according to the specialized classification scheme developed, the other sorted by classification and subdivided by country. Requests for information may be addressed to the Labour Law Information Branch, International Labour Office, 4 route des Morillons, CH-1211 Geneva 22, Switzerland. Tel.: +41 22 799 7149; fax: +41 22 799 6926.

Box 14. NATLEX classification for migrant workers

12.05.01 General provisions
   (Migration policies and programmes)
   .02 Conditions of migration and settlement
      .01 Conditions of departure
      .02 Conditions of admission
      .03 Conditions of residence
   .03 Human rights
      .01 Non-discrimination
      .02 Freedom of association
   .04 Conditions of employment
      .01 Contracts of employment
      .02 Wages
      .03 Termination of employment
   .05 Conditions of work
   .06 Employment policy
      .01 Employment services
      .02 Unemployment
   .07 Labour administration and management
      .01 Labour inspection
      .02 Information systems
   .08 Occupational safety and health
   .09 Social security
      .01 Medical care and sickness benefit
      .02 Maternity benefit
      .03 Old-age, invalidity and survivors’ benefit
      .04 Employment accident benefit
      .05 Unemployment benefit
      .06 Family benefit
      .07 Administrative and financial aspects
      .08 Social assistance and services, welfare
   .10 Education and training
   .11 Conditions of return
   .12 Legal remedies, administration of justice
   .13 Taxation and financial issues
   .14 Special regimes (irregular migrants, project-tied workers)
Table. Major migrant-receiving countries, 1990

<table>
<thead>
<tr>
<th>Country or territory</th>
<th>Population (millions)</th>
<th>Total GDP (US$ billions)</th>
<th>Real GDP per capita (PPP)</th>
<th>Labour force (millions)</th>
<th>Foreign-born population (millions)</th>
<th>Foreign-born economically active population in brackets</th>
<th>Non-national population (millions)</th>
<th>Non-nationals economically active population in brackets</th>
<th>Nationals (or economically border crossers) of foreign-extracted population in brackets</th>
<th>Inflow(s) and outflow(s) of long-stay workers (mil US$)</th>
<th>Inflow(s) and outflow(s) of long-stay workers (mil of US$ GNP)</th>
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<tbody>
<tr>
<td>M Argentina</td>
<td>32.3</td>
<td>76.5</td>
<td>4 295</td>
<td>12.3</td>
<td>1 628 000</td>
<td>(&gt;5.0%)</td>
<td>...</td>
<td>...</td>
<td>...</td>
<td>0.1</td>
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<tr>
<td>H Australia</td>
<td>17.1</td>
<td>291.0</td>
<td>16 051</td>
<td>8.5</td>
<td>4 000 000&lt;sup&gt;a&lt;/sup&gt;</td>
<td>(&gt;24.7%)</td>
<td>...</td>
<td>...</td>
<td>...</td>
<td>0.2</td>
<td>0.4</td>
</tr>
<tr>
<td>H Austria</td>
<td>7.7</td>
<td>147.0</td>
<td>16 504</td>
<td>3.5</td>
<td>...</td>
<td>&gt;512 000&lt;sup&gt;a&lt;/sup&gt;</td>
<td>(&gt;6.6%)</td>
<td>218 000</td>
<td>...</td>
<td>...</td>
<td>...</td>
</tr>
<tr>
<td>M Azerbaijan</td>
<td>7.2</td>
<td>12.0</td>
<td>3 977</td>
<td>...</td>
<td>1 220 000&lt;sup&gt;a&lt;/sup&gt;</td>
<td>(17.4%)</td>
<td>...</td>
<td>&gt;965 000</td>
<td>...</td>
<td>...</td>
<td>...</td>
</tr>
<tr>
<td>H Bahamas</td>
<td>0.3</td>
<td>2.9</td>
<td>11 235</td>
<td>0.1&lt;sup&gt;b&lt;/sup&gt;</td>
<td>...</td>
<td>...</td>
<td>...</td>
<td>...</td>
<td>...</td>
<td>...</td>
<td>...</td>
</tr>
<tr>
<td>H Bahrain</td>
<td>0.5</td>
<td>10 706</td>
<td>...</td>
<td>0.3&lt;sup&gt;1&lt;/sup&gt;</td>
<td>112 000&lt;sup&gt;a&lt;/sup&gt;</td>
<td>(32.0%)</td>
<td>...</td>
<td>132 000</td>
<td>...</td>
<td>...</td>
<td>...</td>
</tr>
<tr>
<td>M Belarus</td>
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<td>32.0</td>
<td>5 727</td>
<td>5.3&lt;sup&gt;b&lt;/sup&gt;</td>
<td>...</td>
<td>2 250 000</td>
<td>(&gt;20.7%)</td>
<td>...</td>
<td>...</td>
<td>...</td>
<td>...</td>
</tr>
<tr>
<td>H Belgium</td>
<td>9.9</td>
<td>155.0</td>
<td>16 381</td>
<td>4.1</td>
<td>...</td>
<td>&gt;900 000&lt;sup&gt;a&lt;/sup&gt;</td>
<td>(&gt;7.3%)</td>
<td>&gt;300 000</td>
<td>...</td>
<td>...</td>
<td>...</td>
</tr>
<tr>
<td>M Botswana</td>
<td>1.3</td>
<td>2.6</td>
<td>3 419</td>
<td>0.46&lt;sup&gt;1&lt;/sup&gt;</td>
<td>...</td>
<td>&gt;130 000&lt;sup&gt;1&lt;/sup&gt;</td>
<td>(&gt;1.0%)</td>
<td>...</td>
<td>-1.6 - 0.7</td>
<td>...</td>
<td>...</td>
</tr>
<tr>
<td>H Brunei Darussalam</td>
<td>0.3</td>
<td>...</td>
<td>...</td>
<td>...</td>
<td>&gt;150 000&lt;sup&gt;1&lt;/sup&gt;</td>
<td>(&gt;50.0%)</td>
<td>...</td>
<td>...</td>
<td>...</td>
<td>...</td>
<td>...</td>
</tr>
<tr>
<td>L Burkina Faso</td>
<td>9.0</td>
<td>3.0</td>
<td>618</td>
<td>4.6&lt;sup&gt;1&lt;/sup&gt;</td>
<td>...</td>
<td>...</td>
<td>...</td>
<td>&gt;900 000&lt;sup&gt;ee&lt;/sup&gt;</td>
<td>5.5</td>
<td>...</td>
<td>...</td>
</tr>
<tr>
<td>M Cameroon</td>
<td>11.8</td>
<td>11.2</td>
<td>1 646</td>
<td>4.6&lt;sup&gt;1&lt;/sup&gt;</td>
<td>...</td>
<td>250 000&lt;sup&gt;2&lt;/sup&gt;</td>
<td>(5.4%)</td>
<td>...</td>
<td>0.2</td>
<td>2.8</td>
<td>...</td>
</tr>
<tr>
<td>H Canada</td>
<td>26.5</td>
<td>543.0</td>
<td>19 232</td>
<td>13.7</td>
<td>&gt;4 000 000&lt;sup&gt;2&lt;/sup&gt;</td>
<td>&gt;3 000 000&lt;sup&gt;2&lt;/sup&gt;</td>
<td>(&gt;21.9%)</td>
<td>...</td>
<td>-0.9 - 0.1</td>
<td>...</td>
<td>...</td>
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</table>
**EMPLOYING FOREIGN WORKERS**

<table>
<thead>
<tr>
<th>Country or territory</th>
<th>M = Low-income</th>
<th>H = High-income</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Labour force (millions)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Comoros</td>
<td>0.6</td>
<td>721</td>
</tr>
<tr>
<td>Congo</td>
<td>2.3</td>
<td>362</td>
</tr>
<tr>
<td>Côte d’Ivoire</td>
<td>12.0</td>
<td>1324</td>
</tr>
<tr>
<td>France</td>
<td>1.6</td>
<td>6438</td>
</tr>
<tr>
<td>Gabon</td>
<td>1.2</td>
<td>4714</td>
</tr>
<tr>
<td>Gambia</td>
<td>0.9</td>
<td>491</td>
</tr>
<tr>
<td>Georgia</td>
<td>5.5</td>
<td>4572</td>
</tr>
<tr>
<td>Haiti</td>
<td>6.0</td>
<td>24</td>
</tr>
<tr>
<td>Iraq</td>
<td>4.7</td>
<td>510</td>
</tr>
<tr>
<td>Israel</td>
<td>18.9</td>
<td>561</td>
</tr>
<tr>
<td>Italy</td>
<td>57.1</td>
<td>971.0</td>
</tr>
</tbody>
</table>

| | | |
| **Real GDP per capita (PPP)** | | |
| Comoros | 0.2 | 9.1 |
| Congo | 2.3 | 4.7 |
| Côte d’Ivoire | 12.0 | 13.2 |
| France | 1.6 | 6.6 |
| Gabon | 1.2 | 4.7 |
| Gambia | 0.9 | 4.9 |
| Georgia | 5.5 | 4.6 |
| Haiti | 6.0 | 2.4 |
| Iraq | 4.7 | 5.1 |
| Israel | 18.9 | 5.1 |
| Italy | 57.1 | 97.1 |

| | | |
| **Total GDP (US$ billions)** | | |
| Comoros | 0.2 | 721 |
| Congo | 2.3 | 362 |
| Côte d’Ivoire | 12.0 | 1324 |
| France | 1.6 | 6438 |
| Gabon | 1.2 | 4714 |
| Gambia | 0.9 | 491 |
| Georgia | 5.5 | 4572 |
| Haiti | 6.0 | 24 |
| Iraq | 4.7 | 510 |
| Israel | 18.9 | 561 |
| Italy | 57.1 | 971.0 |

**Notes:**
- High-income countries have a per capita income above $10,000 in 2000.
- Low-income countries have a per capita income of $10,000 or below in 2000.
<table>
<thead>
<tr>
<th>Country</th>
<th>M</th>
<th>F</th>
<th>Total</th>
<th>M</th>
<th>F</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>M Jamaica</td>
<td>2.4</td>
<td>3.6</td>
<td>2.979</td>
<td>1.1</td>
<td></td>
<td>3.8</td>
</tr>
<tr>
<td>H Japan</td>
<td>123</td>
<td>3141</td>
<td>17 616</td>
<td>63.7</td>
<td></td>
<td>400 000</td>
</tr>
<tr>
<td>M Jordan</td>
<td>4.0</td>
<td>3.9</td>
<td>3.869</td>
<td>0.9</td>
<td></td>
<td>12.8</td>
</tr>
<tr>
<td>M Kazakstan</td>
<td>16.7</td>
<td>42.0</td>
<td>4.716</td>
<td></td>
<td></td>
<td>&gt;1 601 000</td>
</tr>
<tr>
<td>H Kuwait²</td>
<td>2.1</td>
<td>15 178</td>
<td>0.9</td>
<td></td>
<td></td>
<td>731 000</td>
</tr>
<tr>
<td>M Kyrgyzstan</td>
<td>4.4</td>
<td>7.0</td>
<td>3 114</td>
<td>1.8</td>
<td></td>
<td>&gt;340 000</td>
</tr>
<tr>
<td>M Latvia</td>
<td>2.7</td>
<td>9.0</td>
<td>6 457</td>
<td>1.5</td>
<td></td>
<td>&gt;76 000</td>
</tr>
<tr>
<td>M Libyan Arab Jamahirya</td>
<td>4.5</td>
<td></td>
<td></td>
<td>&gt;200 000</td>
<td>&gt;250 000</td>
<td></td>
</tr>
<tr>
<td>M Lithuania</td>
<td>3.7</td>
<td>10.0</td>
<td>4 913</td>
<td>1.9</td>
<td></td>
<td>&gt;1 43 000</td>
</tr>
<tr>
<td>H Luxembourg</td>
<td>0.4</td>
<td>1.0</td>
<td>19 244</td>
<td>0.2</td>
<td></td>
<td>&gt;1 10 000</td>
</tr>
<tr>
<td>M Malaysia</td>
<td>17.9</td>
<td>41.5</td>
<td>6 140</td>
<td>6.7</td>
<td></td>
<td>&gt;90 000</td>
</tr>
<tr>
<td>L Maldives</td>
<td>0.2</td>
<td>0.1</td>
<td></td>
<td>0.1</td>
<td></td>
<td>1.7 kn</td>
</tr>
<tr>
<td>L Mali</td>
<td>8.2</td>
<td>2.3</td>
<td>572</td>
<td>2.0</td>
<td></td>
<td>5.4</td>
</tr>
<tr>
<td>H Malta</td>
<td>0.4</td>
<td>2.0</td>
<td>0.1</td>
<td></td>
<td></td>
<td>1.9</td>
</tr>
<tr>
<td>L Mauritania</td>
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<td></td>
<td>0.7</td>
<td></td>
<td></td>
<td>0.5</td>
</tr>
<tr>
<td>M Moldova</td>
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<td></td>
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<td>&gt;558 000</td>
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<tr>
<td>H Netherlands</td>
<td>14.9</td>
<td>259.0</td>
<td>15 695</td>
<td>7.0</td>
<td></td>
<td>&gt;251 000</td>
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<tr>
<td>H New Zealand</td>
<td>3.3</td>
<td>43.0</td>
<td>13 481</td>
<td>1.6</td>
<td></td>
<td>1.3</td>
</tr>
<tr>
<td>L Niger</td>
<td>7.7</td>
<td>2.4</td>
<td>645</td>
<td>3.9</td>
<td></td>
<td>0.5</td>
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## EMPLOYING FOREIGN WORKERS

<table>
<thead>
<tr>
<th>Country of origin</th>
<th>Labour force (millions)</th>
<th>Total GDP (US$ billion)</th>
<th>Real GDP per capita (PPP)</th>
<th>Population (millions)</th>
<th>Foreign-born population</th>
<th>Foreign-born as % of total population</th>
<th>Number of workers</th>
<th>Number of employers</th>
</tr>
</thead>
<tbody>
<tr>
<td>M Oman</td>
<td>1.5</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>H Qatar</td>
<td>0.4</td>
<td>7.0</td>
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<td>10.989</td>
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<td>3.0</td>
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<td>460.0</td>
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<td>15.2</td>
<td>35.3</td>
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<td></td>
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<td>53.0</td>
<td>12.48</td>
<td>15.880</td>
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<td>3.0</td>
<td>0.2</td>
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</tr>
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<td>2.689</td>
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<td>4.665</td>
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<td>0.02</td>
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<td>15.1</td>
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<td>8.0</td>
<td>620.0</td>
<td>17.014</td>
<td>4.5</td>
<td>0.2</td>
<td>0.002</td>
<td>0.02</td>
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<tr>
<td>M Swaziland</td>
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<td>200.0</td>
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<td>0.002</td>
<td>0.02</td>
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<td>1.5</td>
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<tr>
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<td>1.5</td>
<td>7.34</td>
<td>1.5</td>
<td>0.2</td>
<td>0.002</td>
<td>0.02</td>
<td></td>
</tr>
</tbody>
</table>

### Notes

- Labour force data are from the International Labour Organization.
- Population data are from the United Nations.
- Real GDP per capita is in terms of purchasing power parity (PPP).

### Source

International Labour Organization.
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<td>7.3</td>
<td>&gt;1,000,000</td>
<td>...</td>
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</table>

1 = ILO estimate; 2 = Data prior to Gulf crisis as of 1 August 1990; 3 = Data excluding Chinese; 4 = Data prior to unification in October, 1990.

SOURCES:
Nationals abroad: national sources; Segal et al., op. cit., and ILO estimates.
The table on "Major migrant-receiving countries" explained

The table provides benchmark estimates for 1990 (or the closest year to it, i.e. 1989 or 1991) in respect of both the international migration and the remittance data shown. The table focuses on countries and territories that have a population of not less than 200,000 persons on their soil (irrespective of whether these are nationals or foreigners) and, among them, selects those that fulfill certain quantitative criteria relating to international migration or remittances. The threshold of 200,000 persons was chosen so as not to overburden the table with numerous small countries whose populations, individually speaking, are comparatively small and which, in toto, do not have a great weight. One should, however, be aware that countries or territories with small populations tend to be disproportionately involved in international economic migration as receiving/immigration countries or territories. For example, Liechtenstein and San Marino would have been included in the table if they had had larger populations.

A level of importance was judged to be useful to distinguish major from minor migration countries. This level was fixed in relation to the size of the human stock of migrants (population data) as well as in relation to the economic implications of those who are economically active (remittance data).

Population data (stock data)

Countries or territories (Hong Kong) are defined as major receiving/immigration countries or territories:

- either if 2 per cent or more of their populations are non-nationals and there are at least 200,000 foreign passport-holders present;
- or if 1 per cent of their economically active populations are made up of non-nationals and at least 100,000 such persons, on the assumption that about 50 per cent of a population is, on average, economically active.

Statistics on foreign nationals tend to be collected by countries that prefer to view foreigners as temporary stayers rather than permanent immigrants, whereas most of the so-called settlement countries or territories, and some others, collect data on foreign birth. To make the settlement countries’ or territories’ statistics as comparable as possible with those of the so-called temporary countries or territories, and assuming a current rate of naturalization of foreign-born persons of the order of 50 per cent, the selection criteria were doubled to:

- either 4 per cent or more of their populations having being born abroad, comprising a minimum number of 400,000 persons;
- or 2 per cent or more of the labour forces being made up of foreign-born persons and in any case 200,000 such persons, the simplifying assumptions concerning activity (50 per cent) and naturalization (50 per cent) being identical to those used previously.

No distinction was made as to whether economically active migrants are in seasonal employment, admitted under other temporary auspices or without limit of time.

Migrants who are undocumented or in an irregular situation as regards their stay or economic activity are included in the figures wherever a relatively uncontested or conservative estimate was available.

Given the concern with international economic migration, refugees are excluded from the table’s figures on non-nationals. This was impossible, however, where the table shows data on foreign-born populations or foreign-born economically active persons. Those figures may be slightly inflated relative to the figures on non-nationals; but as a cross-check will
confirm, this effect is immaterial to the inclusion of a country or territory in the "whole" itself. Totally disregarded are estimates of "diasporas", i.e. ethnic communities abroad, because they originate, in very many cases, from political flight rather than strictly economic motivations.

Remittance data (flow data)

The economic dimension is an independent determinant of whether or not to select countries or territories for the table, i.e. irrespective of whether the population criteria include or exclude it. This economic dimension is operationalized through remittance data that derive from the economic activities of non-nationals or foreign-born persons.

Countries or territories are identified as major receiving/immigration countries if the outflow of remittances from them (indicated by a minus sign) is in excess of 2 per cent of their GNP where their population statistics are collected on the basis of foreign origin rather than nationality, and where they exceed 1 per cent of their GNP in the case of so-called temporary labour import of non-nationals.

In both remittance columns, the first row relating to a particular country or territory always gives the volume of receipts (inflow) occasioned by nationals who are abroad, and the second row the volume of remittances leaving the country or territory (outflow, indicated by a minus sign) occasioned by foreigners on its soil.

A distinction is made, according to the IMF/World Bank statistics drawn upon:

between "long stayers' remittances", which are received from nationals who are economically active abroad for a period of more than one year;

and "short stayers' remittances", which are receipts from economically active nationals abroad who were there for a period of less than one year, usually seasonal or transient migrants.

Where remittances are available for only one of the two categories, a country or territory will be included in the table if either of the remittance indicators comes up to the required level. If both are available and the two added together exceed 1 or 2 per cent of GNP, depending on the policy regime, the country or territory is likewise selected. Where the IMF statistics included not only workers' remittances but also other transfer payments of unknown size, countries or territory have been left out of the table for lack of precision.

Some remittance figures lead to the inclusion of countries or territory where the migration data do not reach the level of significance, which is due to considerable wage differentials between sending and receiving countries or territories. This would explain the inclusion of Mali, for example. In the case of low-income developing countries or territories whose total populations are not very large, they appear in the table because the numerically small expatriate population on their soil remits sizeable amounts of relatively high earnings (see, for example, Congo and Mauritania.)

The prefixes H (= High-income country or territory), M (= Middle-income country or territory) and L (= Low-income country or territory) derive from the World Bank's classification of these countries in 1990.

A total of 67 countries or territories were identified by the various criteria as major receiving/immigration countries. This demonstrates the growing importance of international economic migration and is certainly an underestimate because of the fact that good recent estimates are lacking for most African and Latin American countries.

The work of strangers: A survey of international labour migration, by Peter Stalker

The migration of workers across international boundaries has a major impact worldwide. This highly topical study provides a lively analysis of labour migration - its volume and characteristics, and the many issues it raises. The book first paints an overall picture, and then examines the recent experience of some 20 countries and several regions. Contains numerous charts and tables, and a comprehensive "global economic migration table". "... an extremely useful book. It reflects an admirable survey of the literature..." (Philip Martin, International Migration Review, New York).

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Edited by Guy Standing and Victor Tokman

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