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► Enhancing the effectiveness of legal pathways for labour migration in ASEAN

Thematic background paper for the 16th ASEAN Forum on
Migrant Labour

Supported by



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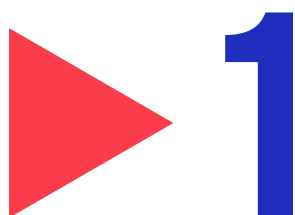
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Introduction and background

Each year, the ASEAN Forum on Migrant Labour, or AFML, brings together representatives from governments, employers' organizations, workers' organizations and civil society organizations of the Member States of the Association of Southeast Asian Nations (ASEAN)¹ to review, discuss and exchange good practices on labour migration governance. The AFML concludes with the adoption of recommendations that advance the implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, 2007 (Cebu Declaration) and the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers, 2017.

The International Labour Organization (ILO) through its TRIANGLE in ASEAN programme,² with the International Organization for Migration, UN Women and the Taskforce on ASEAN Migrant Workers, support the AFML annually. In preparation for the 2023 forum, TRIANGLE in ASEAN collaborated with ministries responsible for labour in several ASEAN Member States to co-host national tripartite-plus workshops to review the progress made in implementing the previous AFML recommendations and to discuss and draft national recommendations on the 16th AFML theme: **Enhancing the Effectiveness of Legal Pathways for Labour Migration in ASEAN**.

1.1 16th ASEAN Forum on Migrant Labour

The Government of Indonesia hosted the 16th AFML on 25–26 October 2023 in its capacity as chair of the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW). This background paper was prepared to inform and guide discussions on the theme **Enhancing the Effectiveness of Legal Pathways for Labour Migration in ASEAN** and its two subthemes.

- **Subtheme 1: Improving labour migration programmes in ASEAN:** This subtheme focused on reviewing current forms of temporary labour migration in ASEAN – work permit systems, bilateral labour agreements, memoranda of understanding and domestic migrant worker, seasonal worker and border pass schemes – with a view to consider how to make them more gender-responsive, safe, affordable, accessible and efficient. The discussions examined the challenges related to migration pathways, including recruitment fees and related costs, length of process and limited rights protection. They also looked at good international and regional practices in facilitating temporary labour migration in ways that are effective and protect migrant workers' rights while empowering them. The discussion also encompassed labour market access for admitted migrant workers, including approaches to allowing changes in employer regardless of the sector, and the role of digital platforms for enhancing transparency and efficiency in the process of sending and receiving workers.

1 The ten Member States of ASEAN: Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam.

2 The TRIANGLE in ASEAN programme is a partnership between the Australian Department of Foreign Affairs and Trade, Global Affairs Canada and the ILO.

► **Subtheme 2: Ensuring legal migration pathways are inclusive and responsive to the labour market:**

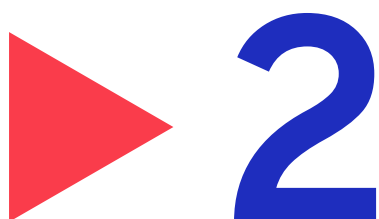
This subtheme centred on aligning labour migration pathways with labour market and skills demands in ASEAN labour markets. The session looked at different ways for governments to respond to labour and skills shortages, including identifying in-demand occupations based on labour market information and forecasts and ways to increase skills development and facilitate mutual recognition of skills, qualifications and competencies for all migrant workers, especially women. The session also considered the restrictions, exclusions in law and practice that limit opportunities, particularly for women to migrate safely and orderly, and the ways to expand and diversify regular pathways to ensure they are inclusive and accessible for all migrant workers.

1.2 About this paper

This paper is structured around the two subthemes of the 16th AFML. Subtheme 1 discusses the current model of temporary migration, including some of the challenges. These include the practical barriers to aspiring migrants in accessing the regular migration pathways and also the lack of incentive to do so. The second subtheme discusses the ways that legal pathways could be made more inclusive and responsive to market needs. The paper builds upon the discussions at and recommendations from the past AFMLs, which cover all aspects of labour migration governance and the protection of migrant workers' rights (box 1).

► **Box 1. Previous themes of the annual ASEAN Forum on Migrant Labour**

- 1st AFML 2008: Institutionalization of the ASEAN Forum on Migrant Labour
- 2nd AFML 2009: ASEAN Declaration on Migrant Workers: Achieving Its Commitment
- 3rd AFML 2010: Enhancing Awareness and Information Services to Protect the Rights of Migrant Workers
- 4th AFML 2011: Development of a Public Campaign to Promote Understanding, Rights and Dignity of Migrant Workers in Countries of Destination: Return and Reintegration and Development of Sustainable Alternatives in Countries of Origin
- 5th AFML 2012: The Protection and Promotion of the Rights of Migrant Workers: Towards Effective Recruitment Practices and Regulations
- 6th AFML 2013: Enhancing Policy and Protection of Migrant Workers Through Data Sharing and Adequate Access to the Legal and Judicial System During Employment, Including Effective Complaints Mechanism
- 7th AFML 2014: Towards the ASEAN Community by 2015 with Enhanced Measures to Protect and Promote the Rights of Migrant Workers
- 8th AFML 2015: Empowering the ASEAN Community Through the Protection and Promotion of the Rights of Migrant Workers
- 9th AFML 2016: Better Quality of Life for ASEAN Migrant Workers Through Strengthened Social Protection
- 10th AFML 2017: Towards Achieving Decent Work for Domestic Workers in ASEAN
- 11th AFML 2018: Digitalization to Promote Decent Work for Migrant Workers in ASEAN
- 12th AFML 2019: Future of Work and Migration
- 13th AFML 2020: Supporting Migrant Workers During the Pandemic for a Cohesive and Responsive ASEAN Community
- 14th AFML 2021: Recovery and Labour Migration in the Post-Pandemic Future
- 15th AFML 2022: Resumption of Labour Migration and Regional Cooperation



Overview of labour migration in the ASEAN region

2.1 Legal pathways for temporary labour migration

Across the ASEAN region, legal pathways for temporary labour migration consist of memoranda of understanding (MOUs), bilateral labour agreements and admission policies. ASEAN net countries of origin – Cambodia, Indonesia, Lao People's Democratic Republic, Myanmar, Philippines and Viet Nam – have MOUs with multiple countries of destination in and outside of the ASEAN region (ILO 2023a). Since 2020, at least 15 new MOUs were signed (table 1).

► Table 1. MOUs signed by ASEAN Member States since 2020

Date	MOU	Content
February 2020	Thailand and Japan	A Basic Framework for Information Partnership for Proper Operation of the System Pertaining to Foreign Human Resources with the Status of Residence of “Specified Skilled Worker” (14 occupations)
June 2020	Viet Nam and Japan	Special visa for Vietnamese migrant workers in Japan
July 2020	Thailand and Israel	Thailand-Israel Cooperation on the Placement of Workers
June 2021	Philippines and Romania	Increase hiring of Filipino workers
October 2021	Philippines and United Kingdom and Northern Ireland	Recruitment of Filipino nurses and other healthcare professionals
November 2021	Philippines and United Kingdom	Recruitment of Filipino nurses and other health care professionals
December 2021	Malaysia and Bangladesh	Recruitment of Bangladeshi workers
March 2022	Lao PDR and Republic of Korea	IT skills training for potential migrant workers

Date	MOU	Content
March 2022	Philippines and Yukon, Canada	Employment and protection of Filipinos under the Yukon Nominee Programme
March 2022	Thailand and Saudi Arabia	The export of Thai labour
March 2022	Viet Nam and Malaysia	Recruitment, employment and repatriation of workers
March 2022	Viet Nam and Australia	Support for Vietnamese citizens to participate in the Australian Agriculture Visa Programme
April 2022	Indonesia and Malaysia	The employment and protection of Indonesian domestic migrant workers in Malaysia
June 2022	Philippines and Germany	Recruitment of Filipino healthcare professionals
June 2022	Viet Nam and Japan	Special visa for Vietnamese migrant workers in Japan
July 2022	Lao PDR and Japan	Memorandum of cooperation on sending skilled workers to Japan
October 2022	Philippines and Alberta, Canada	Recruitment of Filipino nurses
March 2023	Cambodia and Malaysia	Recruitment, employment and repatriation of workers
March 2023	Cambodia and Malaysia	Recruitment and employment of domestic workers

Source: Adapted and updated from ILO 2023a.

The ASEAN net countries of destination have varying systems to admit foreign migrant workers. Singapore manages admission of migrant workers through a multitiered system of work passes covering all skill levels. Malaysia and Thailand admit migrant workers for limited periods of time to elementary occupations in specific permitted sectors or occupations through bilateral MOUs, with different policies governing admission of highly skilled “expatriates”. For example, the MOU between Indonesia and Malaysia allows domestic workers to work for two years, with the possibility of a maximum of one-year extension (ILO 2019a). In Thailand, the MOUs allow migrant workers to stay for two years, with the possibility of a two-year extension. In addition, Thailand manages a three-month renewable border pass scheme for the employment of migrant workers in the border areas (ILO 2020a). Thailand also has a ten-year visa that allows stateless persons to work (ILO 2019b).

Although millions of migrant women and men leave their home to work abroad through these legal pathways each year, they do not represent all the labour mobility in the ASEAN region. A large proportion of labour migration takes place through irregular pathways. An ILO survey in 2020 of migrant workers from Cambodia, the Lao People's Democratic Republic and Myanmar who were working in Thailand found that only 36 per cent of them had entered the country through a regular channel (ILO 2020a). A joint ILO and International Organization for Migration study in 2017 found that only 26 per cent of migrant workers from Cambodia, the Lao People's Democratic Republic, Myanmar and Viet Nam who were working in Thailand and Malaysia had used a regular labour migration pathway (ILO 2017). In a more recent but smaller study of 74 Lao migrants who had worked in Thailand, only 12 had migrated through a channel designated by the MOU process (ILO 2023b).

There are many ways in which migrant workers can find themselves in an irregular situation. Many of them enter a country of destination through a regular channel but later fall into an irregular situation either through no fault of their own or by choice. Many persons also enter through an irregular channel but become regularized in the country of destination through a recalibration (Malaysia) or nationality verification (Thailand) process. For example, around 74 per cent of the 2.3 million regular migrant workers were regularized after their arrival in Thailand, according to Ministry of Labour statistics (September 2023). This indicates that the migration status of a migrant worker is a fluid concept: It may change several times during their labour migration journey.

Table 2 reflects the latest data on labour migrants in Malaysia, Singapore and Thailand. However, the data do not provide a full picture of labour migration across the region due to the difficulties in fully capturing the migrant population, especially irregular migrants, in national statistics.

► **Table 2. Regular and irregular labour migrants in Malaysia, Singapore and Thailand**

Malaysia	Singapore	Thailand
2,090,900 ^a regular migrant workers comprising:	1,424,200 ^b regular migrant workers, including:	2,336,125 regular migrant workers comprising:
• 683,600 women, 1,407,300 men • 690,659 (33%) from Indonesia	• 268,500 registered migrant domestic workers • 185,800 Employment Passes (for foreign professional, manager and executives) • 184,400 S Passes (for skilled workers, including associate professionals and technicians)	• 1,048,471 women, 1,287,654 men • 588,448 MOU migrant workers • 15,256 migrant workers on a border pass • 1,732,421 workers regularized in Thailand
1,228,000 ^d estimated irregular migrant workers	No estimate for irregular migrant workers	810,000 ^e estimated irregular migrant workers

Source: a= ILOSTAT and the 2020 Malaysia Labour Force Survey; b= Singapore's Ministry of Manpower, as of 2022 (not disaggregated by sex); c= Office of Foreign Workers Administration, Department of Employment, Ministry of Labour, as of September 2023; d=World Bank 2017; e= United Nations 2018.

Objective 5 of the Global Compact for Migration is “Enhancing availability and flexibility of pathways for regular migration”. The core strategy in realizing this objective is increasing the effectiveness of legal pathways so that they can be a viable alternative to irregular migration (box 2). The Global Compact for Migration is an inter-governmental agreement covering international migration in a holistic and comprehensive manner. It was adopted in 2018 to support international cooperation on the governance of international migration.

► **Box 2. Enhancing availability and flexibility of pathways for regular migration in the Global Compact for Migration**

Objective 5 of the Global Compact for Migration is “Enhancing availability and flexibility of pathways for regular migration”. This commitment requires adaptation of options and pathways for regular migration in a manner that facilitates labour mobility and decent work and that reflects labour market realities. Actions under this objective include developing flexible, rights-based and gender-responsive labour mobility schemes for migrants, in accordance with local and national labour market needs and skills supply at all levels. Such schemes may include temporary, seasonal, circular and fast-track programmes in areas of labour shortages. They are intended to provide flexible, convertible and non-discriminatory visa and permit options for permanent or temporary work, multiple-entry study, business, visiting travel, investment and entrepreneurship.

2.2 Challenges to legal migration in the ASEAN region

Regular migration pathways have the potential to be highly beneficial for countries of origin and destination. Regular migration can help formalize the informal economy in countries of destination and promote the rule of law and good governance. They can result in increased tax revenue and social security contributions. They can foster transparency over recruitment and its costs. For countries of origin, regular migration allows governments to better prepare and protect their nationals when working abroad and to promote the rule of law and good governance. Regular migration flows facilitate labour diplomacy, the continuation of labour market access and the extension of MOUs, all of which are threatened by undocumented migration.

Many workers migrate through a regular migration pathway because of its promise of strong legal and social protection and the expectation of better working conditions and because it is the right thing to do. Equally, many employers comply with the law and hire migrant workers through legal pathways. There are, however, some persistent challenges to the success of regular temporary labour migration programmes in the ASEAN region. Because of these challenges, irregular migration pathways continue to function, drawing in aspiring migrant workers and employers needing workers. Understanding the challenges to the legal migration pathways helps to determine the critical changes needed in labour migration policies to enhance the effectiveness and attractiveness of temporary labour migration programmes (table 3).

► **Table 3. Challenges confronting regular labour migration pathways**

For employers, hiring of migrant workers through regular pathways is challenging because of...	For workers, migrating regularly is challenging because...
• the long, complicated process; • the high cost (recruitment costs, levy, security bond); • uncertainty to get the quota they need; • workers may not be appropriately skilled or experienced or unfamiliar to life in the country of destination; or • limited length of stay thus high turnover.	• few jobs are available and may be limited by gender, sector or age; • the wait before departure is a long, complicated process; • the high cost means possible indebtedness and salary deductions; • the ability to change employers is limited; or • the length of stay is limited.

Some characteristics of the ASEAN region facilitate irregular labour migration. First, the porous borders in some ASEAN labour migration corridors enable irregular migration. Second, although the hiring of migrant workers in irregular situations is illegal in all ASEAN countries of destination, lax enforcement of this prohibition allows labour markets for irregular migrant workers to thrive. The availability of jobs and the lack of decent work options at home attracts workers to cross the border informally. In this context, irregular migration may seem a viable option for employers and workers alike. See table 4 for the factors underlying irregular migration.

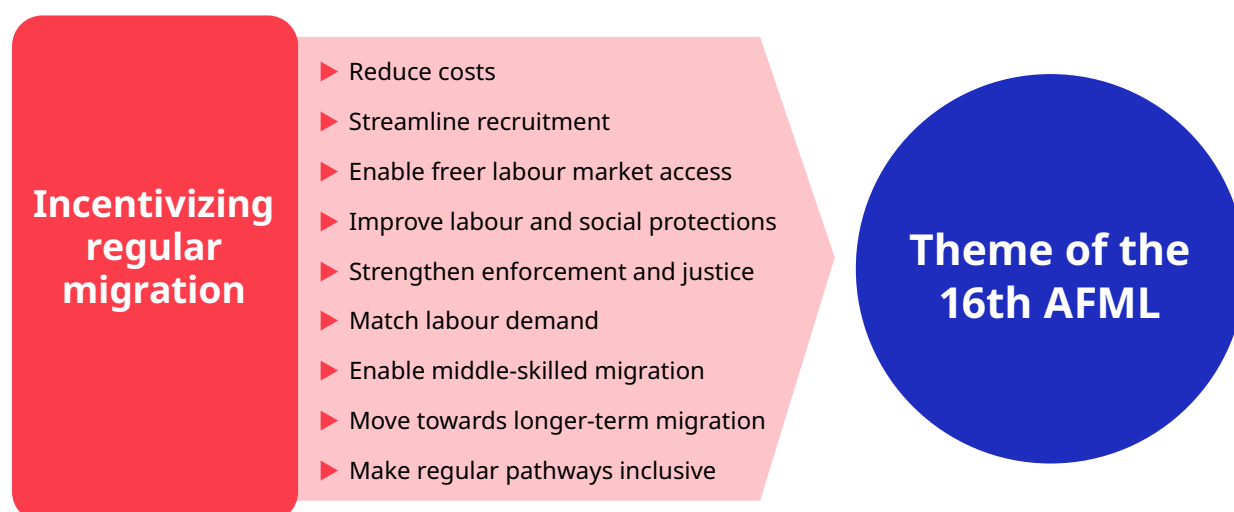
► **Table 4. Factors underlying irregular migration**

For employers, the hiring of migrant workers in an irregular situation may seem attractive (even if illegal) because...	For workers, migrating irregularly or overstaying may seem attractive (even if illegal) because...
• migrants can be hired immediately in-country; • there is no recruitment cost, levy or security deposit; • there is no time limitation on length of stay; • the workers are already experienced and well-settled in the country of destination; or • recruitment can follow the skills required by the job.	• it is faster and cheaper; • there is possibility for regularization (in some countries); • working conditions are perceived as not much different from workers in regular status; • workers can change jobs; or • there are no restrictions on gender, sector, health, disability, age, etc.

The Risks and Rewards study that the ILO and the International Organization for Migration conducted in 2017 (ILO 2017b) assessed the outcomes of migration in the ASEAN region for 1,808 migrant workers from Cambodia, Lao People's Democratic Republic, Myanmar and Viet Nam. More than half of them (56 per cent) were in a regular situation, with 44 per cent thus in an irregular situation. The study found that migration outcomes appear to be heavily dependent upon how effectively labour migration policies are implemented for specific migration corridors. In other words, most positive outcomes are achieved when migrant workers are provided with opportunities to enhance their job skills, avoid debt, receive the minimum wage and find gainful employment upon return.

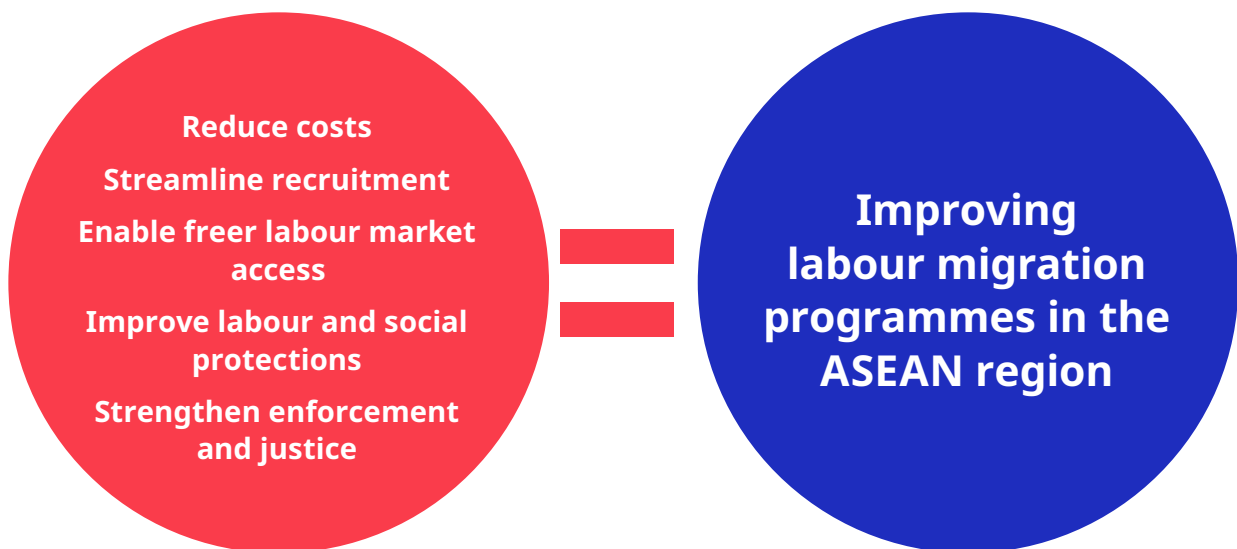
Regular migration, while desirable from several perspectives, including allowing States to design programmes to better protect workers' rights, must be implemented in a rights-based manner to reduce the risks for migrant workers and to ensure incentive to regular migration. Thus, the optimum strategy for reducing irregular migration in the ASEAN region is to increase the attractiveness of regular pathways by diminishing the challenges they represent (figure 1).

► **Figure 1. Incentivizing regular migration**



▶ 3

AFML subtheme 1: Improving labour migration programmes in ASEAN



As introduced previously, there are multiple and intersecting reasons why irregular migration remains a significant feature of labour migration in the ASEAN region. To improve labour migration programmes and reduce irregular migration, it is necessary to look at how to improve the effectiveness of the MOUs, bilateral labour agreements and admission policies and regulations that facilitate labour migration and protect migrant workers.

This section looks at the practical barriers that prevent aspiring migrants and employers from accessing regular pathways, including costs and time. It also looks at the incentive scenario, arguing that the lack of employment mobility and the limited access to labour and social protections and effective remedies ultimately de-incentivize aspiring migrants from regular pathways.

3.1 Reduce recruitment costs and eliminate worker paid fees

A common barrier to regular pathways is the high cost. The ILO's Private Recruitment Agencies Convention, 1997 (No. 181) and the ILO General Principles and Operational Guidelines on Fair Recruitment prohibit charging of recruitment fees and related costs to workers. Realizing this principle in the ASEAN region through imposing zero fee legislation is crucial in making regular pathways attractive for migrant workers and their employers.

An ILO study (2020a) on the costs paid by labour migrants from Cambodia, Lao People's Democratic Republic and Myanmar when migrating to Thailand found that regular migrants paid more for securing a job than persons who went through an irregular channel. The total cost paid by workers strongly related to whether the worker went through an agency or broker or not. On average, these workers paid an equivalent of two months' wages to find a job in Thailand (ILO 2020a). Another study of seasonal workers in Thailand found that the use of brokers or middlepersons to secure a border pass for Thailand outside of the formal channel resulted in migrants paying more than five times the prescribed cost of the border pass (Winrock 2023). A study of migration pathways from the Lao People's Democratic Republic similarly found that payments made by migrant workers using the legal pathways were more than the legal limits and higher than the average paid by irregular migrants (ILO 2023b).

The lengths that migrant workers need to go to pay fees and costs can negate any development gains of migration. Many of them sell assets or go into debt, either with a broker or their employer, which can mean they end up overpaying. While the dominant paradigm of regular labour migration in the region remains in which migrant workers pay recruitment fees and related costs to secure a job abroad, some countries have made progress towards zero-fee recruitment (box 3).

Hiring migrant workers can be expensive for employers too, especially where they are expected to pay security bonds and levies. Levies can take the form of regular payments for each migrant worker employed (MOM 2023a; MOHA 2023). Security bonds are commonly a one-off payment (in Singapore, it is S\$5,000) for each worker to cover the cost of an employer or migrant worker breaking the law. The security bond is returned only when the work permit is cancelled and the migrant worker returns home. Removing the levy and security bond payments may incentivize recruitment of migrant workers through regular channels for employers (see also section 3.3).

An interesting finding from the ILO study (2020a) on the costs paid by labour migrants from Cambodia, Lao People's Democratic Republic and Myanmar to migrate to Thailand is that the most of what was paid by the migrant workers (who did not use an agency or broker) was for official documents issued by the government in the countries of origin and destination. As much as 70 per cent of the cost covered the expense of the passport, visa, ID card, work permit, registration card, police or security clearance and exit clearance (ILO 2020a) (table 5). This indicates that if there was political will, governments could significantly reduce the recruitment costs for employers and workers by lowering the price for the government documents or providing them free of charge to migrant workers. Such fee exemption could help make regular labour migration pathways more accessible for migrant workers and their employers.

► **Table 5. Average contribution to total recruitment costs for survey respondents who did not make a payment to an agency or broker**

Cost item	Mean item cost (US\$)	Per cent contribution to total cost (%)
Average total cost of coming to work in Thailand	328	100
1. Visa	72	22
2. Passport	67	20
3. Work permit	58	18
4. Travel to Thailand	45	14

Cost item	Mean item cost (US\$)	Per cent contribution to total cost (%)
5. Medical exam	28	9
6. Travel within Thailand	20	6
7. Thai registration card (Pink Card)	18	6
8. Police or security clearance	12	4
9. Payment to the employer	4	1
10. Overseas worker card	1	0
11. Exit clearance from the home government	1	0
12. Bribes to authorities	1	0
13. Health/life insurance	1	0
14. Language training	-	0
15. Skill certificate or test	-	0
16. Contract approval from the home government	-	0
17. Pre-departure training or briefing	-	0
18. Overseas migrant welfare fund	-	0

Note: Survey of migrants from Cambodia, Lao People's Democratic Republic and Myanmar who had migrated to Thailand.

Source: ILO 2020a.

There is growing support for the position that costs and fees related to the recruitment of migrant workers should not be paid by the worker. This important principle is a core provision in the ILO Private Employment Agencies Convention, 1997 (No. 181), which stipulates that workers shall not, directly or indirectly, be charged any fees related to their recruitment and placement (article 7(1)). The ILO general principles and operational guidelines for fair recruitment and the definition of recruitment fees and related costs³ reiterate this Convention provision and provide a definition of recruitment-related costs and fees not to be paid by workers. The importance of reducing the cost of recruitment is also recognized in the 2030 Agenda for Sustainable Development, under a dedicated indicator, SDG indicator 10.7.1, whereby the charging of recruitment fees and related costs to migrant workers should be eliminated to reduce their vulnerability to labour abuse and exploitation, including indebtedness.

3 The principles and guidelines were developed by a Tripartite Meeting of Experts in 2016, the general principles and guidelines inform current and future work of the ILO and of other organizations, national legislatures and social partners on promoting and ensuring fair recruitment.

► **Box 3. Zero-fee recruitment in the ASEAN region**

The charging of recruitment fees and related costs to migrant workers is prohibited in the ILO's Private Employment Agencies Convention, 1997 (No. 181) and the general principles and operational guidelines for fair recruitment and the definition of recruitment fees and related costs. Exceptions relate to costs that are subject to consultations with social partners and under certain conditions. The dominant paradigm of regular labour migration in the ASEAN region remains that migrant workers pay recruitment fees and related costs to secure a job abroad. But some countries have made progress towards zero-fee recruitment:

In **Indonesia**, article 30 of the Law on Protection of Migrant Workers (No. 18/2017) provides that migrant workers shall not be charged placement fees, unless such fees are prescribed by a Decree. Implementation of this prohibition is supported by the Indonesian Migrant Workers Protection Agency regulation 9/20 (amended in 1/2021) and its Decree 214/2021.

In the **Lao People's Democratic Republic**, Ministry Agreement No. 1050 on the Management of Employment Service Enterprises provides clear guidance on the elimination of worker-borne fees. It requires that employment service enterprises cover the cost of most fees associated with the recruitment of migrant workers, including documentation, travel, training, food and accommodation. It also prohibits these enterprises from charging "workers employment service fees".

Thailand has incorporated the principle of zero recruitment fees for migrant workers into the Royal Ordinance Concerning the Management of Foreign Workers, 2017. Section 42 states: "In bringing foreign workers to work with the employers in the Kingdom, the licensee who is permitted to bring in foreign workers or the employee who performs duties relating to bringing foreign workers to work are prohibited to demand for or receive money or any other property from the employer or the foreign worker other than service fee or cost from the employer according to the list and rate prescribed by the Director-General." Section 5 defines "fee" as "money or other benefits given in return for the bringing of foreigners for working" and defines "licensee who is permitted to bring in foreign workers" as "an operation of business that brings in foreign workers to work with the employers in the Kingdom who is granted a license to bring in foreign workers". The Ministry of Labour has yet to develop secondary legislation specifying a list of "recruitment costs not to be paid by migrant workers". Until this secondary legislation has been developed, the current legal framework stipulates that migrant workers must not be charged a "recruitment service fee", but they are responsible for covering the recruitment-related cost for the work permit, passport and medical check-up.

In **Viet Nam**, the Law on Contract-Based Vietnamese Overseas Workers 69/2020/QH14 (Law 69) was adopted in 2020 and came into force in January 2022. Important changes introduced in the law include:

- the removal of the obligation for migrant workers to pay service fees in addition to brokerage commission to public employment services;
- if part or all of the service fee is covered by employers or foreign receivers, then workers will only pay for any remaining amount required under the law;* and payment of brokerage commissions to the counterpart recruitment agency, if any, by workers is eliminated;
- the ability for migrant workers to unilaterally liquidate a contract in the event of threats, sexual harassment, maltreatment or forced labour;
- inclusion of definitions for discrimination and forced labour that are in line with ILO Conventions No. 111 and No. 29;**
- a provision for legal aid in cases of abuse, violence or discrimination while working abroad;
- specific wording about gender equality in the stated goals;

- prohibition on deceitful advertising for the purpose of organizing trafficking in persons, abusing recruitment activities to illegally collect fees and charging brokerage fees, backed up with a sanction of revocation of recruitment agency license for violation of these prohibitions; and
- predeparture training must include information on forced labour, trafficking in persons prevention, gender equality, sexual abuse and gender-based violence prevention skills.

Note: *=The fee permitted is still exceptionally high, equivalent to three months' wages in a destination country. **=Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and Forced Labour Convention, 1930 (No. 29).

Source: TRIANGLE in ASEAN.

3.2 Make recruitment processes faster and more efficient

The process of regular migration can also be lengthy and complicated, although the time taken to process recruitment and placement can vary depending on the sector of work and country of destination (ILO 2020b). The ILO study (2017b) looking at migration pathways to Thailand found that migrating regularly was three times longer than going irregularly, at 104 days versus 33 days. Similarly, the study of pathways from the Lao People's Democratic Republic reported that recruitment agency staff said it takes them from 1.5 to 3 months to prepare all the required legal documents involved in the MOU migration process (ILO 2023b). Migrants from the Lao People's Democratic Republic study who had made use of irregular channels said that the process was much simpler and the costs and fees involved were generally small or non-existent. Coupled with the availability of jobs in countries of destination and the prospect of a high salary, many migrant workers decide to take the greater initial risk of migrating informally through a porous border in exchange for ease and affordability. With limited access to information, training and regular migration channels as well as scarce resources – all of which are even more restricted for women – migrant workers make use of the migration channels available to them. For many, it becomes a matter of “choosing” the least-bad option (ILO 2017; ILO 2020a; ADBI, OECD and ILO 2021).

States should streamline and simplify migration processes to make regular migration channels attractive and accessible for migrant workers without compromising the protection of their labour rights. In particular, digitizing recruitment, deployment and admission processes and regulating the maximum processing time for each step can be helpful in making the migration process move faster. Platforms should be developed with the involvement of migrant workers and with the expressed intention of meeting their needs. They should also guarantee compliance with privacy and internet laws and benefit from regular monitoring and active enforcement (box 4).

► **Box 4. Good practices – Government digital platforms in India and Sri Lanka**

The use of information and communication technologies and digital technologies can directly address some of the challenges facing temporary labour migration programmes. Government and non-government migration stakeholders alike have turned to technological and digital solutions to enable, for example, efficient and transparent document processing, management of data and remittance services. The role of technology in facilitating the recruitment and emigration of migrant workers has become a well-established process in countries with long-standing labour migration programmes, like India and Sri Lanka.

In **India**, recruitment-related functions and services in eMigrate focus on the regulation of recruitment, including approval of demand, and the streamlining of administrative processes. As a protective measure, Indian nationals who have not completed secondary education and are deemed to be more at risk of exploitation must obtain emigration clearance. This process includes examination of the employer, the job offer and the employment contract as well as obtaining insurance. The process of obtaining emigration clearance is fully integrated into eMigrate.

In **Sri Lanka**, the portal created by Sri Lanka Bureau of Foreign Employment (SLBFE) covers labour market information; placement and regulation of recruitment; job order (demand) attestation and approval; registration of migrant workers, recruitment agencies and employers; and a complaint management system.

Unlike the SLBFE portal, India's eMigrate does not provide services or information on employment opportunities and jobseekers (job placement and matching).

Both systems have led to greater transparency and accountability for the government, employers (in particular in the case of eMigrate) and recruitment agencies. eMigrate represents an integrated online system across government agencies in India. It is a fully online system with streamlined administrative processes. The SLBFE portal also features a good degree of coordination and integration between the Sri Lankan missions abroad and the capital-based agencies and brings together the relevant parties (recruitment agencies and migrant workers). It is, however, not yet a fully online system.

Limitations of both platforms include low direct use by migrant workers (who rely on intermediaries, such as recruitment agents). As well, the digital platforms must struggle with the digital divide. Participatory design can ensure that all users (especially migrant workers) can access and use the platform.

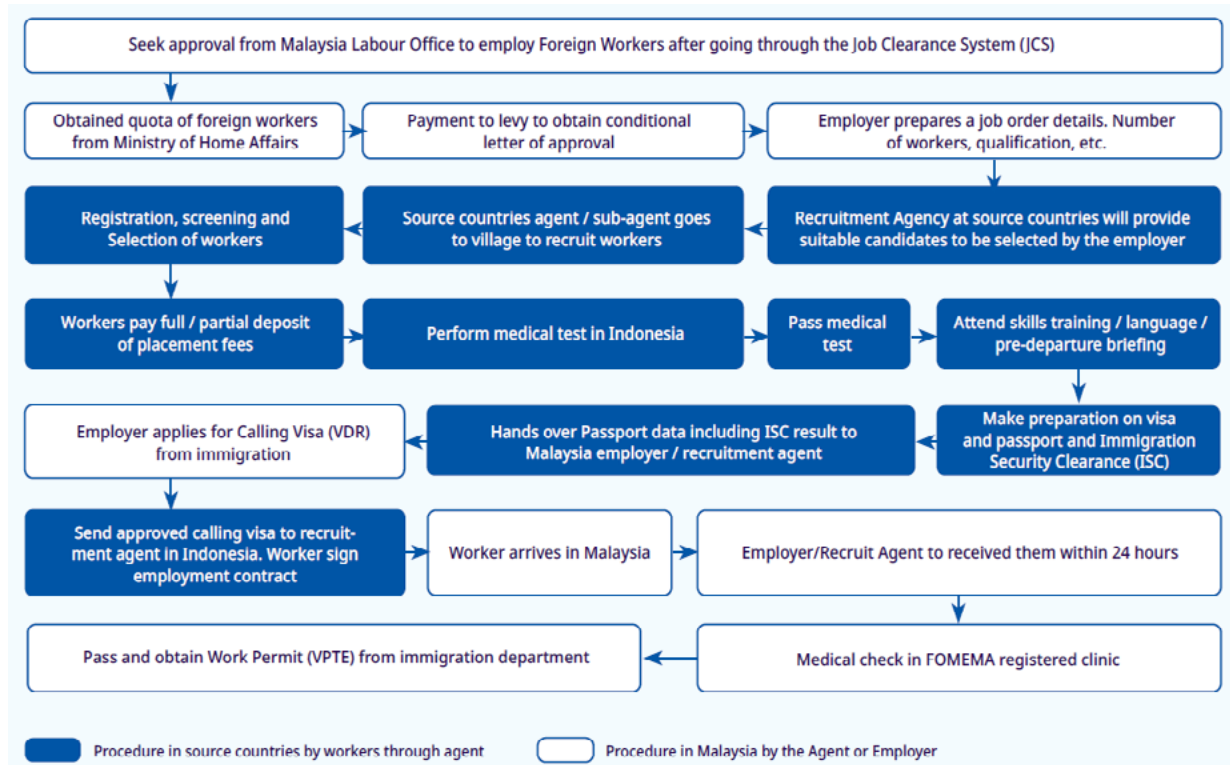
eMigrate enables online payment methods, which makes the payments related to emigration clearance transparent. The SLBFE portal lacks this facility. For most job placements, migrant workers rely on private recruitment agents who may charge illegal fees and costs. While introduction of the online processes would impact migration costs for the worker by making certain processes transparent (for example, emigration clearance in India) and providing for direct recruitment (as in the case of Sri Lanka), measures to address high recruitment costs paid by workers would need additional and broader measures.

Limitations, such as the continuation of employment contract substitution, despite checks in the system prior to emigration and departure, point to the importance of bilateral and international cooperation, including the integration of some aspects of the online system with systems in countries of destination.

Source: ADBI, OECD and ILO 2023.

Figure 2 illustrates the formal procedures to employ Indonesian migrant workers for the plantation sector in Malaysia (2019). Blue boxes of the flowchart mark steps required in Indonesia (country of origin) while the white boxes mark steps needed in Malaysia (country of destination). Digitizing the processes could make the 19 steps faster and smoother. In addition, replacing the employer-led system to control the number of migrant workers admitted with a more systemic assessment of labour market needs could cut out the first three steps of the process (see section 4.1). Removing duplicative medical tests (see sections 4.4.) could further cut the lengthy process one or two steps. Such approaches to make legal pathways less complicated and time-consuming are core to making them more attractive to migrant workers and their employers.

► **Figure 2. Steps involved in formal procedures to hire Indonesian migrant workers for the plantation sector in Malaysia**



Source: ILO 2020b.

3.3 Enable labour market access to admitted migrant workers

Even with streamlined recruitment processes and lower costs, hiring migrant workers from overseas is always going to be more time-consuming and expensive than hiring them locally. It therefore makes sense to make the hiring and re-hiring of migrant workers already present in the country of destination legal and regulate it accordingly. Employers prefer to hire migrant workers who are already accustomed to the working life in the country of destination instead of recruiting unfamiliarized migrant workers from abroad. Allowing migrant workers to change employers and look for new jobs in the country of destination when their contracts expire would also be in the interest of migrant workers and help encourage them to maintain their regular migration status.

In Malaysia, Singapore and Thailand, migrant workers work permits and visas are tied to one employer. For example in Malaysia, the Visitor's Pass (Temporary Employment) ties the migrant worker to a specific employer and is only valid for a particular job. The only option for a transfer of the permit is after receiving permission from the Department of Immigration at the Ministry of Home Affairs. In Singapore, migrant workers are allowed to change employers during their contract with their employer's consent as well as nearing the end of their employment without the need for their employer's consent. An employer's consent is not required when there are breaches of legal protections or valid employment claims, such as non-payment of salary. In Thailand, workers who came to Thailand through the MOU process can only change their job when one of the five conditions set in law are met. Workers who have been regularized in Thailand do not need to prove specific circumstances. Migrant workers have a 60-day grace period to find new employment once their contract ends (extended from the previous limit of 30 days) (MOL 2023).

Several studies have linked the difficulties in changing employers and restrictions on mobility within a country to the high levels of irregular migration to that country (ILO 2019b; Tunon and Harkins 2017; ILO 2016b; Vasuprasat 2008). For example, Cambodian and Lao workers were found to frequently fall into irregular status in Thailand despite migrating legally due to the difficulty in changing employers and the subsequent decision not to renew their registration for the extension of their work permit (Vasuprasat 2008). Especially in sectors in which migrant workers move to new sites (such as construction) or employers as often as every few weeks in response to the phasing of work activities, the requirement to reregister with every move deters employers and migrant workers from seeking documentation in the first place because it can be quickly invalidated (ILO 2016b).

Migrant workers may also try to avoid being tied to one employer for the power imbalance that it creates between an employer and worker (ILO 2019b; OHCHR 2022). For example, in Malaysia, where migrant workers must get permission from the Immigration Department to leave their employer, a recent ILO study on domestic workers found that workers reported having their mobile phone and travel documents taken away, being kept in isolation, not being allowed to leave the workplace and being under constant surveillance (ILO 2023c). The payment of a levy and security bond may further expand this imbalance of power between worker and employer, resulting in employers treating workers through the lens of ownership. A suggestion is that the removal of levies and security bonds and the delinking of a migrant worker's migration status from a single employer may address these disincentives. The labour mobility reforms put in place in Qatar in 2020 is a good practice for ASEAN countries to consider on granting migrant workers freer access to the labour market (box 5).

Some ASEAN countries have seen positive policy changes in recent years, including temporary measures to extend visas during the COVID-19 pandemic. In Singapore, employers have been able to “hire existing workers” in the construction sector since 2015, in the processing sector from 2017 and in the marine shipyards since 2018 (ILO 2019b). An ILO survey of migrant workers' experiences during the pandemic found that almost all surveyed migrant workers in Singapore (97 per cent) were able to renew their visa and work permit from within the country, but roughly a third of migrant workers in Malaysia (34 per cent) and Thailand (27 per cent) were unable to do so (ILO 2021).

► **Box 5. Good practices – Labour mobility reforms in Qatar**

In the past few years, the Government of Qatar has undertaken comprehensive labour reforms to improve the conditions of migrant workers within its borders. In 2020, national legislation was revised to remove the requirement for migrant workers to obtain a No-Objection Certificate from their employer to change employment and to introduce termination-of-employment provisions. Due to the reform, employers and workers can now terminate the employment contract at any time, with due notice. If workers want to change their employment during their probation period, they need to give a one-month notice and the new employer needs to compensate the first employer part of the recruitment fees and air ticket expense, if any, provided it does not exceed two months of the worker's basic monthly wage. After the probation period, one-month notice period is required during the first two years of employment and two months after two years of employment.

The reform led to a significant increase in labour mobility in Qatar. Over the two-year period after adoption of the revised legislation, 348,455 workers (16 per cent women) changed employment, up from 17,843 the year before. However, only 5.6 per cent of those who changed jobs were domestic workers, which suggests they have not been fully able to benefit from the policy reform.

Enhanced labour mobility in the Qatari labour market allows skills and experience to stay within the country, increasing productivity and competitiveness. Employers can recruit workers locally, which has led to improved job matching and reduced recruitment costs in comparison to cross-border recruitment. Anecdotal evidence has highlighted some employers investing in human resource policies as well as improving working and living conditions as means to retain workers. This further helps to drive up compliance with national legislation and level the playing field for employers. Limits on labour mobility,

though, likely deter highly skilled workers who would otherwise have better bargaining power and international mobility. The reforms adopted in 2020 are expected to increase the appeal of the labour market of Qatar for highly skilled workers and increase attractiveness for investment.

The implementation of Qatar's labour mobility reforms were facilitated through awareness-raising on the new legislation and procedures. However, some workers have faced challenges in changing jobs and employers have experienced delays in recruiting workers locally. Some unscrupulous employers have retaliated against workers who filed a request to change their employment. The retaliation has been in the form of cancelling their residency permit or falsely reporting the workers for absconding. Because the employment and immigration policies and procedures are closely linked, the Ministry of Labour and the Ministry of Interior have been coordinating and working closely to address such retaliation. For instance, the electronic systems of the two Ministries are linked so that once a worker files a request to change their job, the employer can no longer cancel their residency permit or report them for absconding.

A lesson learned is to highlight the benefits of enhanced labour mobility to employers and the economy more broadly.

Source: Rai 2023.

A recommendation of the ILO Governing Body for governments when designing temporary labour migration schemes is the freedom to change employer. Guidance from the ILO's general principles and operational guidelines for fair recruitment reinforces this recommendation: "Workers should be free to terminate their employment and, in the case of migrant workers, to return to their country. Migrant workers should not require the employer's or recruiter's permission to change employer." Suggestions include not tying the work permit to the residence permit and providing a grace period for workers to seek alternative employment, as well as facilitating mobility through job portals and national employment services.

3.4 Improve labour and social protection

Both regularly admitted migrant workers and irregular migrant workers have rights under international law (box 6). Under the ILO Migration for Employment Convention (Revised), 1949 (No. 97), regularly admitted workers have the right to treatment no less favourable than what is applied to local workers with respect to remuneration, membership in trade unions, accommodation and social security (article 6.1) (ILO 2016c).

► **Box 6. Protecting irregular migrant's rights in international law and ASEAN instruments**

International labour standards and human rights Conventions acknowledge the sovereignty of States to control their borders. At the same time, they uphold the human and labour rights of all migrant workers, including those in irregular situations. While calling for all necessary and appropriate measures to suppress clandestine movements of migrants for employment and illegal employment of migrants, the **ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)** grants migrant workers in irregular situations the right to payment of remuneration, social security and benefits arising out of past employment as regards remuneration, social security and other benefits and to seek redress for wage claims.

The 1990 **United Nations Convention on Migrant Workers** further provides that rights of migrant workers and their family members in irregular situations include, among others, the right to life, protection against inhumane or degrading treatment, freedom of thought and religion, equal access to legal proceedings, the right to emergency medical care and treatment no less favourable than the treatment for nationals with respect to remuneration (ILO 2016c).

General Recommendation No. 26 of the Elimination of All Forms of Discrimination Against Women, 1979 emphasizes that women migrant workers who migrate independently; women migrant workers who join their spouses or other members of their families who are also workers and undocumented women migrant workers must be protected against all forms of discrimination.

Within the ASEAN regional frameworks, the 2017 **ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers** extends protection to “migrant workers who are documented and those who become undocumented through no fault of their own” (article 2). The newly adopted (2023) **ASEAN Declaration on the Protection of Migrant Workers and Family Members in Crisis Situations** takes a step forward by committing ASEAN Member States to “cooperate and coordinate to extend humanitarian assistance to migrant workers, irrespective of their migration status, and their family members who are already residing with them in the States where the crisis occurred”.

In the ASEAN region, however, regular migration status does not always guarantee access to labour rights or social protection, especially in the domestic work, agriculture or fishing sectors. For example, recent analysis of labour rights afforded to domestic workers in Malaysia, Singapore and Thailand against those provided by the ILO Domestic Workers Convention, 2011 (No. 189) and other relevant international laws, found that domestic workers were excluded from significant sections of the law, including minimum wage coverage, protection of maximum hours, equality of treatment in relation to overtime or daily rest (ILO 2023c). While migrant domestic workers are not covered under Singapore's Employment Act the Employment of Foreign Manpower Act states that migrant domestic workers are entitled to weekly rest days with flexibility for rest days to be compensated where the worker agrees to work on the rest day. From January 2023, migrant domestic workers have been guaranteed at least one rest day a month that cannot be compensated away. In Thailand's agriculture sector, seasonal migrant workers are excluded from several important protections, including minimum wage, regulated working hours, rest time, overtime wages, national holidays, paid annual leave and severance pay (ILO 2022a). In many ASEAN countries, migrant workers are further excluded from social protection or it is provided through separate schemes with inferior benefits in comparison with those that are available to the local workforce (ILO 2018). For instance, in Thailand, the popular border pass allows migrants to work in border provinces for 90 days only – one day shy of eligibility for social security, thus effectively keeping them unable to contribute to or benefit from social protection schemes.

Migrant workers are also commonly excluded or face limitations in exercising their right to join or form a trade union, which is a critical method used by workers to collectively bargain for improved labour rights and employment conditions. Although migrant workers in Malaysia (with the exception of domestic workers) Thailand are allowed to join existing trade unions, they are not allowed to form their own union or hold leadership positions in a trade union. In Singapore, migrant workers require approval from the Ministry of Manpower to form their own union and to hold leadership positions (ILO 2023c).

The ILO's Migration for Employment Convention (Revised), Convention, 1949 (No. 97) provides regularly admitted migrant workers in all sectors of the economy the right to comprehensive labour and social protection equal to what is provided to the local workforce. Realizing this in the ASEAN region will be an important factor in attracting more migrant workers to migrate through legal pathways. Equal treatment includes extension of effectively enforced labour protection to sectors, such as domestic work, agriculture and fishing.

3.5 Strengthen enforcement and access to justice

As noted already, migrant workers may fall into irregular situations through no fault of their own. This may occur if negligent employers or recruitment agencies fail to renew their work permit or move them to a new job or worksite without processing the necessary paperwork (see section 3.3). Effective enforcement of sanctions against such practices is important to ensure that migrant workers can maintain their regular status. Sanctions need to be enforced against exploitive recruitment and employment practices that are known to erode the benefits of regular migration for workers, such as the overcharging of recruitment fees (ILO 2023d).

Labour inspection and other relevant authorities need to also enforce sanctions against employers who illegally hire migrant workers in irregular situations. Effective sanctions against illegal hiring are important to curb such practice. When migrant workers in irregular situations are found working illegally in a workplace, it is important to remember that labour inspectors' primary duty under the ILO Labour Inspection Convention, 1947 (No. 81) is to protect the workers' labour rights (see box 6) and it is not to enforce immigration law (ILO 2006). Governments should also ensure that labour inspectorates are able to focus attention on hard-to-reach sectors in which migrants work, such as domestic work and agriculture.

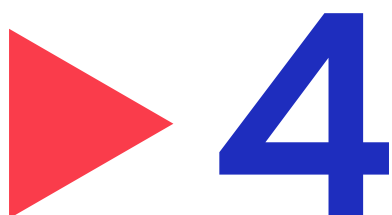
Effective enforcement is also needed to make sure that migrant workers can access their labour rights and remedies. To be attractive to workers, regular migration status needs to guarantee effective access to labour rights and social protection, including in domestic work, agriculture or fishing (see section 3.4).

Migrant workers commonly are confronted with challenges in obtaining access to justice (ILO 2022b). The precarity of their labour migration – its temporariness – can also be a barrier to accessing justice, with workers facing risks that they will lose their migration status if they lose their job; or that they will jeopardize their chance of securing future employment if they pursue a claim against their current employer (ILO 2022c). Increasing access to justice for migrants who experience labour exploitation or have an employment dispute can create a strong incentive for migrants to choose regular migration pathways.

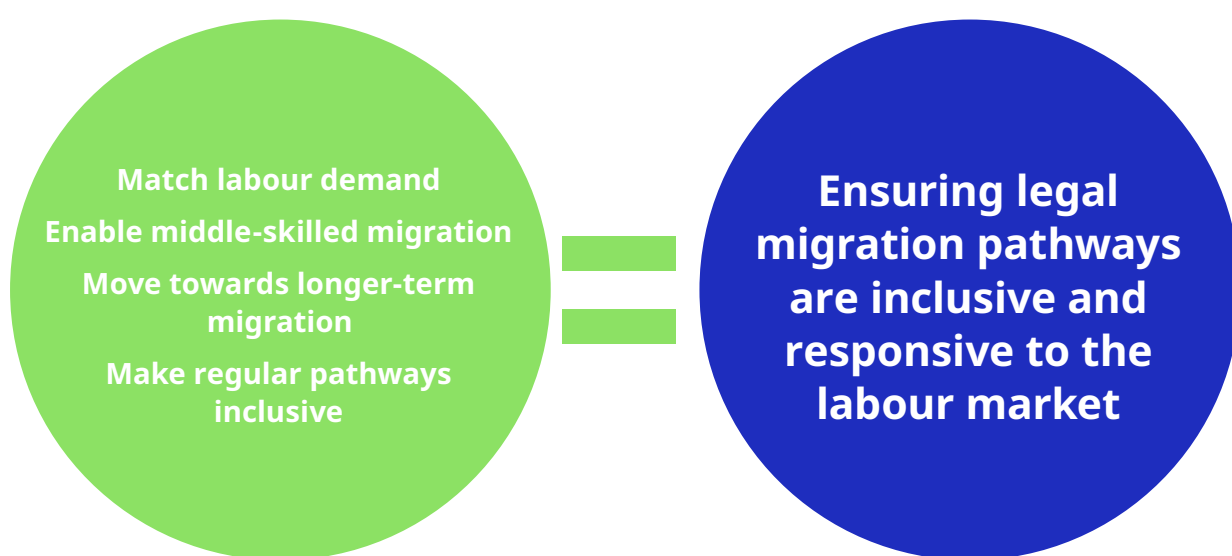
Under international law, both regular and irregular migrant workers have the right to redress (see box 6). Recent case law in Malaysia and Thailand reveals granular progress towards securing irregular migrant workers' right to redress for the non-payment of wages cases. For example, in May 2022, the Malaysian Court of Appeal unanimously affirmed the High Court decision of *Fice Fransina Nenobais v Lee Hee Chooi*,⁴ which ruled that an undocumented worker, referred to in the media as Nona, had the right to have her case heard in the Labour Court. Nona had filed a claim for unpaid wages in the sum of more than 30,000 Malaysian ringgit against her employer in the Labour Court. This case affirmed the principle that work done by undocumented workers is deserving of wages (The Malaysia Bar 2022).

Legal aid and other support services provided by civil society, trade unions, bar councils and other legal aid clinics have an important role in facilitating migrant workers' access to justice. Labour attaché services and other consular support provided by embassies is also crucial to facilitate migrant workers' access to remedies (OHCHR 2022). It is important to strengthen the labour attaché and other support services to migrant workers in countries of origin and destination by ensuring they have adequate financial and human resources to perform their crucial functions.

4 *Fice Fransina Nenobais v Lee Hee Chooi*, 7 CLJ 416 (2020).



AFML subtheme 2: Ensuring legal migration pathways are inclusive and responsive to the labour market



This section centres on making legal migration pathways more inclusive and responsive to the labour market. The discussion looks at how ASEAN countries can better assess the labour and skills demand in their labour market to inform their admission policies and explores opportunities for enabling middle-skilled labour migration in the region. The section then goes on to suggest a move towards longer-term labour migration programmes in the region and then looks at how labour migration pathways could be more inclusive to promote regular migration.

4.1 Match admission with labour and skills demand in the labour market

Labour migration is both a search for better and decent jobs and a response to labour market demands. States can take different approaches to responding to employer requests or demand for migrant workers and in responding to shortages. Producing reliable data to assess labour market demand facilitates a State's ability to admit the needed number of migrant workers with a certain skill type. This can help to achieve employment, productivity and wage goals, especially if the migrants complement local workers (ILO 2016a).

As noted, governments take different approaches to react to labour and skills shortages. In the ASEAN region, Malaysia and Singapore use employer-led processes, such as labour market tests, levies and enterprise-level quotas, to control the number of migrant workers admitted. Malaysia applies a system that combines a pricing mechanism (levy) and an enterprise-level quota (dependency ratio) to regulate the employment of foreign workers in the six approved economic sectors and subsectors⁵ in which “foreign contract workers” may be employed in elementary occupations. In addition, Malaysia maintains a Critical Occupations List for high-skill occupations in which there is a significant market shortage for foreign expatriates (ILO 2019a). In Singapore, the Ministry of Manpower reviews and adjusts the dependency ratio ceilings and employer levies to meet the overriding goals of raising overall productivity, uplifting the skills and competency of the workforce and maintaining sustainable human resource growth, with levies increasing as the number of migrant workers in the workforce increases (ILO 2019a).

In Thailand, conditions for admission of migrant workers include that the position is not in the list of prohibited occupations and professions and that consideration of work permit issuance is in accordance with the need and propriety. The Department of Employment reports that it consults with employers to assess labour shortages and to identify the need for migrant workers.

All of these approaches are employer-led, which means admission depends on a job offer. Economies like Australia and Canada, however, also have a points-based system that are not employer-led. Points-based selection assigns applicants points for a variety of attributes (ILO 2019a). Successfully admitted workers join the national labour pool and apply for jobs (box 7).

All ASEAN Member States collect statistics on international labour migration and contribute it annually to the International Labour Migration Statistics (ILMS) database on the ILOSTAT portal. Since 2012, the ILO's TRIANGLE in ASEAN programme has been building up the capacity of national statistical offices and other data producers to measure labour migration. Although much progress has been made, challenges and data gaps persist. In some countries, the national statistics system collects data only on limited ILMS indicators, while in others, national sources exist but are not disaggregated by migratory status or they are collected less frequently. Some countries collect high-quality data but do not share it internationally. Further challenges relate to quality of the data, resulting in an incomplete picture of labour migration. Coverage of migrant workers in national survey samples needs to be improved to better capture irregular migrants. Sampling for household-based surveys should take into account migrants living in their workplace – of particular relevance for domestic workers and workers in the construction, agriculture and fishing sectors (ILO 2022d).

Improved approaches to systemic assessment of labour market requirements in countries of destination based on labour market data, including ILMS, could help countries of origin and destination better match labour migration and admission policies with the actual labour and skills demand and supply. Ensuring that legal pathways respond to the actual labour and skills demand of employers will help curb the illegal hiring of migrant workers who are in irregular situations.

⁵ Agriculture, plantations, manufacturing, mining and quarrying, construction and service.

► **Box 7. Good practices – Labour market needs and admission of migrant workers into Australia and Canada**

Australia and Canada manage programmes for temporary and permanent labour migration. While recruitment to temporary programmes requires the employer to establish that they cannot source a suitable local worker (labour market test), the admission for a permanent programme is based on broader economic, cultural and other factors.

Australia's permanent migration programme has a skilled migration stream that is designed to attract migrants who will make a significant contribution to the Australian economy, facilitate regional development and fill positions where no Australian workers are available. Australia maintains and updates several occupation lists – including a short-term list, a medium-term list and a regional list – that align labour migration programmes to meet Australia's economic needs. The occupation lists are reviewed regularly based on the labour market analysis by the National Skills Commission.

The occupation lists are used to qualify potential migrants for various skilled migration visas, and they underpin a range of employer-sponsored, points-tested and State-nominated visa programmes. Points-tested programmes require the candidate to meet base eligibility criteria, including nomination in an occupation on the relevant skill occupation list, skills assessment, age, English language ability and health and character requirements. The candidate needs to attain the points test pass mark for attributes, including age, English language ability, educational qualifications, Australian study requirement, specialist education qualifications, employment experience in Australia and employment experience outside of Australia. The Australian Government is reviewing its migration strategy, including replacement of its skilled migration occupation lists and visas.

In **Canada**, permanent labour migration programmes include the express entry programme and regional programmes. The **express entry programme** assesses candidates based on a comprehensive ranking system, which allocates 600 points for core factors, including age, education level, language proficiency, Canadian work experience and skill transferability. Another 600 points are allocated for additional factors, including strong second language skills, post-secondary education in Canada, arranged employment, provincial nomination or having a sibling who is a Canadian citizen. Canada's **regional programmes** include:

- Provincial Nominee Program, which enables provinces and territories to support the immigration of people who the province or territory believes will be able to contribute to the economic development and prosperity of that province or territory and ultimately benefit the country.
- Rural and Northern Immigration Pilot, which is designed to spread the benefits of economic immigration to 11 participating smaller communities, including four that have Francophone minority communities.
- Atlantic Immigration Program, which attracts and retains skilled immigrants to Atlantic Canada to address demographic and economic needs through public-private partnerships.

Canada's policies are based on the understanding that labour migration is beneficial to the country. Migrants bring economic benefits by contributing to the economy and creating jobs, not only by filling gaps in the labour force and paying taxes but also by spending money on goods and transportation. Migrants are also needed to offset the trends of an aging population to ensure that Canada can offer the same level of services to its residents into the future. Migrant workers also support the success and growth of many critical industries, such as agriculture and agri-food, health care and technology.

Source: Arrell 2023; Nichols 2023.

4.2 Enable middle-skill migration to meet skills demand

Labour Force Survey data from Malaysia and Thailand show that the majority of migrant workers employed in these countries were in medium-skill occupations in 2019, when classified against the ILO's International Standard Classification of Occupations (ISCO-08). In Thailand, 60 per cent of migrant workers were in middle-skill occupations (61 per cent men and 58 per cent women), while in Malaysia, workers in middle-skill occupations accounted for 56 per cent (53 per cent men and 61 per cent women) (ILO 2022d). This finding is illuminating, given neither of these countries have admission policies or MOUs that have prioritized recruitment of medium-skilled migrant workers. Both countries maintain a distinction in the types of work visas provided to migrants who are workers in elementary occupations and those who are highly skilled workers in managerial, professional or technical positions (ILO 2019a).

Consultations and rapid assessments by the ILO with employers in Thailand's construction sector have revealed that employers have demand for migrant workers at different skill levels and that they employ migrant workers at both the elementary and medium-skill levels (ILO 2023e). In the absence of established processes for recognizing these workers' skills in the recruitment process, it appears many of these workers work for wages below their actual skill level and experience.

Among the ASEAN countries, Singapore has different permit options for workers based on skills, with entry and rights determined by skill level. The multilevel system of work passes ranges from the Employment Pass for foreign professionals, managers and executives to the S Pass for skilled workers and Work Permits for semi-skilled migrant workers in the construction, manufacturing, marine shipyard, process or services sector and for migrant domestic workers. Specific work pass types are also available for foreign entrepreneurs, performing artists and confinement nannies and many other specific categories.⁶ The Singapore system also includes incentives for upskilling of workers (box 8).

► **Box 8. Good practice –Ability to upgrade to “higher skilled” in Singapore**

In Singapore, construction workers must – at the very least – be certified as “basic skilled” to secure work. Basic-skilled status construction workers can work in Singapore for a maximum of 14 years. Higher-skilled workers are eligible to work in Singapore for up to 26 years, and employers pay a lower levy for them. Singapore provides four pathways to upgrade construction workers, from basic skilled to higher skilled. Workers can be upgraded to a higher skilled status if they meet the prevailing requirements for the relevant pathways which comprise minimum years of experience in the construction sector, relevant skill certification as well as minimum fixed monthly salary.

Some ASEAN countries have MOUs with countries outside the region to facilitate the migration of skilled workers. At least six of the 15 MOUs included in table 1 are for skilled migrant workers. These MOUs outline the qualifications required, the processes for skills recognition and, if needed, skills assessments, as well as the pay and conditions of employment commensurate with workers' skill level (ILO 2020c). With this positive experience in facilitating skilled labour migration to regions outside ASEAN, the question remains as to why there are so few opportunities for middle-skilled labour migrants within the region?

MOUs that include middle-skilled labour migration or admission policies covering all skill levels appear to be necessary to meet the actual skills demands of employers and businesses in the ASEAN region. Such entry processes should have cost-effective processes for skills recognition or certification.

Where migration programmes do not recognize or respond to the different skills required within a sector of work, they effectively flatten the skills to the detriment of both workers and employers. For example, based

⁶ See www.mom.gov.sg/passes-and-permits.

on the findings of an ILO study domestic workers in Malaysia, Singapore and Thailand have no access to skills recognition nor ability to upgrade to higher skilled status, even if they had years of work experience and had acquired specialized skills. Those with experience may be able to negotiate better employment terms, but this will be for them to manage (ILO 2023). In Malaysia, for example, migrant workers who have years of specialized construction work experience and in-demand skills, by law, cannot qualify as a supervisor (ILO 2019b). Being able to access middle-skill work, develop skills and have necessary labour mobility benefits the labour market and workers.

Allowing workers to have their skills recognized as part of their access to temporary migration programmes can contribute to skills development, employment mobility and the strengthening of sectors, thus offering a workforce that can contribute positively to a more robust labour market.

4.3 Move from temporary labour migration to longer-term programmes

Labour markets in ASEAN countries of destination face long-term or structural labour shortages due to population ageing and other demographic shifts (ILO 2019c). Because the need for hiring migrant workers to fill the labour market gap is likely to persist, countries in the ASEAN region may consider moving from temporary labour migration programmes to longer-term programmes to ensure a stable labour force. Using temporary labour migration programmes to meet permanent labour market needs causes a mismatch that is not sustainable (OHCHR 2022).

A limited time frame of temporary labour migration programmes in the ASEAN region is also a factor that may deter both employers and workers from using legal migration pathways. These programmes offer employers the ability to secure workers for only relatively short-term work visas, meaning that employers must deal with frequent and numerous labour force turnover. The time and resources involved in this turnover can represent a considerable loss for the employer (ILO 2019b), making it more attractive to hire irregular migrant workers already residing in the country to ease their labour shortage (ILO 2023e). Similarly, a limited time frame of existing labour migration programmes may be the reason many migrant workers prefer to rescind their regular migration status. Indeed, many of the undocumented migrants in Malaysia and the Republic of Korea are irregular not because of unauthorized entry but as a result of overstay and changing employers irregularly (ILO 2016a).

Establishing longer-term labour migration programmes with freer access to the labour market (see box 7) or making temporary labour migration programmes more flexible could help better meet the needs of employers, workers and the broader labour markets. In practice, this would mean that migrant workers are given the ability to exercise their rights in relation to deciding the length of stay and time of return, the ability to change their job in the course of their migration and when and whether to return to their country of origin (OHCHR 2022). In the face of enforced returns and the breaks in employment required under the current regular migration pathways, migrant workers and employers may choose irregular pathways. An ability to renew work contracts and work permits while a migrant worker is in the country of destination can counter some of these disincentivizing elements (see also section 3.3).

► Box 9. Ageing demographics and replacement migration in Thailand

A study by the Institute for Population and Social Research at Mahidol University projects that by the end of the twenty-first century, Thailand's population will decrease by 50 per cent, leaving fewer than 30 million people, making it the second country after Japan with such a significant decline. This projected decline poses economic challenges and threatens the standard of living in Thailand if the country fails to integrate foreign professional workers, immigrants, refugees and migrant workers into its workforce.

The study suggests that Thailand should initiate a "replacement migration policy" to cope with the dwindling labour force before the situation becomes too difficult to manage. Such policies can be

successful when the competition for human resources is not yet intense and the Thai labour force has not decreased to the extent that social integration is difficult. Due to this, Thailand should consider creating a points-based pathway to permanent immigration and Thai citizenship for foreigners who meet the appropriate criteria.

The study projects that, at current rates of demographic transition, the permanent immigration rate of at least 100,000 persons per year for the next 80 years would be needed to help replace around one quarter of the population loss to soften the socio-economic impacts.

Realizing the objectives of the replacement migration policy requires a clear action plan and mechanisms to grant a long-term residency permit and citizenship to qualified foreigners. Dedicated participatory processes should be created for managing migration of different groups, including stateless persons, migrant workers and children, refugees and others.

Source: Niyomsilpa 2023; SEA Junction 2023.

4.4 Make regular pathways more inclusive

Many ASEAN countries have discriminatory restrictions in their labour migration policies, admission policies or MOUs that limit migrant workers' access to regular pathways. When such provisions exclude aspiring migrant workers from regular migration pathways based on their gender, age or nationality or unnecessary health requirements that are not inherent requirements of the job in question, the aspiring migrant worker may seek to migrate through an irregular channel. Discriminatory restrictions also limit the pool from which employers can hire, which in itself limits the labour market's ability to be fully inclusive.

Table 6 includes examples of labour migration restrictions in selected ASEAN countries. For example, the upper-age limit of 45 years for the employment of domestic workers in Malaysia is one of the reasons why many capable and experienced migrant domestic workers who have worked in the country for many years have no other option than to become irregular when they reach this age. No legal pathways for migrants from Cambodia to work in fishing in Thailand and absence of legal pathways from the Lao People's Democratic Republic for work in domestic work similarly means that many women and men seeking employment in these sectors have no other option but to migrate irregularly.

There is evidence that women migrant workers are more likely to migrate through an irregular channel, partly as a result of such gendered restrictions on regular migration but also due to a lack of financial access to regular pathways.⁷ Because policy restrictions are not always coherent across migration corridors, migration bans can encourage irregular migration. For example, despite Myanmar's ban on migrating into domestic work, the high labour market demand and ability to secure documentation in Singapore has drawn many aspiring migrants into that corridor. The inconsistency between the policies of the two States means, however, that aspiring migrant domestic workers in Myanmar have had to leave their country of origin irregularly to access the employment opportunities in Singapore (ILO 2017a).

⁷ Several international laws explicitly discourage restrictions on women's labour migration. Among them, the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 includes a mandate for States to repeal sex-specific bans and discriminatory restrictions on women's migration (General Recommendation 26), as does the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990 (General Recommendation 1). Several international laws fundamentally guarantee all persons the right to leave any country, including the Universal Declaration on Human Rights, 1948; the International Covenant on Civil and Political Rights, 1966; the Committee on the Elimination of Racial Discrimination; and the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

Greater inclusivity and diversity in the migrant labour force can also be achieved by addressing gender normative ideas around work and workers – for example, that women are nimble and obedient and that men will take greater physical risks (ILO 2022e). These are gendered norms that result in feminized and masculinized sectors of work, such as domestic work and work on fishing vessels – both of which result in exploitation that is gendered. According to an ILO and UN Women study, gender-based discrimination in law and practice increases the likelihood of their temporariness and decreases their fundamental protections, including of their rights at work.⁸

Unnecessary health requirements or duplicative medical check-ups should also not be used to exclude migrant workers from work. Health conditions or disabilities that do not impair migrant workers' ability to perform a job should not be a barrier to migration through a legal pathway. For example, where a worker has a mobility impairment, they may be fully able to perform an assembly line job because mobility is not an inherent requirement of that job (ILO 2012).

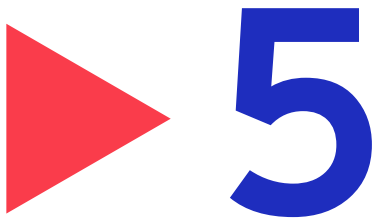
Inclusivity in migration can be key to regularity. By creating inclusive and diverse pathways into protected employment, the regular pathways carry more incentive than the irregular options. Inclusive and diverse migration pathways will result from ending discriminatory practices, empowering people in vulnerable situations and addressing the detrimental gender norms.

► **Table 6. Labour migration restrictions in policy and law in selected ASEAN countries**

Cambodia	► No mechanisms to migrate into fishing
Lao PDR	► No mechanism for migration into domestic work
Malaysia	► Domestic workers can only be employed if they are: • women • aged 21–45 ► Health and fit-to-work testing required
Singapore	► Domestic workers can only be: • women • aged 23–50 during the work permit application (MDWs aged 50 and above can renew their Work Permits until they are 60) ► Health and fit-to-work testing required

Source: TRIANGLE in ASEAN annual report; MOM 2023b; MOM 2023c.

8 ILO and UN Women. 2022. A Very Beautiful But Heavy Jacket: The Experiences of Migrant Workers with Diverse Sexual Orientation, Gender Identity and Expression In South-East Asia, p. xvi, 6, 30.



Recommendations

Continued existence of irregular labour migration implies that the regular migration pathways in the region are not working the way they should. To improve labour migration programmes and reduce irregular migration, it is necessary to look at how to improve the effectiveness of the current system of MOUs, bilateral labour agreements and admission policies and regulations to facilitate labour migration and protect migrant workers. Legal migration pathways need to also be made more inclusive and responsive to the labour market. The ILO recommends the following points here for consideration by the ASEAN Member States and other relevant parties in pursuing these goals. Gender-responsiveness should be taken into account when translating these recommendations into practice.

Subtheme 1: Improving labour migration programmes in the ASEAN region

1. Enact and enforce legislation to prohibit the charging of recruitment fees and related costs to migrant workers in the country of origin and destination. Reduce the cost of passports, visas, work permits and other government documents to reduce migration costs for all actors.
2. Streamline and simplify migration processes to make regular migration channels attractive and accessible for migrant workers without compromising the protection of their labour rights. Digitize recruitment, deployment and admission processes and regulate the maximum processing time for each step to make the migration process move faster.
3. Enable freer labour market access for regularly admitted migrant workers by enabling the changing of employers in shortage occupations without consent from their previous employer and by renewing visas and work permits from within countries of destination. Allow migrant workers whose contracts end a grace period to allow migrant workers to look for new employment.
4. Strengthen national laws and policies to ensure that migrant workers in all sectors enjoy comprehensive labour and social protections, freedom of association and access to support services and effective remedies. Ensure that regular migrant workers in all sectors of the economy enjoy equal treatment with national workers. Ensure that migrant workers in irregular situations enjoy protection for their basic human rights and labour rights arising out of past employment regarding remuneration, social security and other benefits, as well as effective access to support services and effective remedies.
5. Strengthen enforcement of sanctions against unscrupulous employers who illegally hire migrant workers in irregular situations. Monitor recruitment agencies and apply sanctions against those that overcharge workers or otherwise violate the rights of migrant workers or their employers.

Subtheme 2: Ensuring legal migration pathways that are inclusive and responsive to the labour market

6. Improve data collection on labour and skills demand in the labour market and adjust admission of migrant workers to meet these demands. Improve data sources and methodologies for assessing the labour and skills demand.
7. Based on labour market requirements, consider adoption of MOUs, where appropriate, and admission policies that cover all skill levels (elementary, medium and high skills) to enable the hiring of migrant workers at different levels while taking into account the interests of local workers.
8. Consider introducing pathways for residency and citizenship for all skill levels, given the structural needs resulting from ageing, economic growth and labour shortages.
9. Remove any discriminatory gender, age and other requirements as well as health requirements that are not inherent requirements of the work to enable more women and men, including those with disabilities that do not impair their ability to perform a job, to apply for employment overseas. This will make regular pathways more inclusive. Remove unnecessary duplicative medical tests to make the recruitment process faster and cheaper.

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► Enhancing the effectiveness of legal pathways for labour migration in ASEAN

Thematic background paper for the 16th ASEAN Forum on Migrant Labour

This report was prepared to inform and guide discussions on the theme “Enhancing the effectiveness of legal pathways for labour migration in ASEAN” at the 16th ASEAN Forum on Migrant Labour (AFML) hosted by the Government of Indonesia on 25–26 October 2023 in Jakarta, Indonesia.

Although millions of ASEAN migrant women and men leave their homes to work abroad through legal pathways each year, these pathways do not represent all the labour mobility in the region. A large proportion of labour migration in the region takes place through irregular pathways. This paper discusses factors underlying irregular migration and proposes ways to improve labour migration programmes within ASEAN. It also recommends ways to make legal pathways more inclusive and responsive to labour market needs.

The AFML is a tripartite meeting that brings together governments, employers’ and workers’ organizations, alongside civil society groups, to discuss migration governance issues across the Association of Southeast Asian Nations (ASEAN) region, and aims to promote and protect migrant workers’ rights. The AFML is supported by the ILO through its TRIANGLE in ASEAN programme.

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