ACHIEVING BEST OUTCOMES FROM GLOBAL, REGIONAL AND BILATERAL COOPERATION*

CHAPTER 13

1. Introduction

Migration is by its very nature a transnational process. No country can claim to be in a position to respond to and manage these movements on its own, all the more so since the policies of other countries influence migration flows and the effectiveness of domestic policies. The awareness of the ineffectiveness of unilateral actions, increased diversity of migratory routes and patterns of flows (cutting across regions and continents; reacting to changes in external factors such as immigration policies, economic situations and employment opportunities), and interlinkages with other global issues such as trade, development and human rights have increasingly led states to acknowledge the need for international cooperation in migration management.

However, states have generally been reluctant to translate this growing awareness into concrete action by accepting trade-offs between sovereignty and international regulatory mechanisms. Progress has mainly occurred at the regional and bilateral levels, where common interests between countries of origin and destination are more easily identified and mutual benefits worked out. But even at these levels, the general tendency has been to engage in informal, as opposed to legal or more formal means of cooperation.

Among the main obstacles to entering into binding legal frameworks on migration are the divergences of opinion on the respective merits of liberalizing or restricting migration flows; administrative and financial burdens of adapting national frameworks; concerns about limiting the state's capacity to intervene because of the nature and extent of the rights to be granted to migrant workers and, especially, to irregular migrants; the diverging views between countries of origin and destination regarding the categories of workers to be given access to domestic labour markets, e.g. skilled, low-skilled or both; and, perhaps most importantly, the general preference for a high degree of flexibility in determining national migration policy.

This chapter provides an overview of the formal and less formal mechanisms in place for managing labour mobility at the multilateral, regional and bilateral levels, with a particular focus on temporary migration for employment, and considers their respective advantages and disadvantages in practice.

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2. Multilateral Approaches

Although a limited number of instruments cover specific aspects of cross-border mobility for economic purposes, there are no comprehensive global agreements or international conventions in place to manage temporary labour migration.

2.1 ILO and UN Conventions

The International Labour Organization (ILO) has adopted two conventions (Nos. 97 and 143) and two accompanying non-binding recommendations (Nos. 86 and 151) applying to persons moving from one country to another for the purpose of employment.[1] The first convention and its accompanying recommendation, adopted in 1949, focus on setting standards for the recruitment of migrant workers and their conditions of work, while the two other instruments, adopted in 1975 in the wake of the oil crisis, reflect a growing concern about the resulting increase in unemployment, and emphasize the need to prevent irregular migration and the unauthorized employment of migrants (ILO, 2004). Both conventions cover issues related to the entire migration process and provide for equal treatment between lawfully resident migrant workers and nationals. Convention No. 143 obliges states parties to respect the basic human rights of **all** migrant workers and also provides for equal treatment between irregular and regular workers in respect of rights arising out of past employment, such as remuneration, social security and other benefits.[2] Both conventions exclude certain categories of workers from their scope, such as the self-employed, seafarers, frontier workers, and artistes and members of liberal professions who have entered the country on a short-term basis. In addition, Convention No. 143 excludes students and trainees and temporary workers sent by their employer to perform specific duties or assignments in the destination country from its Part II on equality of opportunity and treatment.

In its 2004 report *Towards a fair deal for migrant workers in the global economy*, the ILO recognizes that international labour standards "were not drafted with the protection of temporary migrant workers in mind and the provisions applicable to other lawfully admitted migrant workers may not always be well suited to their situation" (ILO, 2004: 89). For example, while movements of temporary workers who are sent by their employers to perform a specific duty or assignment for a limited period of time are increasing and are the subject of discussion under Mode 4 of the World Trade Organization's General Agreement on Trade in Services (GATS),[3] as noted above, such workers are excluded from the provisions on equality of opportunity and treatment in Part II of Convention No. 143,[4] together with artistes and members of the liberal professions who have entered the country on a short-term basis.[5] In addition, these instruments do not adequately reflect the increasing role of private actors in the world of work and international mobility for employment, in particular of private employment agencies. This trend led to

[1] See respectively: Convention No. 97 concerning Migration for Employment (Revised 1949); Convention No. 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (1975); Recommendation No. 86 concerning Migration for Employment (Revised 1949); and Recommendation No. 151 concerning Migrant Workers (1975). These instruments can be accessed from the ILO website at http://www.ilo.org/global/What_we_do/InternationalLabourStandards/lang--en/index.htm.

[2] Articles 1 and 9(1) respectively.

[3] See Textbox Int. 1.

[4] Part II is also concerned with, inter alia, the obligation of a state to facilitate family reunion (Art 13), the right to free choice of employment and geographical mobility (Art 14(a)), as well as to recognition of qualifications (Art 14(b)).

[5] But "project-tied" (Article 2(2)(f)) and "specified-employment" workers (Article 2(2)(g)) are covered in the 1990 UN Migrant Workers Convention, discussed below, subject to some limitations (see Part V). The identification of gaps in international standards related to the protection of seasonal workers, project-tied workers, special purpose workers, cross-border service providers, students and trainees resulted in the adoption by the ILO of "Guidelines on special protective measures for migrant workers in time-bound activities" covering such issues as housing, tied employment, wages and other terms of employment, family migration and reunification, freedom of association, social security and return issues for regular migrants during its Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration, 21-25 April 1997 (Doc. MEIM/1997/d.4, Annex I).

the adoption by the ILO in 1997 of Convention No. 181 concerning Private Employment Agencies.[6]

In 1990, the UN adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which represents an important step towards the more effective protection of the rights of migrant workers and their families by providing in a single instrument a comprehensive set of standards for the protection of all migrant workers, including migrants in an irregular situation (Part III), and more extensive safeguards for regular migrant workers (Parts IV and V) (see Textbox 13.1),[7] including categories of workers not covered by ILO Conventions Nos. 97 and 143 (i.e. seafarers, frontier workers and the self-employed). The UN Convention is more detailed and specific regarding the rights of **temporary** migrant workers than are the ILO Conventions.[8] Nonetheless, the UN Convention underlines in explicit terms that it does not interfere with the sovereign competence of states to design their own rules on the admission of foreigners. Article 79 stipulates that "nothing in the present convention shall affect the right of each state to establish the criteria governing admission of migrant workers and members of their families".

[6] Convention No. 181 contains provisions for preventing abuses of migrant workers in the placement and recruitment processes; e.g. Article 7 states: "Private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers." To date, the Convention has received 20 ratifications.

[7] Part IV provides for additional rights to all lawfully resident migrant workers, except as otherwise provided for in Part V (limitations can be applied to seasonal workers (Art. 59), itinerant migrant workers (Art. 60), project-tied migrant workers (Art. 61) and specified-employment workers (Art. 62)).

[8] However, ILO offers potentially better protection to seasonal migrant workers, itinerant migrant workers, technically unqualified project-tied migrant workers, whose rights can be limited according to Part V of the UN Convention, and to students and trainees not covered by the latter (Böhning, 2003).

Textbox 13.1

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*

The Convention, which came into force on 1 July 2003, establishes minimum standards for migrant workers and members of their families. As of September 2008, 39 countries had ratified the Convention.

Article 2(1) of the Convention defines a migrant worker as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national". It should be noted that the protection provided under the Convention can be invoked not only in the country of employment, but already before departure in the country of origin, during the travel in the country of transit and again upon return in the country of origin.

The Convention distinguishes between migrants who are either in a regular or in an irregular situation. All migrant workers enjoy basic human rights, including irregular migrants, while additional rights are foreseen for regular or documented migrant workers. Parties to the Convention are under an obligation not to discriminate against migrant workers on the grounds of sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status (Part II, Article 7).

One of the more interesting features of the Convention is contained in Part VI, which calls for the promotion of humane conditions of migration.[1] States parties undertake to cooperate with each other and maintain appropriate services, such as the exchange of information and assistance, recruitment of migrant workers, orderly return of migrant workers and members of their families, prevention and elimination of illegal and clandestine movements, and employment of migrant workers in an irregular situation.

Concerning labour mobility, of most relevance are the rights of documented migrant workers set out in Part IV of the Convention.[2] Part IV includes not only the right of migrant workers and members of their families to be fully informed by the state of origin or of employment, as appropriate, of all conditions applicable to their admission (particularly concerning their stay and the remunerated activities in which they may engage), but they also have the right to be fully informed of the terms on which temporary absences from the state of employment are authorized and which the state is required to make every effort to provide to them without this adversely affecting their right to remain or work.[3] In addition, Part IV includes the obligation for the state to take measures to avoid double taxation of migrants' earnings and savings, as well as the right of migrant workers to equal (national) treatment in the host country in such fields as access to vocational training and placement services, exemption from import and export duties for household effects and professional equipment, and the transfer and repatriation of their earnings and savings.

Part III of the Convention concerns the rights of all migrant workers and members of their families, including those in an irregular situation, and establishes the right to equality with nationals of the country of employment regarding wages and working conditions (Article 25). The aim of this provision, as set out in the Preamble, is not only to ensure humane and decent working conditions for migrant workers, but also to discourage the employment of undocumented workers by removing any inducement for employers to hire such labour.

The Convention's monitoring body, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (Committee on Migrant Workers), commenced its work in 2004 and started to examine the reports submitted by states parties to the Convention at its 4th Session in April 2006. In its first observations on the reports, the Committee emphasized the need for cooperation to effectively combat illegal or clandestine movements of migrants, and paid special attention to the particular vulnerability of women and children, as well as domestic and agricultural migrant workers.

On the occasion of the High-Level Dialogue on International Migration and Development, held at the General Assembly of the United Nations in September 2006, the Committee organized a "Day of General Discussion on Protecting the Rights of all Migrant Workers as a Tool to Enhance Development".[4] It then adopted a written statement highlighting the human-rights based approach to migration and emphasized the shared responsibility of all states to guarantee the human rights of migrants, as well as the importance of international consultations and cooperation in order to promote and ensure humane conditions of migration.

Notes:

* Adopted by UN General Assembly Resolution 45/158 of 18 December 1990. The Convention entered into force on 1 July 2003.

1 Part VI: Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families.

2 Part IV: Other rights of migrant workers and members of their families who are documented or in a regular situation.

3 Articles 37 and 38, respectively.

4 See http://www2.ohchr.org/english/bodies/cmw/mwdiscussion.htm.

***Source**: Carla Edelenbos, Secretary, Migrant Workers Committee, Office of the United Nations High Commissioner for Human Rights, Geneva.*

All these instruments recognize the importance of interstate cooperation in addressing labour migration. ILO Conventions Nos. 97 and 143 contain provisions on the exchange of information on national policies, laws and regulations. The UN Convention (in Part VI) requests states parties to consult and cooperate with the competent authorities of other states parties on measures regarding the orderly return of migrants. Both the UN Convention and ILO Convention No. 143 also envisage interstate cooperation to suppress clandestine movements of migrants for employment and to act against organizers of irregular migration and the unauthorized employment of migrant workers.

The exact form of cooperation is not prescribed and it is for the states parties to determine. However the drafters were of the view that, while general principles or standards can be spelled out at the multilateral level, the differences in situations and

legal frameworks between countries call for more specific, complementary modes of cooperation at other levels of operation. The ILO Conventions refer to bilateral agreements as an appropriate means of putting general principles into practice, and Recommendation No. 86 of 1949, provides, in an Annex, for a model bilateral agreement covering the different stages of the migration process which includes a model contract for employment (Article 22). The model agreement also recommends the conclusion of separate bilateral agreements with respect to social security.[9] The UN Convention acknowledges, in its Preamble, the progress made in bilateral and multilateral regional agreements towards the protection of the rights of migrant workers, and their importance and usefulness, and also specifies in Article 81(1)(b) that nothing in the Convention shall affect more favourable rights granted to migrant workers and members of their families by virtue of any bilateral or multilateral treaty in force for the state party concerned.

However, these instruments have been ratified by a limited number of states only[10] and, in so far as the UN Convention is concerned, by no major developed destination country.[11]

[9] Migrant workers can face difficulties in benefiting from social security provision as such systems are generally based on contributions and the period of employment or residence (see also Chapter 11). Social security provides another illustration of complementarity between multilateral and bilateral approaches. While ILO Convention No. 157 of 1982 on the Maintenance of Social Security Rights and its accompanying Recommendation No. 167 provide an international framework for the maintenance of acquired rights or rights in the course of acquisition by workers who change their country of residence, they recommend the conclusion of bilateral and multilateral agreements and the Recommendation contains model provisions for such agreements.

[10] ILO Convention Nos. 97 and 143 have been ratified by 48 and 23 states, including both countries of origin and destination, respectively, and the UN Convention has been ratified by 39 states (as of September 2008).

[11] Two destination countries, which have ratified the UN Convention, are Argentina and Libya. Important transit countries that have ratified include Libya, Mexico and Morocco. For obstacles cited by governments to ratification of the ILO Conventions on migrant workers, see ILO (1999). For obstacles relevant to the UN Convention, see the country and regional reports commissioned by UNESCO on the webpage of the UNESCO Project on the International Migrants' Rights Convention at http://portal.unesco.org/shs/en/ev.php-URL_ID=6554&URL_DO=DO_TOPIC&URL_SECTION=201.html.

2.2 General Agreement on Trade in Services (GATS)

The GATS provides for the liberalization of trade in services. Under Mode 4, the GATS offers a multilateral framework for negotiations,[12] with a set of principles (covering domestic regulations, transparency requirements and other issues) designed to facilitate the movement of service providers. However, the GATS does not create universal criteria for the admission of defined categories of service providers and their access to labour markets. Indeed, it does not provide a definition of service providers nor does it prescribe the range, depth or sectoral coverage of country commitments. Inclusion of individual sectors within the GATS schedules is at the discretion of WTO Member States, which must define the commitment they are prepared to make on market access and national treatment on a sector-by-sector basis. States can also make "horizontal commitments", i.e. cross-sectoral commitments given by Member States for market access (e.g. categories of stay, duration of stay, and conditions of entry and compliance by natural persons). Moreover, the GATS does not require its members to offer market access or conditions that are more liberal than those in national policy settings. Departures from market access and national treatment are not prohibited per se under the GATS, but must be identified in schedules as limitations.[13] Therefore, each party defines in its commitments the category of service providers to be granted freer access and, to date, these commitments reflect merely what is already permitted under existing immigration policies.[14]

[12] See the WTO's website at http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm#14 (GATS: objectives, coverage and disciplines).

[13] Limitations to market access can take the form of quota restrictions and economic needs or labour market tests, including wage parity requirements (for a fuller description of these mechanisms, see Chapter 11).

[14] Current commitments focus mainly on the highly skilled, such as executive managers and professionals. These categories usually already enjoy quite liberal access in national immigration admission policies (see Chapter 2), while lower-skilled migrants have fewer or no possibilities to enter the country (see Chapter 3).

Each party also determines its own admission criteria. The only limitation to a member's competence to regulate the entry and temporary stay of natural persons within its borders is the obligation to ensure that such measures are not applied in such a way as to nullify or impair the benefits accruing to another.[15] However, some members would like to see the scope of the GATS expanded with the adoption of multilateral rules in the area of admission (such as a standard GATS visa) (Winters, 2005). Other commentators take this idea one step further and would like WTO to monitor and/or participate in the allocation of visas concerning the movement of natural persons.[16] The proposed inclusion of migration management issues within WTO competences is highly controversial and probably unlikely to secure the support of all WTO Member States as required for an amendment of its mandate.[17]

A further contentious aspect is that GATS Mode 4, as a trade agreement, focuses only on one aspect of the migration process, namely the entry and access of service providers, and does not refer to social and labour standards, such as the quality of working conditions for service providers. The argument usually advanced in this context is that the WTO is a trade body and therefore not the appropriate forum to set social or labour standards for the protection of workers worldwide. However, this question is present in the negotiations in an oblique fashion through the notification of limitations to market access in countries' schedules. Indeed, over 50 WTO members stipulate in their commitments that they require wage parity. In addition, 22 members have reserved the right to suspend Mode 4 commitments in the event of labour-management disputes with a view to precluding employers from hiring foreigners as "strike-breakers" (to replace national workers) (Dommen, 2005). A number of recent regional and bilateral trade agreements also contain explicit references to social issues or core labour standards, either in the text of the agreement or, indirectly, through side agreements on labour cooperation.[18] These provisions do not generally secure any particular labour protection for migrant workers and/or service providers, but they can benefit from broader requirements, such as the obligation to enforce domestic labour standards in a non-discriminatory manner.[19] From a legal point of view, however, these provisions and/or their enforcement mechanisms appear to remain generally weak.

Would it be possible to include a social clause in the GATS to ensure respect for core labour standards (such as non-discrimination in the payment of wages) at the multilateral level? Those in favour of such a clause argue that it will protect local workers from "social dumping", whereas those against express the view that it will reduce the advantage for a country in being involved in recruiting/sending workers abroad. However, to date, it seems that there are no strong voices to advance this issue apart from those of trade unions and some NGOs (GURN, 2007).

While multilateral trade negotiations stalled at Cancun in September 2003, and no significant progress was made in Hong Kong SAR in December 2006, the number of bilateral and regional trade agreements and negotiations has been growing, reigniting a debate about whether such regional

[15] GATS, Annex on movement of natural persons supplying services under the Agreement. See http://www.wto.org/english/tratop_e/serv_e/8-anmvnt_e.htm.

[16] See e.g. Ng and Whalley (2007), who envisage this possibility for the WTO or a new international body.

[17] However, some commentators argue that visas already fall within the GATS Mode 4 mandate as they can be part of "measures" referred to in the Annex on the movement of natural persons.

[18] The U.S.-CAFTA-D.R. (U.S.-Central America-Dominican Republic Free Trade Agreement) and the U.S.-Chile Free Trade Agreement (FTA) include commitments to core labour standards (except for the ILO core conventions on discrimination and equal remuneration). In parallel to the Canada–Costa Rica FTA, there is also an agreement on labour cooperation (Canada-Costa Rica Agreement on Labour Cooperation (CCRALC) signed in April 2001). In this agreement, the parties are obliged to embody in their labour legislation the principles enshrined in the 1998 ILO Declaration on Fundamental Principles and Rights at Work and to enforce this legislation effectively (ICFTU, 2004).

[19] E.g. the 11th Principle of the North American Agreement on Labour Cooperation under the North American Free Trade Agreement (NAFTA) provides migrant workers on a state party's territory with the same legal protection as that provided to the state party's nationals in respect of working conditions.

and/or bilateral agreements complement multilateral trade agreements, or undermine them (Brown et al., 2005; ICFTU, 2004; see also Textbox 13.7 at the end of this chapter).

2.3 Other International Instruments

There are a number of other binding international legal instruments of relevance to labour migration. They can be divided into two broad categories: instruments indirectly and directly related to migration. Under the first category are human rights treaties protecting the fundamental rights of all migrant workers as human beings (the two International Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights, 1966), as women (International Convention on the Elimination of All Forms of Discrimination against Women, 1979), as children (Convention on the Rights of the Child, 1989) and as foreigners (Migrant Workers Convention, 1990).[20] Like any other workers, migrants are also covered by ILO international labour standards.[21] Under the second category, it is necessary to mention the 2000 UN Convention against Transnational Organized Crime and its two protocols addressing trafficking in human beings and smuggling of migrants.[22]

2.4 Non-binding Initiatives

In addition, a number of non-binding initiatives have been taken or are taking place at the multilateral level with a view to fostering dialogue and effective practices in managing labour migration, either by focusing exclusively on this objective or as part of a broader migration agenda. Focusing on the protection of the human and labour rights of migrants, in 1999 the UN Commission on Human Rights (now the Human Rights Council) established the mandate of the UN Special Rapporteur on the human rights of migrants,[23] who has since issued a number of reports focusing specifically on migrant workers and conducted several country visits. In 2006, the ILO Governing Body endorsed the non-binding Multilateral Framework on Labour Migration (ILO, 2006), which comprises principles and guidelines promoting a rights-based approach to labour migration, and provides guidance to governments, and employers' and workers' organizations on the formulation and implementation of national and international policies (see Textbox 10.6).[24] IOM's International Dialogue on Migration (IDM) offers a platform for its Membership to exchange information and effective practices in the formulation and implementation of migration policy.[25] An International Agenda for Migration Management (IAMM), published in December 2005, was the outcome of the Berne Initiative, a states-owned process sponsored by the Swiss Government and for which IOM provided the Secretariat (IOM/Swiss Federal Office for Migration, 2005a). More recently, and as discussed in the Introduction and Chapter 12, the international community has been preoccupied with the theme of international migration and development, which includes an important labour mobility component.[26]

[20] See also here the Vienna Convention on Consular Relations, 1963.

[21] The 1998 ILO Declaration on Fundamental Principles and Rights at Work requires ILO Member States to respect four categories of principles and rights at work, even if they are not signatories to the relevant conventions: freedom of association and rights of collective bargaining, equality of opportunity and treatment, abolition of forced labour, and the elimination of child labour.

[22] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and Protocol Against the Smuggling of Migrants by Land, Sea and Air. These Protocols were adopted at Palermo on 15 November 2000 and, as of September 2008, have been ratified by 123 and 114 states, respectively. See also Chapter 8.

[23] For more information on the Special Rapporteur's work, see the website of the Office of the UN High Commissioner for Human Rights at http://www2.ohchr.org/english/issues/migration/rapporteur/index.htm.

[24] The Framework focuses on areas such as inter alia decent work, international cooperation, the effective management of migration and the protection of migrant workers.

[25] See the IDM webpages at http://www.iom.int/jahia/Jahia/lang/en/pid/385 for the recent themes addressed. For example, in 2007 the overarching theme of the IDM, "Migration Management in the Evolving Global Economy", was closely tied to the subject matter of this Report and a workshop was convened on 8-9 October on Global Making Labour Mobility a Catalyst for Development. See http://www.iom.int/jahia/Jahia/pid/1826.

[26] See the UN General Assembly's High-Level Dialogue on International Migration and Development (New York, September 2006) and the Global Forum on Migration and Development (GFMD) (Brussels, July 2007). For an overview of labour mobility in the context of the GFMD, see Textbox Int. 2.

Other elements for the management of labour migration are scattered throughout many legal instruments, and are at the heart of several non-binding initiatives of various international agencies. For this reason, in order to increase efficiency, policy consistency and to pool available expertise, the Global Commission on International Migration (GCIM)[27] considered in its October 2005 final report, as a longer-term option, the possible establishment of a global agency in charge of the portfolio of "economic migration" (GCIM, 2005), which is a concept that goes beyond labour migration per se and includes other movements for economic purposes, such as business travel and family migration, that are also discussed in Part A of this Report. Such an agency would have a leading role in developing linkages between the migration sphere and related domains, such as development, trade, security and human rights.

3. Regional Approaches

Although labour migration flows are becoming geographically more diverse, the largest share of labour movement is taking place within regions. It is therefore not surprising that regional initiatives to facilitate and manage these flows are flourishing. Regional processes tend to be more efficient than global ones because small groups of countries can more easily tackle emigration and immigration dynamics and reach a common understanding for cooperation, harmonization of policies and liberalization of labour movements. On regional agendas, labour migration is typically dealt with in conjunction with issues such as visa policies, return and readmission, border management and, increasingly, migration and development.

The achievements to date towards the liberalization of labour markets, the increase in the categories of workers eligible to move to another country to work, the streamlining of procedures, the granting of permanent migration opportunities and access to family reunion, nonetheless, vary tremendously. Some of the progress results from the drive towards economic integration, which has led to formal labour-migration related agreements being inscribed in the regulatory framework for common markets and free trade agreements. While the evaluation of regional consultative processes is difficult to conduct on account of their informal and non-binding character, they have undoubtedly been helpful in strengthening interstate cooperation in the management of international migration.

3.1 Regional Economic Integration and Worker Mobility

Based on current and past experiences of regional integration, the following four preliminary conclusions may be drawn with respect to labour mobility at the regional level:

- Labour migration policy agendas are generally more ambitious when drafted within the framework of the establishment or further development of common markets than under the auspices of free trade agreement initiatives, for example, the European Union (EU) as compared to the North American Free Trade Agreement (NAFTA).
- Positive results are more likely to be reached when progress on migration issues can advance projects in other policy areas of interest to countries in the region.
- Efforts to remove barriers to labour mobility are more likely to succeed when the process of economic integration is already well under way; they are less likely to succeed when presented as a potential engine for progress towards regional integration. For example, compare the difficulties in the implementation of the Common Market for Eastern and Southern Africa (COMESA) Protocol on Free Movement of Persons, Labour, Services and the Right of Establishment, and the delays in the

[27] The GCIM was created in 2003 as an ad hoc body with the approval of the UN Secretary-General and with the mandate to propose the framework for the formulation of a coherent, comprehensive and global response to international migration. For a fuller description of its mandate, see the GCIM's website at http://www.gcim.org/en/.

full implementation of the Economic Community of West African States (ECOWAS) Protocol on Free Movement of Persons, Establishment and Settlement (see Textbox 13.2) with the EU example where the liberalization of worker mobility was treated as a cornerstone of economic integration.

- Agreements between countries sharing geographical proximity, similar levels of development and limited (current and potential) labour migration flows are generally more liberal with respect to the movement of people (e.g. the Common Nordic Labour Market, which contains even more favourable free movement and residence provisions than those operating in the European Union. However, the Common Market of the South (MERCOSUR) and the Andean Community in South America present a different experience in that there have been limited initiatives among neighbouring countries to liberalize the movement of persons (Santestevan, 2007).

Textbox 13.2

Prospects for Greater Labour Mobility within ECOWAS/West Africa

Historically, migrants have always regarded West Africa as an economic unit within which trade in goods and services flowed and people moved freely. Colonial administrators recruited, attracted or coerced workers from the hinterlands to work on the infrastructure and development projects in coastal areas. Over time, labour migration became voluntary and institutionalized.

Independence changed all that as new national governments enacted laws and regulations governing conditions of entry, residence and employment of non-nationals. These regulations and indigenization laws restricted the participation of non-nationals in major economic activities and distinguished between regular and irregular movements.

The Economic Community of West African States (ECOWAS) Protocol on Free Movement of Persons, Establishment and Settlement is a pacesetter in Africa. The implementation of the initial phase over the first five years abolished requirements for visas and entry permits, enabling Community citizens in possession of valid travel documents to enter Member States without a visa for up to 90 days. However, the second and third phases have not yet been fully implemented.

The Meeting of Heads of State and Government, in Abuja, Nigeria, in March 2000, had as its major agenda item the creation of a borderless sub-region in a determined effort to invigorate the faltering implementation of various aspects of the Protocol. Henceforth, immigration officials are to accord the maximum 90-day period of stay to ECOWAS citizens at the entry point. Residence permit requirements for Community citizens were abolished. The ECOWAS travel certificate and subsequently the ECOWAS passport should progressively replace national passports in circulation over a transitional period of ten years. Rigid border formalities were to be eliminated and border procedures modernized through the use of passport scanning machines to facilitate the free and easier movement of persons across borders. ECOWAS travellers' cheques and a common currency – the West African Unit of Account – were proposed to harmonize monetary policy. All these and other measures helped facilitate ongoing and new patterns of labour migration, especially to Nigeria and Côte d'Ivoire, the sub-region's demographic and economic giants, as well as to Ghana and Senegal.

Yet, countries in West Africa have retained national laws and treaties and investment codes that are at variance with the ECOWAS Protocol and, in effect, restrict "foreigners", including nationals of Community states, from participating in certain kinds of economic activity. During periods of economic and political crises, non-nationals become scapegoats and have been expelled, as occurred in Nigeria in 1983 and 1985, and in Côte d'Ivoire in 2000, situations that shook the Community. Many citizens do not have access to national passports, and only very few have obtained ECOWAS travel certificates and passports, owing in large part to bureaucratic bottlenecks. Many also enter Member States, and then overstay or work without authorization.

The labour migration system in West Africa is quite complex. Countries that were once destinations for migrants have metamorphosed into countries of origin. Since the late 1980s, traditional countries of origin and attractive destinations for migrants have experienced endemic political and economic crises, as a consequence of which there have been outflows from both sets of countries.

ECOWAS Member States are searching for policies that would enhance the prospects for greater labour mobility in the sub-region, and priorities for action include:

- The establishment of a Permanent Observatory to provide up-to-date information on labour migration patterns and facilitate internal labour mobility within ECOWAS with limited travel documentation.
- The setting up and/or revamping of an Advisory Board on Migration as a forum for formulating and monitoring the status of implementation of national laws and ECOWAS decisions relating to labour migration.
- Raising migration discourse to the top of the political agenda, showcasing the potential contribution of migrant workers to development and underlining the positive outcomes of migration for migrants and countries of origin and destination.
- Harmonizing national laws and employment codes that regulate the types of economic activity that nationals of Community Member States can practice according to the terms of the ECOWAS Protocol on Free Movement of Persons, Establishment and Settlement.
- Concretely addressing the right of residence and establishment of migrants and obligations of the host countries, and ensuring that the rights of migrant workers in the host countries are protected.
- Enhancing capacity of immigration, customs, police and security officials to help transform their role into that of migration managers, assisting to facilitate rather than restrict regular migration within the sub-region. Officials have to be sensitized to the revised national laws and treaties and ECOWAS protocols.
- Mounting an intensive and sustained public education campaign to raise awareness of the ECOWAS passport and travel certificate and its benefits to Community citizens for travel within the sub-region and also to help halt hostility against migrant workers.
- Promoting student exchange and study programmes to help break language and colonial barriers among countries and peoples, and promoting labour migration and more effective utilization of human resources.
- Promoting access of Community nationals to employment and settlement, and easing remitting of earned income through formal banking channels.
- Harmonizing and implementing the policies of trade, investment, transport and movement of persons in a coherent and integrated manner.

***Source**: Aderanti Adepoju, Coordinator, Network of Migration Research on Africa (NOMRA) and Chief Executive, Human Resources Development Centre (HRDC), Lagos, Nigeria.*

The European Union represents the most far-reaching form of regional economic integration, and its principal characteristics are discussed below. The right of free movement of workers within the region was introduced by the 1957 Treaty of Rome and expanded to include the free movement of all EU citizens in 1993.[28] The EU has succeeded in creating an area where **all** workers who are nationals of EU Member States are entitled to equal treatment regardless of their nationality with respect to employment, remuneration and other working conditions, access to accommodation and the right to be joined by family members.[29] This means, inter alia, that any national of a Member State is entitled to take up and engage in gainful employment on the territory of another Member State in conformity with the relevant regulations applicable to national workers. In order not to jeopardize this right through improper requirements concerning entry into and residence in Member States, workers must be admitted to their territory simply on the production of a valid identity card or passport and be granted the right of residence.[30] Spouses and, where applicable, registered partners, as well as their children up to the age of 21, are authorized to reside with them.

[28] Consolidated Version of the Treaty Establishing the European Community (EC Treaty), OJ 2006 C 321/E/37, Arts. 39 and 18, respectively.

[29] Arts. 12 and 39(2) of the EC Treaty and Council Regulation 1612/68/EEC of 15 October 1968 on freedom of movement for workers within the Community (OJ Sp. Ed. 1968-69, 475, JO 1968 L 257/2, as amended).

[30] For a stay of more than three months the requirement for a residence permit has been abolished, but Member States may require EU citizens to register with the relevant authorities (see Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L 229/35, Article 8).

Under the system of mutual recognition of qualifications, EU citizens fully qualified in one Member State are entitled to exercise a regulated profession[31] in another Member State. Depending on the activity in question and the training completed, recognition will be either automatic or subject to a period of probation or an aptitude test. Self-employed persons and service providers can also exercise free movement rights by virtue of Articles 43-48 (Chapter 2 on the Right of Establishment) and 49-55 (Chapter 3 on Services) of Part Three, Title III of the EC Treaty. Moreover, national social security systems are coordinated at the EU level to prevent discrimination against persons who are exercising their right to free movement.[32]

With regard to service providers, the EC Treaty enables an economic operator providing services in one Member State to also offer services on a temporary basis in another Member State, without having to be established there. In particular, "services" covers activities of an industrial and commercial character; craftspersons' activities; and professional activities. In those instances where restrictions on the provision of specific services have not yet been abolished, the application of such restrictions must be applied without discrimination based on nationality.

The possibility of derogating from the general rules governing the mobility of EU workers has nonetheless been envisaged for workers from countries joining the EU after the 2004 and 2007 enlargements.[33] "Transitional arrangements", as this label suggests, permit the former EU-15 to derogate temporarily from the principle of free movement of workers in respect of workers coming from the new EU Member States for a maximum period of seven years. These arrangements only apply to workers and not service providers, with some limited exceptions for Austria and Germany (see Textbox 13.3).[34]

[31] Regulated professions imply de jure professional recognition, because either the education leading to a professional activity or the pursuit of the particular professional activity are regulated by legal acts (i.e. laws, regulations, administrative provisions), and the final decision on mandatory recognition is in the hands of professional or governmental bodies, or both. The professions regulated vary among countries, generally motivated by consumer protection and public interest concerns. Many countries regulate professions which can have an impact on health or life or result in material or moral loss, such as professions relating to medicine and pharmacy, veterinary medicine, architecture, law or transport.

[32] Article 42 of the EC Treaty and Council Regulation 1408/74/EEC of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (JO Sp. Ed. 1971, 416, JO 1971 L 149/2, as amended).

[33] Over a three-year period (2004-2007) the EU has been transformed from a 15-country Union to one of 27 countries. In May 2004, 10 countries joined the 15 EU Member States: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia. In January 2007, Bulgaria and Romania also became members.

[34] The transitional arrangements in the Accession Treaties of 16 April 2003 provide that for workers from the 8+2 new EU Member States in Central and Eastern Europe (the transitional arrangements do not apply to Cyprus and Malta), access to the labour markets of the former EU-15 will depend on the national laws and policies of those Member States. These arrangements only apply to the taking up of employment, with the exception of Austria and Germany, where the movement of service providers in a limited number of sectors, for example construction and industrial cleaning, may also be restricted in the event of serious disturbances in the service sectors in question.

Textbox 13.3

EU Enlargement – Free Movement of Workers

General Provisions

On 1 January 2007, Bulgaria and Romania joined the European Union, taking the total to 27 Member States. While nationals of all 27 Member States are also EU nationals, not all enjoy from the outset equal rights of free movement. All EU nationals are entitled to move freely among the Member States without visas or other pre-entry conditions. They are entitled to remain on the territory of any other Member State for a period of not more than three months without further formalities and longer if they are self-employed, service providers or recipients, or as students, retirees or economically inactive persons, provided they produce evidence of sufficient independent means and will not have to rely on the social security/welfare system of the respective EU host country.

For the nationals of eight of the ten 2004 accession states (i.e. the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia, collectively referred to as "A8 states"), the right to employment and to remain in the country to work has been limited, though not for Cyprus and Malta. Thus, "A8" nationals are subject to a gradual labour market liberalization scheme under which pre-2004 Member States (the former EU-15) are entitled to restrict labour market access in their regard for an initial two-year period and, subject to notification, for a further three years. In the presence of serious disturbances in a Member State's labour market, these restrictions may be extended for a further two years. However, A8 workers who have completed twelve months or more of lawful employment in a Member State acquire full Treaty rights and are no longer subject to the transitional provisions.

Among the substantial issues that arise in restricting access to the labour market for workers only, and not for the self-employed and service providers, is the suspicion that the self-employed and service providers might be "abusing" the rules against labour market access by falsely presenting their economic activity as self-employment. Similarly, the fact that companies have the right to bring in workers to carry out service provision, though these workers have no right of access to the labour market, has lead to tensions regarding the working conditions applicable to such posted workers (who tend to be from the EU Member State of origin) and the effect on competition.

Free Movement of Workers: Current Situation of A8 Workers

At present, of the pre-2004 Member States, ten have opened their labour markets completely: Ireland, Sweden and the United Kingdom did so as of 1 May 2004; Finland, Greece Portugal and Spain (1 May 2006); Italy (27 July 2006); the Netherlands (1 May 2007); and France (1 July 2008). The U.K. is continuing its Worker Registration Scheme[1] and Finland is developing one.

While the remaining pre-2004 Member States (Austria, Belgium, Denmark, Germany and Luxembourg) extended the transitional arrangements for a further three years as of 1 May 2006, they have relaxed their labour market access rules for A8 workers, either generally or on a sectoral basis.

Concerning the new EU Member States, Hungary proceeds on a reciprocal basis, while Poland and Slovenia first applied and subsequently removed such reciprocity measures.

Free Movement of Workers: Bulgaria and Romania

Ten Member States (the Czech Republic, Cyprus, Estonia, Finland, Latvia, Lithuania, Poland, Slovakia, Slovenia and Sweden) have introduced no restrictions in regard to workers from Bulgaria and Romania, while Denmark, Hungary and Italy have relaxed their labour market access rules in their regard. However, concerns have been raised in some Member States over the application of general national regulations rather than EU rules to foreigners, particularly in the case of expulsions.

Note:

[1] In the U.K., an A8 worker is obliged to register under the Worker Registration Scheme (WRS) within one month of starting employment. A8 nationals who have been lawfully employed in the U.K. for a continuous 12-month period or who are self-employed or service providers are not required to register. The registration fee is GBP 90, to be paid by the worker who is then issued a registration card and certificate. Employers may face sanctions if they violate this obligation and a fine of up to GBP 5,000. For more information on the WRS, see the UK Border Agency website at http://www.ukba.homeoffice.gov.uk/workingintheuk/wrs/.

***Source**: Elspeth Guild, Centre for European Policy Studies (CEPS), Brussels, Belgium.*

One of the unique EU features is a specific approach to the management of migration flows from regions outside the EU through the development of a common policy on asylum and immigration.[35] However, progress on the adoption of a common EU law and policy on regular or legal migration has been relatively slow. Member States have found it easier to adopt measures in the fields of visa policy; external border controls, including the establishment of the European External Border Agency (FRONTEX); prevention of irregular migration (e.g. through information exchange and measures to combat smuggling and trafficking in human beings);[36] and the establishment of an EU return policy involving the negotiation of EU-wide readmission agreements with third countries (agreements with Albania, Hong Kong SAR, Macao SAR and Sri Lanka have already come into force), and common measures on the return of third-country nationals who are resident without authorization within their territories.[37]

While Directives on the right to family reunification (see also Chapter 6), on the status of third-country nationals who are long-term residents and on the admission of students and researchers have been adopted,[38] Member States have demonstrated a reluctance to engage at the EU level with the issue of economic-related migration from third countries. In order to break this impasse, in January 2005 the European Commission (2005a) presented a Green Paper on an EU approach to managing economic migration, a consultative document which paved the way for the adoption in December 2005 of a Policy Plan on Legal Migration (European Commission, 2005c).[39] This plan led to two legislative initiatives presented in October 2007. The first is a proposed Directive on the conditions of entry and residence of highly skilled migrants from third countries (European Commission, 2007d), the so-called "Blue Card" proposal, and the second a proposed Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State, as a well as a common set of rights for lawfully resident third-country workers (European Commission, 2007e).[40]

A further characteristic of EU migration policy is close cooperation with countries of origin on managing migration flows, which is supported by a special budget line (originally AENEAS, recently replaced by a new programme, the Thematic Cooperation Programme with Third Countries on the Development

[35] EC Treaty, Part Three, Title IV. Key elements of this policy were identified by the European Council in Tampere in 1999: the adoption of a comprehensive approach to the management of migratory flows so as to find a balance between admissions for humanitarian and those for economic purposes; fair treatment for third-country nationals; and forging partnerships with countries of origin, including policies of co-development. The Hague Programme (2004-2009) reinforced these elements and identified new ones. See also n. 39 below. It should be noted that one of the ultimate objectives of the Southern African Development Community (SADC) 2005 Protocol on the Facilitation of the Movement of Persons (which has not yet come into force) is also to eliminate obstacles to the **movement of persons into** the Community (Williams, 2008).

[36] One the most recent initiatives to address irregular migration is the proposed Directive on employer sanctions (European Commission, 2007c).

[37] In June 2008, the Council of Ministers and the European Parliament reached agreement on a Directive on Common standards and procedures in Member States for returning illegally staying third-country nationals. The Directive includes common measures on the voluntary return, detention and expulsion of irregular migrants, and Member States will be required to transpose these measures into their domestic legal and administrative systems within a period of two years from the Directive's formal adoption.

[38] See, respectively, Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 2003 L 251/12; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004 L 16/44; Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, non-remunerated training or voluntary service, OJ 2004 L 375/12; and Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purpose of scientific research, OJ 2005 L 289/15.

[39] The Policy Plan defines a roadmap for the remaining period (2006-2009) of the European Council's Hague Programme, a five-year programme for the development of the Area of Freedom, Security and Justice adopted in November 2004. The Policy Plan was one of the priorities identified in the Hague Programme and lists the actions and legislative initiatives that the Commission intends to take to pursue the consistent development of an EU legal migration policy.

[40] Proposed directives on seasonal workers, intra-corporate transferees and remunerated trainees are in the process of formulation (European Commission, 2005c).

Aspects of Migration and Asylum).[41] This cooperation now encompasses the global approach to migration management adopted at the end of 2005.[42] It also builds on earlier initiatives, such as the support of a linkage between migration and non-related issues as a means to secure greater cooperation on migration issues,[43] and the inclusion of migration concerns in EU external and development policies and agreements (European Commission, 2005b).[44] The recent introduction of mobility partnerships to better manage migration flows between the EU and specific third countries is the latest development in the construction of a comprehensive cooperation framework.[45]

All these elements make the EU the most advanced regional entity in managing external and internal movements of persons, even though it took several decades to reach that level. However, the framework applicable to the movement and treatment of non-EU nationals is still incomplete and does not cover admission for employment, which remains within the competence of individual Member States.

Other regional economic integration processes (e.g. Andean Community, Caribbean Community and Common Market (CARICOM), COMESA, ECOWAS SADC and MERCOSUR), which support free movement to various extents,[46] are some distance from the progress made at the level of the European Union, although the EU experience also demonstrates that such an advanced degree of integration is the result of a lengthy and painstaking process and requires the support of an institutional infrastructure and a strong resource base. It should also be underscored that each region is unique on account of its history and level of economic and social development with the result that migration management objectives, whether they are to be applied in an internal or external context, or both, are often also quite different. Nevertheless, this does not mean that progress cannot be achieved through other less formal regional mechanisms, as discussed in the section below.

3.2 Regional Consultative Processes

The purpose of Regional Consultative Processes (RCPs) is to discuss migration-related issues in a cooperative manner with a view to reaching a common understanding of, and where possible, effective solutions for regional migration management (IOM/Swiss Federal Office for Migration, 2005b). A number of factors explain their emergence and breadth:

- RCPs offer a structure for dialogue, exchange of information and expertise without requiring a government to enter into formal commitments. This facilitates confidence building, the identification of like-minded partners and the search for common understandings and approaches. It also allows the discussion of sensitive issues in a non-confrontational manner.

[41] See the European Commission website at http://ec.europa.eu/europeaid/where/worldwide/migration-asylum/index_en.htm (External cooperation programmes - Migration and Asylum).

[42] In December 2005, the European Council adopted the "Global Approach to Migration", which brings together migration, external relations and development policy to address migration in an integrated, comprehensive and balanced way in partnership with third countries.

[43] Every cooperation and association agreement concluded by the EU must contain a clause on joint management of migration flows and on compulsory readmission in the event of irregular migration (see the Conclusions of the European Council in Seville in June 2002).

[44] See e.g. the Partnership Agreement between the Members of the African, Caribbean and Pacific (ACP) Group of States and the European Community and its Members States, Cotonou, 23 June 2000, and the European Neighbourhood Policy with countries to the South and East of the EU (European Commission, 2007a).

[45] In May 2007, the European Commission (2007b) presented a Communication on *Circular migration and mobility partnerships between the European Union and third countries*. The Communication proposes partnerships between the EU and third countries interested in working with the EU to address irregular migration, while facilitating regular migration and circular migration. In June 2008, two joint declarations on mobility partnerships were signed between the EU and Cape Verde (in cooperation with four EU Member States) and Moldova (in cooperation with 14 EU Member States).

[46] While free movement of persons has not been advanced in the context of the Association of Southeast Asian Nations (ASEAN), the protection of migrant workers is a particular concern, as reflected in the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, adopted by the Heads of State/Government in Cebu, the Philippines on 13 January 2007. See the ASEAN website at http://www.aseansec.org/19264.htm.

- States are more willing to join RCPs since they can withdraw from them just as easily if they so desire.
- States interact on equal terms, which favours a broad sense of ownership of the process.
- Membership can be open to states sharing migratory routes (countries of origin, transit and destination). Unlike more formal entities based on economically or politically motivated membership, RCPs may select participants according to their potential contribution to the advancement of the migration agenda (e.g. the 5+5 Dialogue on Migration in the Western Mediterranean[47]).
- They can extend participation to non-state actors, such as intergovernmental organizations or NGOs, and bring together officials from different ministries (IOM/Swiss Federal Office for Migration FOM, 2005b).

RCPs' agendas are flexible and responsive to members' main concerns, hence the evolving nature of their work priorities. RCPs typically revolve around a key theme. In the past, many of them focused on issues linked to irregular migration, such as the return of irregular migrants and readmission agreements, visa policy, border management, and human smuggling and trafficking. They are now inclined to have a broader work programme and increasingly cover development issues, labour mobility (see Textbox 13.4), remittances, protection of the human rights of migrants, integration or visa facilitation.

[47] The 5+5 Dialogue involves **Algeria, France, Italy, Libya, Malta, Mauritania,** Morocco, Portugal, Spain and Tunisia. **It is an informal process in which** governments cooperate and exchange information and analyses on topics such as migration trends, irregular migration and trafficking in human beings, migration and co-development (e.g. the role of diasporas), human rights and duties of migrants, integration, movement of people and management of regular migration, labour migration and vocational training, migration and health, local cooperation and gender equality in the context of migration. For more information, see IOM's website at http://www.iom.int/jahia/Jahia/pid/860.

Textbox 13.4

Regional Consultative Processes and Labour Mobility

Regional Consultative Processes (RCPs) are informal, non-binding and regularly scheduled meetings attended by government representatives – generally at senior official, but sometimes at ministerial level – to discuss issues of mutual concern related to migration. In keeping with the non-institutional character of RCPs, their administrative structures are kept simple, often in the form of small secretariats hosted by an international organization.

RCP membership is wide and varied. The meetings may be attended by either both home and host countries or, alternatively, only countries of origin or destination. Some of the better known RCPs are:

- Intergovernmental Conference on Migration, Asylum and Refugees (IGC). Established in 1985, it involves destination countries in Europe, North America and Australia and New Zealand, and examines border control, asylum, immigration (regular and irregular) and security issues.
- Regional Conference on Migration (RCM) (Puebla Process). Established in 1996, it includes Canada, the United States, Mexico and Central American countries, and focuses on migration policy, rights of migrants and development.
- 5 + 5 Dialogue on Migration in the Western Mediterranean. Established in 2002, it includes five southern European and five North African countries and examines migration, trafficking in human beings, rights of migrants, health, gender equality and public awareness.
- Migration Dialogue for Southern Africa (MIDSA). Established in 2000, it includes Botswana, the Democratic Republic of the Congo (DRC), South Africa and 12 other Southern African countries. It focuses on migration/border management, health, development, rights of migrants, return and readmission, and trafficking in human beings.
- Intergovernmental Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants (APC). Established in 1996, the APC brings together 29 countries from the Asia-Pacific region. It focuses on return, refugees, trafficking in human beings, remittances, public awareness, burden sharing and capacity building.

- Bali Process. Established in 2002, it includes a wide range of countries of origin, transit and destination from many different regions of the world. It focuses on trafficking and smuggling in human beings and related transnational criminal activities.
- Ministerial Consultations on Overseas Employment and Contractual Labour for Countries of Origin in Asia (Colombo Process). Established in 2003, its membership consists of Afghanistan, Bangladesh, China, India, Indonesia, Nepal, Pakistan, the Philippines, Sri Lanka, Thailand and Viet Nam. In addition, certain countries of destination, viz. Bahrain, Italy, Kuwait, Malaysia, Qatar, Republic of Korea (South Korea), Saudi Arabia and the United Arab Emirates (UAE) participated as observers in the Ministerial Consultations in September 2005. The Colombo Process focuses on three thematic clusters: protection of vulnerable migrants and provision of support services; optimization of the benefits of organized labour migration; and capacity building, data collection and interstate cooperation (see also Textbox 10.5).
- Abu Dhabi Dialogue. The Abu Dhabi Dialogue was launched in January 2008. It brings together Colombo Process countries and countries of destination in Asia for consultations focusing on the facilitation of labour mobility and the protection of temporary contractual workers (see also Textbox 10.5).

RCP agendas have evolved considerably over the years. The initial focus on individual topics of interest (such as asylum policies and procedures, trafficking in human beings or border control) has gradually given way to broader, comprehensive perspectives on migration management in which labour mobility now occupies an increasingly important place. Even issues that appear less directly related to labour mobility – trafficking and irregular migration, for instance – have implications for labour mobility, in the sense that the effective control of borders can contribute to the development of a climate of public confidence supportive of the facilitation of the movement of migrant workers. Two RCPs, the Colombo Process and the related Abu Dhabi Dialogue, have chosen labour mobility as their prime focus of interest and have developed a range of capacity-building activities to equip participating countries with the legislative and administrative tools needed to manage their labour flows effectively.

***Source**: Randall Hansen, Canada Research Chair in Immigration and Governance, Department of Political Science, University of Toronto, Canada.*

Regional consultations often lead to the adoption of recommendations, action plans or regional strategies setting shared principles and goals. Financial mechanisms are sometimes devised to sustain a component of technical cooperation assistance (e.g. joint training). Past experiences have proven that the success of RCPs may result from the choice of a limited number of participants combined with the support of an ad hoc (e.g. IGC) or internationally-based (IOM, UNHCR, UN Institute for Training and Research - UNITAR) secretariat. A participating state or a regional intergovernmental organization (e.g. Association of Southeast Asian Nations – ASEAN) may also host the process.

RCPs dedicated to labour migration issues do not create openings within the regional labour market. Rather, they facilitate movements through the adoption of recommendations or guidelines on issues such as visa facilitation (e.g. Asia-Pacific Economic Cooperation - APEC), or the protection and training of the labour force (e.g. Colombo Process[48]), which in turn can create the impetus for the realization of projects in these fields (e.g. training of labour attachés or the establishment of migrant resource centres). Although APEC is not a typical RCP, its pro-mobility activities are a good illustration of the levels of progress that can be achieved in a regional forum on the basis of consensus and voluntary commitments (see Textbox 13.5).

[48] This is the short title for the RCP on overseas employment and contractual labour for countries of origin in Asia. See also Textbox 13.4.

Textbox 13.5

Asia-Pacific Economic Cooperation (APEC)

APEC,[1] which gathers members bordering the Pacific Ocean and often separated by large geographical distances (e.g. Australia, China, Peru), does not increase access to the labour markets of its members. Rather it is committed to facilitating labour mobility for certain categories of highly skilled persons through (1) exchanging information on regulatory regimes; (2) streamlining the processing of short-term business visitor visas and procedures for temporary residence of business people; and (3) maintaining a dialogue on these issues with the business community. This work is coordinated by the Informal Experts' Group on Business Mobility.

The APEC Business Travel Card (ABTC) is one of the key initiatives being pursued. This card provides pre-cleared short-term entry to the 17 APEC economies participating in the scheme. The card holders do not need to individually apply for visas or entry permits each time they travel, as the card provides for multiple entries into participating economies during its three-year period of validity. In addition, immigration processing on arrival is accelerated via fast-track entry and exit through special APEC lanes at major airports. APEC has also developed an electronic APEC Business Travel Handbook providing a quick reference guide to the visa and entry requirements of APEC participating economies.[2]

The introduction of the ABTC followed a pathfinder approach, allowing countries to join when ready (conditions include: sufficient resources, necessary legislative frameworks in place and capacity to be an equal partner) and providing technical assistance to developing economies. The principles and procedures of the programme are compiled in an ABTC Operating Framework (including card manufacturing standards, eligibility criteria and service standards), which should be followed on a "best endeavour basis", and are not legally binding.

> Applications for the ABTC card are made to the designated home country agency (each state determines which particular agency accepts applications). The home country then carries out necessary vetting procedures in order to select bona fide applicants: it was agreed that the country of origin is in the best position to implement the specific procedures to determine who is eligible for the ABTC, and thereby maintain the integrity of the scheme. Although the basic eligibility requirements are set out in the Operating Framework, economies may use additional criteria to ensure bona fide applicants. Applications approved by the country of origin are sent to the participating economies and, if accepted, are given a pre-clearance permission. Member states are not required to give reasons for refusing pre-clearance to any applicants. Finally, the home country can issue the ABTC card, which allows entry into all economies that have given a pre-clearance permission. The ABTC pre-clearance system ensures that states retain the control over the movement of people across their borders and over the eligibility of domestic applicants. The ABTC members also benefit from the increased integrity of the scheme, which results from the double-screening procedure by home and destination countries. The programme inspires a high degree of confidence in both government officials and the business community: in the history of the ABTC, no instances of fraud have been discovered (David Watt, Department of Immigration, Multicultural and Indigenous Affairs, Australia, speaking at the OECD/World Bank/IOM Seminar on Trade and Migration, Geneva, 12-14 November 2003).

One of the keys to the success of the scheme is that it is designed and supported by a major destination country, Australia, which has considerable experience in migration management and pre-entry clearance, thereby reassuring other destination countries of the efficiency of the entire system. Nonetheless, despite this and the good record of the scheme, it is important to note that Canada has not yet joined, while the U.S. only became a transitional member in September 2007 (with the aim of full participation within three years).

Other pro-mobility initiatives include a 30-day processing standard for applications for, and extensions of, temporary residence permits for APEC intra-company transferees, the development of standards in all major immigration areas,[3] assistance to regional economies to develop Advance Passenger Information (API) Systems (information about incoming airline passengers supplied to the destination government) and Advance Passenger Processing (using API provided by airlines to run checks against electronic immigration records for pre-arrival screening); as well as the creation of a Regional Movement Alert System (RMAS – provision of real-time access to a database of lost and stolen passports).[4] Since 2002, APEC has also paid more attention to remittances with a working group established by finance ministers to examine the economic, structural and

regulatory factors that encourage the use of remittances in the APEC economies. The APEC initiative on remittances systems has helped launch research projects (undertaken by the World Bank and the Asian Development Bank, in particular) and led to the organization of two symposia.[5]

Notes:

1 APEC's 21 member economies are: Australia, Brunei Darussalam, Canada, Chile, China, Hong Kong SAR, Indonesia, Japan, Republic of Korea (South Korea), Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippines, Russian Federation, Singapore, Taiwan Province of China, Thailand, United States and Viet Nam.

2 The Business Travel Handbook is available at http://www.businessmobility.org/travel/index.asp. It lists the basic eligibility criteria and procedures for applying for visas and the terms and conditions that apply to business travellers. This information is provided for both short-term business visits and temporary residence for business purposes in APEC economies. The Handbook also provides contact details for the embassies, consulates and other visa-issuing agencies of each member economy.

3 Including pre-arrival, entry, stay and departure. Standards and/or best practice guidelines have been agreed by the Business Mobility Group covering short-term and temporary residence arrangements, transparency, API implementation, e-commerce, immigration legislation, travel document examination, travel document security, professional immigration services and the APEC Business Travel Card scheme.

4 See http://www.businessmobility.org/key/index.html.

5 APEC Symposia on Alternative Remittances Systems, Tokyo, 3-4 June 2004 and The Role of the Private Sector in Shifting from Informal to Formal Remittance Systems, Bangkok, 26-27 May 2005.

RCPs' perceived success is based partly on the common interest of participants in the topical issues considered by the group of states concerned. RCPs are well positioned to add coherence to the broader regional agenda and complement formal regional processes by involving neighbouring or like-minded states in special or ad hoc discussions. They are particularly useful when progress in formal arrangements is lagging, as they allow continuation of dialogue. They are similarly well placed to enhance bilateral cooperation (see Section 4 below) by creating trust relationships between countries and generating opportunities for interactions in a broader setting. The number of RCPs specializing in international labour mobility is still rather limited and their impact on the development of national labour migration policies is difficult to assess owing to the non-normative approach adopted. The informality of these processes may therefore be regarded both as a strength (as this fosters broader participation) and as a weakness (as the concretization of identified goals is left to the discretion of each country).

4. Facilitating and Managing Temporary Labour Migration through Bilateral Cooperation

Bilateral labour migration agreements were first used extensively at the end of the Second World War, when large emerging economies in "New World" countries decided to meet their considerable labour market needs through large-scale immigration programmes.[49] They have regained currency more recently as a flexible policy instrument used by two countries in the management of migratory flows (OECD, 2004). Such agreements can target specific groups of migrants, contain provisions enabling policies to adapt to labour market fluctuations in countries of destination and equitably attribute responsibilities between countries of origin and destination for the monitoring and overall management of the labour migration process.

The scope of these agreements varies. Their provisions generally specify the purpose of the agreement; define the categories of labour concerned; and provide for admission criteria, the terms of migration, fair and equitable treatment and annual quotas, where applicable. However, some specific issues, such as social security and double taxation, recognition of qualifications and irregular migration, are often dealt with in separate agreements (e.g. the bilateral social security agreements signed by the U.S. with 20 countries, including Chile, France and South Korea, or

49 For more information on the historical context of bilateral labour migration agreements, see the textbox written by the author for IOM (2005: Textbox 12.2: "Bilateral Labour Agreements: Effective Tools for Managing Labour Flows?"), from where the material in this section is mainly drawn.

the readmission agreements in force, signed or under negotiation between Switzerland and 33 countries[50]). The diversity of agreements and their provisions reflect the differences in the economic environment and the nature of labour market shortages, as well as a variety of broader economic, social and political objectives for entering into bilateral cooperative approaches for the management of these flows.

4.1 Objectives of Countries of Destination

When engaging in bilateral labour agreements, countries of destination follow mainly four broad types of objectives that are not mutually exclusive. The first of these is to satisfy their labour market needs and to better manage the labour migration process. Through such agreements, a country of destination can respond to its labour market needs by recruiting workers from other countries. Alternatively, where regular channels for migration are already in place, bilateral agreements may help to better match supply and demand, for instance by streamlining recruitment procedures or by stipulating the activities and responsibilities of public authorities and private partners. The most comprehensive agreements cover all phases of the migratory process and various issues related to movement (e.g. access to health care, pre-departure information on labour laws and the cultural and social environment of the destination country, and vocational and language training).

A second objective is to prevent or reduce irregular migration by affording regular migration opportunities. The motivations to offer such opportunities are twofold. First, the idea is to relieve the pressure to migrate from countries of origin and curb the number of irregular migrants by channelling such movements into regular avenues.[51] Second, the opening up of a regular channel is sometimes used as a negotiation tool to secure the willingness of countries of origin to cooperate on managing irregular migration, and especially on the readmission of their nationals who are in an irregular situation (e.g. rejected asylum seekers).

A third objective is the use of bilateral labour agreements to promote and support broader economic relations with countries of origin. The movement of workers in this case is aimed at facilitating regional economic integration and the development of countries of origin. The bilateral agreements signed by Germany with some central and eastern European countries (CEECs) are good examples (OECD, 2004). They establish several forms of temporary migration for work purposes (e.g. seasonal work, contract work and "guest worker" programmes). In that sense, their purpose goes beyond the satisfaction of German labour market needs to the strengthening of economic relations between Germany and CEECs.

A final specific objective is to preserve or strengthen ties between countries sharing historical (sometimes post-colonial) and cultural links. For example, the United Kingdom operates a "working holidaymaker" scheme with participating Commonwealth countries, allowing persons aged between 17 and 30 to come

[50] Information taken from the IGC Matrix on Countries of Origin/Transit Countries parties to IGC States' and the EC's Readmission Instruments (in force, signed or under negotiation).

[51] Some bilateral labour agreements are signed at the time of a regularization programme and target the principal countries of origin of irregular migrants. The idea behind this approach is to encourage irregular migrants to leave the destination country, return home and benefit from regular work opportunities set out in the agreements. Special clauses on the implementation of the regularization programme can figure in the agreement (with a limited period of validity), e.g. migration agreements between Argentina and Bolivia, and Argentina and Peru, signed in February 1998 and May 1999, respectively, and their additional Protocols. The agreement between Spain and Ecuador concerning the regulation and control of migratory flows (*Acuerdo entre España y Ecuador relative a la regulación y ordenación de los flujos migratorios*) (Madrid, 29 May 2001), stipulates in Article 14(3) that migrants returning home to regularize their situation will have their visa and work permit applications treated as a priority: "[T]he authorities of the requesting contracting party undertake to facilitate the departure and gradual and voluntary repatriation of undocumented persons in their territory, so that those who so request are guaranteed that the respective embassy will provide fast-track treatment for their residence and work visas, with the guarantee of a job in the requesting contracting party."

to the United Kingdom for an extended holiday of up to two years and to engage in part-time or casual work.[52] In the same vein, in 1998, Portugal concluded an agreement with Cape Verde on the temporary recruitment of workers (Fonseca et al., 2005).

4.2 Objectives of Countries of Origin

The objectives of countries of origin in entering into bilateral labour migration agreements are mainly economic and social. The first and obvious motivation is to offer their workers wider, facilitated access to the international labour market and, at the same time, to prevent criminal activities involving the smuggling and trafficking of human beings, and the exploitation, suffering and sometimes deaths of migrants, frequently associated with attempts to migrate in an irregular manner.

Nationals of countries of origin are provided preferential entry by destination countries under bilateral arrangements in three different ways:

- **Special categories**: Employment of certain categories of workers (especially the low or semi-skilled or for certain types of jobs not covered under the general immigration admission system is authorized for nationals of countries having signed bilateral arrangements (e.g. in Germany, seasonal employment in agriculture and other sectors can only be accessed through bilateral agreements). This provision is sometimes capped.
- **Preferential admission or employment**: When the categories covered by bilateral agreements are not different from those covered by the general migrant entry provisions, workers covered by these agreements can benefit from preferential admission or employment over other foreigners (e.g. in Spain nationals from countries with which Spain has signed bilateral agreements are given preference).
- **Preferential quota**: When countries regulate the number of foreign workers to be admitted under their general migration programmes through quotas, a special quota can be attributed to countries having signed a bilateral labour agreement (e.g. Italy has a preferential quota for for the employment of Albanian and Tunisian nationals in tourism and agriculture), or they can benefit from unrestricted entry.

Bilateral agreements can include guarantees on ensuring return to home countries[53] or cooperation in matters involving irregular migration, which can be key for securing the support of destination countries in opening their labour markets, in particular to more "sensitive" categories of workers, such as low-skilled workers (see Textbox 13.6).

In addition to relieving the strain on domestic labour markets, by providing opportunities abroad for unemployed or underemployed persons and broadening the tax base (mainly through family members' consumption and indirect taxes), bilateral agreements are also seen as a means to support the link between labour migration and development by (i) regulating outflows, including the reduction

[52] The details of the scheme are described in more detail on the U.K. Border Agency's website at http://www.ind.homeoffice.gov.uk/workingintheuk/tier5/workingholidaymakers/. See also Chapter 5.

[53] E.g. the employment agreement for Caribbean workers in Canadian agriculture stipulates a 25 per cent mandatory remittance from the worker's wages under a "Compulsory Savings Scheme". This deduction is remitted to the country of origin liaison officer and is handed back to the worker upon return. Another feature of this agreement is that it authorizes workers to re-enter the scheme year after year and thus acts as an incentive to return. In the agreement between Spain and Ecuador, above n. 51, a specific provision concerning return has been included. According to Article 12 of the agreement, prior to recruitment, temporary workers must sign a commitment to return to Ecuador when their permit expires, and within a month of their return they are obliged to present to the Spanish consular office from where they obtained their visa for temporary work in Spain their passport with the stamp of the original visa. The failure to do so will disqualify them from obtaining future contracts in Spain and will be taken into account when considering any future applications for work and residence permits they may lodge with Spanish authorities.

of brain drain;[54] (ii) setting up mechanisms to facilitate remittances and the transfer of know-how and technology; and, more generally, (iii) building confidence between communities of origin and destination, which in turn fosters forms of cooperation beyond labour migration management.

Bilateral agreements are also seen as a tool to promote and protect the welfare and rights of migrant workers. Some agreements are used to state the general working and wage conditions applicable to migrant workers, and may provide a standard employment contract (e.g. the Canada-Mexico Memorandum of Understanding (MoU) states that employment conditions should be equivalent to those of Canadian workers, and Annex 2 includes the employment contract which should be signed by the employer and the worker).[55] Bilateral labour agreements can provide for social security arrangements or refer to parallel bilateral social security agreements already concluded or to be signed (e.g. Article 5 of the Protocol for temporary migration from Cape Verde to Portugal) and may also cover issues such as health insurance or job safety measures (e.g. provision of training and adequate equipment). Some specific clauses for the protection of migrants regarding freedom of religion and trade union rights can be built into the agreement as well.

In many cases, clauses pertaining to working conditions and wages are simply a reminder that foreign workers are subject to the same laws and regulations applicable to nationals. However, they can also address gaps in sectors that are often not covered in national labour codes (which is mainly the case for agricultural and domestic workers[56]) and in countries where there is no minimum wage.

[54] With regard to highly skilled workers, bilateral agreements can provide safeguards to respond to the concerns of some countries of origin over potential brain drain effects. These may include specific measures relating to, e.g. the return of workers, joint training or the exchange of expertise. The United Kingdom developed a code of practice for the international recruitment of healthcare professionals that encourages the use of bilateral agreements in the prevention of adverse consequences on developing countries. The use of bilateral agreements to prevent brain drain is also part of the recommendations of the 2003 Commonwealth Code of Practice for the international recruitment of health workers and its companion document (http://www.thecommonwealth.org/Internal/34040/34042/human_resources_for_health/), and the 2004 Teacher Recruitment Protocol (http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B90CCBAE1-D475-47EC-BD52-02BE05EA0D27%7D_PROTOCOL.pdf).

[55] Another example concerns the Bilateral Labour Service Cooperation Agreement between the Government of the Republic of Mauritius and the Government of the People's Republic of China, signed in January 2005. The Agreement provides, inter alia, for (i) the establishment of a working group within the framework of the Sino-Mauritian Economic and Trade Joint Committee for the exchange of views on a regular basis and the review of the employment situation of Chinese workers in Mauritius; and (ii) the recruitment of workers from China through Chinese recruitment agencies approved by the Chinese Government.

[56] However, these types of instruments are limited in number. To address the problem of the rights of domestic workers, in 2001, Jordan instituted an MoU between the Ministry of Labour and the UN Development Fund for Women (UNIFEM) that also involves the following countries of origin: India, Indonesia, Nepal, the Philippines and Sri Lanka. In 2003, a standardized contract for foreign domestic workers in Jordan stipulated a set salary and provided for medical care. New laws followed to regulate and license recruitment agencies. A steering committee involving relevant ministries, embassies and NGOs has also been established.

Textbox 13.6

Exploring the Role of Reformed Bilateral Labour Agreements: The Caribbean Community and the Temporary Movement of Less-skilled Labour

Composed largely of small island states with limited economies of scale and per capita income differentials of up to 35:1, the Caribbean Community and Common Market (CARICOM) relies in good part on intra-regional labour mobility for the realization of a Caribbean Single Market and Economy (CSME). The objective of the free movement of persons (covering the movement of skills, the movement of services and the right to establishment) is tied to a 2008 target; however, for this deadline to be met the more developed states will have to acquire confidence in their ability to manage influxes of migrants, especially when they are less-skilled.

Until this issue is fully addressed, the growth of those sectors of the economy that rely on intensive, less-skilled labour – tourism, for instance – will be constrained and least developed countries (LDCs) with a surplus of less-skilled labour will struggle to overcome intra-regional disparities (Caldentey and Schmid, 2006). In the meantime, as unmet labour demands persist and important countries of origin (e.g. Haiti) and destination (e.g. the Bahamas) remain outside the CSME, one may expect an increase in irregular intra-regional migration.

The regulation and facilitation of less skilled labour flows is also of critical significance for the management of extra-CARICOM migration, whether to the nearby Dominican Republic or farther afield to the U.S., Canada, the United Kingdom, France and the Netherlands, all the more so because of the role played by remittances in the regional economy (IADB, 2007; World Bank, 2005) and because of the current and/or projected demographic and economic profiles and associated demands for migrant workers among various countries of destination.

In the light of such unresolved concerns over how best and to what extent to integrate labour markets at the lower end of the skills spectrum, bilateral labour agreements (BLAs) may constitute promising instruments for the flexible matching of labour supply and demand, both seasonal and structural and according to national requirements and capacities, while mitigating irregular migration pressures. Several BLAs already exist, including those under the Commonwealth Caribbean Seasonal Agriculture Workers Program (SAWP) with Canada[1], and others concluded by CARICOM Member States with the U.S. for the temporary employment of farmers and hospitality workers.

If the coverage of destination countries and worker categories of such agreements is to be expanded successfully (World Bank, 2005), public education and awareness of their benefits, and significant improvements in their design to ensure feasibility, will be critical.

The benefits of well-designed BLAs for countries of origin include, among others, expanded access to the international labour market and "brain circulation". Destination countries meanwhile can gain from cooperation in ensuring that access to their territory generally remains temporary and responds more efficiently to verifiable labour shortages and sectoral shifts in demand. Effectively meeting these objectives requires that these agreements and/or accompanying unilateral initiatives incorporate incentives for temporary and circular migration; adequate quotas; and relatively low transaction costs for employers and migrants alike (Mansoor and Quillin, 2007; Ruhs, 2005).

BLAs could also potentially serve as development policy instruments by offering less-skilled nationals of LDCs preferential access to employment quotas, the impact of which may support the attainment of the Millennium Development Goals (MDGs) (Pritchett, 2006). By targeting the less-skilled, these agreements could partly address the reservation that skill-biased admission policies may exacerbate income disparities within countries of origin by raising the local skill premium (Pritchett, 2006; Caldentey and Schmid, 2006) and skewing remittance flows towards the presumably better-off. However, at the moment, Haiti, for instance, has a fairly even distribution of remittance recipients among the lowest and highest income quintiles, according to the Haiti Remittance Survey 2006 of the Inter-American Development Bank (IADB, 2007), although this could change. Nevertheless, further research is required to determine whether any such effects are offset by the human capital and/or employment generated through higher returns to education and the local investment of remittances from highly skilled workers (World Bank, 2005).[2] Such development objectives may be most realistic where the agreements address labour shortages that are of a temporary nature.

BLAs may furthermore reduce the vulnerability of migrant workers to exploitation during recruitment and employment. Beyond obliging countries of origin to better regulate recruitment agencies, the agreements could assist them in negotiating limited freedom of movement for their nationals within assigned occupational sectors, thereby also potentially raising labour market efficiency in the destination country (Ruhs, 2005).

More rigorous research on the effectiveness of such agreements in terms of their implementation and impact and, possibly, the formation of a regional consultative process (RCP) on migration to complement the CSME, where good practices and experiences can be shared, would likely assist the Member States of the Caribbean Community to develop expanded and more effective BLAs.

To conclude, well-designed BLAs can assist countries of origin and destination to cultivate the multi-stakeholder cooperation and public support necessary to address politically sensitive issues in migration management and help to bring migration policies more into line with those on trade and foreign investment (Ruhs, 2005). In so doing, BLAs may assist in securing the interests of all parties and facilitate a more equitable integration of less-developed countries of origin into the regional and global economies.

Notes:

[1] Implementation of the SAWP commenced in 1966 based on negotiations between Canada and Jamaica, and the programme was subsequently extended to Trinidad and Tobago and Barbados in 1967, Mexico in 1974, and the Organization of East Caribbean States in 1976.

[2] Other remittance issues under discussion include the direction of causality in the association between remittance inflows and relatively high unemployment among migrant-sending households in some countries such as the Dominican Republic, and the potential for remittances to result in exchange rate appreciation and reduced competitiveness of exports among small economies.

***Source**: Jennifer Zimmermann, Darfur Coordinator, IOM Sudan (formerly Project Development Officer, IOM Haiti).*

4.3 Different Forms of Bilateral Arrangements and their Scope

As discussed above, bilateral cooperation on temporary labour migration may aim to fulfil various economic, social and political purposes and take a number of different approaches. But how does this cooperation take shape? Bilateral cooperation arrangements can be distinguished according to their legal status, the comprehensiveness or specificity of the migratory issues addressed and the categories of workers covered.

(a) Legal status

Bilateral arrangements can cover a wide variety of devices, from legally binding agreements (i.e. formal treaties) to less formal Memoranda of Understanding (MoUs) and very informal practical arrangements, such as those involving primarily the national employment agencies of the two countries concerned.

Bilateral arrangements can take the form of a treaty, i.e. a legally binding instrument between the two governments concerned governed by international law. Such agreements may or may not include a formal mechanism (e.g. arbitration) for the settlement of disputes, but where they do, the parties to the agreement are required to follow the decisions of any such body. Furthermore, bilateral agreements are often published in the official journal of laws of the countries concerned, although their method of adoption and publication will normally depend on the administrative and constitutional rules of those countries.

A country may, however, prefer to conclude MoUs or Cooperation Arrangements (CA),[57] which have a status similar to that of administrative or private "arrangements", and which are not legally binding on the state. While MoUs/CAs may also contain mechanisms for resolving disputes, these are usually in the form of further political dialogue or consultations between representatives of the parties concerned.

Memoranda of Understanding can be of the "government to government" type (e.g. MoU between Canada and Mexico or the Caribbean states on the Seasonal Agriculture Worker Program (SAWP) – see Textbox 13.6), of the "government to private sector" type (e.g. Guatemalan Ministry of Labour with FERME, an employer association in the Canadian Province of Québec on the recruitment of seasonal agriculture workers - see Textbox 10.2) or between national administrations (e.g. between Germany's and Slovenia's employment services for "guest workers"). While under a MoU, the actions or decisions taken

[57] MoUs and CAs are two out of a large variety of informal arrangements used. For example, the U.K. operates a youth exchange scheme with Japan, "Japan yes", on the basis of a *Note verbale* agreed with Japan, and the Philippines has signed a "Memorandum of Agreement" with Iraq, Jordan and Qatar.

are generally not subject to public international law, they may be subject to pertinent branches of national law (e.g. administrative or labour laws).

Bilateral labour arrangements and MoUs are general framework agreements: the details for their implementation are to be found in operational guidelines often attached to the main agreement (e.g. Canada SAWP MoU, Annex 1), or to be arranged through informal cooperation directly between the parties[58] (e.g. through an exchange of letters between administrative agencies), or be left for decisions to be taken at the local level, which in turn may or may not be enshrined in administrative instruments or similar means of regulation. BLAs and MoUs may serve to establish a joint committee to manage issues arising from the application of the agreement by countries of origin and destination (e.g. under the Spain-Ecuador agreement[59] and Canada's SAWP[60]).

Flexibility is an important element of bilateral arrangements. One of the potential advantages of foreign employment schemes is their ability to adapt in a timely manner to labour market developments in terms of the number and groups of persons they wish to capture. Sometimes programmes are set up for a limited period of time, for example the time needed by a country to adapt its human resource development strategy to meet certain needs.[61] In all bilateral agreements, the possibility of amendment is included and, indeed, most existing agreements have been modified several times. Emphasis on flexibility is further expressed by the legal nature of these agreements, only a few are legally binding treaties, while most of them constitute less formal arrangements.

In summary, when formal arrangements are in place, they also require informal cooperation, in particular on the administrative details for their implementation. However, bilateral cooperation may rely on purely informal processes in the absence of written commitments, and operate through working groups, periodic discussions and annual conferences. For example, Guatemala and Mexico established a bilateral commission on migration for the exchange of information, discussions on working conditions and irregular migration, together with a sectoral working group on agriculture workers (Geronimi, 2004).

Because they are generally in a less advantageous bargaining position, countries of origin usually prefer legally binding arrangements between governments and the establishment of clear procedures. Formal agreements specify more clearly the division of responsibilities between the parties, and their binding character compels compliance while offering better guarantees regarding the protection of the interests of each party.

(b) Comprehensive labour agreements and agreements on specific issues

The different forms of bilateral cooperation may also be categorized according to the extent to which they cover the various stages and aspects of the migratory process. The content of formal bilateral labour agreements is generally more detailed than in MoUs and other less formal arrangements. ILO identifies

[58] E.g. the Model Bilateral Agreement between the Czech Republic and selected partner eastern European countries (OECD, 2004). Clause 8 stipulates that implementation mechanisms should be elaborated in cooperation with responsible authorities.

[59] The Agreement, n. 51 above, establishes a Joint Coordination Committee, which has a multifaceted role regarding follow-up, proposals for amendments where appropriate, timely dissemination of the contents of the agreement and the settlement of any difficulties that may arise in its application.

[60] Canada organizes a national meeting every year in alternation with Mexico or a Caribbean country, which includes senior officials from the source country's Ministry of Labour, Ministry of Foreign Affairs and Ministry of Health.

[61] In 2001, Canada signed MoUs with employer representatives in the construction and the tooling and machining trades of the manufacturing sector. The purpose of both MoUs was to fill immediate shortages in the sectors concerned by facilitating the temporary entry and employment of foreign workers with a view to replacing the latter with Canadian citizens and permanent residents in the medium to long terms. Consequently, both MoUs had a limited life span, although they also contained express provisions for their renewal.

24 core elements which should appear in bilateral labour agreements (Geronimi, 2004).[62]

The categories of workers covered in these agreements vary, with some referring to general employment and others being more sector or skill specific.[63] The most common categories by type of labour recruited are:

- seasonal workers (in sectors such as, for example, tourism, agriculture or construction);
- contract workers and project-tied workers (foreigners employed by a foreign-based company or a domestic firm for work abroad);
- "guest workers" (under general temporary recruitment programmes or programmes targeting skilled professionals);
- trainees (for vocational or language training); and
- working holidaymakers (access to work for young adults while in the host country on holiday).[64]

Beside agreements focusing on temporary labour migration and issues related to a specific migratory process, a number of other bilateral agreements facilitate mobility and/or the management of migration flows generally as regards the admission and return of migrant workers, as well as the prevention of irregular migration and readmission of irregular migrants. These can be broadly classified as follows:

- Bilateral agreements covering specific groups of migrant workers or other migrant categories **with a broader purpose than the management of labour mobility**:

  a. Free trade agreements (FTAs) with provisions on the mobility of workers, particularly skilled or highly skilled workers, discussed in more detail in Textbox 13.7 at the end of this chapter.
  b. Technical cooperation and development agreements, with emphasis on the development of the country of origin (e.g. return and reintegration of skilled workers, creation of job opportunities in areas of high migration pressure, and investment tools and remittances).

- Bilateral agreements covering different migrant target groups and **addressing border-crossing issues**:

  a. Agreements designed to prevent irregular migration, including readmission arrangements and the management of security threats (e.g. assistance for the manufacture of secure identity documents, information campaigns on the risks associated with irregular migration and cooperation on the return of irregular migrants).
  b. Cross-border agreements (applicable to persons residing in border areas and addressing commuting, employment, taxation and other issues of concern)
  c. Visa facilitation agreements which call for, on the basis of reciprocity, the issuance of short-stay visas (e.g. 90 days within a period of 180 days) for specific categories of persons (e.g. scientists, journalists or members of international crews).[65]

[62] These core elements are: Identification of the competent government authority; exchange of information; situation of irregular migrants; notification of job opportunities; list of candidates; pre-selection of candidates; final selection; nomination of candidates by employers (possibility to state the name of a person of interest to the employer); medical examination; entry documents; residence and work permits; transportation; employment contract; employment conditions; dispute settlement; trade union and collective bargaining rights; social security; remittances; housing; family reunification; activities of social and religious organizations; establishment of a joint commission to monitor the implementation of the agreement; validity and renewal of the agreement; the applicable law and place of jurisdiction (Geronimi, 2004: 23-26).

[63] Some agreements are not limited to temporary labour migration and may also facilitate permanent employment-based immigration, as, for instance, the agreement between Spain and Ecuador (see n. 51 above).

[64] For a description of working holidaymaker schemes, see Chapter 5.

[65] This is, for instance, the case for the visa facilitation agreements concluded between the EU and the Russian Federation, Ukraine and the Western Balkan countries, respectively.

- Bilateral agreements **facilitating (or addressing the consequences of) mobility**, while paying no attention to international border-crossing issues:

  a. Mutual recognition arrangements on the criteria and procedures for the recognition of diplomas, or the right to practice a profession or trade in another country.
  b. Social security and double taxation agreements (e.g. portability of pensions, prevention of double taxation).

The diversity of instruments available often implies that a wide range of actors are involved in bilateral cooperation on labour migration. The leading roles in the negotiations and discussions are typically taken by one or several ministries (for instance, the ministry of labour and social affairs, or interior or foreign affairs, or the ministry of immigration or emigration where such specific entities exist). Administrations and institutions under their umbrella (e.g. public employment agencies, universities) may also initiate bilateral agreements with a local or national scope. Some agreements are concluded between private entities and foreign public and/or private authorities. Added to this is the fact that the authorities in charge of negotiating an agreement are often not the same as those responsible for their implementation.

Given these complexities, one of the main challenges consists in achieving coherence in the framing of bilateral labour migration policies, especially as they relate to both the identification of economic and social objectives and their realization through policymaking and implementation. This requires a relatively high degree of national coordination on the part of countries of origin and destination, which is typically lacking owing to the real or perceived inability to reconcile conflicting objectives pursued by diverse public and private stakeholders at various levels (e.g. between different ministries; by businesses; and representatives of employers, workers and civil society), and/or the lack of institutional capacity and financial resources (especially when developing countries are involved).

The high degree of informality, the diversity of objectives and the variety of actors involved make it all the more difficult to track the dynamics of bilateral negotiations on facilitating and regulating labour migration; to identify the trade-offs resulting in the opening up of new channels for migrant workers from particular countries; and to weigh the importance of particular migration management issues (e.g. addressing irregular migration) and their success in securing regular openings for migrant workers.

4.4 Impediments to Bilateral Agreements

It would be mistaken to assume that the relatively limited number of bilateral labour arrangements that have been concluded and are being implemented to date are a reflection of the asymmetry of relations between countries of origin and destination, where the former would be willing to enter into bilateral arrangements but lack the capacity to convince the latter to do so. It is true that many destination countries have declined offers from countries of origin to negotiate such arrangements. Spain has declined 40 such requests (Schulman, 2003), whereas the Philippines and Moldova have not been successful in securing bilateral agreements with some major destination countries (e.g. Saudi Arabia, in the case of the Philippines; and 24 countries relying to some extent on Moldovan migrant workers in the case of Moldova[66]). However, the reasons for this lack of success are complex.

Some of the difficulties may stem from the fact that a number countries adopt a position of principle not to resort to bilateral agreements, but to pursue a

[66] These include Bosnia and Herzegovina, Bulgaria, Canada, the Czech Republic, Estonia, France, Germany, Greece, Hungary, Israel, Italy, Kuwait, Lithuania, Former Yugoslav Republic of Macedonia (FYROM), Poland, Slovakia, the then Serbia and Montenegro, and Slovenia (Sleptova, 2003).

more universal approach regarding labour migration, i.e. one that does not distinguish on the basis of nationality.[67] Other destination countries have engaged in bilateral agreements, but may be unwilling to expand the number of current beneficiaries for various reasons, such as reservations regarding countries that do not figure prominently on their list of priorities, or they may entertain other concerns (e.g. domestic labour market conditions or a source country's standards regarding governance and human rights). Obstacles may also arise from a divergence of opinions between countries of origin and destination about the terms of a bilateral agreement, or from a lack of institutional capacity to pursue the negotiation and implementation of such agreements.

(a) Preference for a unilateral/universal approach

Certain destination countries do not feel the need for bilateral agreements as foreign workers have access to their labour markets through their general immigration policy, and the rights of migrant workers are protected under national legislation. They may also have concerns that concluding bilateral agreements would result in conferring additional rights on migrants not enjoyed by local workers.

For countries that favour a universal immigration policy and offer the same access and conditions to workers of all nationalities, bilateral arrangements may be regarded as discriminatory which, by privileging nationals from one country over others, are susceptible to create political tensions. Indeed, entering into a bilateral labour agreement with one country is likely to create expectations for other countries that their nationals should similarly benefit from the favourable treatment and may, in consequence, affect the quality of diplomatic relations by generating resentment in case of refusal.

With regard to skilled and highly skilled workers, in a context where such competences are scarce and the challenge of global competition to attract such workers is acutely felt, restricting labour market access to professionals from selected nationalities may not appear advisable.

As far as **opening up access** to their labour market is concerned, most destination countries, when declining an offer to negotiate, point to the situation of their employment market and their unemployment rates. Parallel reasons include the general opposition expressed by public opinion to regular migration and fears relating to overstay and the fuelling of irregular migration. As far as **working conditions** are concerned, there may be a reluctance on the part of the government to take decisions which could translate into more obligations beyond those set down in national and international labour standards, and higher costs for the employers of foreign workers (e.g. by regulating issues such as accommodation, overtime pay, rest periods and similar concerns). Certain governments are of the view that the determination of wages and the conditions surrounding the hiring of workers more generally is essentially a private matter between employers and employees, or should be left to labour market forces to determine.

While an argument in favour of BLAs is the prevention of abuse by the private sector (e.g. overcharging of fees, contract substitution) through the involvement of the state in the recruitment process, it has also to be considered that governments or public administrations are not necessarily immune to malpractices themselves and that their involvement can be misdirected to satisfy "political patronage". Furthermore, unnecessarily bureaucratic

[67] This policy is sometimes also qualified as a unilateral approach. However, universal and unilateral approaches are not necessarily the same. Indeed, a unilateral approach suggests that one country has established a policy on its own and on the basis of objectives identified by its government. A universal policy (applying no differences in terms of migrants' origins) may result from such a unilateral process. However, there is nothing to preclude a country from entering into consultations with source countries with a view to improving its universal policy, and therefore departing from a purely unilateral approach (see also Chapter 11 and the discussion regarding the adoption of "development-friendly" policies).

administrative requirements can be an obstacle to effective implementation of the agreement.

The general tendency among major destination countries today is still concerned with the management of ports of entry on the basis of a universal system and closer cooperation with countries of origin on issues related to irregular migration at the bilateral level. Moreover, some countries believe that their commitments under GATS Mode 4 (see Textbox Int. 1), which could be invoked by non-parties on the basis of the Most Favoured Nation Clause of the GATS, preclude such a bilateral approach to admission.

(b) Negotiation and implementation problems

Destination countries usually limit their readiness to enter into bilateral agreements to countries that are potential sources of migratory flows. The number of BLAs they accept to enter into is limited for several reasons, in addition to those connected with the existence of less favourable labour market conditions. Any additional BLA a country concludes will have the effect of limiting or diluting the relative advantage of other beneficiary countries, and may create discontent. Another source of tension emerges when a BLA does not generate movements; countries of origin often regard the availability of jobs in a country of destination as an entitlement rather than a mere prospect, and quotas (where they exist) more as targets than ceilings. Some countries of destination experience this problem with their trainee programmes for foreign nationals, which are typically underused to the dissatisfaction of countries of origin, especially when the programme was negotiated together with a readmission agreement (OECD, 2004). Lack of implementation or utilization can be due to inadequacies in recruitment mechanisms; employer preferences; mismatches between admission criteria and labour force profiles in countries of origin; the balance between earning possibilities (wages, duration of stay) and the costs of migration (i.e. travel, medical examination, lodgings and such like); administrative inefficiency; and the presence of community networks from other countries acting as intermediaries for job matching for their nationals.

It may also be difficult to terminate a bilateral agreement, or to resist pressure for its expansion, even if conditions in the labour market have changed or if countries prefer to change their future immigration policy and restrict their intervention (and related costs) to visa delivery, so as not to be involved in the administration and monitoring of the entire process. Indeed, bilateral agreements are time and resource (financial and human) intensive, as they might imply extensive public administration involvement in their implementation and monitoring; the more countries involved, the higher the administrative complexity, especially if, as is often the case, the terms of the agreements vary.

Countries of destination enter into bilateral labour agreements for two main reasons: (a) normalizing a pre-existing situation with a source country by regularizing irregular flows and reorganizing them in a satisfactory manner; or (b) encouraging/facilitating new recruitment channels for persons whose qualifications are in high demand on the basis of the resources available in **specific** countries (e.g. agreements on nurses by the U.K. with the Philippines and Spain[68]). Consequently, countries of origin that are outside the scope of these interests experience difficulties in building the bargaining capacity necessary to enter into bilateral cooperation.

Obstacles to negotiations and prospective implementation on the part of countries of origin may arise from a lack of institutional capacity to analyse the existing labour demand in destination countries, determine their priorities and pursue

[68] However, changes in the demand for certain categories of foreign labour can affect the functioning of these agreements. For instance, "general nursing" occupations were removed from the U.K. shortage occupation list in August 2006, which impacted on the recruitment of nurses from the Philippines.

a lengthy process of negotiation.[69] Countries of origin may also suffer from the absence of adequate public or private recruitment agencies to "market" their national workforce and facilitate the implementation of labour migration programmes. Further impediments include the educational level, skills and language proficiency of their nationals, whose attributes do not always correspond to those in demand in destination countries.

Countries of origin may also be reluctant to accept a bilateral arrangement requiring, in exchange for some limited market access, the return of nationals in an irregular situation in the destination country. Indeed some countries of origin may feel that it is beyond their capacity to prevent the departure of irregular migrants whose job expectations cannot be accommodated at home, and whose families rely on remittances from abroad to make ends meet. Furthermore, when wages are agreed under BLAs while other sources of foreign recruitment exist, such types of agreement may undermine their competitiveness. For some countries, bilateral agreements are of limited interest as they typically offer few mechanisms for enforcement and redress, and unequal power relationships between countries of origin and destination make it difficult to negotiate equitable agreements that truly protect migrant workers.

Even when parties are willing to enter into BLAs, the terms under discussion might put too much pressure on one party to reach an accord. It is sometimes difficult for the parties to identify common goals when each is advocating its own agenda and is unwilling to make compromises regarding its own perceived interests. Among some of the common subjects of contention are: social and medical insurance, family reunification, conditions of readmission of irregular migrants, recognition of qualifications, and mechanisms supporting circular migration between host and home country to limit disruption to families.

In the context of GATS Mode 4 negotiations and development considerations, the likelihood of bilateral agreements being a complementary tool to the multilateral framework by providing for further openings for the low and semi-skilled workforce should not be overestimated.[70]

It would nonetheless be worthwhile to explore in more depth the other ways in which bilateral agreements may assist in liberalizing the movement of workers, either through further research on examples of good practices of migration management extracted from bilateral agreements, which could lead developed destination countries to adopt a more open attitude towards them, and/or through using these examples for the elaboration of a pre-commitment mechanism which would guarantee access to the labour markets of WTO Members to any countries of origin meeting the stated criteria. Both options offer the advantage of providing solutions for all developing countries because they are not discriminatory and support efforts in the direction of the establishment of a workable global framework.

5. Conclusion

In recent years, the international community has come to recognize migration as a key global issue. There are few who would dispute that migration affects virtually every country in the world in one way or another, and frequently to a very significant degree. This has created previously unforeseen challenges for policymakers, but it has also led to the acknowledgement that no country can realistically hope to manage migration on its own; and, in turn, provided impetus for cooperation

[69] And once the agreement is signed, to discuss the modalities for its implementation and monitoring.

[70] Another issue when exploring bilateral possibilities is the fact that an agreement covering movements of persons only in the context of service provision would normally be incompatible with the Most Favoured Nation principle of the WTO which requires all Member States to be treated equally.

towards the development of common approaches to the management of international migration.

At the global level, there are elements of a normative framework "dispersed across a number of treaties, customary law provisions, non-binding agreements and policy understandings" (GCIM, 2005: 55). There are challenges for the international community in both articulating clearly these provisions and ensuring that they are implemented. The GATS Mode 4 negotiations are an ambitious worksite where advances on the access and entry of service providers is, to a large extent conditioned to progress on much larger portfolios of interest such as agriculture. For the foreseeable future however, most of the effort at the global level is likely to be applied to the Global Forum on Migration and Development, where the migration and development agenda offers a commonly acceptable discussion platform for countries of origin and destination.

At the regional level, the most significant outcomes have been achieved when migration management objectives are linked to broader economic integration endeavours supported by well-developed institutional frameworks and considerable financial resources, as best exemplified within the European Union. By providing a normative framework, such regional undertakings create predictability and a legal basis for safeguarding the rights of migrants. However, in many regions, movements of workers are still restricted, with the exception of the highly skilled in carefully defined situations, and the prospects of fuller integration of labour markets and freer movements of workers are clouded by economic disparities and fear of massive inflows by the strong economies of regional groupings. For this reason, most of the considerable activity at this level is of an informal and non-binding nature. Regional frameworks are sometimes seen as relay stations for the non-coercive implementation of standards and principles adopted at the global level. Regional cross-border movements create shared concerns and elicit interest in their management. The limited number of countries involved offers a more manageable environment for consensus building, allocation of financial resources and technical assistance, and reduction in transaction costs through joint activities. In response to the emergence or evolution of issues of interest to more than one region, inter-regional processes, such as the Bali Process or the Abu Dhabi Dialogue (see Textbox 13.4), can be established as broader consultative or cooperative platforms.

Finally, the bilateral level offers a wide range of possibilities for cooperation, including very concrete partnerships to enable the movement of targeted contingents of migrant workers. Bilateral arrangements are very diverse in form and content. In considering why and how they work, it should be noted that the principal motivations for engaging in such cooperation for the facilitation of movement may frequently be unrelated to the improved matching of labour demand and supply. Other social, economic or political considerations come into play, and the specific objectives pursued by countries influence the way these agreements/arrangements are designed and in turn their capacity to function effectively as instruments fostering labour movements. Other internal and external factors are also relevant. Internal conditions relate, for instance, to the efficiency of the mechanisms in the agreement or arrangements for matching demand and supply, the criteria outlined for migrants to participate in the scheme, the complexity of administrative procedures, and the cost of the process to workers and employers. Among external conditions are the existence of other migration routes;[71] the language and vocational skills available in the country of origin; the availability of a pool of irregular migrants;[72] the deterrent effect

[71] E.g. possibilities to enter under other migration/visa programmes for foreign workers, under family migration/reunion or even humanitarian schemes.

[72] Irregular migrants are attractive to employers because they are cheaper (employers do not respect minimum wage requirements, or pay contributions to the social security system, etc.) and allow considerable flexibility in hiring and firing according to the needs of enterprises.

of policies against unauthorized employment; and the preference of employers for workers of certain nationalities (e.g. for reasons of cultural affinity, geographical proximity).

The bilateral, regional and global levels of cooperation afford differing advantages and disadvantages to countries in terms of bargaining strategies and outcomes. The bilateral approach generally allows the more powerful party a stronger say, while offering the ability to both parties to arrive at tailor-made arrangements reflecting an agreed balance of interests. Regional cooperation, even when dominated by the stronger economies in the group, provides possibilities for countries with a weaker voice to be heard, and the commitments made in such circles tend to be measured and practicable. The global arena is a more level playing field, in theory at least, with each country having an equal voice and weaker countries being in a position to develop effective alliances with like-minded partners, bearing in mind that in global institutions developing countries are superior in number to developed countries. Countries interested in becoming more involved in international cooperation on labour mobility may explore all these available opportunities according to their respective merits.

Textbox 13.7

Skilled Migration and Regional, Bilateral and Multilateral Agreements

The flow of global talent across borders is growing continuously, spurred by such diverse factors as demographic profiles, developments in information and communication technologies, and the growing internationalization of goods and services production and delivery. Earlier, skilled labour flows were primarily directed from developed to developing countries. Increasingly, skilled migration also occurs within and among developing countries, reflecting the integration of developing economies in global markets and the growth in South-South trade and investment relations.

Today, there is a distinct shift in migration patterns towards the highly skilled, and countries of destination are pursuing various approaches to attract talent globally (see Chapter 2). In countries of origin, there has also been a shift in thinking on skilled outflows, from viewing such flows as brain drain to seeing them as sources for brain exchange and circulation, especially in view of the temporary and repeat nature of much of these flows in key source sectors like information technology and within global firms. Thus, although economic and social push and pull factors in countries of origin and countries of destination, respectively, have been and remain the primary drivers in migratory flows, changes in host country policies and shifts in source country attitudes have also played a role in driving the growth in cross-border skilled flows.

As more and more host countries compete for global talent and as more and more source countries seek to reap benefits from their skilled labour base and capitalize on their demographic dividend, labour mobility is becoming an important issue in bilateral, regional, and multilateral discussions. Several trade and investment agreements today include labour mobility provisions and commitments on movement and entry of workers among countries. Such agreements are intended to ensure an appropriate framework for managed migration among the parties, in a manner that benefits both sides and at times also go beyond to address issues of capacity building, education and training policies, as well as coordinating screening, monitoring and deployment issues. In the context of skilled migration, these agreements entail shaping the sectoral and regional dynamics of skilled labour movements so as to lower transactions costs for trade and business flows and to leverage complementarities in labour supply and demand between partner countries.

At the multilateral level, the General Agreement on Trade in Services (GATS), negotiated under WTO auspices, provides a framework for the discussion of international movements of service providers at all skill levels. However, despite a few improved offers in the Doha Round discussions that touch on certain categories of interest to developing countries and remove certain conditions on entry and stay, there has been little progress made in the Mode 4 discussions under the GATS and no commercially meaningful improvement in market access conditions so far (see Textbox Int. 1). Thus, the prospects for liberalizing skilled labour flows do not seem promising under the GATS at this time.

On the other hand, regional and bilateral approaches have been more successful in handling migration issues.[1] Regional and bilateral agreements, such as free trade agreements (FTAs), economic partnership agreements (EPAs) and comprehensive economic cooperation agreements (CECAs), generally cover labour mobility under the separate headings of labour and investment. These agreements tend to focus on skilled labour categories similar to those under GATS, as these raise fewer concerns over labour displacement and cultural and social impacts. Regional and bilateral arrangements need not be viewed separately as the approach towards liberalizing migration is not affected by the number of the participating countries or the size of the region covered by such arrangements. Several of these agreements use the GATS model with specific schedules of commitments for various categories of persons. Some, such as the U.S.-Jordan FTA, also go beyond GATS to include specific visa commitments for such categories as independent traders, treaty investors and investment-related entry.

The approach adopted by regional and bilateral agreements towards skilled labour mobility can be broadly classified into three groups.

The **first** concerns agreements such as those concluded under European Union (EU), European Economic Area (EEA) and European Free Trade Association (EFTA) auspices, as well as the Australia-New Zealand Closer Economic Relations Agreement that cover skilled movements under the broader heading of labour movements, which is a general right among member countries. Such agreements tend to be concluded among developed countries.

The **second** group consists of agreements which specifically focus on movements associated with investment and business flows, such as business visitors and investment treaty-related movements. The Asia-Pacific Economic Cooperation (APEC) Forum, for example, excludes self-employed and low or semi-skilled labour and includes arrangements to facilitate labour mobility through information exchange, business dialogue, harmonization of immigration procedures and standards, and the streamlining of procedures for entry, processing and stay for business purposes. There is an in-principle agreement to reduce the processing time for temporary entry applications for intra-corporate transferees, specialists and business visitors. An APEC Business Travel Card valid for three years provides for multiple short-term business entries and accelerated airport processing and entry for business travellers from within APEC (see Textbox 13.5). Likewise, the U.S.-Jordan FTA specifies visa commitments for independent traders and persons entering in connection with investment activities. Jordanian nationals can obtain E-1 and E-2, i.e. U.S. treaty-trader and treaty-investor visas, respectively. The Japan-Singapore Economic Partnership Agreement regulates movement for business purposes, covering business visitors, intra-corporate transferees and certain categories of professionals and investors. However, parties to such agreements continue to retain the right to refuse entry, and national laws on employment, entry and stay take precedence over the agreement provisions on mobility. The Trade in Services Agreement (TIS), concluded under the Framework Agreement on Comprehensive Economic Cooperation between China and the Association of Southeast Asian Nations (ASEAN), similarly provides for improved market access and national treatment for select service suppliers with the objective of facilitating greater investment in the region.

The **third** group of regional or bilateral agreements focuses on liberalizing market access for select business and professional categories to address skills shortages in particular areas. These agreements also discuss associated regulatory issues such as harmonization of standards and mutual recognition of professional and academic qualifications among the parties. For instance, the India-Singapore CECA relaxes visa restrictions for Indian professionals in 127 categories, including information technology (IT), medicine, engineering, nursing, accountancy and university lecturers, by introducing one-year multiple entry visas and removing economic needs tests and labour market tests together with the social security contribution requirement for these categories. By adopting this targeted approach, the agreement clearly builds on the complementarity in the supply of and demand for skilled service providers between India and Singapore, respectively. It also provides for mutual recognition of degrees issued by specified universities and technical education boards of both countries, and a framework for negotiations in other areas where there are requests for recognition. The agreement further addresses the issue of wage parity by adding special allowances paid in India and Singapore to the basic pay of Indian professionals to achieve salary equivalence requirements for market entry into Singapore. Thus, under this bilateral agreement, India has been able to address and make some headway on critical regulatory and market access issues, which the government has also raised in the context of the GATS negotiations. In turn, India hopes to use the CECA as a benchmark in negotiations on other regional trade agreements.

Two points should be noted concerning discussions on labour mobility in the context of bilateral and regional frameworks.

The first point is that, although more progress on skilled movements may be achieved in the regional and bilateral context than under the GATS, discussions have not always been easy even as regards the former. Agreement on skilled movement and labour mobility is often particularly difficult. Thus, the Japan-Philippines Economic Partnership Agreement (JPEPA) was initially unable to progress concerning the admission of Filipino nurses onto the Japanese market. This was the first free trade agreement to be negotiated by Japan to include provisions on the movement of labour. Japan's new economic strategy aims to boost the number of foreign workers in Japan and this agreement is a step in that direction. The Japanese Government has decided to introduce a new facilitated licence for nursing caretakers, which will certify those who have completed relevant courses at vocational schools, colleges and universities, but have not passed a national exam, as "practical" nursing caretakers. This will enable nurses who have not passed the state exam to work at nursing care facilities. Japan will accept 400 nurses and 600 nursing caretakers under this FTA. As a result, hundreds of Filipino nurses, caregivers and nursing care trainees are expected to enter Japan. Some organizations have already been training Filipino nurses in anticipation of this development. Other countries, such as Thailand and Indonesia, that are interested in free trade agreements with Japan are also likely to seek greater market access for skilled and semi-skilled service providers to the Japanese market. However, the Japan-Philippines FTA shows that the passage of labour mobility provisions is not a smooth one, although it could also be argued that more has been achieved by the Philippines in the bilateral than might have been possible in a multilateral context, from a traditionally closed host country like Japan.

Likewise, China's request for admission of its skilled workers to New Zealand has been a matter of debate, as New Zealand negotiators wish to protect working conditions and their local labour force in any agreement. Trade unions in New Zealand are concerned that to admit such labour would reduce incentives to train and upgrade the skills of local workers and affect their working conditions. However, some associations in New Zealand, such as the Engineering, Printing and Manufacturing Union, view such provisions as a means to fill critical skills gaps in manufacturing and other areas, and thus potentially as beneficial. New Zealand may grant access to select groups of skilled Chinese workers, such as teachers of Mandarin, specialists in Chinese medicine and working holidaymakers from China. Therefore, labour mobility issues clearly evoke a wide range of responses and raise host country sensitivities on such issues as wages, the displacement of local workers and the effect on working conditions, similar to those in the multilateral context and, therefore, progress is not easily made.

A second point worth noting is that bilateral and regional agreements may involve substantial concessions by developing countries to their partners to the agreement, particularly in sectors that are in high demand, in exchange for market access for their skilled workers. In the discussions between China and New Zealand, New Zealand has demanded major concessions from China in return for increased access for Chinese skilled workers. In the discussions taking place between India and the EU, the free movement of professionals, especially in such activities as IT, medicine and engineering, and the recognition of professional qualifications are among India's main demands. However, such access is likely to require India's commitments on investment in, for example, the financial, telecom and retail distribution services sectors, and in other areas such as tariffs for industrial products as well as competition policy and regulatory transparency. Thus, the quid pro quo, especially for countries such as India and China, which have large pools of skilled labour but are also very attractive markets for investment, is likely to be much more pronounced in bilateral and regional discussions and also a necessary condition for realizing any gains on skilled movement.

The real value of bilateral and regional agreements, however, lies beyond the market access gained through any particular agreement. Such agreements also provide developing countries with experience and the institutional and regulatory capacity to negotiate with large trading partners on issues such as visas and standards. India is expected to use the CECA concluded with Singapore as a benchmark for its mutual recognition and visa discussions with the EU. Likewise, China, which is seeking market access for its skilled workers on temporary permits as part of a planned free trade deal with New Zealand, is looking to use this agreement as a precedent in its future discussions with larger OECD economies.

Thus, bilateral and regional agreements can potentially serve as building blocks for multilateral frameworks such as the GATS by providing countries with negotiating experience, enabling regulatory capacity building and instilling confidence among policymakers to undertake commitments initially on a bilateral or regional scale before moving on to the multilateral level.

This is particularly so for complex issues such as standards, mutual recognition and labour market policies where there can be no single agreed technical formula for liberalization and where multilateral discussions are more likely to falter. Ideally, these regional and bilateral pacts should pave the way for more liberal multilateral commitments. Whether or not this will be so depends on the overall state of play and the confidence of member countries in the multilateral trading system and the intersectoral trade-offs involved. There is, of course, the frequently referred to concern that some smaller countries may be marginalized in these regional and bilateral processes. But, given the growing number of small countries that are entering into EPAs and FTAs with developed countries, and the accelerating rate of South-South pacts, such marginalization need not occur. Additional issues, such as the classification of occupations and occupational categories, could be addressed multilaterally building on the experience and successful cases of regional and bilateral pacts.

Note:

[1] Much of the discussion on bilateral and regional agreements and their typologies is based on Nielson (2003) and miscellaneous articles from the bilaterals.org website.

***Source**: Rupa Chanda, Professor of Economics, Indian Institute of Management, Bangalore.*

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