

# **Toward a Harmonized, Rights-Based Regional Approach in Strengthening Protection of ASEAN Migrant Workers**

A Policy Brief of the  
ASEAN Trade Union Council (ATUC)

The recognition of migrants' rights is essential to achieving Decent Work for all men and women. In 2012, the International Labour Organization (ILO) and the Canadian Department of Foreign Affairs, Trade and Development launched the *Tripartite Action for the Protection and Promotion of the Rights of Migrant Workers in the ASEAN Region*, also known as the **ASEAN TRIANGLE Project**.

The ASEAN Triangle Project (ATP) aims to significantly reduce the exploitation of migrant workers in the region through increased legal and safe migration and improved labour protection. The Project promotes bilateral and regional approaches to deal with shared concerns, make regionalism more effective, and enhance the capacity of institutions in ASEAN. One of the Immediate Outcomes of ATP is: *Enhanced capacity of social partners to influence migration policy and protect the rights of women and men migrant workers*. Better involvement of workers' and employers' organizations in migration policy dialogue will enhance the protection of the rights of all migrant workers.

The ASEAN Trade Union Council (ATUC) is an apex organization of eighteen national trade union centers and confederations in nine ASEAN Member States and East Timor that represents five million members. Its affiliates include some of the most representative trade union organizations in ASEAN. It conducts conferences and training workshops on important labour issues. ATUC started work on labour migration in 2009 and its objectives are aligned with ATP. It engages in social dialogue about labour mobility in the region and undertakes initiatives to support its affiliates' activities for migrant workers.

The ATP has developed a three-year work plan with the ATUC that outlines shared objectives and common activities. The work plan was endorsed by the ATUC General Assembly and approved by the ATP Project Advisory Committee. ATP and ATUC implement the work plan in collaboration with the ILO's Bureau for Workers Activities and the International Trade Union Confederation – Asia Pacific.

This document presents one of the outputs of the ATP-ATUC collaboration.

# Toward a Harmonized, Rights-Based Regional Approach In Strengthening Protection of ASEAN Migrant Workers

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### I. BACKGROUND AND PROBLEM

1. Starting with the ASEAN Social Charter,<sup>2</sup> ATUC has been advocating for more urgent and coordinated actions by all stakeholders to address the adverse social impacts of globalization and regional integration. Fair and effective management of international migration for employment, or labor migration,<sup>3</sup> is a major theme in its advocacy. This policy brief presents ATUC's priorities on labor migration in the context of helping achieve the vision of one ASEAN Community.<sup>4</sup> It calls for a harmonized, rights-based regional approach in recognizing, promoting, protecting and enforcing migrant workers' rights, specifically focusing on intra-ASEAN labor migration involving low and medium skilled ASEAN nationals employed or seeking employment in other ASEAN Member States under temporary or short-term contracts. For this purpose, it also proposes a road map by which Member States, with the active engagement of social partners, can review and align their disparate national legislations and regulatory systems and make these congruent and consistent over time,<sup>5</sup> leading to a regional regulatory regime that incorporates international instruments on human and labor rights and on labor migration.
2. Labor migration has undeniable benefits. But it also raises difficult and complex problems. Low and medium skilled temporary migrant workers, particularly, are most prone to unscrupulous recruitment practices, or to suffer from poor working conditions, low wages, inadequate provisions for health and safety, inadequate social protection coverage and access to mechanisms of assistance and legal redress, unequal and discriminatory treatment, among others.<sup>6</sup> Within ASEAN, how are the rights of these workers recognized, respected, protected and enforced? What national, regional and international regulatory regimes exist for this purpose? What strategic actions and measures are necessary to help realize the aspirations of migrant workers and their families to be a part of one progressive, inclusive, equitable, cohesive and just ASEAN Community?
3. Intra-ASEAN migration, which is mostly labor migration, has risen from 1.5 million migrants in 1990 to 6.5 million in 2013.<sup>7</sup> Four of the ASEAN Member States - Brunei, Malaysia, Singapore and Thailand - are labor receiving countries. Three of them source heavily from other ASEAN Member States, i. e., Singapore sources 45% of its migrant workers from Malaysia; Malaysia 42.6% from Indonesia; and Thailand 50.8% from Myanmar. The Philippines and Vietnam have shares in the Singapore and Malaysian markets;<sup>8</sup> Cambodia is also a major source for Thailand. Most of this involves low to medium skilled workers under temporary contracts.<sup>9</sup> Although there are efforts to align ASEAN governments' initiatives<sup>10</sup> with the Social Charter, policy actions on movement of natural persons has focused on professionals and the highly skilled. Low and medium skilled temporary migrant workers tend to be excluded from mainstream policy actions.

### II. POLICY AND REGULATORY REGIME ON LABOR MIGRATION IN ASEAN

4. The temporary labor migration cycle has several stages - labor market information, job search, recruitment and placement, deployment, contract execution, contract termination, repatriation and re-integration. In ASEAN, multiple layers of policies and regulations govern the cycle. These can be grouped into national employment and immigration laws and institutions; executive agreements, declarations and memoranda of cooperation or understanding at bilateral, sub-regional or regional level, either of a public nature with governments as parties, or of private nature between non-government or sectoral organizations; international instruments adopted through the multilateral system with recommendatory effects on individual states,<sup>11</sup> such as ILO Recommendations and other framework agreements; and international instruments such as UN or ILO treaties, conventions, standards and protocols with binding effects on states which ratified them.

## II. A. International Instruments

5. UN instruments on labor migration are principally derived from the 1948 Universal Declaration of Human Rights. Four human rights treaties are directly related to labor and labor migration - the International Covenant on Economic, Social and Cultural Rights (CESR, 1966);<sup>12</sup> the Convention on the Rights of the Child (CRC, 1989); the International Convention on the Elimination of All Forms of Racial Discrimination (CEARD, 1965); and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1965). Another UN instrument is the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW, 1990).<sup>13</sup> Relevant ILO instruments include the eight core conventions - Conventions 29 (Forced Labor); 105 (Abolition of Forced Labor); 138 (Minimum Age); 182 (Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor); 100 (Equal Remuneration); 111 (Non-Discrimination in Employment and Occupation); 87 (Freedom of Association and Protection of the Right to Organise); and 98 (Right to Organise and Collective Bargaining Convention). ILO governance and technical instruments on labor migration pertain to the regulation of recruitment and placement activities, provision of accurate labor market information, minimum standards of treatment for migrants in transit and on arrival, and adoption of an active employment policy. Among these are Convention 97 (Migration for Employment, Revised); Migration for Employment Recommendation No. 86 (1949); 143 (Migrant Workers Convention, Supplementary);<sup>14</sup> Maritime Labor Convention (2006);<sup>15</sup> Conventions 88 (Employment Service), 96 (Fee-Charging Employment Agencies), 122 (Employment Policy); 181 (Private Employment Agencies); and 189 (Domestic Workers) and its Recommendation. Another relevant ILO document is the ILO Multilateral Framework on Labor Migration,<sup>16</sup> which contains non-binding principles and guidelines for a rights-based approach to maximize the benefits of labor migration.
6. The ILO core conventions have a relatively solid support base in ASEAN. Eight Member States have ratified at least five and three have ratified all eight conventions.<sup>17</sup> On the other hand, TABLE 1 below shows the ASEAN Member States that have signed (s), acceded (a) or ratified (r) selected relevant UN human rights conventions<sup>18</sup> and ILO governance and technical conventions. Conventions with more general application like CEDAW and CESR have a wide support base, but the level of ratification or accession of other UN and ILO instruments with more specific application to labor migration is low. Notably, labor senders are more likely to ratify than labor receivers: the Member States that signed or ratified CESR and CMW are all labor senders.

TABLE 1. Selected UN and ILO Conventions and Instruments ratified by ASEAN Member States.

COUNTRY	UN CONVENTIONS				ILO CONVENTIONS			
	CESR	CEDAW	CEDAW Protocol	CMW	C.97	C.143	C.181	C.189
Brunei	X	2006 a	X	X	X	X	X	X
Cambodia	1990 s 1992 a	1980 s 1992 a	2001 s 2010 r	2004 s	X	X	X	X
Indonesia	2006 r	1980 s 1984 r	2000 s	2004 s 2012 r	X	X	X	X
Lao PDR	2000 s 2007 r	1980 s 1981 r	X	X	X	X	X	X
Malaysia	X	1995 a	X	X	1964	X	X	X
Myanmar	2015 s	1997 a	X	X	X	X	X	X
Philippines	1966 s 1974 r	1980 s 1981 r	2000 s 2003 r	1993 s 1995 r	2009 X	2006 X	X X	2012 X
Singapore	X	1995 a	X	X	X	X	X	X
Thailand	1999 r	1985 a	2000 s 2000 r	X	X	X	X	X
Vietnam	1982 a	1980 s 1982 r	X	X	X	X	X	X

## II. B. Regional and Intra-Regional Initiatives

7. The ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers,<sup>19</sup> together with its follow-up actions, is the region's most comprehensive document of cooperation on labor migration. The Declaration affirms the sovereignty and commitment of States in determining their own labor migration policy and in protecting and promoting the rights of migrant workers in accordance with their prevailing national laws, regulations and policies. It recognizes the power of receiving states to determine conditions under which migrant workers may enter or remain; enumerates the obligations of labor receiving<sup>20</sup> and labor sending States;<sup>21</sup> and enumerates the joint commitments of all Member States. However, the Declaration does not commit the Member States<sup>22</sup> to work for a harmonized rights-based approach of regional regulation that would progressively align their national legislations or regulations with each other. Follow-ups to the Declaration call for promotional means on fair and appropriate employment protection and facilitation migration procedures,<sup>23</sup> embodying the preference of Member States toward a "soft" approach at the individual State's own choosing, rather than a hard, harmonized rights-based regional approach.

## II. C. Bilateral and Sub-Regional Arrangements and Inter-Union Initiatives

8. Bilateral and sub-regional arrangements also exist between specific countries, such as the Memorandum of Understanding (MOU) between Cambodia and Thailand on Cooperation in the Employment of Workers (2003); the Bangkok Declaration on Irregular and Undocumented Migration (1999);<sup>24</sup> the Memorandum of Understanding and Cooperation (MOUC) against the Trafficking of Persons in the Greater Mekong Sub-Region, Lao, Vietnam, Cambodia, Thailand, Myanmar and China (2004); and the Vietnam and Cambodia - Bilateral Cooperation for Eliminating Trafficking in Women and Children and Assisting Victims of Trafficking (2005). The MOU between Cambodia and Thailand covers, among others, pre-employment requirements; repatriation procedures; prevention of illegal border crossings, trafficking and illegal employment of workers; setting up a shared information system on job opportunities, qualifications required and terms and conditions of employment; facilitation of visa and entry/work permits; health insurance; contributions to a savings fund; and payment of taxes. The employing country shall ensure that the workers enjoy protection in accordance with the domestic laws in their respective countries. Migrant workers are entitled to wage and other benefits due local workers based on the principles of non-discrimination and equality of sex, race and religion. Any dispute involving migrant workers shall be settled by the authorized agencies according to the laws and regulations in the employing country.<sup>25</sup> Notably, some terms of the MOU have been institutionalized through corresponding laws and regulations in both countries. For this reason, the MOU may be considered as a prototype of a bilateral agreement producing subsequent national actions with legally binding effects.
9. ATUC and some of its national affiliates have also entered into inter-union agreements and understandings to work together on specific action points.<sup>26</sup> In this regard, ATUC has several ongoing activities to implement the action points.

## **III. POLICIES, LAWS AND INSTITUTIONS IN ASEAN MEMBER STATES**

10. The range of policies, laws and institutions to regulate the labor migration cycle in ASEAN is wide and diverse. The most basic lines of differentiation in policy and regulatory environments, as well as in social protection and assistance mechanisms and programmes, lie in whether the Member State is a labor sender or receiver. For sending countries, migration policy and management is essentially a function of employment and labor law, labor diplomacy and international instruments relating to labor. For receiving countries, it is more a function of national economic interests, immigration law and the exercise of sovereign powers.

### III. A. The Labor Sending Member States

11. Sending countries have different ways of stating their motivations and policy objectives in facilitating or regulating the employment of their nationals in other countries. Cambodia authorizes export of labor to improve living conditions of people and enhance their professional skills "while the job market in the country is inadequate to absorb the unemployed and the underemployed, and to raise revenues for the State."<sup>27</sup> Vietnam encourages workers who have demand and ability to go abroad as "guest workers." For this purpose, workers from ethnic minorities and poor households or households engaged in agriculture, or whose relatives

rendered meritorious service to the revolution who wish to go abroad, are provided State support for vocational training or for learning foreign languages and the host country's customs and laws. Loans with preferential interest rates are also offered.<sup>28</sup> In Lao, the sending of labor overseas may be for education, training and upgrading technical knowledge and capacity, skills development and "fulfilling" goals. The law prohibits sending of Lao labor if the migrant worker's safety and well being cannot be guaranteed.<sup>29</sup> In Indonesia, the general policy is to ensure that placement shall be based on integrity, equality of rights, democracy, social justice, gender equality and justice, anti-discrimination and against trafficking of persons.<sup>30</sup> In the Philippines, the State policy is not to promote overseas employment as a means to sustain economic growth, but to assure the dignity and fundamental human rights and freedoms of Filipino citizens.<sup>31</sup> Deployment is allowed only in destinations that guarantee and protect Filipino migrant workers' rights through existing labor and social laws, multilateral conventions, declarations and bilateral agreements. When national interest or public welfare requires, the government may terminate or ban deployment migrant workers.<sup>32</sup> Labor exchange offices are set up in Myanmar although it is not clear whether these cater to those wanting to work abroad.<sup>33</sup>

12. All sending countries have some form of regulations on recruitment and placement activities. Some governments are directly engaged in recruitment, while others allow private sector participation subject to regulations. Common governmental functions include licensing and supervision of recruitment agencies, marketing, verification of job orders, and contract processing and approval. With respect to substantive rights of workers and support mechanisms available to them, consular offices of sending countries typically provide various forms of on-site assistance to their nationals in destination countries. One country mandates and finances labor offices and migrant workers' resource centers in countries where there are large concentrations of its nationals. In others, funding for such centers comes from non-government or donor organizations. Means of repatriation also vary. In one sending country, the law requires the recruiter in the sending country to shoulder repatriation expenses. In another, these are to be taken from a savings fund to which the migrant worker has contributed. In receiving countries, the employer may be required to bear these expenses. On liabilities arising from the employment contract, one sending country makes local recruitment agencies solidarily liable with the foreign employer, allowing a migrant worker to pursue a claim in his or her home country after repatriation. Other labor sending countries do not provide for this legal remedy.

### III. B. The Labor Receiving Member States

13. For Brunei, Malaysia, Singapore and Thailand, the common policy premise in the employment of foreign workers is national interest. Entry for employment is allowed when local labor supply in certain areas of the economy is scarce, provided this does not threaten the opportunities of their own nationals or national security. Thailand, for example, explicitly provides that employment of foreign workers shall take into account national security, career opportunity of Thai people and demand for alien labor necessary for national development.<sup>34</sup> Malaysia prohibits discrimination in employment opportunity and treatment in relation to both nationals and foreign migrant workers, even as it provides retention preference for its nationals over foreigners if an employer reduces its workforce.<sup>35</sup>
14. The common device to implement the policy is the work permit system. The legal procedure for entry typically starts with immigration authorities. In Malaysia, it is a criminal offense for any person to employ one or more persons, other than a citizen or a holder of an entry permit who is not in possession of a valid pass.<sup>36</sup> For a work permit to be issued, the employment conditions must be embodied in written contracts approved by proper authorities.<sup>37</sup> In Singapore, the employment of a foreign worker shall be strictly in accordance with the conditions and the trade, sector, occupation or employment specified in his or her work pass,<sup>38</sup> otherwise the pass will be revoked.
15. Apart from licensing of recruitment agencies and implementation of a permit system, the common regulatory features among labor receiving Member States are: a) the central role of immigration laws and authorities in determining the entry and exit of foreign workers; b) pre-departure safeguards implemented at the sending country, such as a duly-processed formal contract of employment, health examination and health insurance coverage, posting of bond by the local recruiter, arrangements for repatriation); and c) the application of an economic test (i. e., foreign labor is needed in a particular sector of the economy) or a labor market test (i.e., no national is available to do the job) or a combination of both. In Singapore and Malaysia, the entry of foreign workers is also controlled through a quota system combined with a workers' levy. Thailand, on the other hand, limits the entry of foreign workers who are not craftsmen or experts (unskilled and low skilled) by requiring employers to apply for a work permit, to register the foreign worker, and to pay a corresponding fee.<sup>39</sup>

## IV. CHALLENGES, ISSUES AND RESPONSES

### IV. A. Main Findings and Observations

16. Despite the multiple layers of policy and regulatory instruments, low and medium skilled workers remain highly vulnerable to abuse and exploitation. Their inability to protect themselves is attributed to their lack of market power, inadequate recognition of and information on their legal rights, inadequate employment and welfare services, gaps in regulation of recruitment and placement agencies, faulty or fraudulent documentation, non-implementation of contracts and contract substitution, employment discrimination and employment in stressful or abusive conditions, inadequate or no access to social protection, reintegration programs and financial counseling, lack of organization and consequently lack of representation or voice, and no provisions for an immediate and readily accessible mechanism for redress of violations. These deficits are oftentimes aggravated by a migrant worker's sex, nature of employment (especially in hard-to-reach or hard-to-regulate occupations like household work and work in plantations), or limited ability to communicate in the receiving countries' language. Where the migrant worker is protected in his or her national laws, this may be rendered ineffective by the fragmented nature of the multilateral system that limits the capacity of governments to deal with cross-border labor mobility.<sup>40</sup>
17. ASEAN Member States recognize the problems related to low and medium skilled temporary migrant workers, yet there is no harmonized regional approach that will assure these workers fair and equal opportunity and treatment, decent working conditions, access to relevant programs, and effective participation or representation in policy and decision-making processes. In their choice of policy and regulatory approaches, ASEAN Member States tend to favor a combination of a national approach supplemented by regional, sub-regional and bilateral cooperative arrangements, as well as a promotional or "soft" approach where each individual Member State has flexibility to choose its own course of action. This appears to be a derivative of the region's traditional deference to national sovereignty and non-interference with each member's affairs.
18. ASEAN Member States generally support UN and ILO instruments. However, ratification of specific instruments across countries is uneven. A situation may arise where only the sending country ratified an instrument, thereby potentially leaving the migrant worker without effective protection in a non-ratifying host country. Further, there is no clear call for ratification of any specific instrument.
19. The most powerful "push" factor for all sending countries remains their inability to generate enough adequate work opportunities for their nationals. But the fact that they are at different stages of economic and institutional development and have different considerations in allowing their nationals to seek employment overseas makes for wide variations in national policy and regulatory environments.
20. In labor receiving Member States, labor and immigration policies, laws and institutions are strongly influenced by national or political economy perspectives. Policies and laws providing protection to migrant workers exist. However, the level of effort being exerted to effectively internalize into law and practice universal principles of equality, inclusion and non-discrimination, particularly in respect to women and to workers in hard-to-reach and hard-to-regulate occupations, cannot be determined.
21. Sending and receiving countries, through their governments and non-government organizations, have been providing counseling and legal assistance to migrant workers not only in the countries of origin but also on-site. In some Member States, migrant workers' resource centers exist for this purpose. But in most, such centers have not been institutionalized and have no budget allocation from the concerned Member States.
22. There is no common regional approach in administering and enforcing employment contracts. Member States typically make assurances that migrant workers have access to the host country's courts or tribunals and, when necessary, that diplomatic channels are open to resolve issues. However, there is no data on how such arrangements actually work, or how labor inspection or any process similar to it, is used to ensure compliance with employment contracts.
23. Social protection is a major regional issue. Various types of funds and insurance schemes are in place for migrant workers in contingent or distressed situations. Performance bonds for recruitment agencies in sending and receiving countries appear to be the most common. Insurance coverage (particularly for health and repatriation) and surety guarantees to be put up by recruiters or employers also exist. Migrant workers' levy and mandatory insurance are the mechanisms of choice in labor receiving Singapore and Malaysia. A savings fund built through deductions from migrant workers' salaries is set up in Thailand. A welfare fund set up through

one-time fee per contract, combined with comprehensive mandatory insurance at the cost of the recruitment agency, and a State-provided legal assistance fund, are in place in the Philippines. In all these, two policy questions are crucial – on one hand, who pays for the costs and whether these costs are actually passed on as burdens or tax to the migrant worker; and on the other hand, immediate accessibility to the fund when the migrant worker needs it.

24. Existing regional declarations, agreements, recommendations and laws cover the entire cycle of labor migration with specific action points identified by governments, the social partners and non-government organizations. However, there are no time-bound measures for these action points, and none of these envision a clear, active role of unions and of freedom of association and collective bargaining.

#### IV.B. The Road Map and Proposed Guideposts

25. In proposing a road map focusing on intra-ASEAN migration involving low and medium skilled temporary migrant workers, ATUC is guided by the ASEAN Social Charter, the ASCC Blueprint, and the ILO's Fair Migration Agenda whose objectives, among others, include making migration a choice by creating decent work opportunities in countries of origin, respecting human and labor rights, and ensuring fair recruitment and equal treatment of migrant workers.<sup>41</sup> For this road map, Member States should agree on objective guideposts along which national policies, laws and institutions on labor migration can be reviewed, aligned and eventually harmonized. Among these are:

- *National treatment should be the minimum standard of treatment for all migrant workers.* Appropriate and accessible mechanisms should be in place to ensure effective implementation and enforcement of this standard.
- *Certain international instruments should be used as starting points for regional harmonization of standards.* There are instruments that Member States have already given unanimous or near-unanimous consent such as CEDAW and CESR and ILO Conventions No. 100 and 111, all of which are intended to eliminate discrimination. This should give Member States a framework with which to align their respective national laws on non-discrimination. Further, there are instruments that are jus cogens, embodying norms universally applicable to all humanity and binding on every State regardless of its consent, as for example ILO Conventions No. 29 and 105 on prohibition and abolition of compulsory and forced labor and the UN Convention against human trafficking. That migrant workers may be exposed to conditions of forced labor and human trafficking justifies harmonized, regional regulatory action in preventing such conditions.
- *Existing regional measures of protection should be effectively implemented and enforced,* with due consideration to the special circumstances of women and other workers in vulnerable situations. These include education campaigns on migrant workers' rights; efficient labor market information systems and effective measures against illegal and unscrupulous recruitment practices; mechanisms to administer and enforce employment contracts; setting up of migrant workers resource centers to provide basic services such as counseling and legal assistance; development of a migrant workers' database from which the travel and identity documents of migrant workers to help them in emergency situations; provision of training and retraining programs for low and medium skilled workers; and establishment of a monitoring mechanism on the implementation and enforcement of programs and rights of migrant workers including the development of a migrant workers' decent work index.
- *Cooperative arrangements for social protection must be built, while protecting migrant workers' take-home pay and enabling them to access social services in receiving countries.* Where migrant workers contribute to such schemes, care must be taken to ensure that the amount of contribution does not unreasonably erode the net take-home pay. With respect to workers' levies that are paid by employers, care must also be taken that the burden of the levy is not unduly passed on to the migrant worker.
- *International instruments are the standard to improve working conditions and to bring about effective recognition of the substantive rights of migrant workers.* Member States should give effect to all ratified instruments in law and in practice, and benchmark their law and practice with unratified instruments, with a view of eventual ratification, as well as with recommendatory instruments.
- *Capacity building programs and measures should be continued and enhanced.* These include education campaigns on migrant workers rights, better labor market information systems, training and retraining programs, migrant workers resource centers, standard employment contracts, and enhancement of dispute

settlement mechanisms, among others. Unions should be actively involved in the process.<sup>42</sup> In every case, due consideration should be given to the special requirements of women, household workers and workers in the most vulnerable and hard-to-reach occupations.

- *Unions shall promote the harmonized rights-based approach by continuing to implement the action points identified in the ATUC inter-union agreement.* These are important to re-affirm the principles of the ASEAN Social Charter, shepherd a coordinated response of affiliated unions across national jurisdictions on labor migration, supplement governmental mechanisms designed to protect migrant workers, and sustain ratification campaigns for international instruments.
  - *Continuing support to inter-union initiatives* in widening their capacity to organize and to engage in collective bargaining, tripartism and social dialogue, in capacitating themselves and their members to be more aware and vigilant of their rights, and in undertaking campaigns for ratification of relevant international instruments.
26. Low and medium skilled temporary migrant workers cannot be assured of effective protection if national policy and regulatory regimes remain disparate. A harmonized regional approach is a difficult and complex undertaking. But it is not an impossible one. Member States should now see harmonization as a means to improve each Member State's ability to ensure protection of its nationals working in other countries, thereby reinforcing rather than undermining each other's national sovereignty. The vision of one cohesive ASEAN Community requires no less.

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Convention 98, the Right to Organise and Collective Bargaining Convention (1949).

Convention 100, the Equal Remuneration Convention (1951).

Convention 105, the Abolition of Forced Labor Convention (1957).

Convention 111, the anti-Discrimination (Employment and Occupation) Convention (1958).

Convention 122, the Employment Policy Convention and Recommendation (1964).

Convention 138, the Minimum Age Convention (1973).

Convention 143, Migrant Workers Convention [Supplementary] (1975).

Convention 181, the Private Employment Agencies Convention (1997) and its Recommendation (No. 188).

Convention 182, the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (1999).

Convention 189, Convention on Domestic Workers, 2011 and its Recommendation (No. 2011).

Migration for Employment Recommendation [No. 86] (1949).

Maritime Labor Convention (2006).

## **G. United Nations Instruments**

Convention Against Transnational and Organized Crime and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000).

Convention on the Elimination of All Forms of Discrimination against Women (1965).

Convention on the Elimination of All Forms of Racial Discrimination (1965).

Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).

Convention on the Rights of the Child (1989).

Covenant on Civil and Political Rights (1966).

Covenant on Economic, Social and Cultural Rights (1966).

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999).

Optional Protocol to the Covenant on Economic, Social and Cultural Rights (2008). Universal Declaration of Human Rights (1948).

Vienna Treaty on the Law of Treaties (1969).

1. This policy memo is a synopsis of the position paper prepared for the ASEAN Trade Union Council (ATUC), with support from the ASEAN Triangle Project of the International Labor Organization (ILO), by Benedicto Ernesto R. Bitonio Jr. (Philippines). The Triangle Project generally aims to improve labor migration protection and governance in ASEAN.
2. Signed in 2003 with ATUC among the original parties and signatories. The general objectives of the Social Charter are to respect, realize and promote the core ILO labor standards and fundamental principles and rights at work; employment stability; health and safety; wages and salaries for a just living; social security; and human resource development. The ATUC Declaration on the ASEAN Agreement on the Promotion and Protection of the Rights of Workers subsequently refined and refocused the Social Charter along thematic and sectoral priorities, specifically to include migrant workers, fundamental workers' rights and social protection, economic integration and free trade agreements (FTAs), child labor, gender equality, working conditions, occupational safety and health and dispute settlement bodies.
3. Migrant for employment or labor migrant is used here in its technical sense to refer to a person engaged in a remunerated activity in a State of which he or she is not a national (UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990), or one who migrates from one country to another with a view to being employed otherwise than on his or her own account (Art. 11.1, ILO Convention No. 97, Migration for Employment Convention [Revised], 1949).
4. Through the Bali Concord, signed at the ASEAN Leaders Summit, Bali, Indonesia, 7 October 2003. At the 11th ASEAN Summit (December 2005), the ASEAN Leaders agreed to accelerate the liberalization of services under the AEC to 2015.
5. In the 1990s, four emerging models of international labor regulation were identified: 1) pre-emptive legislation applicable to persons, business entities and states within a transnational bloc; 2) harmonization of domestic legislation, i. e., harmonization of domestic legislations within one bloc; 3) cross-border monitoring and enforcement; and 4) extra-territorial application of domestic law. The first two are European Union approaches meant to make disparate regulatory systems congruent and consistent over time. The last two are North American approaches employing an interpenetrative approach, the temporary incursion of one legal system into the affairs of another. See Stone, K. 1996. "Labour in the Global Economy: Four Approaches to Transnational Labour Regulation." *International Regulatory Competition and Coordination*. W. Bratton, J. McCahery, S. Picciotto and C. Scott, eds. Oxford: Clarendon Press; cited in George Tsogas, "international Labour Regulation: What Have We Learnt So Far?" *Relations Industrielles/Industrial Relations*, Vol. 64, No. 1 (2009 Winter), Univesiate Laval, pp. 75-94.
6. Laws and institutions pertaining to such workers, where these exist, are oriented toward the procedural aspects of managing their entry to and repatriation from the receiving country, and do not necessarily confer substantive rights on them.
7. International Labour Organization (ILO) and Asian Development Bank (ADB), *ASEAN Community 2015: Managing integration for better jobs and prosperity*, Bangkok, Thailand (2014), p. 83.
8. The main markets of the Philippines and Vietnam are the Gulf countries, East Asia, Europe and North America.
9. ILO and ADB, *idem*, pp. 83-100.
10. 12th ASEAN Summit, Cebu, Philippines. The vision of one ASEAN Community has three central components and blueprints - the ASEAN Economic Community (AEC), the ASEAN Socio-Cultural Community (ASCC), and the ASEAN Security and Political Community (ASPC). The ASCC blueprint responds to the social dimensions of regional integration. This blueprint envisions ASEAN as a progressive, inclusive, people-centered, harmonious and socially responsible community with a common identity. It also offers a road map for a post-2015 ASEAN Community characterized by human development, social welfare and protection, social justice and rights, environmental sustainability, an ASEAN identity, and narrowing of the development gap among Member States. In the ASEAN Declaration on the Rights of Migrant Workers and their Families also signed at the 12th ASEAN Summit, ASEAN Leaders recognized the human rights dimension of labor migration and confirmed the shared responsibility to realize a common vision for a secure and prosperous ASEAN Community by improving the quality of life of its people and strengthening its cultural identity towards a people-centered ASEAN through, among others, measures to protect and promote the rights of migrant workers; by recognizing the social and economic contributions of migrant workers to both receiving and sending Member States; and by acknowledging the legitimate concerns of receiving and sending Member States for the adoption of appropriate

and comprehensive migration policies on migrant workers. Following the Declaration, labor migration has been included in the agenda of the ASEAN Labor Ministries (ALM) and the ALM's 2010-2015 Work Programme. An ASEAN Forum for Migrant Labor (AFML) has also been established, in which ATUC has been a regular participant.

11. These instruments, some of which are part of international human rights law, generally become binding and obligatory on State parties and on ratifying States. But some of them may also be seen as embodying principles of jus cogens, or peremptory norms of general international law that are accepted and recognized by the international community of States as a whole, from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.
12. Part III of the CESR specifies the following labour rights: right to work including technical and vocational training (Article 6); right to just and favourable conditions of work including fair remuneration and equal pay for work of equal value, safe and healthy working conditions, equality of opportunity, and rest days and holidays (Article 7); right to form unions and to strike (Article 8); social security and social insurance (Article 9); and right of working children young children to employment not harmful to their health and morals and which do not interfere with their education.
13. Other related conventions and protocols relevant to labor migration include the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999); and the Optional Protocol to the Covenant on Economic, Social and Cultural Rights (2008). Inasmuch as labor migration can take place under abusive conditions or through clandestine or illicit means, likewise relevant is the Convention Against Transnational and Organized Crime, and whose Annex II contains the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.
14. Applicable to land-based migrant workers.
15. Applicable to sea-based migrant workers.
16. ILO, Multilateral Framework on Labor Migration, adopted by the Tripartite Meeting of Experts on the ILO Multilateral Framework on Labour Migration, Geneva, 31 October-2 November 2005.
17. The core conventions ratified by ASEAN Member States are the following:

COUNTRY	FoA and CB		Forced Labour		Discrimination		Child Labor	
	C 87	C 98	C 29	C 105	C 100	C 111	C 138	C 182
Brunei							2011	2008
Cambodia	1999	1999	1969	1999	1999	1999	1999	2006
Indonesia	1998	1957	1950	1999	1958	1999	1999	2000
Lao			1964		2008	2008	2005	2005
Malaysia		1961	1957	1958; Den. 1990	1997		1997	2000
Myanmar	1955		1955					2013
Philippines	1953	1953	2005	1960	1953	1960	1998	2000
Singapore		1965	1965	1965; Den. 1979	2002		2005	2001
Thailand			1969	1969	1999		2004	2001
Vietnam			2007		1997	1997	2003	2001

18. Not included in the Table are the Optional Protocol to the Covenant on Economic, Social and Cultural Rights since no ASEAN country ratified it.
19. Adopted at the 12th ASEAN Summit, Cebu, Philippines.
20. Under the ASEAN Declaration, the obligations of receiving States shall be pursuant to their prevailing laws, regulations and policies, as follows:
  - Intensify efforts to protect the fundamental human rights, promote the welfare and uphold human dignity of migrant workers;
  - Work towards the achievement of harmony and tolerance between receiving states and migrant workers;

- Facilitate access to resources and remedies through information, training and education, access to justice, and social welfare services as appropriate and in accordance with the legislation of the receiving state, provided that they fulfill the requirements under applicable laws, regulations and policies of the said state, bilateral agreements and multilateral treaties;
  - Promote fair and appropriate employment protection, payment of wages, and adequate access to decent working and living conditions for migrant workers;
  - Provide migrant workers, who may be victims of discrimination, abuse, exploitation, violence, with adequate access to the legal and judicial system of the receiving states; and
  - Facilitate the exercise of consular functions to consular or diplomatic authorities of states of origin when a migrant worker is arrested or committed to prison or custody or detained in any other manner, under the laws and regulations of the receiving state and in accordance with the Vienna Convention on Consular Relations.
21. The obligations of sending States shall be pursuant to their prevailing laws, regulations and policies, as follows:
- Enhance measures related to the promotion and protection of the rights of migrant workers;
  - Ensure access to employment and livelihood opportunities for their citizens as sustainable alternatives to migration of workers;
  - Set up policies and procedures to facilitate aspects of migration of workers, including recruitment, preparation for deployment overseas and protection of the migrant workers when abroad as well as repatriation and reintegration to the countries of origin; and
  - Establish and promote legal practices to regulate recruitment of migrant workers and adopt mechanisms to eliminate recruitment malpractices through legal and valid contracts, regulation and accreditation of recruitment agencies and employers, and blacklisting of negligent/unlawful agencies.
22. In committing to protect and promote the rights of migrant workers, ASEAN Member Countries shall, in accordance with national laws, regulations and policies:
- Promote decent, humane, productive, dignified and remunerative employment for migrant workers;
  - Establish and implement human resource development programmes and reintegration programmes for migrant workers in their countries of origin;
  - Take concrete measures to prevent or curb the smuggling and trafficking in persons by, among others, introducing stiffer penalties for those who are involved in these activities;
  - Facilitate data-sharing on matters related to migrant workers, for the purpose of enhancing policies and programmes concerning migrant workers in both sending and receiving states;
  - Promote capacity building by sharing of information, best practices as well as opportunities and challenges encountered by ASEAN Member Countries in relation to protection and promotion of migrant workers' rights and welfare;
  - Extend assistance to migrant workers of ASEAN Member Countries who are caught in conflict or crisis situations outside ASEAN in the event of need and based on the capacities and resources of the Embassies and Consular Offices of the relevant ASEAN Member Countries, based on bilateral consultations and arrangements;
  - Encourage international organisations, ASEAN dialogue partners and other countries to respect the principles and extend support and assistance to the implementation of the measures contained in this Declaration; and
  - Task the relevant ASEAN bodies to follow up on the Declaration and to develop an ASEAN instrument on the protection and promotion of the rights of migrant workers, consistent with ASEAN's vision of a caring and sharing Community, and direct the Secretary-General of ASEAN to submit annually a report on the progress of the implementation of the Declaration to the Summit through the ASEAN Ministerial Meeting.
23. Recommendations of the 7th ASEAN Forum on Migrant Labor. The specific recommendations include responsibilities and obligations of sending and receiving States in contract enforcement, labour inspection, allocation of resources especially for vulnerable and hard-to-reach workplaces and occupational safety and health; setting up of one-stop services and migrants resource centres and referral systems, and setting up of assistance services on-site through embassies; capacity building for recruitment agencies; facilitation of access trade unions and associations; and dispute settlement mechanisms and procedures.
24. Signed at the International Symposium on Migration, "Towards Regional Cooperation on Irregular/Undocumented Migration" 21 - 23 April 1999, by ministers and representatives of the Governments of Australia, Bangladesh, Brunei Darussalam, Cambodia, China, Indonesia, Japan, Republic of Korea, Lao PDR, Malaysia, Myanmar, New Zealand, Papua New Guinea, the Philippines, Singapore, Sri Lanka, Thailand, and Vietnam, as well as the Hong Kong Special Administrative Region
25. See Arts. XVII-XIX, *idem*.
26. Among these are the Memorandum of Understanding between the Arab Trade Union Confederation (ARABTUC), ATUC and the South Asian Regional Trade Union (SARTUC), 03 August 2013; ITUC Asia Pacific and LO-FTF Statement on

- ASEAN 2015 and the Social Charter, 12 December 2014; Inter-Union Cooperation Agreement Among ASEAN Unions as a Strategy to Promote Decent Work, 26 October 2014; Memorandum of Understanding between the Cambodian Federation of Trade Unions (CCTU) and the Thai Trade Union Council (ITUC), 11 November 2013; Initial Memorandum of Understanding for Bilateral Cooperation between the Federation of Trade Unions Myanmar and Migrant Resource Center (a project of ILO Triangle, Labor Congress of Thailand, National Congress of Private Industrial Employees, and Thai Trade Union Congress) to combat the problems of forced labor and human trafficking according to the policy of the Ministry of Labor of Thailand and the ILO, 07 November 2013; and Partnership Agreement on Migrant Labor between Malaysian Trade Union Congress (MTUC) and Indonesian Trade Union Congress (ITUC), 17 September 2006.
27. Labor Law of Cambodia, Art. 1.
  28. Employment Law of Vietnam, Arts. 20 and 38.
  29. Labor Law of Lao, No. 43 National Assembly, 24 December 2013.
  30. Law on Placement and Protection of Indonesian Workers Abroad, Law No. 39/2004, Statute Book of the Republic of Indonesia of 2004 No. 13.
  31. See Sec. 1, *idem*.
  32. See Secs. 4-5, *idem*.
  33. Employment and Skill Development Law, Pyidaungsu Hluttaw Law No. 29/2013 (Myanmar), 9th Wanning of Wargoung 1375 M.E 30th August 2013.
  34. Alien Working Act, B. E. 2551 (2008).
  35. Employment Act, Nos. 60L to 60N, *idem*.
  36. Malaysia's Immigration Act (Act 155) requires non-nationals except permanent residents to secure an entry permit or pass prior to entry to Malaysia.
  37. See Immigration Act of Brunei. Upon compliance with the Immigration Act, Section 118 of the Labor Act requires employers to secure a license from the Commissioner of Labor under prescribed forms and conditions to employ migrant workers. Among the conditions prescribed by subsidiary legislation on the employer are that the employment shall be upon a written contract to be attested by the Commissioner of Labor, and a recognition that the employer shall provide the worker with work suitable to his capacity at not less than the prevailing wage for the particular type of work in which he is engaged, appropriate housing, sanitation and medical care, facilities to make remittances, among others. See also Section 121, Labor (Immigrant Workers' Employment Licences) Rules, Laws of Brunei, CAP. 93, R 6, (2002 ed.), pp. 2-3.
  38. See the Employment of Foreign Manpower Act (EFMA), Act 21 of 1990, as recently amended, *Idem*.
  39. Alien Working Act of Thailand. See Secs. 7, 8 and 14.
  40. ILO, "Promoting Decent Work for Migrant Workers," paper prepared for the thematic meeting on international migration in the post-2015 UN development agenda of the Global Forum on Migration and Development in Geneva, Switzerland, 5 February 2015, published by the Population Division, UN Department of Economic and Social Affairs, United Nations Secretariat New York, February 2015.
  41. ILO, Fair Migration: Setting an ILO Agenda, Report of the Director-General, International Labor Conference, 103rd Session, 2014, Report 1 (B), International Labor Office, Geneva, 2014.
  42. These include education campaigns on migrant workers' rights; improvement of labor market information systems and strengthening of measures against illegal and unscrupulous recruitment practice; development of effective mechanisms to administer and enforce employment contracts; setting up of State-funded or subsidized migrant workers resource centers; development of a shared migrant workers' database from which the travel and identity documents of migrant workers can be stored, verified or retrieved; training and retraining programs; and establishment of a stakeholder monitoring mechanism, including a migrant workers' decent work index, on the implementation and enforcement of programs and rights of migrant workers. In all these measures, due consideration shall be given to the special requirements of women, household workers and workers in the most vulnerable and hard-to-reach occupations.



# **Toward a Harmonized, Rights-Based Regional Approach in Strengthening Protection of ASEAN Migrant Workers**

## **A Policy Brief of the ASEAN Trade Union Council (ATUC)**

As the pace of regional integration and globalization accelerates, the number of ASEAN migrant workers has been increasing steadily. From 1980 to 2013, the volume of intra-ASEAN labour migration rose from 1.5 to 6.5 million workers. This labour mobility has undeniable benefits. It addresses labour shortages and enhances productivity of host countries; as well as provides employment opportunities for workers from sending countries. But labour migration also creates complex challenges especially for low and medium skilled migrant workers. Coordinated national and international action, not only from governments but from all concerned sectors, is needed to effectively respond to these challenges.

The International Labour Organization's ASEAN TRIANGLE Project collaborated with the ASEAN Trade Union Council (ATUC) to define and articulate ATUC's perspective on the issue of labour migration in the context of the ASEAN Economic Community. This policy brief supports the development of rights-based ASEAN policies and institutional infrastructure for migrant workers and calls for:

- Full and effective recognition of migrant workers' rights, in conformity with ILO conventions and other international instruments;
- Capacitating trade unions to undertake national, sub-regional, regional and inter-regional initiatives for migrant workers in countries of origin and destination; and
- Enhancing the capacity of trade unions to effectively participate in the formulation of policies and the management of governance mechanisms.

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