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Review of labour migration policy in Malaysia

Tripartite Action to Enhance the Contribution of Labour Migration to Growth and Development in ASEAN
(TRIANGLE II Project)

ILO Regional Office for Asia and the Pacific

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Foreword

Labour migration has become a well-established feature of ASEAN labour markets and a meaningful factor supporting the continued growth of the bloc. In many of the Region's destination countries, significant labour shortages in agriculture, construction, fishing, domestic work, manufacturing and other industries have been mitigated by admitting migrant workers, often to fill jobs that are considered undesirable by nationals.

Malaysia is no exception and has benefitted greatly from the employment of migrant workers in several economically important sectors. During the last two decades, these workers have helped to provide the labour that has fuelled the country's emergence into an upper middle-income country. However, ensuring that migrant workers receive fair treatment continues to prove difficult, with reports of abuse in several major industries. In light of recent developments in international trade and greater scrutiny of global supply chains, there has been increased pressure from the international community to enact policy and institutional reforms that will better protect the rights of migrants.

Since 2011, the ILO has been providing technical assistance to the Government and social partners to strengthen labour migration governance in Malaysia. Key areas of work have included contributing inputs to draft legislation and bilateral agreements, improving the collection of labour migration statistics, building the capacity of authorities on the labour dimensions of trafficking, organizing consultations for labour attachés and consular officials, conducting research to develop practical guidelines for employers, launching a campaign to support a more positive image of migrants and delivering support services through migrant worker resource centres.

As revealed by the findings of this report, while there has been substantial progress made on developing policies to manage labour migration, considerable challenges still remain. The ILO is committed to continuing its support for tripartite constituents in Malaysia to assist with achieving national development goals and ensure that the rights of all workers are recognized and protected.



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Abbreviations

ASEAN	Association of Southeast Asian Nations
ATIPSOM	Anti-Trafficking in Persons and Smuggling of Migrants Act
BDT	Bangladesh Taka
CCFWII	Cabinet Committee on Foreign Workers and Illegal Immigrants
ILMIA	Institute of Labour Market Information and Analysis
ILO	International Labour Organization
MAPO	Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants
MEF	Malaysian Employers Federation
MOHA	Ministry of Home Affairs
MOHR	Ministry of Human Resources
MOU	memorandum of understanding
MRC	migrant worker resource centre
MTUC	Malaysian Trades Union Congress
NGO	non-governmental organization
RELA	People's Volunteer Corps
SMEs	small and medium-sized enterprises
TPP	Trans-Pacific Partnership
SOMO	Centre for Research on Multinational Corporations
UN	United Nations
USDOS	United States Department of State
3D jobs	dirty, dangerous and degrading jobs

Key recent policy developments:

- The Eleventh Malaysia Plan (2016–2020) has stated that a comprehensive immigration and employment policy for foreign workers will be developed, with MOHR assuming the lead role in policy-making.
- Malaysia has become a party to the Trans-Pacific Partnership, which requires states to adopt and implement laws in accordance with the ILO Declaration on Fundamental Principles and Rights at Work.
- A minimum wage law has been enacted that applies to migrant workers (with the exception of domestic workers), setting a basic monthly wage of 900 ringgit (MYR) (US\$210) in Peninsular Malaysia and MYR800 (US\$185) for Sabah, Sarawak and Labuan. A rise in the minimum wage has been announced for the 2016 budget.
- Responsibility for payment of the levy on employment of foreign workers has been shifted from employers to migrants, ranging from MYR410–1,850 (US\$95–425).
- A new regulation on domestic work has been proposed to govern conditions in the sector but has faced criticism for maintaining labour protections that are unequal with other types of work.
- The Private Employment Agency Act is expected to be subsumed by the Private Employment Agencies Bill, which will include regulation of recruitment for foreign workers (including domestic workers) within its scope. A policy decision has also been made to phase out the system of outsourcing agencies.
- Trafficking victims have been permitted to move freely and work after a protection order has been issued, as well as to receive payment of due wages in cases of non-conviction. In addition, non-governmental organizations and other parties can provide official protection services to victims.
- Research on the government to government recruitment process established under the MOU with Bangladesh found that it has reduced worker-paid recruitment costs by 8–10 times in the plantation sector.
- Problems with upholding international obligations under the Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19) continue to be observed.
- The Institute of Labour Market Information and Analysis (ILMIA) has been established under MOHR to carry out labour market studies and projections, including estimating labour supply and demand from 2015–2030.

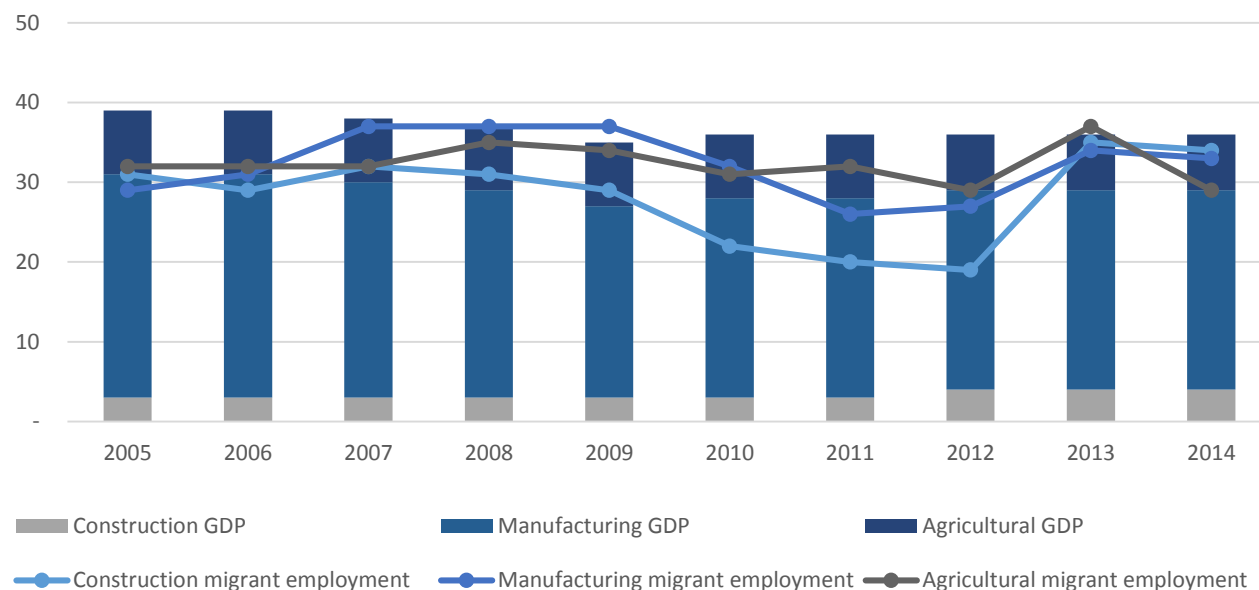
1. Introduction

Although population growth has remained relatively high in Malaysia, its rapidly expanding economy, increasing urbanization and relatively low-level of labour force participation among women continue to create a major demand for migrant workers. Most estimates suggest that there are 3–4 million migrants currently employed in Malaysia, which would constitute approximately 20–30 per cent of the country's workforce.

With close to full employment since 1990 and higher educational attainment among nationals, migrant workers have for many years filled substantial shortages in the supply of low-skilled

labour for key economic sectors. As shown in Figure 1, approximately one-third of the agricultural, manufacturing and construction workforce are migrants, industries which collectively contributed MYR297 billion (US\$68 billion) or 35.7 per cent of Malaysia's gross domestic product in 2014 (Ministry of Finance, 2015). Even these high rates of sectoral employment of migrants are known to fall short of the reality as they do not account for irregular migrant workers.

Figure 1. Share of GDP and employment of migrants for key economic sectors 2005–2014 (%)



Source: Ministry of Finance and Ministry of Home Affairs (2015).

Policies to manage labour migration have generally remained ad hoc since they were first introduced as an “interim solution” to fill labour shortages over two decades ago. Prominent features of the policy framework have included a detailed quota system for entry of migrant workers and efforts to regularize migration through temporary amnesties. These measures have often been followed by bans on new admissions and large-scale law enforcement actions to detain and deport those migrants who do not register with authorities. Although frequent changes have been made, the policies have been consistent in respect to admitting migrant workers only for the purpose of meeting the immediate labour needs of employers rather than allowing for longer term settlement.

Despite their ubiquity within the labour market, the Malaysian Government has not readily accepted the role that migrant workers play in filling the demand for low-skilled workers (with a few notable sectoral exceptions such as in domestic work). For many years, targets have been set and policies introduced to reduce the number the country employs in order to encourage economic restructuring. The New Economic Model of Malaysia in 2010 and other policy documents have sought to reduce dependency on migrant workers through a variety of strategies, including charging a levy for their employment, introducing a minimum wage, raising the

retirement age and increasing the number of women entering paid employment. However, changing the composition of its labour force has proven difficult to achieve, with employers complaining of severe shortages in some industries when more restrictive policies have been applied. Pushback from the private sector has contributed to awkward policy shifts and incoherence in some cases, such as the abrupt decision to allow payment of the migrant worker levy to be transferred back to workers after instituting a minimum wage. The goal of capping employment of migrants at 1.5 million workers as of 2015 once again appears unrealistic and has contributed to a situation where as much as half of the migrant workforce are now thought to be undocumented. The Eleventh Malaysia Plan (2016–2020) maintains this objective – envisaging a limit on the employment of low-skilled migrant workers of 15 per cent of the total workforce by 2020.

Political and public discourse have regularly dovetailed in portraying migrant workers as a potential threat to national security and detrimental to the country's long-term social and economic development. As a result, the Government has typically formulated labour migration policy from the standpoint of controlling immigration and maintaining public safety rather than labour administration, as evidenced by the authority granted to the Ministry of Home Affairs (MOHA) over migration issues. Recent years have seen the rise of increasingly virulent rhetoric against migrants within the popular media, blaming them for a host of social problems ranging from electoral fraud to increases in street crime. Scapegoating of migrants, regardless of the realities, has contributed to an environment where exploitation and abuse are sometimes viewed as acceptable. The results of a survey of public attitudes among Malaysian nationals showed that while nearly 40 per cent of respondents felt that migrants made a positive contribution to the economy, over 80 per cent believed that irregular migrants should not be entitled to any rights at work and that Government policy should be more restrictive (ILO, 2011).

During the last several years, an increasing number of reports have documented serious labour rights abuses against migrant workers in Malaysia, including cases of forced labour and human trafficking: (1) research by a non-governmental organization in 2014 found that nearly one third of their sample of migrant workers employed in electronics factories were engaged in forced labour (Verité, 2014); (2) a Finnwatch investigation of working conditions on palm oil plantations in Peninsular Malaysia uncovered severe violations of labour rights among many of the workers interviewed, including wages below the statutory minimum, lack of overtime pay, restrictions on freedom of association, gender-based discrimination, imposition of large amounts of debt and withholding of documents (Vartiala and Ristimäki, 2014); (3) in its 2015 Trafficking in Persons Report, the US Department of State found that some migrant workers on agricultural and palm oil plantations, at construction sites, in the electronics industry and in domestic work are subjected to labour practices indicative of forced labour, such as restrictions on movement, withholding of wages, contract substitution, confiscation of passports and debt bondage. (US DOS, 2015); (4) a mission report of the United Nations Special Rapporteur on Trafficking in Persons in 2015 documented victims of trafficking employed in a similar range of sectors, including agricultural, construction, manufacturing and domestic work (Giammarinaro, 2015); and (5) noting the reports of extensive abuse by the International Organization for Migration and International Trade Union Confederation, the ILO Committee of Experts on the Application of Conventions and Recommendations strongly encouraged the Malaysian Government to increase its efforts to eliminate forced labour and human trafficking in compliance with its obligations

under the Forced Labour Convention, 1930 (No. 29) in 2014 (ILO, 2015b).

Responding to the increased concern voiced by the international community and consumer groups, there have been a number of prominent shifts in labour migration and anti-trafficking policies in recent years. In particular, several of the new measures announced in the Eleventh Malaysia Plan may potentially improve the protections afforded to migrant workers in Malaysia, signalling progress towards a more coherent and rights-based governance framework. Moreover, by joining the newly established Trans-Pacific Partnership (TPP), Malaysia has made a commitment to raising labour standards in-line with the ILO Declaration on Fundamental Principles and Rights at Work. This policy review assesses the key recent changes made, and how they have been implemented in practice, in order to provide recommendations for further strengthening of labour migration governance in Malaysia.

2. Legal framework

The Immigration Act 1959

The Immigration Act provides the rules for admission and stay of migrant workers in Malaysia and enforcement has been mandated to the Immigration Department of the MOHA. In response to a rapid increase in the number of undocumented migrants working within its borders, the law was amended in August 2002 in an attempt to control the flow of irregular migrants. The amended Act criminalizes migrants who do not comply with Malaysian immigration policies relating to entry, stay and work, making them subject to arrest if caught by authorities or the People's Volunteer Corps (RELA). It also introduced stringent punishments for both employers hiring undocumented migrants and irregular migrants themselves, including fines of up to MYR 10,000 (US\$2,280), prison sentences extending to five years, caning and fast-tracked deportations (Kanapathy, 2006). Application of the punitive aspects of the law are known to be deeply unequal between employers and migrants and have had no clear impact on reducing the number of irregular migrants working in Malaysia.

As of 2006, the Malaysian Government started operating Immigration Courts in several of its detention centres. These were established with the purpose of streamlining the deportation process by using the detention centres as one stop centres where migrants are detained, tried and punished for illegal entry and stay (Neeko, 2008). The courts have been strongly criticized by the Malaysian Bar Council as facilitating a legal process where migrant workers are not provided with a clear understanding of the charges against them in their own language and are effectively denied the right to legal counsel.¹ It is a common practice for 15–20 migrants to be tried together at court hearings, grouped by the offence to which they have been charged. If found guilty, the cost of deportation is generally at the detainee's expense, which has led to prolonged detention for migrants who are unable to pay. It has also been reported that a significant number of migrants are detained beyond the end of their sentences because they are required to testify in pending court cases against their employers (ILO, 2015c).

¹ During a series of tripartite consultations held with labour attachés and consular officials from countries of origin in Kuala Lumpur, it was recommended that diplomatic missions should take on greater responsibility for arranging legal representation, providing interpretation services and repatriation of nationals who are detained for violation of the Immigration Act (ILO, 2015a).

As a result of the high emphasis placed on the use of detention as a deterrent against irregular migration, the Bar Council estimates that one-third of the prison population is foreign born, although migrants are responsible for only two per cent of the crimes committed every year (Ramachelvam, 2008). The situation appears likely to continue as the Immigration Department declared 2015 to be a “Year of Enforcement” against irregular migration and the Eleventh Malaysia Plan states that the issue of foreign workers with irregular legal status will be addressed through effective enforcement initiatives. There were 12,862 migrants being held at immigration detention centres in Malaysia as of March 2015 (ILO, 2015c).

The Employment Act 1955 and other labour legislation

The terms of employment and conditions of work for migrant workers are regulated by the Employment Act, which the MOHR has been tasked to administrate. Additional labour laws, such as the Occupational Safety and Health Act, Workmen’s Compensation Act, Industrial Relations Act and Trade Union Act, are also applicable to migrant workers. In principle, this framework of labour legislation provides equality of treatment for registered migrants with nationals in terms of wages, work hours, holidays, terminations, non-discrimination, freedom of association, access to complaint mechanisms and other protections. In practice, however, labour laws are often ineffectively enforced for migrant workers (box 1).

Box 1

Application and enforcement of labour laws

A number of factors continue to constrain systematic enforcement of labour legislation for migrant workers in Malaysia. The MOHR has limited resources to fulfill its labour inspection mandate, particularly in terms of staffing. A total of just 350 labour inspectors are responsible for monitoring conditions at over 400,000 workplaces around the country. As a result, the Ministry responds to specific complaints from migrants but lacks the resources to comprehensively inspect their workplaces. It should be noted that this situation is not unique to Malaysia as insufficient human resources to conduct labour inspections is a common challenge faced in many countries.

Compounding the shortfall in law enforcement personnel, migrants often work in sectors that are harder for labour inspectors to reach, such as on remote palm oil plantations. Other major sectors of migrant worker employment, including domestic work in private homes, fall outside the scope of inspections entirely. Uneven law enforcement has contributed to segmentation of the labour force, establishing migrants as a class of workers to which a largely different set of rules apply.

The official mechanism for resolving migrant worker grievances about labour rights violations has been similarly unsuccessful at ensuring employer accountability. In the event of a breach of their terms and conditions of employment, workers can lodge a complaint with the Labour Department, and for cases of unlawful dismissal, objections can be registered with the Industrial Relations Department. Despite being provided with equal access to these complaint mechanism under law, the number of cases pursued by migrant workers negligible in comparison to the number of violations committed against them (Santhiago, 2011). It should be noted that those with irregular legal status or informal work arrangements are not guaranteed similar rights to redress, which prohibits a very substantial portion of migrant workers from registering grievances.

When complaints are filed, even completing the initial step of identifying the employer who bears legal responsibility often proves a daunting task due to the common practices of outsourcing and sub-contracting (ILO, 2015a). Moreover, the long duration of the process favours employers as it is common for cases to require six months or more to be resolved – by which time migrants have often returned home (MOHR has recently issued a directive that all migrant cases should be resolved within three months). Because the legal process often does not function effectively for migrant workers, service providers report that most migrant complainants rely on direct negotiation with employers to attempt to resolve their grievances.

These gaps in regulating employment practices have had detrimental impacts on the labour rights of both migrant and national workers, particularly in undercutting efforts by trade unions to organize and bargain collectively for better terms and conditions. Understanding the importance of protecting the rights of all workers in order to avoid a race to the bottom on working conditions, the Malaysian Trades Union Congress (MTUC) has been active in reaching out to migrant workers to join trade unions and providing them with legal assistance for cases of abuse. However, the operating environment remains extremely challenging in this regard as migrants often cannot remain in Malaysia long enough to benefit from collective bargaining agreements and/or are reluctant to actively engage with trade unions due to fear of retaliatory dismissal and deportation. These fears may be well-founded as there have been reports by MTUC and other civil society organizations of migrants being sent home immediately upon attempting to organize. Although the practice has become less common in recent years, some employers of migrant workers continue to include an invalid clause within employment contracts stating that joining a trade union is prohibited.

The Private Employment Agency Act 1981

The regulatory procedures for recruitment of migrant workers are provided by the Private Employment Agency Act 1981. Recruitment agencies are required to obtain a license to operate from the Ministry of Human Resources (MOHR) and an additional endorsement is required for placement of workers overseas. As the Act was originally formulated with the intention of regulating recruitment agencies providing services for domestic employment and sending Malaysian workers abroad, it has become outdated for the current context where inbound recruitment of migrant workers is much more prevalent. The Act is expected to be subsumed by the Private Employment Agencies Bill, a draft of which was shared publically 2014 but appears to have stalled out in the legislative process. MOHR has stated that the new legislation will extend to recruitment of foreign workers and improve enforcement – particularly for recruitment of domestic workers – but will not address the issue of outsourcing agencies (see section 5).

The Anti-Trafficking in Persons Act 2007

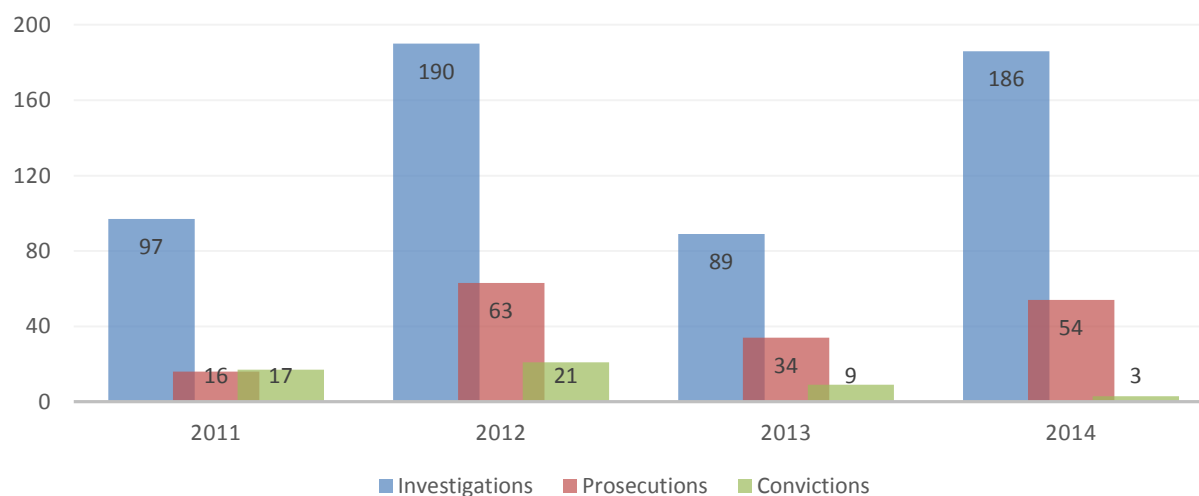
The Anti-Trafficking in Persons Act criminalized trafficking for purposes of labour exploitation, in-line with the international standards established under the United Nations (UN) Palermo Protocols. It was amended to become the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act in 2010 (ATIPSOM), which broadened the definition of trafficking to include all actions involved in acquiring or maintaining the labour or services of a person through coercion. The law is comprehensive in criminalizing all dimensions of trafficking and establishes stringent penalties of up to twenty years imprisonment and fines for those convicted.

Following enactment of the law, the Malaysian Government launched a five-year National Action Plan (2010–2015) aimed at improving preventive measures, protection services and social awareness. In November 2013, the Malaysian Government put into place standard operating procedures for the investigation and prosecution of trafficking offenses and a follow-up Action Plan for the period of 2016–2020 is being developed.

The Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants (MAPO) is responsible for overseeing the implementation of these initiatives, which includes representatives from multiple ministries and is chaired by the MOHA. An anti-trafficking unit has been created under the Royal Malaysian Police to investigate trafficking offenses and specialized positions have been established at the Immigration Department and Attorney General’s Chamber. The Government’s efforts to combat trafficking have also included labour authorities in a multi-disciplinary approach to law enforcement, including the formation of an anti-trafficking unit within MOHR and provision of training to inspectors on the labour dimensions of trafficking.

In spite of the additional planning, resources and personnel dedicated to counter-trafficking activities, the Government’s initiatives have yet to yield concrete results in holding traffickers criminally liable for their actions. A small increase in the number of trafficking victims identified has occurred in recent years but the quantity of convictions has declined precipitously (figure 2).

Figure 2. Criminal justice response to trafficking from 2011–2014



Source: US Department of State (2012–2015).

According to a recent report by the UN Special Rapporteur on Trafficking in Persons, many of the same factors that previously limited the effectiveness of the law enforcement response to trafficking remain, including insufficient coordination and capacity; and corruption of officials (Giammarinaro, 2015). Another key challenge identified by Tenaganita, an NGO providing shelter and legal assistance to victims of trafficking and forced labour, is that pursuing cases under the Anti-Trafficking in Persons Act places redress under the framework of criminal law. After informing migrant workers that they may not receive their due wages soon if ever in following through with such a case, most opt to seek financial remedy through a negotiated

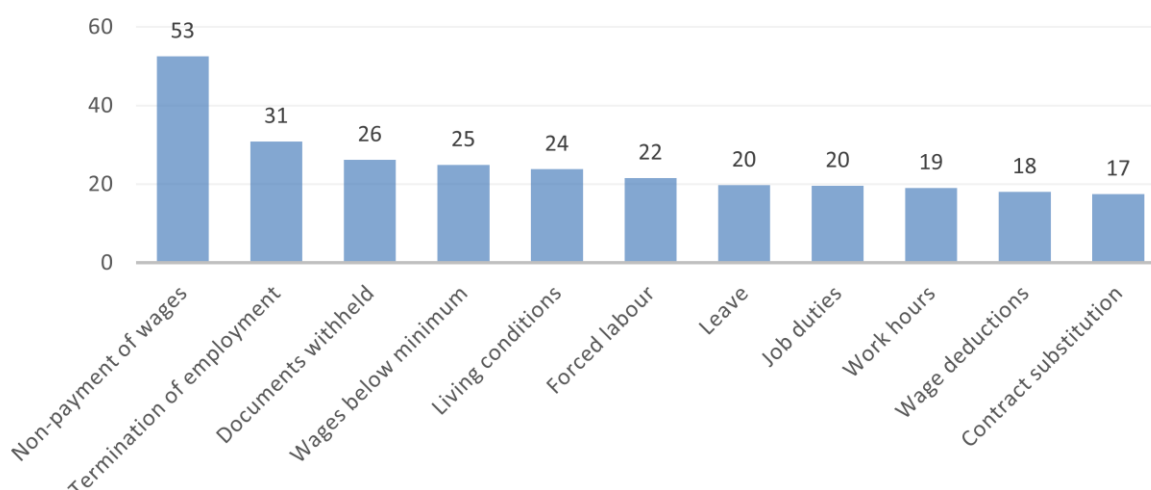
settlement so that they can return home. If they do decide to go through with a trafficking case, they run the substantial risk that it will not be resolved within three months, which is the maximum period of time that migrants are permitted to stay in Malaysia while they have a court case pending and is often insufficient.²

In July 2015, an amendment was made to ATIPSOM which addresses several of the shortcomings in the legal framework that have been raised by NGOs and the international community. The changes include granting permission for trafficking victims to move freely and work after a protection order has been granted, the requirement that a court order for payment of due wages must be issued in cases of non-conviction, allowing non-governmental organizations (NGOs) and other parties to provide protection services to victims and the establishment of a high-level inter-ministerial committee to improve government coordination on combatting trafficking.

Box 2 Legal assistance services for migrant workers

Tenaganita and the Malaysian Trades Union Congress manage three Migrant Worker Resource Centres (MRCs) in Selangor, Johor and Penang to deliver support services to migrant workers. Data compiled from the 1,584 migrant workers who resolved grievances through MRC legal assistance reveals that the forms of abuse they endure are often severe and compound in nature. A substantial portion of complainants showed indications of forced labour and 22 per cent (342 migrants) were explicitly identified as such by case managers (figure 3). This suggests that broader efforts to protect the labour rights of migrant workers are necessary to effectively identify and assist victims of exploitation and abuse, complementing criminal justice responses to trafficking.

Figure 3. Subject of complaints received from migrant workers 2011–2015 (%)



Source: Migrant Worker Resource Centers (2015).

² The Immigration Department grants migrant workers in such cases a “Special Pass,” which allows them to stay for a one-month period of time (renewable for a maximum of three months) but prohibits employment.

3. Quotas on admission and employment

The core laws relating to employment of migrant workers have been supplemented by an array of secondary instruments, most of which are intended to regulate the admission and employment of low-skilled workers but also encourage high-skilled migration. Similar to Singapore's twin-track policy on labour migration, Malaysia maintains a distinction between migrants who are "contract workers" (low-skilled workers) and those who are "expatriates" (high-skilled workers), with the latter receiving preferential treatment in terms of admission, duration of stay and allowing accompanying dependents, though nonetheless regarded as temporary migrants (Kaur, 2008). The classification is made largely based upon salary, as workers earning over MYR3,000 (US\$685) per month are classified as expatriates.

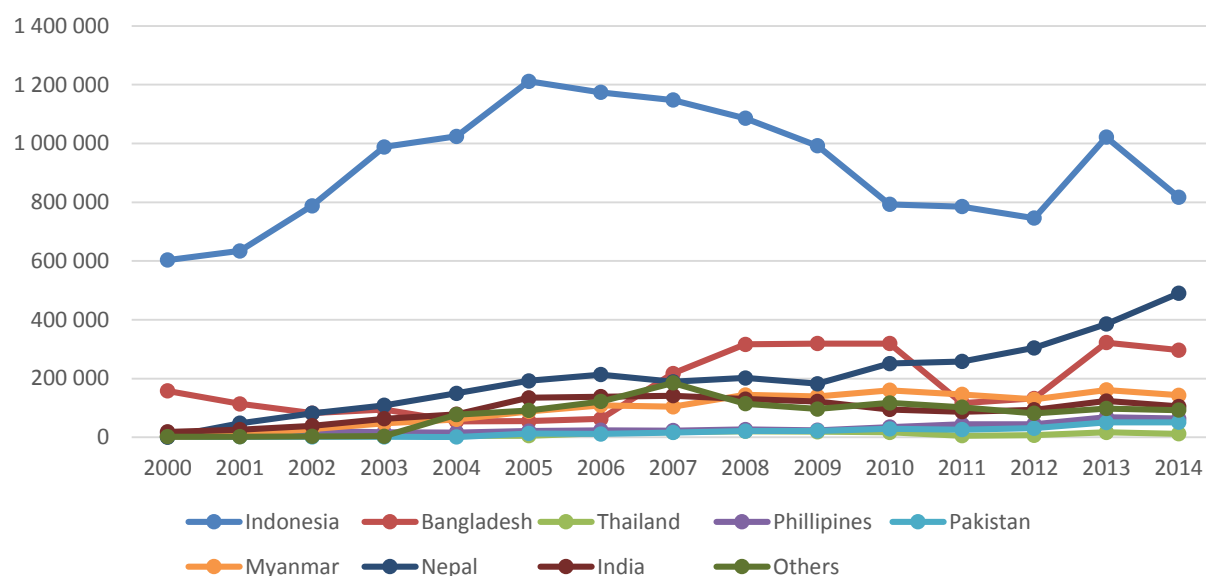
With the intention of reducing the likelihood of dependence on any single population of migrant workers and protecting job opportunities for nationals, an elaborate system of quotas and restrictions has been established for low-skilled migrants. These include considerations related to sector, gender, nationality and availability of a domestic candidate: (1) Malaysian employers must prove that they have posted the job vacancy and attempted to hire a national before employing a migrant worker; (2) the permitted sectors of employment for migrants are manufacturing, construction, agriculture, plantation, services and domestic work. Further restrictions are placed on the ratio of migrants to nationals employed in specific types of enterprises (more liberal for sectors shunned by local workers such as palm oil plantations and more limiting in others with domestic candidates available, including hotel services); (3) admission of migrant workers is restricted to 14 nationalities and each nationality is only permitted to work in specified sectors; and (4) gender restrictions have been applied, particularly in regards to migration of women, which has been promoted as a means to facilitate the transfer of domestic work and caregiving tasks in private households from nationals to migrants.³

To maintain the quota system, Malaysian law provides very limited flexibility for migrant workers to change jobs of their own volition. Their legal status to remain in the country is directly tied to their current employer, restricting the ability of migrant workers to leave without losing permission to stay and work and increasing their vulnerability to abuse.

However, the constitution of labour migration flows to Malaysia to date have been extensively shaped by practical considerations such as wage differentials, cultural and linguistic similarities and the ease of migrating informally rather than the stipulations of migration management policies. As shown in figure 4, over half of regular migrant workers during the last 15 years come from neighboring Indonesia (56 per cent).

³ Recently, there have been renewed efforts to encourage low-income Malaysians to enter domestic work as a means of reducing dependency on migrants and increasing the number of women entering the workforce. MOHR began implementing a pilot project in 2016 named "Housekeeper," which targets 10,000 welfare recipients for full or part-time employment.

Figure 4. Migrant workers in Malaysia by country of origin 2000–2014



Source: Ministry of Home Affairs (2015).

Labour market assessment

While extremely detailed, the quotas and restrictions on admission and employment that have been developed are not based upon comprehensive assessments of labour market demand as are conducted in some destination countries. Under the framework of the One-Stop Labour Approval Centre within the MOHA, the responsible authorities determine the quota figures for their respective industries. For several sectors, no clear procedural guidelines have been established for making these calculations. Interviews with authorities and industry representatives suggest that they are a “guesstimate” of the need for migrant workers, taking into account the views of key stakeholders (Abella and Martin, 2015). Therefore, Malaysia’s labour shortage can be termed a “revealed shortage”; no systematic attempt to measure or estimate its extent has been made but strong demand in several sectors has resulted in a large influx of migrant workers (Ducanes, 2013).

Acknowledging the inadequacy of the information available on the need for migrant workers within the labour market, several measures have been proposed in the New Economic Model (2010–2020) to allow for a more informed “labour market test.” One major initiative has been the establishment of the Institute of Labour Market Information and Analysis (ILMIA) in 2012, under the auspices of MOHR. The Institute is tasked with carrying out labour market studies and projections, including estimating the supply and demand of labour by occupation and sector from 2015–2030, and appears to be a meaningful step towards the development of a more evidence-based policy.

4. Institutional framework

The main Government ministries involved in developing and administering labour migration policy in Malaysia are the MOHR and MOHA. The responsibilities have not been divided

equally between the two institutions as the MOHA has taken the lead in policy-making and implementation for many years. As a result, Malaysia's labour migration policies are heavily oriented towards ensuring national security. Enacting measures to expand or contract the number of migrant workers in the country and reduce irregular migration have been the primary policy concerns, rather than managing the broader impacts of labour migration on national economic and social development or protecting workers' rights.

The oversight body for migration policy in Malaysia is termed the Cabinet Committee on Foreign Workers and Illegal Immigrants (CCFWII). The MOHA functions as the secretariat for the CCFWII, which is chaired by the Deputy Prime Minister and includes representatives from 13 ministries. The Committee was initially mandated with setting policy related to labour migration but its mission was expanded in 2005 to include the issue of illegal immigration. As there are currently no legislative or administrative provisions in place governing the protection of refugees in Malaysia, "illegal immigrants" is an undifferentiated grouping that includes all irregular migrant workers and asylum-seekers in the country.

There are some indications that labour migration policy may be more closely aligned with national development goals and provide better protection for workers moving forward. In the Eleventh Malaysia Plan, it has been stated that "A comprehensive immigration and employment policy for foreign workers will be formulated, taking into account the requirements of industry and the welfare of foreign workers....The MOHR will assume the lead role in policy-making for foreign worker management" (Government of Malaysia, 2015, p. 5–18). This appears to be a positive step towards achieving greater coherency on labour migration governance.

Box 3

Migration Works:

A campaign to promote positive attitudes towards migrant workers in Malaysia

An ILO study of public attitudes towards migrant workers in Malaysia, Singapore, Republic of Korea and Thailand revealed widespread misunderstandings and misconceptions among nationals. These attitudes matter because they can translate into actions and behaviors that negatively affect migrants, including discriminatory and exploitative practices at workplaces. In addition, where opinion surveys report negative attitudes towards migrant workers, policymakers may be drawn into introducing policies and legislation that cater to these mistaken beliefs and biases rather than basing them on the facts and evidence available.

On International Migrants Day 2012, the ILO launched the Migration Works campaign to promote a positive image of migrants that more closely corresponds to their actual contribution and highlights the benefits that migration can bring, both to Malaysia and countries of origin. Working in close partnership with other UN agencies and civil society organizations to develop the strategy, a theme of mutual benefit was chosen for the campaign: 'Working Together, Walking Together: Migration Works for Us All.'

Highlights of the campaign have included an art exhibition entitled 'Journey of Hope,' which was displayed at several venues in Kuala Lumpur, and a public service announcement produced in collaboration with MTV EXIT. By focusing on what migrant workers and Malaysians have in

common rather than their differences, the campaign activities have sought to foster greater understanding and appreciation of their work.

5. Regulating recruitment

The recruitment sector has proven a major regulatory challenge for the Malaysian Government. Mandatory licensing of recruitment agencies is required under the provisions of the Private Employment Agencies Act but the evidence suggests that compliance with rules and regulations has been far from complete.

In response to widespread complaints about deceptive and abusive practices, attempts have been made to reduce their role in facilitating labour migration over the years. A ban on recruitment agency placement of migrant workers was enforced in all economic sectors in 1995 (except for domestic work). However, the prohibition was later lifted when the authorities determined that the use of recruitment services had become an “unstoppable trend” (Kanapathy, 2006).

An important change in policy occurred in 2005 when a guideline was issued by the Cabinet Committee on Foreign Workers requiring that companies intending to hire fewer than 50 migrant workers must use the services of “labour outsourcing companies.” For companies hiring over 50 migrant workers, either direct recruitment in countries of origin or use of an outsourcing company were allowed. The legal framework governing the operations of these companies was not determined until 2010 when the Committee decided that the Private Employment Agency Act would be applied (ILO, 2015d). However, it remains unclear how the provisions of the law have been used to regulate outsourcing companies as MOHA has been administratively responsible for the issuing of licenses rather than MOHR.

The rationale for introducing this recruitment system was primarily that it was a more efficient and flexible means for recruiting and managing migrant workers. In particular, it simplified the process for employers, reducing administrative delays and allowing for changes in employment and short-term assignments. Supply chain research has suggested that lobbying pressure from the powerful manufacturing industry was highly influential factor in the policy decision (SOMO, 2011).

The policy quickly spawned a massive new recruitment industry within Malaysia, growing to over 400 outsourcing companies at its peak (ILMIA, 2013). Even for “direct recruitment” of migrant workers, outsourcing firms were often heavily involved, acting as the employer’s representative to source workers in countries of origin and handling the administrative requirements. The scope of regulatory responsibilities created by this new system proved beyond the capacity of the Government to manage effectively, leading to major problems with misconduct by outsourcing companies. Pervasive abuses related to the fee amounts charged convinced the Government to suspend the quota of job orders and distribution of new work permits in 2010. Further regulatory action followed in 2011, halting the issuance of licenses and work permits to outsourcing companies.

A critical problem with the policy has been that it clouds the legal relationship between migrant workers and their employers, making their statutory responsibilities unclear. Rather than a direct contractual arrangement, the outsourcing policy artificially divides accountability for meeting the terms of employment to the outsourcing agency while the employer is directly responsible for managing the worker. This disconnect has contributed to greater casualization of employment and scope for abuse of migrant workers, compounding the fundamental vulnerability of being employed outside of their countries of origin.

In many cases, workers placed by outsourcing companies were not provided with acceptable housing facilities, stable employment, freedom of movement or the legal minimum wage. Contract substitution was also a common rights violation, with complaints often leading to job transfers rather than remedies for the abuse (ILMIA, 2013).

The results of the outsourcing policy on increasing labour market efficiency have been mixed. While employers benefitted from having a ready pool of workers to draw upon, migrant workers often experienced prolonged periods without jobs or income. A Bangladeshi worker recruited by an outsourcing company described his experience: “After arrival at the Kuala Lumpur International Airport, we were taken by the agent to a house where we were kept for about a month. There were 50 of us there at the house. We were fed very little.” (Amnesty International, 2010).

Introduction of another intermediary into the recruitment process also increased the cost substantially. For the first batch of workers recruited under the MOU with Bangladesh in 2006, the cost borne by migrant workers was said to frequently be more than double the rate set forth in the agreement (Abella and Martin, 2015).

A parliamentary decision was made in December 2013 to phase out the outsourcing system for recruitment of migrant workers. As several major multinational corporations rely extensively upon migrant workers at their electronics manufacturing plants in Malaysia, it is believed that increasing pressure from buyers and the international community was an important factor in the decision. The Eleventh Malaysia Plan further confirms the change in policy, stating that MOHR will assume full responsibility for regulating the recruitment of migrant workers and that the role of outsourcing companies and other intermediaries will be eliminated. It has not been made clear when this policy will be fully implemented as the existing outsourcing firms have been granted licenses that are valid through 2021.

Other recent government efforts to ensure a fair and efficient recruitment process have centered on the signing of bilateral agreements with countries of origin. These agreements have generally set fixed amounts for the fees that can be charged by private recruitment agencies or have bypassed them entirely through government-to-government recruitment arrangements.

6. Memoranda of understanding

Malaysia has negotiated bilateral MOUs to manage labour migration dating as far back as 1984. More recently, MOUs have been signed with Sri Lanka, China, Thailand, Bangladesh, Pakistan, India, Viet Nam and Indonesia. In many cases, however, problems with abuse and deception

have persisted despite the existence of a formal process for labour migration, contributing to diplomatic tensions and even moratoriums on placement of workers.

Exploitation of domestic workers is a key issue that the MOUs have sought to address, with the Philippines, Indonesia and Cambodia all halting deployment at various points. While increasing protection for some groups of domestic workers in Malaysia, a fundamental problem with using these agreements as an instrument for change is that they apply on the basis of nationality rather than for the sector as a whole. Therefore, they can have the unintended effect of institutionalizing discriminatory practices towards certain nationalities of domestic workers, rather than enabling the more egalitarian improvements that could be achieved through national legislation.

Filipino domestic workers are generally considered to have the most rights and highest pay as a result of the strong negotiating position of their Government when signing MOUs (Amnesty International, 2010). They represent a minority of the workers employed within the sector, as 71 per cent of registered domestic workers came from neighboring Indonesia in 2013 (MOHA, 2015). The trend in recent years has been towards increased national diversification in the recruitment of domestic workers as a result of government suspensions and the ratification of additional bilateral agreements.

MOU with Indonesia

In 2006, Malaysia and Indonesia signed an MOU on the employment of domestic workers. Gaps and loopholes within its articles allowed for widespread abuse by employers, including withholding of passports, unfair wages and inadequate rest periods (Human Rights Watch, 2007). The volume of complaints received from domestic workers, as well as a series of high-profile cases of abuse documented in the media, led Indonesia to suspend deployment of domestic workers to Malaysia in 2009 pending a revised agreement.

In 2011, Malaysia and Indonesia signed a protocol amendment to the MOU establishing the following additional requirements and protections:

- ❖ The total amount charged in recruitment fees was fixed at MYR4,511 (US\$1,030), of which the employer was made responsible for MYR2,711 (US\$620) and the worker MYR1,800 (US\$410).
- ❖ One rest day per week or wages at time-and-a-half for those who choosing to work.
- ❖ Guidelines clarifying the roles and responsibilities of recruitment agencies, employers, and domestic workers in the MOU process.
- ❖ Formation of a joint taskforce to monitor compliance with the terms of the MOU.
- ❖ Direct deposit of wages into workers' bank accounts.
- ❖ Workers were permitted to retain their passports.
- ❖ Standard employment contracts were introduced.

The new agreement has provided several notable improvements in labour protection for Indonesian domestic workers but an important omission was a clearly established minimum wage rate. Indonesia had requested that base wages be set at MYR700 (US\$160) per month, with additional pay provided to domestic workers required to clean more than one house or assigned multiple job duties (e.g. cooking, housekeeping, caring for children or the elderly, etc.). There have also been concerns that the fixed recruitment fees have slowed deployment through regular

channels while irregular migration flows continue. As of December 2013, it was reported that only 669 Indonesian domestic workers had arrived in Malaysia through regular channels since the protocol agreement was signed (The Star, 2013).

Another MOU is currently under negotiation between the two countries and the Indonesian Ministry of Manpower and Transmigration has said that by 2017 it will no longer send domestic workers abroad unless their employment is formally recognized and protected.

MOUs with Cambodia

In 2011, Cambodia suspended deployment of domestic workers to Malaysia, following reports of widespread abuse (in both Cambodia and Malaysia). However, the moratorium was not entirely successful in preventing Cambodian domestic workers from migrating to Malaysia, which created additional vulnerabilities due to their irregular legal status. There were also some accounts of domestic workers being forced to stay against their will as a result of the moratorium on new deployments.

Following many years of discussion, Malaysia signed two new agreements with Cambodia in December 2015; one MOU specific to migration of domestic workers and the other for migrant workers generally. Although the text of the agreements have not been made public, they were formulated with the intent of reopening a regular channel for migration of domestic workers to Malaysia and enhancing protection of Cambodian workers employed there (Blomberg and Sothear, 2015). Prior to approval of the new agreements, there had been various news reports of discussions with the Governments of Bangladesh, Nepal and Myanmar to expand the pool of domestic workers available.

MOUs with Bangladesh

The history of bilateral agreements with Bangladesh on labour migration has been similarly challenging. Malaysia placed a moratorium on admission of workers from Bangladesh in 2007 after hundreds of Bangladeshi workers were left stranded at the Kuala Lumpur International Airport when their outsourcing agencies failed to meet them. Those stranded were kept in special holding pens near the arrivals hall where they slept on floors for up to two weeks, many without enough money to buy food.

The ban on admissions was not lifted until a new agreement was signed in late 2012. A key feature of the new MOU is that it established a government to government recruitment process that removes the involvement of private recruitment agencies. Additional provisions in the agreement include:

- ❖ Fixed recruitment fees of Bangladesh Taka (BDT) 40,000 (US\$520) (table 1)
- ❖ Minimum wage of MYR900 (US\$210) per month
- ❖ Employment in the plantation sector only
- ❖ A target of 30,000 workers
- ❖ Online application system through which workers are selected
- ❖ A feasibility study for the recruitment model
- ❖ Standard employment contracts

A key goal of the MOU has been to reduce worker-paid recruitment fees as many Bangladeshi workers arrived with significant debts, forcing them to overstay their contracts in order to achieve financial goals. Reducing the recruitment costs borne by migrant workers is an important step towards greater compliance with international labour standards,⁴ which prohibit charging such fees to workers entirely. Several studies have found that the MOU has been successful in this regard. As shown in table 1, the first batch of migrant workers deployed under the agreement in 2013 paid BDT33,178 (US\$430) to migrate to Malaysia, which represents a major reduction from the BDT250,000–300,000 (US\$3,205–3,850) in recruitment fees that were previously being charged by private recruitment agencies and brokers (ILO, 2014; Palma, 2015; Wickramasekara, 2014). Another recent ILO study of the government to government recruitment process under the MOU reached similar conclusions, with the total migration costs found to have been reduced by 8–10 times to BDT32,100 (US\$410) (ILO, Forthcoming).

Table 1. Breakdown of recruitment costs under the Malaysia-Bangladesh MOU (BDT)⁵

Type of cost	Set rate
One-way airfare (Subject to variation)	31,500
Medical examination	3,500
Welfare fee	250
Non-judicial stamp	300
Visa fee	1,100
Service charge	2,000
Income tax	200
Orientation training	1,000
Miscellaneous	150
Total*	40,000

Source: Bureau of Manpower, Employment and Training (2013).

*The first batch of workers under the agreement actually paid BDT33,178 due to reductions in the cost of air fare.

The most recent development in bilateral cooperation on labour migration between Malaysia and Bangladesh has been discussion of a major expansion of placements for Bangladeshi workers. Several sources have reported that 1.5 million Bangladeshi workers may be recruited during the next three years under a new agreement being considered, though very little else has been revealed about the negotiations. The news has raised concerns among trade unions and NGOs about the lack of transparency with which the discussions have been handled thus far. Many of these groups have questioned the need to bring in such a large number of additional workers given the major challenges faced in protecting the rights of those migrants already present and working in Malaysia, particularly for those who lack legal status.

7. Amnesty policies

Since 1992, ten Government initiatives have been launched with the intent of regularizing the legal status of irregular migrant workers in Malaysia (ILMIA, 2013). In several cases, these programmes were successful at providing documents to hundreds of thousands of workers but

⁴ Private Employment Agencies Convention, 1997 (No. 181).

⁵ Note: The exchange rate was approximately BDT78 to US\$1 as of December 2015.

the number of migrants without legal status has generally remained high because of the obstacles to full participation.

To address the issue of irregular migration more comprehensively, the MOHA implemented the broadest amnesty policy it has ever attempted in 2011. Referred to as “6P”, the Programme included measures for amnesty, registration, legalization, supervision, enforcement and deportation of migrants.

During a two-month period, a total of 2.3 million migrant workers had registered under 6P, including 1 million regular and 1.3 million irregular workers (ILMIA, 2013). However, the process remained fraught with difficulties, particularly in terms of effective communication with workers and employers, and has not significantly reduced the number of undocumented migrant workers in Malaysia. It was also reported that some of the agents participating in the 6P Programme cheated migrants through accepting payments but not providing work permits or charging excessive fees (as high as MYR3,000–5,000 (US\$685–1,140) in some cases).

The evidence appears to suggest that as long as the recruitment costs involved with regular channels for migration remain high, the incentives for irregular employment will continue for both migrants and employers (ILMIA, 2013), requiring a more systematic policy response.

Box 4 **Survey of Malaysian Employers**

In 2014, the Malaysian Employers Federation (MEF) and the ILO carried out a study of recruitment and employment of migrant workers by its membership. Survey responses from 101 firms were collected as the basis for developing practical guidelines for employers. Key findings included:

- The majority of employers (87 per cent) give priority to local workers before recruiting migrants.
- The main reasons given for recruiting migrants were shortages of local workers (78 per cent), migrant willingness to work hard and perform overtime (53 per cent) and their low rate of absenteeism (31 per cent).
- Most employers (85 per cent) make use of private employment agencies to recruit migrant workers. Selection of a recruiter depends on reputation, fees and past experience.
- Nearly three-fourths of employers (74 per cent) do not allow the migrant workers they hire to join trade unions.
- The majority of firms have procedures in place to handle complaints regarding unfair treatment (84 per cent) and sexual harassment (75 per cent) but migrant access is hindered by lack of awareness, language barriers and fear of retaliation.
- Over two-thirds of employers retain the passports of migrant workers (65 per cent) though the majority of those holding the documents (65 per cent) said that migrants could access them at any time upon request.

Following analysis of the survey results, the MEF has provided training to employers and advocated for the development of a clear, comprehensive and sustainable policy framework to manage labour migration in Malaysia.

Source: MEF (2014). Practical Guidelines for Employers on the Recruitment, Placement, Employment and Repatriation of Foreign Workers in Malaysia. Kuala Lumpur.

8. Minimum Wage Order

A minimum wage law came into effect on 1 January 2013 for employers hiring more than five workers, which was extended to all employers six months later. The law requires that workers be paid a minimum wage rate of not less than MYR900 (US\$210) per month in Peninsular Malaysia and MYR800 (US\$185) for Sabah, Sarawak and Labuan. This rate applies to workers in all sectors – irrespective of nationality – with the notable exception of domestic workers who have no statutory minimum wage.

Part of the Government's motivation for establishing the minimum wage was to decrease dependency on migrant workers by making low-skilled jobs more desirable to nationals. So far, however, the new law does not appear to have had a significant impact on convincing Malaysian workers to pursue this type of work. Data from the Government's Salaries and Wages Survey suggests that the majority of national workers already earned higher wages, with a median monthly salary of MYK1,700 (US\$390) in 2013 (Department of Statistics, 2015).

Although compliance remains incomplete, setting a legal minimum has had a meaningful effect on the wages of low-skilled migrants. According to employers, the average basic wage of migrants was between MYR450–600 (US\$105–135) per month prior to enactment of the Order. It is estimated that the application of the minimum wage law increased wages of migrant workers by about 16–78 per cent, with those employed on plantations receiving the largest net wage increase and the change in the service sector the smallest (Abella and Martin, 2015).

Following complaints about the added burden by representatives of small and medium-sized enterprises (SMEs) employing migrant workers, the MOHR created an exemption for such firms until 31 December 2013. At the same time, the Government decided that foreign workers would have to start bearing the cost of their own levy payments. The shift in policy reflects the competing goals of the Government and employers on this issue, who lobbied to keep costs low for labour-intensive industries.

In its 2016 budget, the Government has announced that the minimum wage for workers in the private sector will be further increased in July to MYR1,000 per month (US\$230) in the Peninsula and MYR920 (US\$210) in Sabah, Sarawak and Labuan. Again, one of the stated intentions of the rise is to reduce reliance on migrant workers (Bernama, 2015).

9. The levy

The Malaysian Government has imposed an annual levy on employment of foreign workers since 1992. Initially, it was payable by migrant workers but was shifted to employers in 2009 to encourage economic restructuring. In 2013, employers were granted permission to transfer the levy back to workers. The justification provided was that it would not represent a significant financial burden for migrants given the salary increase they would receive of between 30-50 per cent under the Minimum Wage Order.

As a de facto income tax, migrant rights advocates have pointed out that the move effectively renders migrant workers to be outside of the structure of Malaysia's progressive tax system, which has a minimum monthly income threshold of RM3,000 (US\$685) per month to pay tax on earnings (Bhatt, 2013). Moreover, it nullifies the intent of the levy policy, which was said to be designed to reduce structural dependency on foreign workers through raising the cost for employers.

As the number of foreign workers in Malaysia has increased exponentially since the levy was introduced, the indications are that it has had no clear impact on decreasing dependency regardless of which party is responsible for payment. Rather, the levy mainly constitutes a considerable tax on labour which is not clearly earmarked for a related purpose, generating revenue in the amount of MYR2 billion annually (US\$456 million) (Nozwir, 2013).

The size of the levy varies substantially across sectors and the means for calculating these amounts has not been made entirely clear (See Table 2). It appears that the levy charged in each industry is based upon a heuristic assessment of the relative labour shortage and wages provided.⁶

Table 2. Levy charged for employment of migrant workers by sector and location (MYR)

Sector	Levy (Peninsular)	Levy (Sabah/Sarawak)
Manufacturing	1 250	1 010
Construction	1 250	1 010
Plantation	590	590
Agriculture	410	410
Service	1 850	1 490
Service (Island resort)	1 250	1 010

Source: MOHA (2015).

The Eleventh Malaysia Plan indicates that the Government will continue to maintain the levy system despite the lack of results in reducing employer reliance on migrant workers. The Plan states that employers will bear the cost of the levy, paying a progressive rate based on the ratio of migrant workers they employ and the duration of their employment. To improve its effectiveness

⁶ The levy is just one of the eight government fees applied to employment of migrant workers: (1) Levy: MYR410-1,850 (determined by sector); (2) Visit pass: MYR60; (3) Visa: RM15-100 (determined by nationality); (4) Processing fee: MYR125; (5) Security bond: MYR250-1,500 (determined by nationality); (6) Foreign Worker Compensation Scheme: MYR86 + 5 per cent service charge; (7) Health insurance premium: MYR120; and (8) Medical examination: MYR180-190 (determined by gender) (MOHA, 2014).

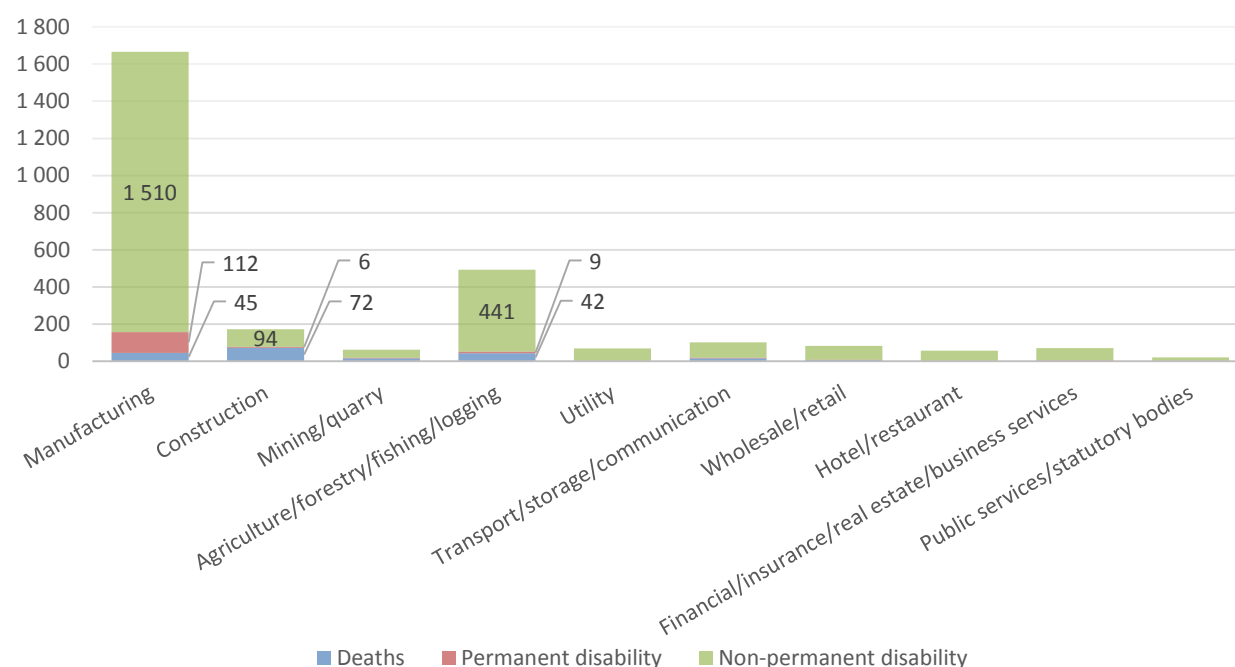
in encouraging restructuring, it is anticipated that the amount of the levy will be gradually increased over time.

10. Occupational safety and health

As migrant workers in Malaysia are often employed in dangerous jobs without sufficient protective equipment or training, a high incidence of workplace accidents have been documented.⁷ Official data from 2014 shows that the largest number of injuries and deaths at work occurred in the manufacturing, construction, and agricultural sectors, all of which are major sectors of employment for migrant workers (figure 5). These statistics only account for accidents that are investigated by authorities and it is believed that a substantial number continue to go unreported by employers in order to avoid legal and financial liability.

While the types of employment that migrant workers are engaged in are commonly more hazardous due to the nature of the work, unequal treatment contributes to an increased risk of accidents and health problems. The Embassy of Nepal provided records showing that its workers died at a rate of nine per week in Malaysia during the second half of 2014. Stakeholders interviewed about these statistics attributed them to poor working conditions, high-levels of occupational stress and lack of adequate medical care (Shrestha, 2014). In addition, there are no guarantees of safety from arrest while attempting to access medical treatment for undocumented workers, which may adversely affect migrant health seeking behavior.

Figure 5. Occupational accidents by sector in 2014



Source: Department of Occupational Safety and Health (2015).

⁷ It should be noted, however, that the majority of employers surveyed by MEF (93 per cent) stated that they did have a safety and health policy in place and had taken steps to communicate the rules to migrant workers (2014).

Compensation for workplace accidents

Compounding the problem of a higher risk of injury faced by migrant workers in Malaysia, the remedies available to them for workplace accidents remain systematically unequal. The social security scheme that provides insurance coverage to nationals who suffer accidents at work also covered migrant workers from its establishment in 1971 until 1993. In that year, however, a decision was made that the administrative burden of issuing periodic payments to workers after return to their countries of origin was too great to continue to offer equal benefits. Instead, the Workmen's Compensation Act was amended to establish the Foreign Workers Compensation Scheme, which offers lump sum payments for permanent disability or death at much lower amounts.

In response to this policy, the ILO's Committee of Experts on the Application of Conventions and Recommendations has issued several observations that Malaysia is not upholding its obligations under the Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19). At the 100th session of the International Labour Conference in June 2011, the Committee noted that:

“Since 1 April 1993, when foreign workers employed in Malaysia for up to five years were transferred from the Employees' Social Security Scheme, which provided for periodic payments to victims of industrial accidents, to the Workmen's Compensation Scheme, which guaranteed only a lump sum payment of a significantly lower amount, the Malaysian social security system has contained inequalities of treatment which run counter to the provisions of the Convention” (ILO, 2011).

Answering the request for a report on this issue, the Malaysian Government indicated that it is in the process of conducting an actuarial study of three options for providing accident compensation to migrant workers. Upon completion of the study, the Government said that it would consult with the relevant stakeholders to make a decision. However, a follow-up report still had not been received as of the 104th Session of the International Labour Conference in June 2015, leading the Committee to repeat its observation (ILO, 2015b).

11. Labour protection for domestic workers

The situation of the estimated 300,000–400,000 migrant domestic workers employed in Malaysia continues to be a major human rights concern. Though critical to filling the increasing demand for household and caregiving services that has resulted from more women entering paid employment and a growing population of citizens over 65 years of age (Government of Malaysia, 2015), regulation of their working conditions is very limited under national labour laws.

Defined as “domestic servants” within the Employment Act, domestic workers are excluded from many of the basic labour protections afforded to other sectors. This includes the articles within the law related to work hours, rest days, public holidays, annual leave, sick leave, maternity leave and severance benefits. In addition, minimum wage rules, social security coverage, mandatory medical insurance and workers' compensation benefits do not apply to their

employment. Gendered perceptions that domestic workers are members of the household who do not require formal legal protection are deeply engrained within Malaysian society.

Due to the physical isolation of their workplaces, restrictions on movement and inadequate mechanisms established to ensure accountability of employers, a large number of domestic workers suffer from abusive working conditions. Responding to hundreds of calls each year for rescue and shelter services for these workers, Tenaganita has reported that nearly all of the cases are severe enough to be described as forced labour. Based upon a recent visit, the UN Special Rapporteur on Human Trafficking filed a mission report stating that the abuses experienced by domestic workers in Malaysia are widespread and can be brutal in nature:

“While all domestic workers are not victims of trafficking, a large number of these women and girls are trafficked into domestic servitude by employment agencies in their home country and in Malaysia, and employers in Malaysia, at times with the alleged complicity of state officials. Many fall victim to debt bondage when they assume an initial debt as part of the terms of employment. Widely reported abuses and exploitation that further contribute to the trafficking situation include breaches of contract, excessive recruitment fees, non-payment of salary, deductions from low wages, excessive working hours, lack of rest days and withholding of passports. Many domestic workers have also experienced unimaginable physical and mental abuse at the hands of their employers, from being deprived of food, to beatings with electrical wires, scalding with hot water, harassment, psychological abuse and sexual assault” (Giammarinaro, 2015).

Practical restrictions on freedom of association for domestic workers in Malaysia have also contributed to increased vulnerability to exploitative employment practices. According to the Trade Union Act, migrant workers have the right to join unions as long as they do not hold official positions. However, MTUC has twice applied for government registration of a Domestic Workers Association and has been rejected without an explanation provided. An appeal against the latest decision in 2014 has been filed but to date has received no reply.

Sectoral specificities pose an additional constraint on access to justice for domestic workers that further enhances their risk of abuse. Although migrant workers in all sectors of work within Malaysia face challenges in lodging complaints due to the possibility of losing their legal status and source of income, domestic workers must also consider the prospect of being made homeless as they live and work in their employers’ households. As a result, many domestic workers flee when problems occur with their employment rather than try to seek assistance.

The lack of responsive options for resolving domestic worker complaints amicably has a substantial financial cost for both domestic workers and their employers. Between 2008 and 2013, 105,119 migrant domestic workers absconded from their positions, with an estimated expense of MYR1 billion (US\$228 million) for employers (Harian, 2014). No efforts have been made to calculate the amount in lost wages and forfeited migration costs for domestic workers but can be presumed to be likewise sizeable.

To better regulate the employment of domestic workers in Malaysia, the MOHR has proposed new legislation entitled the Regulation (Terms & Conditions of Employment) on Domestic Servants 2014. Although measures to fill the gap in the legal framework are an acute need, many of the key stakeholders involved have criticized the Government's lack of transparency in developing the new law. In particular, the consortium of civil society organizations working under the framework of the Domestic Workers Campaign Coalition have stated that they were not adequately consulted during the drafting process. They have voiced strong concerns that the new regulation being formulated will leave the labour protections provided unequal to workers in other sectors – as implied by the continuing reference to their status as servants within its provisions. While addressing some of the gaps in the Employment Act concerning domestic workers, such as establishing standards for employment contracts and providing one rest day per week, the draft regulation falls considerably short of full compliance with the relevant international labour standards (Domestic Workers Convention, 2011 (No. 189) and its accompanying Recommendation (No. 201).

12. Conclusion

Recent policy developments in Malaysia include some laudable shifts in the Government's approach to labour migration management. In particular, the commitment to phase out the outsourcing agencies to ensure clearer statutory responsibility of employers, the enactment of a minimum wage law that includes migrant workers, the establishment of the Institute of Labour Market Information and Analysis to better assess labour market needs and the signing of bilateral MOUs with countries of origin to limit the fees charged to workers can be viewed as applying lessons learned and good practices.

At the same time, there have also been a number of policy measures and situational developments which are widely viewed as roll-backs to progressive governance of labour migration. The inadequate response to reports of exploitation, on-going human rights concerns related to detention, punishment, and deportation, repeated problems with upholding international obligations under the Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19), insufficient social dialogue in policy formulation and unequal protection afforded to domestic workers are all indications of the need for further development of the policy and institutional framework.

Overall, Malaysia's labour migration policies continue to be conspicuously unbalanced, primarily managing migrant workers as a security concern rather than in view of their massive contribution to the country's economic performance. The agricultural, construction and manufacturing sectors are key engines of growth that remain heavily dependent on low-skilled migrant workers to maintain their competitiveness. Transition to a high-skilled labour force through restructuring does not appear likely to reduce the need for these workers in the immediate-term.

Recent developments on international trade are also likely to increase the need for workers in export-oriented enterprises, as well as to ensure that their employment is in-line with international labour standards. Malaysia has become a party to the newly concluded Trans-Pacific Partnership (TPP), an agreement which will form the world's largest free trade area along

the Pacific Rim. Although the accord has yet to be ratified at national level, the Labour Chapter requires states to adopt and implement laws in accordance with the ILO Declaration on Fundamental Principles and Rights at Work (2015). As a result, Malaysia's record on eliminating forced labour, abolishing child labour, prohibiting discrimination in employment and safeguarding freedom of association and the right to collective bargaining for migrant workers is already receiving increased scrutiny from the international community. To facilitate its participation in the TPP, the Governments of Malaysia and the United States have developed a Labour Consistency Plan that requires Malaysia to make significant legal and institutional reforms to ensure compliance with international obligations.

The increased information available to buyers on product supply chains should be also be seen as a key motivation for improving labour migration policy in Malaysia. Growing consumer awareness of the exploitative conditions under which some products are being produced has already begun to have a detrimental effect on a number of industries – and seem likely to only intensify in the future. At the same time, the market for ethically produced goods has become much more lucrative, providing sufficient incentives to persuade firms in many countries to voluntarily commit themselves to high standards of environmentally and socially responsible business practices.

To make further progress in strengthening its policies, a more coherent and equitable approach is required that acknowledges the critical role played by migrant workers in Malaysia's economy rather than repeating the antithetical sequence of amnesty and deportation that has characterized past efforts. The following recommendations to improve the development and administration of labour migration policy within Malaysia should be considered:

- 1. Balance security concerns with the need for effective labour market administration:** Labour migration policies in Malaysia continue to emphasize restrictive management of the number of migrant workers in the country rather than their working conditions and role within the labour market, which is not well aligned with the Government's regional commitments to increased labour mobility and economic integration under ASEAN. To maximize the potential of migrant workers to contribute to the nation's development, enforcement of labour laws must be reinforced to ensure greater compliance by employers and avoid a race to the bottom on working conditions. The recently announced shift in responsibility over labour migration management – with the MOHR taking on a leadership role in policy-making – is a positive step that should be supported by greater investment of resources to carry it out effectively. In particular, the number and capacity of labour inspectors should be augmented to work towards increased compliance among employers.
- 2. Conduct sound labour market needs assessments:** Rather than continuing to implement policies which are primarily reactive in nature, such as the levy and 6P Programme, there is a need to carry out valid labour market assessments to determine the current and projected need for migrant workers in selected sectors and occupations. The assessments should draw upon models of good practice adopted by other countries and be conducted regularly to ensure their continuing relevance.

- 3. Strengthen regulation of recruitment agencies and explore alternative models:** Many of the most severe problems that have occurred with the management of migrant workers stem from an inadequately regulated recruitment sector. In addition to updating the relevance of the legal framework, eliminating the system of outsourcing companies, stricter registration requirements for recruitment agencies and increased sanction for misconduct, the Government should continue to explore alternative models for recruitment of migrant workers. The government-to-government recruitment approach implemented for Bangladeshi workers in the plantation sector has shown promise in reducing recruitment fees and its potential for scaling and replication should be thoroughly assessed.
- 4. Foster more positive public attitudes towards migrant workers:** Studies have shown that negative attitudes among the public contribute to real world abuses against migrant workers. With regular media stories emphasizing the economic burden and crime created by migrants, policymakers have a responsibility to avoid being drawn into demagoguery and scapegoating by countering misconceptions and contributing to a more evidence-based dialogue on migration in Malaysia. In particular, the major contribution made by migrant workers should be better acknowledged within Government policy and planning.
- 5. Increase social dialogue in policy development:** More inclusive labour migration governance, including equitable representation of employers, workers and civil society in the formulation and implementation of policy, is a particularly manifest need in Malaysia. Social partners continue to be side-lined from the consultation process on a number of critical migration management issues, including the Domestic Worker Regulation, determining labour market needs, the Private Employment Agencies Bill and others. To provide opportunities for input on policy development and cooperation during implementation, key stakeholder representatives should be more regularly consulted – through the National Labour Advisory Committee or the establishment of another forum for social dialogue.
- 6. Establish labour and social protection for domestic workers equal to other sectors:** Additional regulation of the employment of domestic workers is necessary but there are concerns that the new legislation proposed will not go far enough in eliminating abusive labour practices. In developing the regulation, the Government should seek to remove the distinction between domestic and other forms of work, as represented by the use of the term “domestic servant.” The Domestic Workers Convention, 2011 (No. 189) sets the standard that domestic workers should be entitled to the same basic rights as those available to other workers, including weekly days off, limits to hours of work, minimum wage coverage, overtime compensation, freedom of movement, freedom of association, social security (including workers’ compensation and maternity leave) and clear information on the terms and conditions of employment. The option for domestic workers to live outside the homes of their employers should also be provided within the new regulation as well as sufficient temporary shelter facilities for those facing abuse.
- 7. Address exploitation through increased labour protection for migrants:** The evidence of widespread abuses committed against migrant workers, extending to

situations of forced labour and human trafficking, has increased substantially during the last few years. While improved efforts to hold offenders accountable through the criminal justice system are an important deterrent, measures should also be implemented to help prevent abuse and ensure financial compensation is provided. In particular, the rights of migrant workers to organize and bargain collectively, change employment (at least within the same sector) and access fair and efficient complaint mechanisms for redress of grievances (including permission to stay and work until their cases are resolved) require reinforcement. The Government should also consider ratification of the Protocol to the Forced Labour Convention, 1930 (No. 29) as a critical step in aligning its policy framework with international labour standards.

- 8. Ensure migrant access to legal and interpretive services during adjudications:** To support their right to due process, migrant workers who have been detained for violation of the Immigration Act or who are pursuing legal remedies for their grievances must be provided with fair access to assistance and representation. This should include provision of interpretation services during court hearings and greater cooperation with labour attachés, consular officials and civil society organizations offering legal counsel to migrant workers.
- 9. Provide equality of treatment for compensation of workplace accidents:** Through ratification of the Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19), Malaysia has committed to providing the same treatment to migrant workers who suffer personal injury due to industrial accidents as received by nationals. Given the higher risk of injury faced by migrants in Malaysia due to the nature of their work, the longstanding gap in availability of equal benefits has left the most vulnerable the least protected. The Government should take immediate steps to close the gulf in social protection coverage for migrant workers, including measures to ensure that compensation for workplace accidents is transferred to migrant workers after return to their countries of origin.
- 10. Extend skills recognitions to low and semi-skilled migrant workers:** Within the context of the ASEAN Economic Community, the next generation of mutual recognition arrangements have already been proposed to include construction, domestic work and lower-skilled jobs in the tourism sector. To reduce irregular migration and increase labour protection in Malaysia, additional opportunities for low and semi-skilled migrant workers to benefit from recognitions should be provided.

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Review of labour migration policy in Malaysia

During the last few years, an increasing number of reports have documented serious labour rights abuses against migrant workers in Malaysia, including cases of forced labour and human trafficking. Responding to the concerns voiced by the international community and consumer groups, there have been a number of recent shifts in labour migration and anti-trafficking policies. In particular, several of the new measures announced in the Eleventh Malaysia Plan (2016-2020) may potentially improve the protections afforded to migrant workers in Malaysia, signalling progress towards a more coherent and rights-based governance framework. This policy review assesses the key recent changes made, and how they have been implemented in practice, in order to provide recommendations for further strengthening of labour migration governance in Malaysia.

The **Tripartite Action to Enhance the Contribution of Labour Migration to Growth and Development in ASEAN (TRIANGLE II)** delivers technical assistance and support with the overall goal of maximizing the contribution of labour migration to equitable, inclusive and stable growth in ASEAN. The project is active in six countries (Cambodia, Lao People's Democratic Republic, Malaysia, Myanmar, Thailand and Viet Nam) and engages with all ASEAN Member States, working in close cooperation with governments and social partners to achieve three inter-linking objectives: strengthening protection of the rights of migrant workers, harnessing the potential of migrants to contribute to economic and social development and establishing labour mobility systems that are gender-responsive and increase the efficiency of labour markets.

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