

Regional Guidelines for the Development of Bilateral Labour Agreements in the Southern African Development Community



International Organization for Migration (IOM)
The UN Migration Agency

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DEVELOPING CAPACITIES IN MIGRATION MANAGEMENT



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Contents



Contents

Acknowledgements.....	iii
List of tables, boxes and figures	vii
List of acronyms	ix
Executive summary	xi
Introduction	1
Section I. Concise overview of international, regional, and SADC standards and frameworks relevant to bilateral labour agreements	5
Section II. The bilateral labour agreement cycle	15
Section III. Recommendations to stakeholders in the Southern African Development Community	33
References.....	39
Annex. Existing Indicators for the Assessment of Bilateral Labour Agreements against International Labour Standards	43

List of tables, boxes and figures



List of tables, boxes and figures

Tables

Table 1: Labour migration-related instruments in the Southern African Development Community region	9
Table 2: Practical protection checklist of essential minimum standards	19
Table 3: Key points for negotiation and possible strategies from the country of origin and country of destination perspectives	22
Table 4: Checklist of specific social services.....	29
Table 5: Good practice criteria aligned to international labour standards.....	43
Table 6: Topics listed in the Model Agreement of the International Labour Organization Recommendation No. 86.....	44
Table 7: Basic elements of a bilateral labour agreement	45

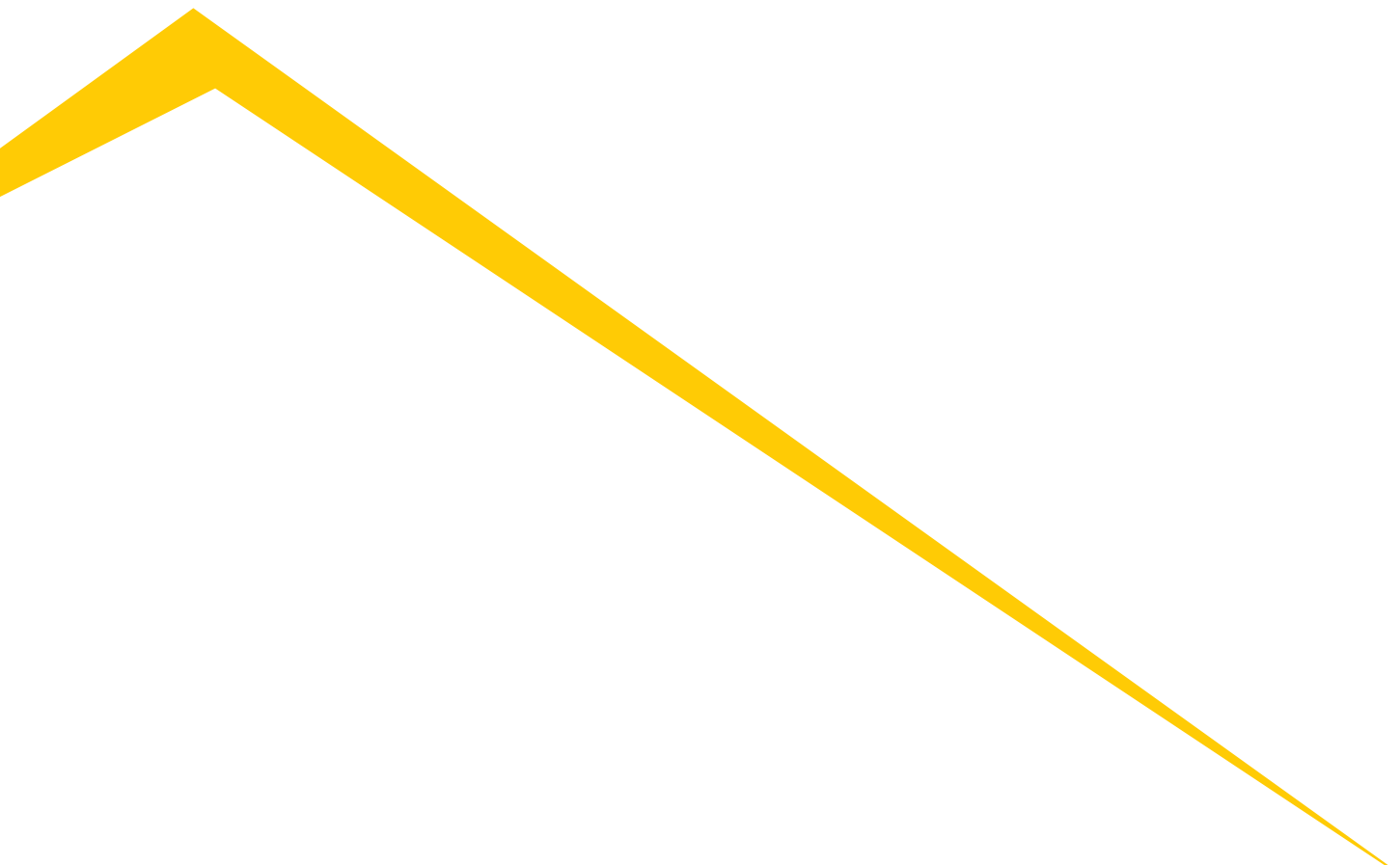
Boxes

Box 1: Terminology and technical tools.....	5
Box 2: Indicative components of a bilateral labour agreement needs assessment.....	17
Box 3: Regulation of private employment agencies and their involvement in bilateral labour agreements	27
Box 4: Payment of recruitment fees	28
Box 5: Pre-departure medical screening for migrant workers.....	31

Figures

Figure 1: International standards and instruments for the regulation of bilateral labour agreements	6
Figure 2: Components of the bilateral labour agreement cycle	15
Figure 3: Summary of bilateral labour agreement strategic options.....	16
Figure 4: Stages of the migration cycle for migrant workers	18

List of acronyms



List of acronyms

BLA	Bilateral Labour Agreement
CIETT	Confédération Internationale des Entreprises de Travail Temporaire
GATS	General Agreement on Trade in Services
ILO	International Labour Organization
IOM	International Organization for Migration
LMIS	Labour Market Information System
MoU	Memorandum of Understanding
MPFA	Migration Policy Framework for Africa
OSCE	Organization for Security and Co-operation in Europe
PEA	Private Employment Agency
PES	Public Employment Service
SADC	Southern African Development Community
TEBA	The Employment Bureau of Africa

Executive summary



Executive summary

The idea to draft the Southern African Development Community (SADC) bilateral labour agreement (BLA) guidelines was submitted to the SADC Employment and Labour Sector in February 2016 and proposed as one output of the updated SADC Labour Migration Action Plan 2016–2019. Funded under the International Organization for Migration (IOM) Development Fund Project on South–South Labour Mobility, the SADC BLA guidelines correspond to Activity 1.2.a of Outcome 1 (governance of the SADC labour migration activities) under Output 1.2 (mechanism for benchmarking and monitoring of established and implemented bilateral labour migration agreements between the SADC Member States) of the updated SADC Labour Migration Action Plan 2016–2019 validated by the SADC Ministers of Labour in May 2016.

BLAs are part of the broader set of frameworks, laws, technical instruments and practices that make up national labour migration policies. By definition, a BLA is a bilateral type of instrument usually between two governments that have agreed on a set of desirable objectives implying labour mobility. While there is a vast array of international, regional, and SADC standards and frameworks to guide the drafting and negotiation of BLAs (see Section I of this guide), recent research shows substantive alignment gaps between existing BLAs and international standards.

Improving the quality and efficiency of BLAs in ensuring rights-based labour migration requires State and non-State actors (social partners and key stakeholders) involved in the making and implementation of BLAs to develop their expertise and capacity in this increasingly technical area. Modernization and strict compliance of BLAs with international standards are possible as shown in recent developments in Asia and Latin America. These recent reforms result in an overall improvement of conditions for all actors in the process (migrant workers, employers, and origin

and destination governments and communities) and contribute to the improved capture of migration’s development potential.

In order to strengthen expertise and capacity among technical staff in key stakeholders’ organizations and institutions, two dimensions are particularly important: one is knowledge of existing standards, framework and good practices; the other is accurate understanding of the technical processes and components of BLAs. This is what these guidelines should help the SADC stakeholders do.

Section I provides a brief overview of existing international, regional, and SADC standards and frameworks. Section II consists in guidelines on key components of BLAs, providing examples of good practices and adapted to the full migration cycle. The section is structured around the four key BLA components: (1) needs assessment (purpose, scope, objectives and budget planning); (2) negotiation, design and drafting; (3) implementation and accompanying measures; (4) monitoring and evaluation (including labour market information systems (LMISs) and data collection). Highlights of Section II are a table reviewing key aspects of the needs assessment phase, a 15-point checklist of minimum standards, and a guide to negotiations from the perspectives of both the country of origin and the country of destination. Section III includes a series of recommendations to various SADC stakeholders, referring readers to specific sections in the guide.

Introduction



Introduction

A. What is a bilateral labour agreement?

The term **bilateral labour agreement** (BLA) is used in this guide as a generic term which usually designates a government-to-government agreement regulating the mobility of migrant workers. There may be a diversity of technical tools included under the general category of BLAs (see Box 1).

BLAs are part of the broader set of frameworks, laws, technical instruments and practices that make up national labour migration policies. By definition, a BLA is **a bilateral type of instrument between two governments that have agreed on a set of desirable objectives implying labour mobility**. However, these objectives may be both common and distinct for the two governments. In many instances, BLAs are concluded between origin and destination countries with some workers migrating from one to the other; in rarer cases, they are about an exchange of workers or services between two governments. A BLA may pave the way for the structuring of a national labour migration policy or, when there is already one, may serve as a technical instrument effectively implementing the strategy of the broader policy (Baruah and Cholewinski, 2006).

Beyond State actors (specific ministries), a number of other parties are concerned by BLAs, whether directly or indirectly. For example, these may be employers associations and workers organizations, professionals associations, local governments in communities of origin and destination, private employment agencies (PEAs) and others. Because of the multiplicity of actors

and purposes that may be involved in BLAs, they stand at the crossroads of different and at times competing interests. Inherently, outcomes of the BLAs will result from what has been factored into them and the manner in which they are managed by the institutions and organizations responsible for their implementation.

B. Where do bilateral labour agreements come from?

BLAs are not a new policy instrument, neither globally nor in Southern Africa. It is always useful to understand the political economy surrounding a specific BLA in order to fully capture its purpose and the challenges it may encounter. BLAs first appeared in Western Europe after World War I, between France and Italy, but they became very popular in the 1960s and 1970s for the reconstruction of Europe (Wickramasekara, 2015). BLAs have been the preferred means of facilitating labour mobility between States due to their flexibility, as well as their ability to target specific groups or needs, react to economic fluctuations and share the responsibility to monitor the flows.

In Southern Africa, while labour migration goes back to the nineteenth century, BLAs were formalized in the 1960s and 1970s in order to meet the formidable labour needs of the South African and Zimbabwean (Rhodesian at the time) mining and farming sectors (Crush and Williams, 2010; Bamu, 2014). This era saw the professionalization of the migrant labour system through the modernization of The Employment Bureau of Africa (TEBA) and several

memorandums of understanding (MoUs) signed between Rhodesia and South Africa as countries of destination and their neighbours as countries of origin. The system relied on long-term contracts, precluding family settlement or reunification, strictly controlled housing in mine compounds, some social benefits upon retirement or death at work, and the deferred-pay system (Moodie and Ndatshe, 1994).

In the 1990s, the general global trend was towards shorter schemes based on shorter contracts with limited benefits, the so-called **circular migration schemes** (Wickramasekara, 2011). Sector-specific agreements were also entered into, more so this time between developing and emerging countries. From the early 2000s onward, a number of Asian developing countries, most notably the Philippines, have successfully renegotiated agreements with destination countries placing a greater emphasis on the protection of migrant workers' rights (Wickramasekara, 2015). In Southern Africa, the migrant labour system started to fracture, particularly as a result of massive job losses and general casualization in mining and related sectors (Crush and Williams, 2010). Most agreements gradually became obsolete with the emergence of new migrant labour-intensive sectors (e.g. construction, hospitality or domestic work) and forms of work not covered in any BLA (Bamu, 2014).

C. Challenges of historical bilateral labour agreements

While there is a vast array of international, regional, and SADC standards and frameworks to guide the drafting and negotiation of BLAs (see Section I of this guide), recent research (Wickramasekara, 2015) shows **substantive alignment gaps between existing BLAs and international standards**. Given these weaknesses in the instruments expected to protect workers, it is unsurprising to see that exploitation and, at times, serious abuses of workers are documented in many countries (Human Rights Watch, 2015). While there is huge variation between BLAs, research points to patterns of non-compliance

with basic aspects of migrant workers' rights (Human Rights Watch, 2015; Wickramasekara, 2015; ILO-KNOMAD, 2015).

In Africa, particular areas of concern or weakness identified in BLAs pertain to:

- gender discrimination;
- limited social dialogue;
- wage protection measures;
- protection of travel and identity documents;
- skills recognition;
- social security and health benefits; and
- access to complaints mechanisms.

(Wickramasekara, 2015:56)

Another challenge with BLAs is simply their **limited impact and inability to capture and thus lessen flows of undocumented or unprotected migrants**. This is often due to limited State capacity and preparedness: too many governments embark on BLAs without adequate knowledge of conditions offered in countries of destination, limited legal expertise to vet proposed agreements, weak or non-existent regulatory frameworks for PEAs, and very limited trained staff to offer services to migrant workers and undertake monitoring and evaluation. Attractiveness in conditions guaranteed under BLAs and the ability of governments, employers associations, and international agencies to offer competitive conditions and services are key to successful BLAs (Martín, 2011).

One last critical issue is the ability of origin and destination States to **collect data to facilitate work placement and monitor benefits** of BLAs over time (Martín, 2011). Lessons can be drawn from experiences of international cooperation in this area (Baruah and Cholewinski, 2006; ILO, IOM and OSCE, 2007; Martín, 2011).

BLAs will only turn into efficient instruments, mitigating aspects of unemployment and the worst consequences of poorly managed labour migration, if they are carefully designed and systematically implemented.

D. What can be done to strengthen bilateral labour agreements?

Improving the quality and efficiency of BLAs in ensuring rights-based labour migration requires State and non-State actors (social partners and key stakeholders) involved in the making and implementation of BLAs to **develop their expertise and capacity** in this increasingly technical area. Modernization and tightened compliance of BLAs with international standards are possible as shown in recent developments in Asia and Latin America (Wickramasekara, 2015 and 2012; Martín, 2011).

These recent reforms result in an overall improvement of conditions for all actors in the process (migrant workers, employers, and origin and destination governments and communities) and contribute to the improved capture of the development potential of migration. In order to strengthen expertise and capacity among technical staff in key stakeholder organizations and institutions, **two dimensions** are particularly important: one is **knowledge of existing standards, framework and good practices**; the other is **accurate understanding of the technical processes and components of BLAs**.

E. Why draft regional guidelines for the development of bilateral labour agreements in the Southern African Development Community?

The idea of drafting the SADC BLA guidelines activity was submitted to the SADC Employment and Labour Sector in February 2016 and proposed as one output of the updated SADC Labour Migration Action Plan 2016–2019. Funded under the IOM Development Fund (IDF) Project on South–South Labour Mobility, the SADC guidelines correspond to Activity 1.2.a of Outcome 1 (governance of the SADC labour migration activities under Output 1.2 (mechanism

for benchmarking and monitoring of established and implemented bilateral labour migration agreements between the SADC Member States) of the updated SADC Labour Migration Action Plan 2016–2019 validated by the SADC Ministers of Labour in May 2016.

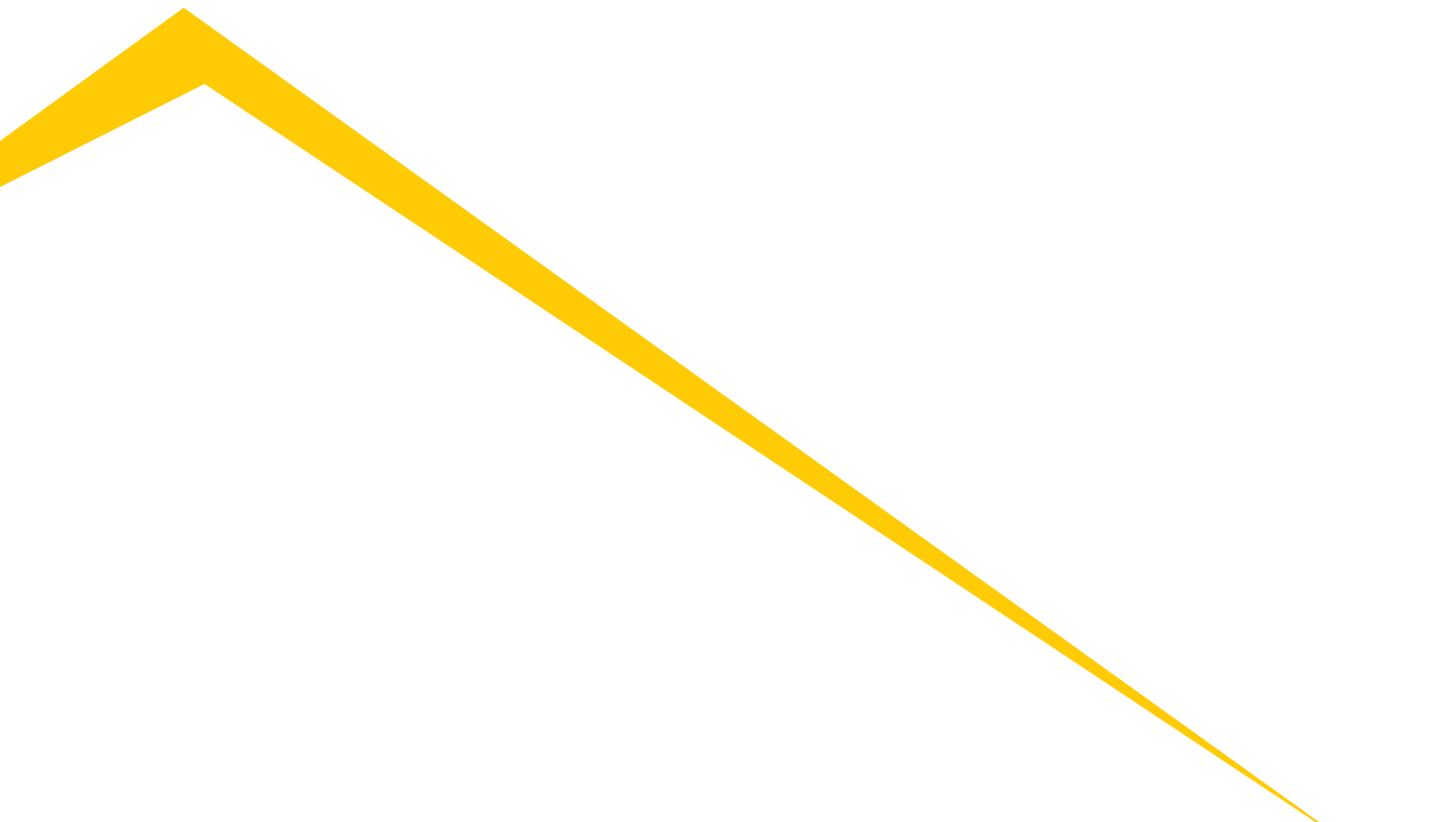
F. Structure of the guide

Section I provides a brief overview of existing international, regional, and SADC standards and frameworks.

Section II consists of guidelines on key components of BLAs, providing examples of good practices where relevant. It follows the full cycle of BLA design and implementation: (1) needs assessment (purpose, scope, objectives and budget planning); (2) negotiation, design and drafting; (3) implementation and accompanying measures; (4) monitoring and evaluation (including LMIS and data collection).

Section III presents a series of recommendations to various SADC stakeholders.

Section I



Section I. Concise overview of international, regional, and SADC standards and frameworks relevant to bilateral labour agreements

This section only provides a concise overview of existing tools in order to point users to easily accessible resources.

A. International standards and frameworks

Box 1 provides a list of technical instruments that fall under the broader notion of BLAs. This diversity of technical instruments is also evidence to the incremental development of BLAs over time and across regions. It shows that BLAs are not mere government-to-government agreements but can be fairly complex multi-stakeholders agreements.

Box 1: Terminology and technical tools

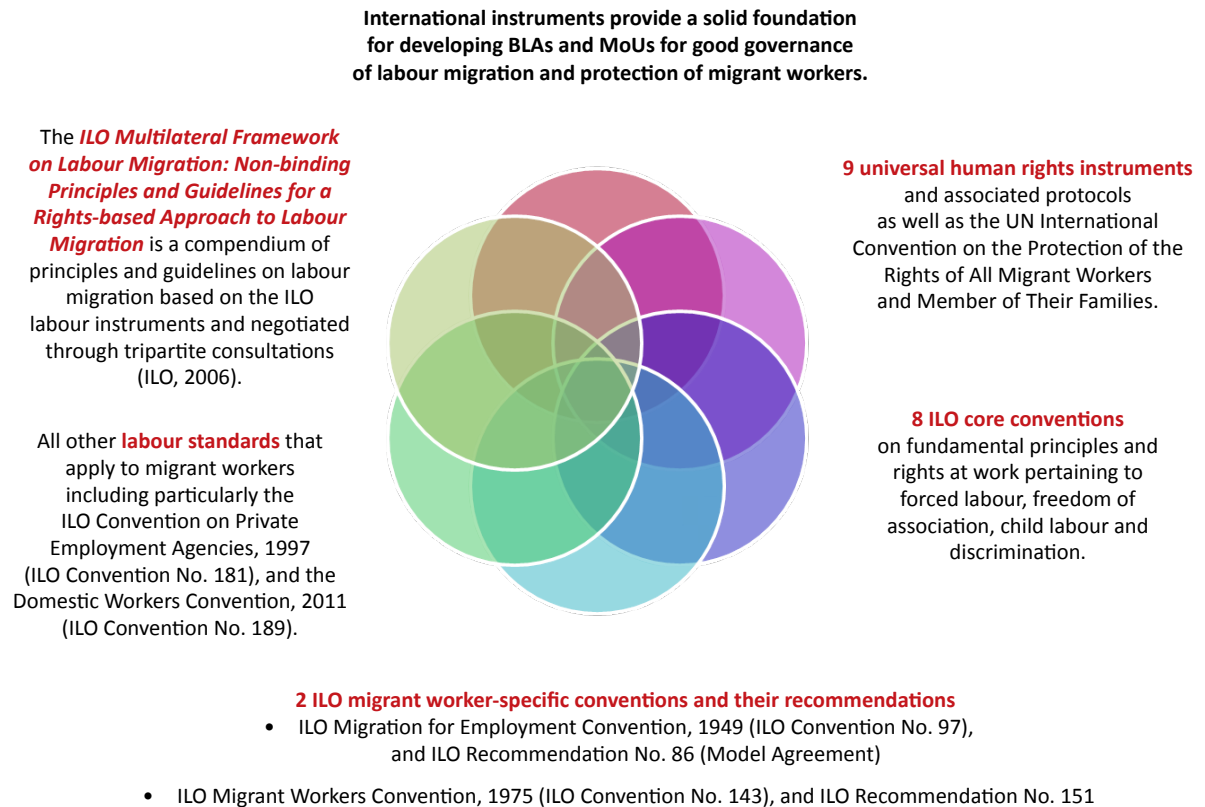
MLAs: Multilateral labour agreements
BLAs: Bilateral agreements
MoUs: Memorandums of understanding
MoAs: Memorandums of agreement
Framework agreements
Inter-agency understanding (IAU)
Protocols (additional or optional)
Agreements for hiring seasonal workers (e.g. between Canada and Mexico; between Germany and Poland)
Cross-border worker agreements
Statements of mutual labour cooperation or informal assurances
Bilateral social security agreements
Anti-trafficking in persons agreements
Agreements between origin countries (e.g. between the Philippines and Indonesia; between Cambodia and the Lao People's Democratic Republic)
Reciprocal agreements (e.g. between India and Malaysia; between Lithuania and Poland)
Trainee schemes (e.g. Japan, Switzerland, Republic of Korea (replaced by the employment permit system))
Working holiday maker schemes
Standardized employment contracts
Multilateral (Mode 4 of General Agreement on Trade in Services: Movement of Natural Persons)

Sources: International Labour Organization (ILO), 2010; Organisation for Economic Co-operation and Development (OECD), 2004; Wickramasekara, 2006.

In spite of the diversity, complexity and ad hoc nature of BLAs, standards have been adopted by international organizations since the beginning of the twentieth century to offer a framework

against which BLAs can be shaped and assessed. Figure 1 summarizes key international standards and instruments.

Figure 1: International standards and instruments for the regulation of bilateral labour agreements



International instruments provide a solid foundation for developing BLAs and MoUs for good governance of labour migration and protection of migrant workers at three levels:

1. UN instruments:

- a) Nine universal human rights instruments and associated protocols.
- b) 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

2. ILO instruments:

- a) Eight core conventions on fundamental principles and rights at work pertaining to forced labour, freedom of association, child labour and discrimination.

b) Two ILO migrant worker-specific conventions and recommendations:

- ILO Migration for Employment Convention, 1949 (ILO Convention No. 97), and Recommendation concerning Migration for Employment (ILO Recommendation No. 86) (Model Agreement);
- ILO Migrant Workers Convention, 1975 (ILO Convention No. 143), and Recommendation concerning Migrant Workers (ILO Recommendation No. 151).

c) All other ILO conventions and recommendations that apply to migrant workers including particularly the ILO Convention on Private Employment Agencies, 1997 (ILO Convention No. 181),

and the Private Employees Agencies Recommendation (ILO Recommendation No. 188); the Domestic Workers Convention, 2011 (ILO Convention No. 189); and the Recommendation concerning HIV and AIDS and the World of Work (ILO Recommendation No. 200).

- d) The *ILO Multilateral Framework on Labour Migration: Non-binding Principles and Guidelines for a Rights-based Approach to Labour Migration* is a compendium of principles and guidelines on labour migration based on above instruments, and negotiated through tripartite consultations (ILO, 2006).
- e) ILO Recommendation No. 86 and more specifically the Model Agreement (which is presented in the Annex of the Recommendation) has been built specifically to assist governments with the design of rights-oriented BLAs which take into consideration workers', employers' and governments' concerns. The Model Agreement sets a number of key criteria for optimal protection of migrant workers' rights based on all UN fundamental conventions and ILO principles and standards. The research conducted for the 2015 Wickramasekara report for the ILO on low-skilled migrant workers provides additional criteria against which to assess BLAs. These can in turn be used to design or improve BLAs (see Section II.B and the Annex in this guide).

3. Guiding frameworks and publications on BLAs developed by international organizations:

Baruah, N. and R. Cholewinski

- 2006 *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination*. Organization for Security and Co-operation in Europe (OSCE), Vienna; IOM, Geneva; ILO, Geneva. Available from www.osce.org/eea/19242?download=true

The *Handbook* contains a specific section on BLAs (p. 71) and on the regulation of PEAs (pp. 44–51).

ILO, IOM and OSCE

- 2007 *Compendium of Good Practice Policy Elements in Bilateral Temporary Labour Arrangements*. Global Forum on Migration and Development (GFMD). Available from www.gfmd.org/compendium-good-practice-policy-elements-bilateral-temporary-labour-arrangements

This compendium is a follow-up activity to Roundtable 1.2 of the 2007 GFMD session themed “Temporary Labour Migration as a Contribution to Development: Sharing Responsibility”.

IOM

- 2007 *The IOM Handbook on Direct Assistance for Victims of Trafficking*. IOM, Geneva. Available from http://publications.iom.int/system/files/pdf/iom_handbook_assistance.pdf

Martín, I.

- 2011 *Background Note – Bilateral Labour Agreements in Practice: Issues and Challenges*. Produced in the framework of the international workshop “Information Needs in Support of Bilateral Labour Agreements”, Bogotá, 22–23 June. Produced under the Project Best Practices on Collecting and Sharing Labour Migration Data for the Improvement of the Labour Market Information Systems (LMISs) in Colombia, Costa Rica, Ghana, Nicaragua, Senegal and Tunisia. IOM, Geneva.

ILO

- 2014 *Fair Recruitment Initiative: Preventing Human Trafficking, Promoting Safe Migration and Reducing the Costs of Labour Mobility*. ILO, Geneva.

Wickramasekara, P.

2015 *Bilateral Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review*. Geneva, ILO. Available from www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/--migrant/documents/publication/wcms_385582.pdf

Overall, international instruments serve at least three functions:

- First, the standards they set are used to establish the core structure of national legislations and policies. In this case, they are used as **model laws** which will be adjusted to specific contexts in the development or reform of legislation and policy.
- Second, international standards and frameworks provide the fundamental principles, criteria, and direction against which existing legislation and policy can be assessed and monitored. This is an **evaluation function**.
- Third, they can be mobilized in the implementation of laws and policies in cases of litigation, arbitration, and jurisprudence **to supplement existing frameworks or bridge gaps**.

The credibility and weight of international instruments and standards are derived from the inclusive and participatory processes that have led to their validation, whether it is the UN system of deliberation or the ILO tripartite social dialogue principle.

However, their scope is – by definition – broad and decontextualized. Regional and subregional frameworks then provide additional resources for policymakers.

B. Regional frameworks

The African Union (AU) has for long developed guiding frameworks for its Member States in the area of labour migration. The existing frameworks which have been officially adopted by the AU are:

- The **2006 African Common Position on Migration and Development**, adopted at the Khartoum Summit, which covers a number of areas including migration and development, human resources and brain drain, remittances, trade, migration and peace, security and stability, migration and human rights, gender, regional initiatives and access to social services, as well as contains a set of recommendations at the national, continental and international levels, which are aimed at addressing migration and development issues.
- The **2006 Migration Policy Framework for Africa (MPFA)**, which covers three broad themes in relation to labour migration: national labour migration policies, structures and legislation; regional cooperation and harmonization of labour migration policies; and labour movement and regional economic integration.
- The **AU Commission Strategic Plan 2014–2017**, which pursues the strategy to “promote labour migration to support cross-border investment and to fill the skills gap”.
- The **Joint Africa–EU Strategy Action Plan Partnership on Migration, Mobility and Employment (MME) (2008–2010; 2011–2013; 2014–2017)**.
- The **AU Declaration on Poverty Eradication, Education and Inclusive Development 2015**, which acknowledges the contribution of continental labour migration to development through skills transfers and remittances, and identifies labour migration as a key priority area in efforts to address high levels of unemployment and underemployment in Africa.

- Validated in the previous Declaration, the **2015 Joint Labour Migration Programme** sets out to provide an implementation plan to the 2006 MPFA. It is divided into two sections: (1) strengthened governance and regulation of labour migration and mobility in Africa; and (2) operational implementation of law and policy.
- The **AU Declaration on Migration, June 2015**, which reaffirmed the AU and Member States' previous commitments aimed at accelerating mobility and integration on the continent, migration, and development while addressing regular and irregular migration.

While they are aligned with international standards, these frameworks however only provide minimal indications with regard to the design and implementation of BLAs.

C. SADC instruments and commitments

The SADC region has embedded migration at the core of its founding principles, as shown in the 1992 Treaty of the SADC, which calls for the abolition of barriers to the free movement of people in the region. The SADC has subsequently adopted several instruments and commitments relating to labour migration which can provide guidance in the drafting of BLAs. These are detailed in Table 1.

Table 1: Labour migration-related instruments in the Southern African Development Community region

SADC instruments	Labour migration issues addressed
Treaty of the Southern African Development Community (1992)	<ul style="list-style-type: none"> The progressive elimination of obstacles to the free movement of capital and labour, goods and services, and the peoples of the region generally, among Member States (Article 5).
Protocol on Education and Training in the Southern African Development Community (SADC) (1997)	<ul style="list-style-type: none"> Reduce and eventually eliminate constraints to better and freer access, by citizens of Member States, to good quality education and training opportunities within the region; Relax and eventually eliminate of immigration formalities in order to facilitate freer movement of students and staff within the region for the specific purposes of study, research, etc.; Progressively achieve the equivalence, harmonization and standardization of the education and training systems in the region which is the ultimate objective of this Protocol (Article 3).
Charter of Fundamental Social Rights in SADC (2003)	<ul style="list-style-type: none"> Promote labour policies, practices and measures which facilitate labour mobility; Promote the establishment and harmonization of social security schemes (Article 2); Create an enabling environment for every worker in the region to have a right to adequate social protection and to enjoy adequate social security benefits regardless of status and type of employment (Article 10).

SADC instruments	Labour migration issues addressed
SADC Draft Protocol on Facilitation of Movement of Persons (2005)	<ul style="list-style-type: none"> • Overall objective is the progressive elimination of obstacles to the movement of persons (Article 2); • State Parties to take measures to facilitate entry, temporary and permanent residence, and establishment of citizens of other State Parties (Article 3); • Adoption of administrative and procedural measures including the provision of travel facilities, the standardization of passports, the simplification of administrative forms and the streamlining of procedures (Articles 12 and 13); • State Parties to provide visa-free entry for up to 90 days per year to visitors from other State Parties (Articles 13 and 16); • State Parties to determine the application procedures, qualification criteria and rights, privileges and obligations (Articles 17–20); • Protection of migrant workers in cases of expulsion (the right to present their case prior to expulsion, the right to protection from collective expulsion, and the right to consult with diplomatic or consular authorities about impending expulsion (Articles 22–25).
Declaration on Tuberculosis in the Mining Sector (2012)	<ul style="list-style-type: none"> • Recognition of the challenges faced by migrant mineworkers and ex-mineworkers; • Development or strengthening of national and regional frameworks for coordination of communicable diseases and occupational health and safety issues in the mines for all mineworkers, including cross-border mineworkers and ex-mineworkers (Article 3(a)(i)); • Creation or strengthening of regional and national task teams on communicable diseases, occupational health and mobile populations (Article 3(a)(iii)); • Development and strengthening of legislation that supports compensation of mineworkers and ex-mineworkers that contract an occupational disease (Article 3(b)(iv)); • Strengthening of programmatic interventions for tuberculosis, HIV, silicosis and other occupational respiratory diseases control in the mining sector (Article 3(c)); • Strengthening of disease surveillance system for tuberculosis, HIV, silicosis and other respiratory diseases control in the mining sector (Article 3(d)).
SADC Regional Decent Work Programme (2013–2017)	<ul style="list-style-type: none"> • Labour migration systems developed (Outcome 1.2).

SADC instruments	Labour migration issues addressed
SADC Revised Regional Indicative Strategic Development Plan (2015–2020) (Human and social development cluster)	<ul style="list-style-type: none"> • Relax immigration formalities to students and academics for research; • The SADC Labour Migration Policy Framework should be approved and implemented; • Member States should implement the SADC LMPF to facilitate labour movement to support industrial development across the region; • Cross-border portability of social protection instruments should be developed and operationalized; • The SADC Decent Work Programme should be implemented, monitored and reviewed; • The SADC Protocol on Facilitation of Movement of Persons and the SADC Protocol on Employment and Labour should be ratified and implemented.
SADC Labour Migration Action Plan (2016–2019)	<ul style="list-style-type: none"> • Governance of the SADC labour migration activities; • Harmonized labour migration policies and legal frameworks in the SADC; • Availability of data and statistics on migration among Member States; • Migrant workers' access to a continuum of health care across borders and at the workplace; • Improved mechanism for remittance transfers across the SADC region; • Strengthened migrant workers' access to pension and social protection across the SADC region.
SADC Labour Migration Policy Framework (2014)	<ul style="list-style-type: none"> • Adoption of national labour migration policies that promote migration and development, enable and facilitate the migration process, and promote and protect the rights of migrant workers and their families; • Bilateral and multilateral labour agreements; • Creation of national labour migration data banks and the regional database on regional labour migration.
SADC Protocol on Employment and Labour (2014)	<ul style="list-style-type: none"> • Improve migration management and control, and strengthen mechanisms to combat smuggling and human trafficking (Article 19(a)); • Ensure that fundamental rights are accorded to non-citizens, in particular labour/employment and social protection rights (Article 19(c)); • Harmonize national migration legislation and policies; and adopt a regional migration policy in accordance with international conventions to ensure the protection of the rights of migrants (Article 19(e)); • Adopt measures to facilitate the coordination and portability of social security benefits, especially through the adoption of appropriate and multilateral agreements providing for equality of treatment of non-citizens, aggregation of insurance periods, maintenance of acquired rights and benefits, exportability of benefits and institutional cooperation (Article 19(f)); • Develop mechanisms, services and effective financial products to facilitate the transfer of remittances by migrants (Article 19(g)).

Source: Bamu, 2014; updated by author.

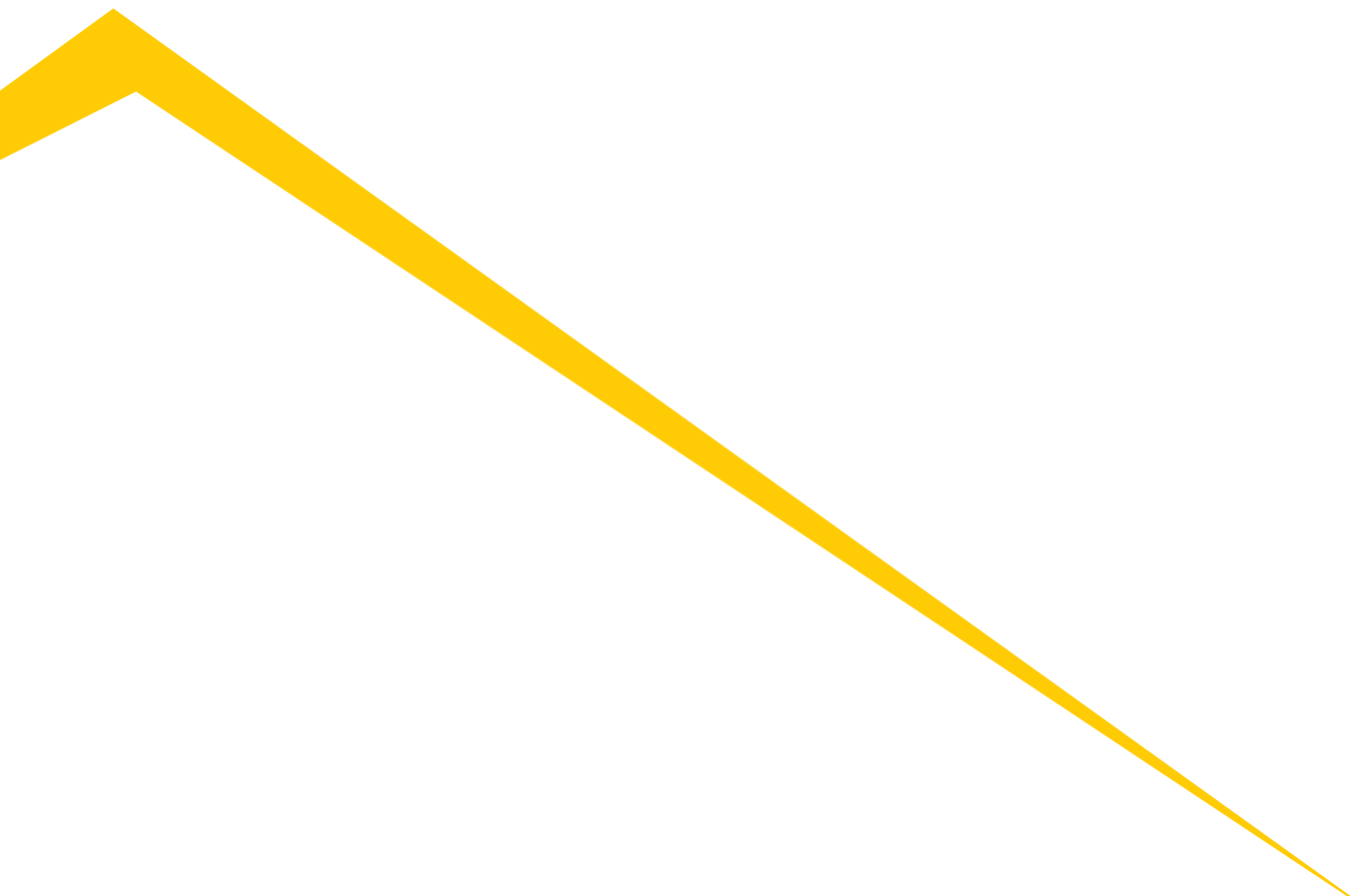
The SADC instruments therefore provide a detailed, consistent framework supportive of rights-based, gender-sensitive BLAs within the SADC region.

The SADC's emphasis is on the following **technical dimensions**:

- Fundamental rights at work as defined by international labour standards;
- Harmonization of national migration legislation and policies and encouragement to develop national labour migration policies;
- Coordination of social security protection regimes and extension to migrant workers, following the principle of equality of treatment;
- Facilitating, securing and reducing the costs of remittances;
- Migrant workers' access to a continuum of health care across borders and at the workplace;
- Improvement of the quality and consistency of data collection on labour migration to serve policymaking.

While still at the level of principles and directions, the various SADC instruments do provide a **clear indication of the technical areas and desirable standards which any BLA should address**. The remainder of this guide considers these different governance levels (international, regional and SADC), following the BLA cycle and providing recommendations to the SADC stakeholders.

Section II

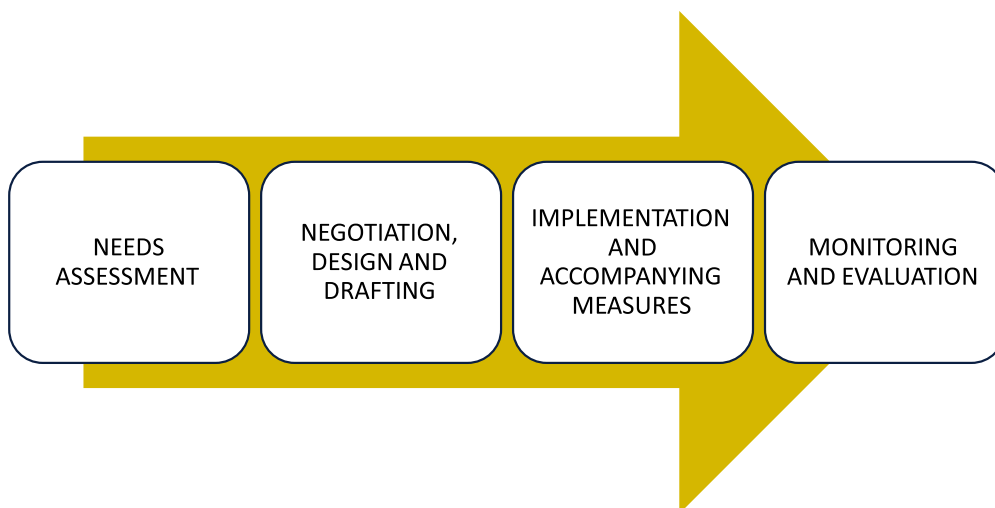


Section II. The bilateral labour agreement cycle

The following subsections intend to provide technical guidance at each step of the design and implementation of a BLA. The cycle followed here is ideal and hardly ever played out in this sequence in reality. While the four stages presented here (needs assessment; negotiation, design and drafting; implementation and accompanying

measures; monitoring and evaluation) can be read in isolation, it is important to bear in mind that the overall quality and impact of a BLA largely derive from the ability of policymakers to ensure consistency and uphold quality standards between the components and at every stage of the process (see Figure 2).

Figure 2: Components of the bilateral labour agreement cycle

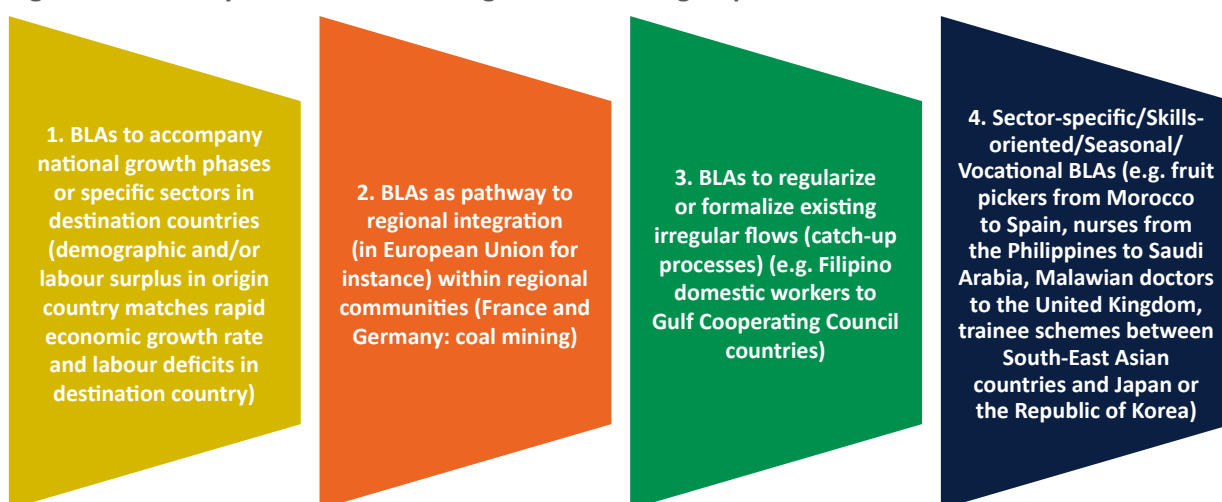


A. Needs assessment

Despite their long history, BLAs still have to prove their **actual capacity to harness developmental forces**. In many instances, their implementation has unevenly addressed the needs they were meant to, whether in terms of stymieing irregular migration, triggering developmental effects in countries of origin or sustainably addressing skills issues (Martín, 2011).

One of the reasons for disappointing outcomes comes from an **inadequate understanding of the situation BLAs are expected to address and the challenges and risks involved**. BLAs ought to be based on a **thorough preliminary assessment of the labour market and migration dynamics** that will help all stakeholders identify what they can reasonably hope to achieve. Preliminary assessments are also a good way to anticipate challenges and unintended consequences, identify strategic options, and determine targets to be adopted in the drafting of the BLA and its accompanying measures (see Figure 3).

Figure 3: Summary of bilateral labour agreement strategic options



Source: Author's analysis from existing literature.

Whether renewing an existing agreement or establishing a new one, governments should consider how BLAs will speak to key government priorities, particularly with regard to countries' poverty reduction strategies; education, skills and employment policies; and overall economic development strategies.

As migration flows tend to fluctuate swiftly, state-of-the-art research based on both quantitative and qualitative data is advisable for mid- and long-term planning and subsequent monitoring. Collection of data for needs assessment will not be a once-off exercise but part and parcel of the ongoing data collection process feeding into countries' LMISs (see Section II.D: Monitoring and Evaluation) which should be factored into any "good" BLA.

This needs assessment exercise is not limited to governments only, but it should be inclusive of employers and workers organizations. In destination countries, employers' needs should be balanced against their mid- to long-term investments in education and training of domestic labour. Workers organizations should assess their ability to service migrant workers and organize them to uphold the principle of equality of treatment.

As BLAs serve different strategies concurrently for origin and destination countries, needs assessments should be contextualized. Box 2 provides an indication of the components that a BLA needs assessment may typically comprise.

Box 2: Indicative components of a bilateral labour agreement needs assessment

For both origin and destination countries

- *Existing flows*: demographic profile of existing migrant workers (gender, age, education level); regions/ areas of origin; key drivers of emigration; recruitment and travel conditions; sectors of employment (conditions, wages, benefits, etc.) on arrival; average duration of migration; major challenges and work deficits.
- *Compatible social protection mechanisms* in destination countries and continuity of access to health care.
- *Exportability/Vetting/Recognition of qualifications and competencies*: existence of adequate mechanisms at both ends.

For origin countries

- *New target groups*: identification of surplus labour (sectors, skills groups, geographical areas, size over time); identification of key incentives; long-term impact on country's skills pool; ability to train.
- *Governments' and workers organizations' capacity to offer pre-departure, support and reintegration services*: public employment services (PESs); non-governmental organization sector; labour attachés; education sector; small and medium-sized enterprises; etc.
- *Identification of protection mechanisms in destination country*: state of existing legislation regarding migrant workers; compliance with international standards; accessibility of labour courts or redress mechanisms; state of labour inspection; freedom of association and existing workers organizations; support structures at destination.
- *Regulation and impact of remittance flows* to minimize costs; banking facilities; impact on communities of origin (in terms of investment opportunities, social protection needs and financial education).

For destination countries

- *Demand-driven sectors/businesses*: nature and scope of demand/shortage over time; type of skills profile; prior experience and record of migrant labour recruitment.
- *Impact on labour market*: local/regional/national competition with local labour; potential impact on wages, unemployment, etc.
- *Workers and migrants organizations*: openness to mobilization of migrant workers; ability to service migrant workers efficiently.
- *State of public opinion* at the local/regional/national level.

Organizations or institutions that can assist with undertaking a needs assessment may be:

- local research centres (independent or academic institutions);
- international organizations; or
- research units located within government ministries.

Information and data from the country of destination may have to be collected through similar organizations in that country. Additionally, there may be a need for translation services.

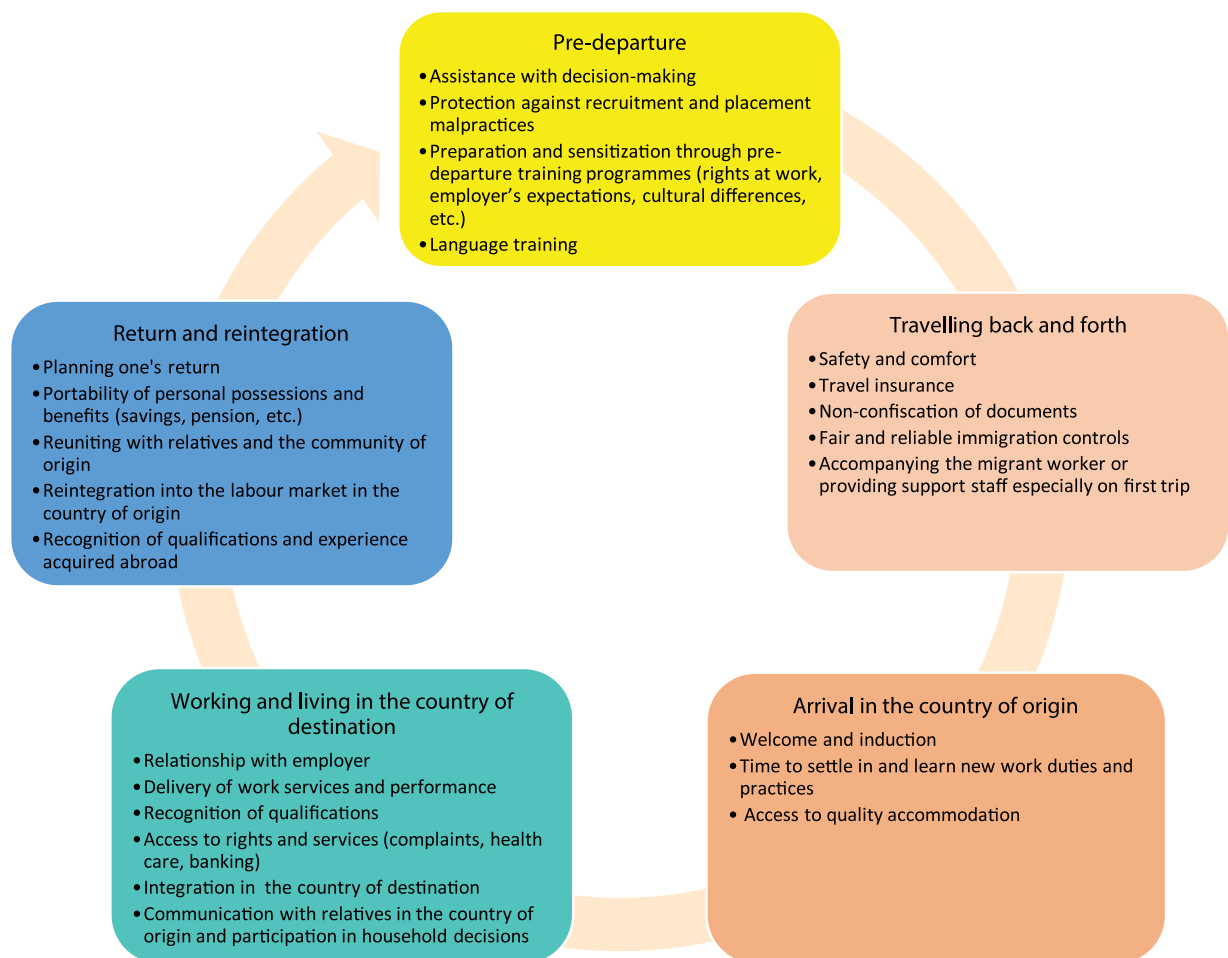
Institutions to be involved in the needs assessment will be all possible State and non-State stakeholders that may have relevant data on the recruitment and employment of migrant workers. Among others, these may include in both the country of origin and the country of destination the following:

- National statistical agencies (e.g. for data on stocks and flows of migrants and labour market indicators);
- Central banks (e.g. for remittance data);

- Government departments (e.g. for records of services to migrant workers);
- Trade unions (e.g. for record of grievances reported by migrant workers);
- Employers associations (e.g. for skills and occupations needs and shortages);
- PEAs (e.g. for current placement capacity and statistics);
- Migrants and rights associations (e.g. for training curriculum for migrant workers);
- International organizations (e.g. for trends from research analysis).

There is a need for a comprehensive understanding of the full migration cycle and its implications with regard to the design of the BLA. Figure 4 summarizes the main stages of the cycle and points to the dimensions to be covered in the BLA.

Figure 4: Stages of the migration cycle for migrant workers



B. Negotiation, design and drafting

Negotiation

As a bilateral instrument of cooperation, BLAs are inherently political. BLAs participate in international relations between States and do entail a degree of negotiation. While BLAs are often concluded to the advantage of the destination party (country or sector), governments in countries of origin have realized that they could use their bargaining power to negotiate better conditions for their workers and therefore ensure better long-term impact at source. The best example of such bargaining power is perhaps that of the Philippines with the establishment of a government agency for the welfare of Filipinos overseas, the passing of several acts protecting migrant workers, and the renegotiation or denunciation of some agreements in the 2000s.

Once the pros and cons have been assessed, a political decision based on rational factors should be taken regarding the benefits to be drawn from entering into the proposed agreement. The best decision might be:

- not to enter into the agreement;
- to delay the process in order to strengthen the government's (or other stakeholders') bargaining power; or
- to identify a different partner offering more guarantees of success.

The various technical aspects described below should help governments and key stakeholders take an informed decision.

Key criteria aligned with international standards

Existing international standards (in particular the Model Agreement contained in ILO Recommendation No. 86) and recent research drawing on existing and new evaluation criteria based on international labour standards and good practice provide multiple indicators against which to evaluate the quality of an offer on the table. Existing indicators will also point to gaps in protection and areas to be expanded further (Wickramasekara, 2015:56; Geronimi, 2004:23–26, in Baruah and Cholewinski, 2006:179). These various indicators are presented in the Annex of this guide.

As a synthesis of these existing indicators, this BLA guide proposes a practical protection checklist based on essential minimum standards. The checklist in Table 2 may help assess the robustness of a BLA and ensure that all key stages are covered in preparation activities.

Table 2: Practical protection checklist of essential minimum standards

Standard to be covered explicitly in the bilateral labour agreement	Yes (specify strong or weak provision)/No
Transparency of process and openness to tripartite national social dialogue mechanisms (between the government, employers associations, workers organizations and migrants associations)	
Provisions to protect migrant workers from recruitment and placement malpractices	

Standard to be covered explicitly in the bilateral labour agreement	Yes (specify strong or weak provision)/No
Provisions for the protection of migrant workers' human, labour and social rights throughout the migration cycle (pre-departure, during travel, in the workplace in the country of destination and upon return), aligned with recommended international labour standards (contract, conditions of employment, termination, etc.)	
Provisions for decent conditions of living (quality of accommodation, access to amenities and communication systems, privacy)	
Mainstreaming of gender concerns throughout the BLA clauses (e.g. equality of treatment and non-discrimination on gender grounds; inclusion of provision for maternity leave; protection of right to reproductive health through occupational medicine; support structures in cases of sexual harassment)	
Legal provisions and mechanisms for equal treatment and non-discrimination of migrant workers in the country of destination and for the protection of vulnerable categories of workers (e.g. domestic workers)	
Explicit protection of wage provision (timely payment, legal deductions, overtime rates, proof of payment)	
Provisions for occupational health and safety (prohibition of unhealthy or hazardous workplace, access to health care, compensation in cases of injury, etc.)	
Prohibition of confiscation of travel and identity documents and personal effects	
Provisions for access to complaints and dispute mechanisms in the country of destination and the country of origin	
Provisions for contribution into the pension scheme and free portability of benefits	
Provisions for free transfer of remittances and right to individual banking (e.g. provision to protect migrant workers' rights to open individual bank accounts)	
Provisions for human resources development, skills enhancement, and recognition of skills and qualifications in the country of destination and back in the country of origin	
Provisions for clear governance and management structures of the BLA and regular exchange of information between the parties	
Provisions for a monitoring and evaluation mechanism throughout the duration of the implementation of the BLA	

Legal instruments

Most BLAs are not legally binding documents. It is in fact considered to be **one of the strengths of BLAs over multilateral trade agreements or the General Agreement on Trade in Services (GATS)**. Trade agreements, which may be used especially for the mobility of the highly skilled and professionals, are usually strictly binding under international trade law. Parties to a trade agreement tend to be risk averse and the area of labour circulation is one they may be reluctant to enter, as it requires more guarantees than the circulation of goods and capital. BLAs may therefore offer the degree of adaptability and flexibility that States may be looking for. Their bilateral nature also makes negotiations easier, as there is a limited number of stakeholders involved (Saéz, 2013:5–6).

However, **formalizing BLAs by turning them into legally binding bilateral instruments is also possible and offers several advantages**. Firstly, it ensures compliance with several aspects of international labour and migration law that will strengthen the protection offered to all parties in cases of complaints or litigation. Secondly, formalizing BLAs can shelter them from political changes that may occur during the implementation time. Lastly, together with a robust monitoring and evaluation component and efficient inter-institutional structures, a strong legal framework can become key to sustainability of a BLA.

Legal formalization is however **constraining** and implications should be assessed by both parties to ensure they will each meet their commitments. Technically, it also requires highly technical expertise whose costs and time need to be factored in to the overall process.

Built-in monitoring and evaluation mechanism

Subsection D of this guide provides a detailed technical description of monitoring and evaluation instruments. These should be factored in at the design stage of a BLA and in any case prior to the beginning of implementation.

As its name indicates, the monitoring and evaluation mechanism will serve **two purposes**: firstly, to monitor implementation; secondly, to assess attainment of targets. A third dimension that is often overlooked is the degree to which data collection from the implementation of a BLA can serve to irrigate data collection for the management of a country's labour migration policy, or even more broadly for LMIS.

Since the monitoring and evaluation mechanism will largely derive from the preliminary needs assessment, it is logical to develop it in the design or inception phases of a BLA process. It is also important to ensure its compatibility with existing LMISs in both the country of origin and the country of destination.

The art of negotiation

All too often, BLA processes are rushed and consist in an exchange of drafts and edited drafts before heads of State affix their signatures. This is revealing of a lack of preparation and strategy, as well as oftentimes limited embeddedness of the BLA in an overall labour migration policy.

Whatever the case may be, developing **internal negotiation capacity** is important to maximize the benefits of labour migration over time. **Such capacity should lie within the lead ministry** (ministries of labour seem pertinent) but may also be shared across relevant ministries such as foreign affairs, higher education, trade and industry, and labour.

Identified officials should have **adequate education and qualifications** in the areas of international labour standards, international relations and trade law, and industrial relations, among others, as well as receive specific training. In particular, such officials should develop expert knowledge of international labour standards, the labour legislations of their own country as well as of countries of destination, labour migration data, and the actual capacity of their PESs. Knowledge of one's own actual capacity to deliver on commitments made within an agreement is key to negotiation. Such officials should also have the ability to edit draft BLAs: this means they should

acquaint themselves with acceptable wording to cover essential protection indicators. ILO Recommendation No. 86 and the ILO/IOM/OSCE *Handbook* (2006) may provide assistance in the drafting of technical provisions in BLAs.

Such officials should **work closely with all relevant services and departments** as well as have good knowledge of operators in the private sector in order to assess the feasibility of commitments and offers.

In terms of processes, these labour agreements-expert officials **should be closely associated with all discussions pertaining to a potential agreement from the inception stage**, as well as accompany principals until the signature of the agreement. The presence of the “chief negotiator”, the lead labour agreement expert, is key to the smooth finalization of the agreement and its successful signing.

While the minimum standards reviewed in the rest of this section are meant to guide negotiators in their review, assessment, and counter-proposals, or in the drafting of BLA templates, it is important that **negotiators anticipate contentious dimensions and that strategic positions, validated by political leaders, be adopted on each specific point prior to official discussions**. It seems advisable to hold such technical meetings until a robust position and strategy have been identified.

Drawing on real field situations in the Africa region, Table 3 summarizes key points for negotiation and possible strategies from the perspectives of both the country of origin and the country of destination. It is not exhaustive but focuses on regularly contentious points.

Table 3: Key points for negotiation and possible strategies from the country of origin and country of destination perspectives

Key point for negotiation	Possible strategy as a country of origin	Possible strategy as a country of destination
1. Overall jurisdiction under which the agreement falls	Insist on the possibility to have the agreement placed under both jurisdictions and in case of disagreement, a third extra-national jurisdiction, where and if relevant (e.g. European Human Rights Court in the European context).	Only agree to own jurisdiction or country-of-origin jurisdiction, provided legal frameworks are similar.
2. Mainstreaming of gender rights	Ensure that female migrant workers’ rights (e.g. maternity leave, reproductive health rights) at least align with the guarantees offered in the country of origin or with the international labour standards.	Ensure provisions in contracts and recruitment practices entrench equality of treatment between men and women to the extent that this is State policy.
3. Selection, recruitment, placement and travel of migrant workers	Ensure that country-of-destination requirements are reasonable enough to be met either by PESs or licensed PEAs; limit the country-of-origin State liability in situations of non-respect; resist non-respect of requirements being akin to breach of contract.	Ensure that the country of origin commits to meeting standards of recruitment and time frames expected by employers; non-respect of such requirements should be considered as breach of contract.

Key point for negotiation	Possible strategy as a country of origin	Possible strategy as a country of destination
4. Sending back of workers in situations of political instability, war, natural disaster or change in economic strategy	Ensure that the country of destination is discouraged from sending back workers without due process and without compensation (e.g. increase provisions for compensation and agreed-upon measures for repatriation).	Ensure that there is room for unilateral termination of contract and repatriation of workers with only limited compensation expected of the country-of-destination State in situations of emergency, and cater for the practical possibility to organize repatriation.
5. Costs of recruitment and placement	Costs should be borne entirely by employers or the country-of-destination State as part of labour supply strategy.	Decrease costs of intermediaries and ensure that costs are borne by employers.
6. Immigration permit longer than contract duration and not subject to contract termination	Ensure that provisions protect workers from premature termination of contracts and allow for an immigration permit that authorizes the workers to seek remedial action, collect due salaries and benefits, seek another job and/or prepare their return in optimal conditions.	Ensure that an immigration permit is distinct from a “right to stay” if the worker’s stay in the country of destination is no longer desirable.
7. Sanctions against recruitment malpractices	Advocate explicit and severe penalties on intermediaries responsible for recruitment malpractices and compensations of migrant workers who are victims of such practices.	Provisions for intermediaries responsible for recruitment malpractices to be sanctioned in order to limit State responsibility.
8. Wages guaranteed in foreign currency and incremental progression over time	Provisions for migrant workers’ wage rates, regularity of payment, incremental progression, or at least alignment of wages with inflation and currency to be guaranteed explicitly with penalties and compensation in situations of non-payment.	Provisions for employers to ensure regular payment of wages and limit State liability.
9. Possibility to remit earnings in totality	Provisions to ensure exemption of migrant workers’ earnings from any taxes prior to transfer and low transfer costs guaranteed in writing.	Provisions to ensure that a portion of migrant workers’ earnings is spent and taxed in the country of destination within income tax limitations.
10. Social protection benefits	Provisions to ensure extension of full social protection benefits to migrant workers to the extent that such protection is offered to national workers of the country of destination and provisions for portability of pension benefits, particularly in relation to most vulnerable workers (women, youth, domestic workers, etc.).	Accord social protection rights along a continuum from long-term, highly paid migrant workers who are guaranteed full extension of rights, to those who enjoy only limited social protection, and to short-term, low-paid migrant workers depending on the calculation made in terms of costs/benefits to the host economy.

Source: Developed by author from field experience in the Africa region.

Joint commission technical task team

In general, BLAs are discussed by **joint commissions**, which are bilateral permanent meetings driven by ministries of foreign affairs. Oftentimes, these processes are **State-centred and tend to exclude non-State actors**. However, given the focus on labour issues, it is important for **labour ministries** to ensure that an inclusive approach be adopted, representative of key stakeholders, those statutorily associated with labour ministries, namely, employers associations and workers organizations, other government departments relevant to migration issues (e.g. ministries of home affairs), and other relevant non-State actors (e.g. migrants associations, rights organizations and PEAs regulatory bodies).

Agenda-setting is key to successful joint commission meetings. It is important to ensure that all technical aspects contained in the BLAs can be discussed comprehensively. Enough time needs to be set aside if there are many technical aspects to discuss and clarify. If need be, **preparatory technical bilateral meetings** can be organized ahead of the actual joint commission in order to make progress in anticipation of the meeting and strengthen the working documents.

The **technical sessions** need to be carefully prepared. For each point proposed by your country, you need to have a clear case ready in order to provide an explanation if need be. This is what Table 3 may help you anticipate. It is also important to have an overall strategy in mind: What are the key objectives you want to achieve through the finalization of the BLA? Which technical points will be key to achieving these objectives?

The **political sessions** of the joint commission should normally merely consist in confirming the technical proposals. The quality of the technical expertise invested in the preparation and drafting of a BLA is usually a good indication of the relevance and efficiency of the final output. However, there may be unexpected changes in plans and tactics. Your technical team should continue to be on standby to respond to last-minute queries. It is also important that political personnel be briefed on the BLA issues prior to

walking into the political session. If need be, giving them options that your technical team is confident about may help find a way forward and avoid fragile, last-minute arrangements. Clarity in the typesetting of final documents and indication of options (using highlighters or sticky notes) is critical, given the technical complexity and volume of work common to those meetings.

Reporting and conflict resolution

As bilateral instruments, BLAs are subject to the oversight of diplomatic channels and to the state of diplomatic relations between States. The more formalized and entrenched the BLA is in the two parties' national policies, budgets and institutional routines, the more insulated from political interference it is likely to be.

While migrant workers' employment contracts will be subject to the conditions stipulated in the labour legislation of the country of destination, the BLA itself is essentially a matter of diplomatic dialogue between two countries. Beyond bilateral diplomatic dialogue, one should mention the following possible actions:

- In cases of ratified international labour conventions, it is possible to report abuses or non-compliance through the ILO reporting system (e.g. through the Committee of Experts on the Application of Conventions and Recommendations, and the Commissions of Inquiry and Complaints);
- In cases of contradictions with the AU frameworks and heads-of-State decisions, reporting through the African Peer Review Mechanism and raising the matter to the Labour, Employment and Social Development Technical Committee of the AU Commission;
- In cases of contradictions with the existing SADC frameworks and protocols, reporting through the SADC Employment and Labour Sector;
- In cases of contradictions with the UN International Convention on Migrant Workers' Rights, reporting to the UN

Special Rapporteur on the Human Rights of Migrants;

- In cases of breaches to a GATS, reporting through the World Trade Organization system (i.e. Dispute Settlement Understanding).

These mechanisms will vary from agreement to agreement and are depending on the parties involved. Each of them offers different conflict resolution approaches.

C. Implementation and accompanying measures

Once BLAs have been drafted, approved and signed – a process which may in itself be lengthy – they will need to be **implemented over extended periods of time**. International research shows that objectives as set out in BLAs are good but often not enough to ensure efficient and effective implementation. A set of **accompanying measures** can prove critical in the delivery of outcomes. The only rule there is again that the more contextualized the measures, the more likely their successful implementation. A wealth of information and databases are currently available to draw lessons from experience and identified good practices. The following subsection draws extensively on ILO/IOM/OSCE 2007 Compendium of Good Practice Policy Elements in Bilateral Temporary Labour Arrangements and Martín's 2011 background note on bilateral labour agreements in practice.

Inter-institutional coordination effort

This effort should be taking place at two levels: bilateral and national. At the **bilateral level**, it is the work of joint bilateral commissions and their technical task teams to monitor the implementation of a BLA at regular intervals and eventually evaluate its impact. As indicated in the previous subsection, it is critical that the road map given to joint commissions and their composition be laid out clearly from the outset.

At the **national level**, the implementation of a BLA will necessitate **interministerial coordination efforts** which should also be expanded to include social partners and relevant stakeholders (migrants associations and rights organizations). There is a need here to distinguish structures in charge of implementation from structures in charge of the overall steering and monitoring and evaluation. Ideally, there should be a small, interministerial coordination and implementation structure in charge of the ongoing implementation tasks. This implementation structure should account to a steering committee where a larger number of ministries, agencies and stakeholders can be gathered for information and monitoring purposes. Ad hoc experts can be consulted for technical inputs even though it seems preferable to build and retain this expertise among State actors and key stakeholders for sustainability purposes. Finally, good coordination at the national level is also key to ensuring more efficient results at bilateral meetings.

Regulation of placement institutions

Whether public (i.e. PESs) or private (i.e. PEAs), placement institutions are pivotal actors in the implementation of BLAs. Most of the time, they are the ones in charge of the actual selection, recruitment, travelling and management processes involved in the sending of migrant workers. In some countries where they do exist, it may be worth considering including umbrella organizations in negotiation and implementation (e.g. in South Africa, the Confederation of Associations in the Private Employment Sector (www.capes.org.za/) serves as the umbrella body for PEAs).

Depending on the agreement and on available capacities, the selection and recruitment functions can be solely or partially undertaken by PESs in the origin country or through a bilateral collaboration between PESs in both origin and destination countries. This is most likely to be the case in sector-specific BLAs with a view to meeting skills shortages in the public sector of the destination country. **In SADC countries, very few PESs have the actual capacity in numbers of staff and budgets to drive these processes.** In

some instances, as in South Africa and the United Republic of Tanzania, legislation even explicitly excludes the recruitment and placement of foreign nationals by PESs. In this case, sector-specific needs may be managed by professionals associations as is the case, for instance, of the Health Professionals Council of South Africa for the recruitment of foreign health professionals.

For BLAs addressing labour shortages in sectors of the economy dominated by the private sector, PEAs are likely to be contracted directly by employers to source, select, recruit, place, and organize the travel of migrant workers and their return upon completion of their contracts. In the SADC, out of 15 Member States, only Zambia (2013) has ratified ILO Convention No. 181. National legislations are also lacking in terms of regulation of this sector.

Beyond legislations, it is also important to view **PEAs as strong partners** that need to develop their own codes of ethics and be made accountable through their incorporation in BLA steering committees. International organizations (e.g. IOM, ILO, International Trade Union Confederation, International Organisation of Employers) do provide technical assistance in the specific area of **ethical recruitment of migrant workers**; examples of these are the ILO Fair Recruitment Initiative (ILO, 2014b) and the IOM

International Recruitment Integrity System (IRIS) (IOM, 2014).

A growing number of **codes of conduct** have been developed by PEAs or their associations. The best known is that developed by the **International Confederation of Temporary Work Agencies or Confédération Internationale des Entreprises de Travail Temporaire (CIETT)**, which establishes general rules to be adopted by national business associations. The CIETT supports the principle of self-regulation by PEAs through cooperation with relevant institutions. National codes should reflect the spirit of this code, and indeed, in many cases, they may go well beyond the general standards set out by the CIETT. The CIETT Code provides general agreed principles on PEA practices, shared by all its members. These common agreed principles are complemented by the CIETT Code of Conduct for PEAs, which describes the obligations of CIETT members regarding their corporate social responsibility.¹ One example of interregional code is the Covenant of Ethical Conduct and Good Practices of Overseas Employment Service Providers adopted by the national associations of employment service providers from Asia-Pacific and Arab States in 2005, in Bangkok, Thailand. In Africa, the Association of Private Recruitment Agencies of Kenya has adopted a code of conduct for members, which addresses issues of smuggling, trafficking, child and forced labour.

¹ See www.wecglobal.org/fileadmin/templates/ciETT/docs/CIETT_Code_Conduct.pdf

Box 3: Regulation of private employment agencies and their involvement in bilateral labour agreements

Before considering legislation and policy formulation, governments should set up an **adequate institutional framework** to coordinate the drafting of national legislation and its subsequent monitoring and enforcement. This coordinating agency may be under the mandate of the ministry of labour but may also have a degree of coordination with other key departments. In any case, the authority should have a clear mandate and sufficient resources to carry out its activities.

Formulation of legislation on PEAs may draw on standards and directions provided in international instruments. Regulation of PEAs is laid out in ILO Convention No. 181 and ILO Recommendation No. 188. ILO Convention No. 181 provides definitions of the types of services rendered by PEAs. ILO Convention No. 181 recognizes the potentially positive role PEAs can play in national and international labour markets. It obliges ratifying States to determine the legal status of PEAs and the conditions governing their operations upon consultation with relevant employers associations and workers organizations (Article 3). PEAs typically exercise two types of services: the first is the selection, recruitment and placement of workers directly with a user enterprise (this implies only a role as intermediary and does not modify the employer–employee relationship); the second is the temporary employment of workers and their hiring out to employers in the country of destination (this implies a triangular relationship: migrant workers–PEAs/labour brokers–employers). States might decide to regulate differently these types of activities as well as the categories of workers that PEAs are allowed to recruit.

Regulation typically takes the form of registering and/or licensing. While registering entails minimum control, licensing means assessment against established standards. Licensing will typically encompass verification of the operator’s personal or corporate personality and financial, marketing, recruitment and management capabilities. Regulation of PEAs should also include reporting and data protection systems for personal information on clients and job seekers. The issue of fees is dealt with further in this guide.

Source: Adapted by the author from Baruah and Cholewinski, 2006:44–46.

Cost of enforcement and responsibility for payment

BLAs involve costs that may not have been budgeted for by State administrations as recurrent. In situations of South–South mobility where destination countries may only be marginally better equipped and capacitated than origin countries, it may be even more critical to accompany the drafting of a BLA with a **costing exercise**. Administrative costs may include additional meeting costs, the supply of new human resources, training, running costs and possibly infrastructure.

In situations of **demand-driven BLAs** where private sector businesses are in need of a specific labour profile, **costs should be borne by employers**. There should be a cost–benefit analysis by governments to assess how much they are ready to invest to sponsor these initiatives. It may be worth for governments to invest and therefore sponsor

some of the costs in order to retain control over the regulation of a sector or ensure job creation and growth and avoid retrenchments which may affect nationals. International organizations and donors may be mobilized to provide additional resources, particularly in the inception phases of BLAs. However, over the long run it is more sustainable to find ways of ensuring that BLAs are self-sufficient. The internalization of costs in the form of a fee paid by employers is one example. In South Africa, for instance, a skills fund has been created and financed by the contributions of employers of foreign nationals.

Box 4: Payment of recruitment fees

One of the most contentious issues in the regulation of recruitment of migrant workers is the **payment of fees to PEAs and intermediaries**. Charging fees to workers, particularly low-skilled workers, is **generally considered bad practice**. It is even **prohibited explicitly in ILO Convention No. 181 (Article 7)**.

However, if it is “in the interest of the workers concerned, and after consulting the most representative organizations of workers and employers”, **exceptions may be allowed for certain categories of workers or types of services provided by PEAs**. In fact, most national legislations allow it, but the problem has more to do away with overcharging and debt bondage resulting from exorbitant fees.

Governments may consider introducing **legislation regulating authorized and prohibited fees** and disseminating information to migrant workers. In order to avoid abusive rates, placing an upper limit on the fees that PEAs can charge is common practice. There may be different levels based on workers’ qualifications. India, Pakistan and the Philippines have legislation on fees.

Legislation is, however, not enough and stringent implementation measures also need to be enforced with high enough **sanctions** to deter non-compliance.

Source: Adapted from various sources by the author.

Accompanying measures

As Martín (2011) puts it, accompanying measures that “lubricate the working of BLAs and optimize their impact” are usually necessary. Existing publications and databases provide numerous examples of such technical measures. Here are only a few typical examples:

- Funding and technical facilitation of joint commission and interministerial meetings from inception and throughout implementation;
- Capacity-building among units in charge of BLA implementation in ministries of labour and home affairs/migration of (may include equipment, training, additional human resources, building of expertise, labour inspection, labour attachés, etc.);
- Sensitization workshops on ethical recruitment for employers and PEAs;
- Pre-departure, induction and reintegration sensitization programmes for migrant workers, and training of trainers among workers organizations and migrants associations (see the IOM Migrant Training Programmes Overview 2010–2011);

- Support to vetting and recognition of skills and qualifications through bilateral training of staff;
- Sensitization of health personnel to ensure continuity of access to minimum health care for all migrant workers;
- Funding of and support for the coordination of data collection;
- Support schemes to access and export accumulated social benefits;
- Technical cooperation programmes with financial institutions to decrease transfer costs and provide financial education of migrant workers.

This guide proposes the following checklist of specific services (Table 4). Services will vary from BLA to BLA depending on the geographical location of countries, type of contract, duration of stay and occupation; therefore, services should be adapted to each situation. However, Table 4 can assist programme developers to design and evaluate the costs of a set of accompanying measures.

Table 4: Checklist of specific social services

Type of social service	Yes/No/Specify and assess against international best practice
Travel: Basic travel insurance, repatriation, repatriation of remains	
Health: Medical insurance providing access to basic and regular health care, chronic medication, repatriation for health reasons, occupation injury cover, compensation for occupation injury, invalidity cover and compensation	
Pension: Pension scheme, portability of contributions	
Financial education, savings and remittances: Financial education programmes, access to banking, savings accounts, provident funds, free and safe transfer of remittances	
Household in the country of origin: Regular access to cheap and private communication systems, education schemes for children and dependents of migrant worker, community development programmes	

D. Monitoring and evaluation

This section deals with all data collection aspects for purposes of implementation and coordination, monitoring and evaluation, and broader LMIS data collection.

Data-sharing mechanisms

Martín (2011) considers that “BLAs can only work efficiently if they are supported by effective databases and data sharing mechanisms”. This data collection work starts from the needs assessment stage, which can pave the way for the **establishment of a more fully fledged data-sharing mechanism** that will then be of use to all administrative entities involved in the implementation of the BLA. Since BLAs are inherently labour placement schemes, all **standard labour placement components** should be captured and shared by administrations in charge of the sourcing, selection, recruitment, and placement of migrant workers.

Data-sharing mechanisms are all the more important, as BLAs entail two national administrations and non-State actors. This challenge has often proved a bottleneck in BLA implementation as in the case of France–Tunisia Agreement or Spain–Senegal Scheme (Martín 2011). In the SADC, data sharing among Member States is only in its infancy stage. Major challenges are, for instance, regularly faced by ministries of labour in trying to assist former migrant workers reclaim their accumulated benefits in the former countries of destination.

Data-sharing mechanisms should be designed on the basis of the **most basic existing systems already operational among administrations** and if possible shared bilaterally. These are conditions of sustainability. They should also be easily accessible while allowing a degree of confidentiality at the same time. Administrations in charge of populating such mechanisms will typically be BLA focal points, PESSs, PEAs, training and vetting institutions, migration and consular authorities, labour ministries and employers.

Linkage to labour market information needs

As indicated in subsection A, it is critical that BLAs be related to existing labour market and economic needs. The preliminary needs assessment should allow for identification of numbers of workers needed per sector, enterprise and other categories.

However, in practice, this is often complex to implement. International experience shows that systems that use multiple labour market monitoring instruments – looking at various aspects, from projections in education and training, to sector-based analysis, to enterprise-based data collection – stand more chances to conduct reliable projections and approximations of their needs over time.

It is therefore critical to ensure that the data-collection mechanisms envisaged above be **compatible with existing LMIS indicators** and that data be channelled regularly to the relevant data collection agencies. **Expertise from national statistical agencies, economic intelligence agencies** and labour market information agencies should therefore be associated with the management of BLAs. Benefit to job intermediation systems and LMISs in countries of origin has been documented in several instances (Martín, 2011).

Instruments that need to be connected through intelligent data sharing methods are, among others, labour force surveys, labour market needs assessments, occupation in demand lists, skills audits and migrant workers databases. They need to be developed, maintained and updated on a continuous basis. While it is challenging for all countries, including the most developed ones, to maintain such systems in order, it is possible to start with limited but targeted, regularly updated information directly speaking to the needs of specific sectors or specific programmes. It requires few but dedicated, well-trained staff.

Pre-selection and recruitment

International experience shows that creation of **pre-selection and recruitment processes that are not grounded in existing intermediation systems are less likely to work efficiently.** The use of existing systems, potentially modernized, strengthened and better aligned with international standards, is likely to be more successful than the establishment of entirely new systems. Experience accumulated by civil servants and stakeholders needs to be taken into account and put to use.

Another dimension is the **disconnection between placement agencies in destination countries, and particularly of their databases, and monitoring and evaluation structures in countries of origin.** Data collection should be standardized and allow for disaggregation per sex, age, occupation, education and skills levels, and geographical area of origin, so as to be of use at both ends of the BLA.

The more integrated the selection, recruitment and placement databases between existing national agencies and across the two countries, the higher the benefits. Drawing on experiences of overlaps resulting in poor recruitment figures, Senegal is, for instance, in the process of redesigning an integrated database. In Southern Africa, one challenge is the fact that multiple databases were managed by the private sectors, as in the case of TEBA. **Public-private partnerships to transfer technical skills associated with data management should be encouraged.** In the area of social protection and access to accumulated benefits, collaboration between key stakeholders in South Africa (e.g. Department of Health, Department of Labour, and Department of Foreign Affairs and Trade) is beginning to address the backlog issue of unclaimed benefits of mineworkers.

Box 5: Pre-departure medical screening for migrant workers

Pre-departure medical screening for migrant workers is considered standard practice as is the case in many recruitment procedures in order to verify that prospective workers are fit for the tasks they will be responsible to undertake. However, a number of countries and employers require unethical and often discriminatory testing for pregnancy and HIV/AIDS in particular.

There are three challenges related to pre-departure medical screening:

1. Negotiation of these conditions with countries/employers that request potentially discriminatory testing;
2. Confidentiality of information and personal data on migrant workers;
3. Discriminatory practices towards workers who may contract such diseases while under contract and their access to care.

ILO Recommendation No. 200 on HIV and AIDS provides clear guidance on good practice in the area of testing, privacy and confidentiality. In Section 25 of the Recommendation, it is indicated that: “HIV testing or other forms of screening for HIV should not be required of workers, including migrant workers, jobseekers and job applicants”. Section 26 recommends: “Workers, including migrant workers, jobseekers and job applicants, should not be required by countries of origin, of transit or of destination to disclose HIV-related information about themselves or others”. Section 28 adds: “Migrant workers, or those seeking to migrate for employment, should not be excluded from migration by the countries of origin, of transit or of destination on the basis of their real or perceived HIV status.”

PEAs and PESs should be sensitized to their role in ensuring confidentiality of information and countering discriminatory practices. Employers should be sensitized to anti-discriminatory practices at the workplace. Access to health care in situations of chronic disease should be incorporated in any medical insurance fund availed to migrant workers.

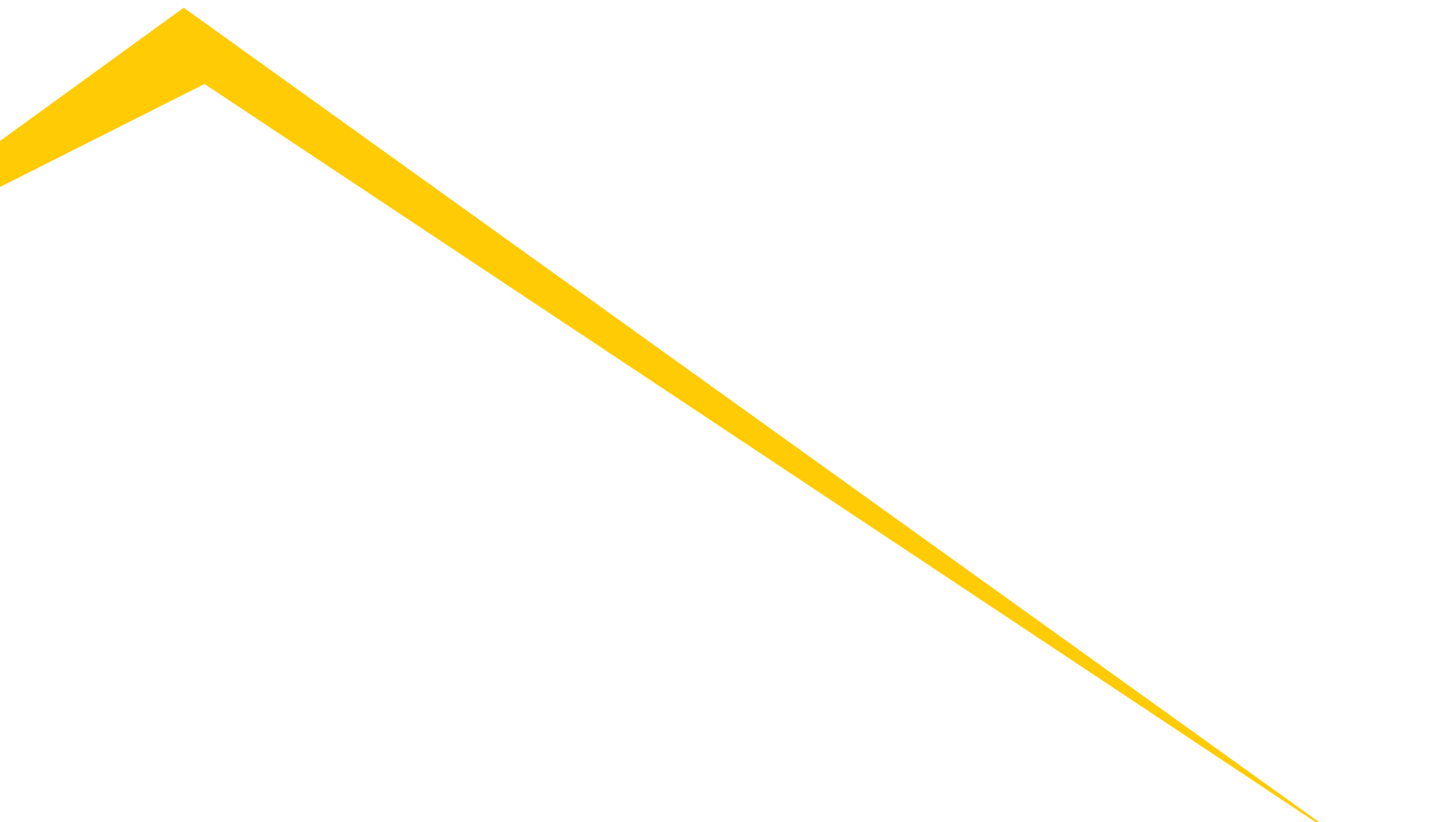
Evaluation Criteria

Monitoring and evaluation is acknowledged to be the weakest link in BLAs. Yet, designing a set of relevant indicators and monitoring and evaluation protocols is possible. Multiple indicators can be selected depending on the objectives of the BLA. They range from immediate targets such as numbers of workers targeted, recruited, returned upon completion, or returned before completion of contract to more sophisticated indicators linked to labour market analyses like skills match (desired profile and actual profile of recruited workers), work conditions and

rights at work, and cost–benefit analysis (costs entailed in the implementation of BLAs including support measures versus measurable impact on workforce composition, sector productivity and other factors). Criteria identified in subsection B can also be of use in monitoring and evaluation.

Monitoring and evaluation protocols are the processes that will determine the frequency, the paths, and the responsibility for monitoring and evaluation to be performed. Independence and quality of evaluation are important to avoid political interference and hold key policy actors accountable.

Section III



Section III. Recommendations to stakeholders in the Southern African Development Community

This section draws on inputs made by various SADC stakeholders following the presentation of the first draft of this guide at the following meetings:

- SADC Employment and Labour Sector Technical Sub-committee and Ministerial Meetings, Johannesburg, May 2016;
- IOM National Stakeholders Consultation and Rapid Assessment meeting, Lilongwe, Malawi, April 2016;
- IOM Development Fund Project on South–South Mobility Regional Stakeholders Consultation Workshop, Mauritius, May 2016.

Recommendations have been drafted in the context of the SADC Labour Migration Action Plan 2016–2019 in order to assist Member States and the SADC Employment and Labour Sector with the dissemination, adoption and effective implementation of the standards supported in this guide under Outcome 1, Output 1.2 of the SADC Labour Migration Action Plan 2016–2019.

Each recommendation corresponds to a section in this guide and to a component of the BLA cycle.

Stakeholder and recommendation	Relevant section of this bilateral labour agreement guide and component of the bilateral labour agreement cycle
A. Recommendations to governments of origin and destination countries	
1. Ensure and facilitate broad dissemination of the guidelines across relevant government departments and social partners.	All sections; all components
2. With support from IOM, coordinate training workshops on BLAs using this guide as training material.	All sections; all components
3. Develop national strategies on BLAs in sync with national education and employment policies.	All sections; all components
4. Develop and/or strengthen the necessary capacity, particularly within ministries of labour, ministries of foreign affairs and PESs to implement the BLA strategies to be adopted.	All sections; all components
5. Identify needs within specific sectors based on up-to-date labour market information.	Section II.A
6. Establish or strengthen robust and efficient interministerial coordination structures tasked with BLA review.	Section II.C

Stakeholder and recommendation	Relevant section of this bilateral labour agreement guide and component in bilateral labour agreement cycle
7. Sensitize ministries of higher education, training and vocational education to their role in the planning and monitoring of skills outputs in relation to the BLA strategy.	Section II.A and Section II.D
8. Systematically review existing agreements against the proposed essential standards presented in this guide and, where relevant, propose amendments.	Section I.A, Section I.B, Section I.C and Section II.B
9. Work towards establishing national template BLAs aligned with the International Labour Standards and the SADC frameworks.	Section I.A, Section I.B, Section I.C, Section II.B and Section II.C; all components
10. Identify, select and train dedicated staff to become experts in BLA negotiation.	Section II.B and Section II.C; all components
11. Develop the necessary accompanying measures and data collection mechanisms to ensure maximum impact and adequate monitoring and evaluation of BLAs.	Section II.C and Section II.D
12. Strengthen or establish legislation on the regulation of PEAs through licensing;	Section I.A and Section II.C
13. Take full ownership of rights-based, protection-sensitive approaches to the development, negotiation and conclusion of BLAs.	All sections; all components
14. Establish inclusive national technical review mechanisms, open to employers associations, workers organizations and relevant civil society organizations, for the adoption and monitoring and evaluation of existing and future BLAs.	Section II.D
B. Recommendations to the SADC Secretariat and the SADC Employment and Labour Sector	
1. Ensure familiarization of the SADC Employment and Labour Sector and the SADC Organ for Politics, Defence and Security staff with the BLA guidelines through broad dissemination and training.	All sections; all components
2. Ensure availability of the BLA guidelines to the public through the SADC website.	All sections; all components
3. Support the Member States to establish an SADC community of practice on BLAs in order for government officials, social partners, migrants associations and other relevant stakeholders to share experiences at regular intervals with a view to encouraging alignment with SADC-supported standards and harmonization.	All sections; all components
4. Request Member States to report regularly on the state of their BLA activities at SADC Employment and Labour Sector meetings in the framework of the SADC Labour Migration Action Plan 2016–2019.	Section II.D

Stakeholder and recommendation	Relevant section of this bilateral labour agreement guide and component in bilateral labour agreement cycle
C. Recommendations to employers associations	
1. Ensure familiarization of your staff and members with the BLA guidelines and encourage their use for training in fair and ethical recruitment of migrant workers.	All sections; all components
2. Sensitize your members to the existence of international and SADC standards and frameworks in the area of the recruitment and employment of migrant workers.	Section I.A, Section I.B, Section I.C and Section II.B
3. Encourage sections of your membership involved in employment intermediation to familiarize themselves with these standards and frameworks and develop self-regulatory mechanisms.	Section I.A, Section I.B, Section I.C and Section II.C
4. Develop protection-sensitive template contracts for migrant workers aligned with international, regional, and SADC standards and recommendations, and promote them among your affiliates.	Section I.A, Section I.B and Section I.C
5. Participate actively in exchange of information and communities of practice on BLAs within the SADC and beyond.	All sections; all components
6. Support the establishment of inclusive national technical review mechanisms, open to employers associations, workers organizations and relevant civil society organizations, for the adoption and monitoring and evaluation of existing and future BLAs.	All sections; all components
D. Recommendations to workers organizations	
1. Ensure familiarization of your staff and members with the BLA guidelines through broad dissemination and training in order to develop internal expertise and capacity for the protection of migrant workers.	All sections; all components
2. Sensitize your affiliates to the existence of international and SADC standards and frameworks in the area of the recruitment and employment of migrant workers.	Section I.A, Section I.B, Section I.C and Section II.B
3. In the SADC countries of destination, educate, organize and mobilize migrant workers to advocate their rights under existing labour legislations and international standards.	Section II.C
4. Develop your own position through internal consultations on labour “export” and labour “import” strategies in relation to national development plans and national poverty reduction strategies through employment.	Introduction D, Section II.A and Section II.B
5. Explore possibilities of bilateral agreements with trade unions in countries party to a BLA with your own country.	Section I.A and Section II.C

Stakeholder and recommendation	Relevant section of this bilateral labour agreement guide and component in bilateral labour agreement cycle
6. Develop and deliver services to migrant workers at the relevant stage of the migration cycle (pre-departure, upon arrival, workplace induction, return and reintegration), and work closely with governments and employers to train migrant workers in various areas (workforce training to new specifications, sensitization to occupational health and safety risks, financial literacy and education, language training, cultural orientation, etc.).	Section II.C
7. Support the establishment of inclusive national technical review mechanisms, open to employers associations, workers organizations and relevant civil society organizations, for the adoption and monitoring and evaluation of existing and future BLAs.	All sections; all components
E. Recommendations to associations of private employment agencies	
1. Ensure familiarization of your staff and members with the BLA guidelines through broad dissemination and training with an emphasis on legal and ethical requirements throughout the selection and recruitment process.	All sections; all components
2. Support the development of a code of ethics among your members at national and subregional levels aligned with the Code of Ethics developed by the CIETT.	Section I.A, Section I.B and Section I.C
3. Familiarize yourself with internationally recommended best practice in Africa and other regions.	Introduction B, C, D; Section I.A; Section I.B; and Section I.C; all components
4. Participate actively in inclusive national technical review mechanisms, open to employers associations, workers organizations and relevant civil society organizations, for the adoption and monitoring and evaluation of existing and future BLAs.	All sections; all components
F. Recommendations to non-governmental organizations and migrants associations	
1. Ensure familiarization of your staff and members with the BLA guidelines through broad dissemination and training in order to develop internal expertise and voice your position when consulted by government.	All sections; all components
2. Educate and sensitize migrant workers and migrant communities to existing standards and frameworks for their protection.	Section I.A, Section I.B, Section I.C and Section II.C
3. In partnership with governments, workers organizations, employers and PEAs, develop services (cultural orientation, financial education, rights sensitization programmes, etc.) for migrant workers to accompany them at each stage of the migration cycle, particularly in the claiming of social benefits upon return.	Section II.C
4. Participate actively in inclusive national review mechanisms for BLAs.	All sections; all components

Stakeholder and recommendation	Relevant section of this bilateral labour agreement guide and component in bilateral labour agreement cycle
G. Recommendations to international organizations	
1. Continue to work in close collaboration with other stakeholders on the priorities identified in the SADC Labour Migration Action Plan 2016–2019, the 2014 Regional Labour Migration Policy Framework, and other SADC tools and instruments to meet targets.	All sections; all components
2. Regularly share information on progress made across the SADC Member States to draw lessons from good practice and technical assistance experiences.	Introduction; Section II.D
3. Provide regular information to Member States on international best practice through continuous capacity-building, mentoring and dialogue.	Introduction; Section II.D
4. Regularly report to the SADC Employment and Labour Sector on activities conducted to support Member States in the area of BLAs.	Introduction; Section II.D

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Annex



Annex. Existing Indicators for the Assessment of Bilateral Labour Agreements against International Labour Standards

Table 5: Good practice criteria aligned with international labour standards

Good practice number	Good practice description
1	Transparency and publicity; awareness creation about provisions
2	Exchange of relevant information between COO and COD on labour migration, and provision of relevant information to migrant workers
3	Evidence of normative foundations and respect for migrant rights (based on international instruments)
4	Specific reference to equal treatment of migrant workers, non-discrimination and/or protection of migrant rights
5	Provisions to protect migrant workers from recruitment malpractices at both origin and destination
6	Address gender concerns, and concerns of vulnerable migrant workers, particularly those not covered by labour laws in destination countries (domestic workers, agricultural workers, etc.)
7	Social dialogue involving concerned stakeholders besides government parties; employers in COO and COD, workers, civil society organizations
8	Coverage of wage protection measures; e.g. timely payment, allowable deductions, provision for overtime work, issue of receipts and payment into bank accounts
9	Concrete and enforceable provisions relating to employment contracts and workplace protection
10	Provision for human resource development and skills improvement
11	Concrete implementation, monitoring and evaluation procedures
12	Prohibition of confiscation of travel and identity documents
13	Provision for recognition of skills and qualifications in the destination country
14	Provide social security and health care benefits for migrant workers
15	Defining clear responsibilities between parties
16	Incorporation of concrete mechanisms for complaints and dispute resolution procedures, and access to justice
17	Provision for free transfer of savings and remittances
18	Coverage of the complete migration cycle

Source: Wickramasekara, 2015 (Annex 2. Table A1: Good Practices Scores by Region).

Note: CoO – country of origin; CoD – country of destination.

For countries that have ratified ILO Convention No. 97, it is also possible to use the 27 topics of the Model Agreement provided in the Annex of Recommendation No. 86. These are listed in Table 6. These criteria can also serve independently of the fact that the countries have ratified the Convention.

Table 6: Topics listed in the Model Agreement of the International Labour Organization Recommendation No. 86


1	Exchange of information
2	Action against misleading propaganda
3	Administrative formalities
4	Validity of documents
5	Conditions and criteria of migration
6	Organization of recruitment, introduction and placing
7	Selection testing
8	Information and assistance of migrants
9	Education and vocational training
10	Exchange of trainees
11	Conditions of transport
12	Travel and maintenance expenses
13	Transfer of funds
14	Supervision of living and working conditions
15	Settlement of disputes
16	Equality of treatment
17	Supply of food
18	Housing conditions
19	Social security
20	Contracts of employment
21	Change of employment
22	Employment stability
23	Provisions concerning compulsory return
24	Return journey
25	Double taxation
26	Methods of cooperation
27	Final provisions

Drawing on Geronimi’s work, the IOM/ILO/OSCE 2006 *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* provides the following 24 elements of a BLA:

Table 7: Basic elements of a bilateral labour agreement

1	The competent government authority
2	Exchange of information
3	Migrants in an irregular situation
4	Notification of job opportunities
5	Drawing up a list of candidates
6	Pre-selection of candidates
7	Final selection of candidates
8	Nomination of candidates by the employers (possibility for the employer to provide directly the name of a person to be hired)
9	Medical examination
10	Entry documents
11	Residence and work permits
12	Transportation
13	Employment contract
14	Employment conditions
15	Conflict resolution mechanism
16	The role of trade unions and collective bargaining rights
17	Social security
18	Remittances
19	Provision of housing
20	Family reunification
21	Activities of social and religious organizations
22	Establishment of a joint commission (to monitor the agreements’ implementation)
23	Validity and renewal of the agreement
24	Applicable jurisdiction

Source: Geronimi (2004:23–26), in Baruah and Cholewinski, 2006:179.



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