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Social Protection for Migrant Workers Abroad: Addressing the Deficit via Country-of-origin Unilateral Measures?



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Social Protection for Migrant Workers Abroad: Addressing the Deficit via Country-of-origin Unilateral Measures?

Marius Olivier

Introduction

From the perspective of international standards, destination countries are supposed to extend social (security) protection – at least in the area of contributory benefits – to migrant workers on the basis of equal treatment with national workers. Yet, migrant workers often experience inadequate social protection provisioning in destination countries. Increasingly, one of the reasons relates to clear indications of nationality discrimination in both social security and related laws and the practice of several destination countries. The lack of bilateral social security coordination arrangements contributes to the absence of or insufficient social (security) protection extended to migrant workers in destination countries, while multilateral social security agreements are still inadequately developed in several regions of the world. In addition, both bi- and multilateral agreements are often restricted to certain migrant worker categories. This paper reflects on unilateral measures introduced by sending countries in an attempt to deal with this deficit, and critically evaluates the sufficiency and appropriateness of such measures.

Challenges faced by migrant workers abroad in relation to access to social protection

In many destination countries migrant workers are faced with a lack of, or weak social protection coverage. The reasons for this may be manifold. In particular, in certain regions, especially in Gulf countries, limited provision is made for the extension of social protection to migrant workers. In fact, there is a tendency, especially in ASEAN countries, to develop separate but inferior regimes for the coverage of migrant workers, in particular unskilled and lower-skilled migrant workers. The protection so provided is less beneficial in comparison with that available to nationals, and at times also higher skilled non-nationals.¹

Also, the social protection system of the destination country may not be adequately developed. This may be the case where workers migrate to countries, for example, within less developed regions of the world, where limited provision is made for social protection. Furthermore, bilateral (social security) agreements are still new to large parts of the developing world; where they do exist, they often only cover a limited range of benefits, and only in relation to certain workers, in particular higher-skilled workers.

¹ M Olivier *Social protection for migrant workers in ASEAN: developments, challenges and prospects* (Final draft report, June 2017) 114. Malaysia can be cited as an example. In the area of *employment injury benefits*, a separate scheme was initiated for migrant workers (the Foreign Workers Compensation Scheme (FWCS)) in 1993. This removed the equal treatment of foreign workers, as well as the possibility of portable employment injury benefits. Regarding *health insurance benefits*, since 1 January 2011 migrant workers are covered by the separate Health Insurance Protection Scheme (SPIKPA). Apparently, the health policy provides for a higher medical fee for migrants compared to citizens, who are covered under the different, subsidised mainstream health insurance scheme. See B Harkins *Review of labour migration policy in Malaysia* (ILO, 2016) 21; Olivier 67-68.

In fact, generally, migrant workers may not be covered by the social protection system of either the host or the home country due to:²

- Lack of extra-territorial application of the laws (and social protection systems) of the country of origin
- Nationality requirements
- Residence requirements
- Work in the informal economy
- Documentation and other administrative barriers

Protection for migrant workers: historical approaches and (the lack of) international standards

Generally speaking, and as a principle of international law, countries have assumed responsibility for nationals/citizens living and working abroad, at least to the extent of diplomatic protection. However, this has not necessarily translated in extending social protection to them. Yet, the realisation that migrant workers in particular are in need of such protection, has given rise to what has become known as international coordination law, both in terms of bilateral agreements and earlier international standards: this entails the principle of equal treatment of migrant workers, appearing from the *reciprocity of unilateral solutions based on citizenship/nationality status*. In particular, older ILO Conventions required of ratifying Member States to extend the same social security protection available to their national workers to migrant workers of other ratifying countries, in the social security area covered by the particular Convention.³

Modern co-ordination instruments (especially bi- and multilateral social security treaties) have reduced the role of citizenship and reciprocity. Increasingly, protection has been based on a *human rights understanding* of the need of migrant workers to be protected by social protection arrangements. This is also evident from the current international standards framework.⁴ The general principle contained in international human rights instruments pertaining to non-citizens is that all persons, by virtue of their essential humanity, should enjoy all human rights *unless exceptional distinctions, for example, between citizens and non-citizens, serve a legitimate State objective and are proportional to the achievement of that objective*.⁵ It has also been remarked that, “[A]ll current ILO social security standards define the personal scope of coverage irrespective of nationality and almost all contain similar clauses on equality of treatment between nationals and foreign workers in the host country, and most of them contain special non-discrimination clauses, such as, for example, Convention 102 of 1952.”⁶ Therefore, the extension of equal treatment is in fact no longer dependent on reciprocity – a tendency which is also confirmed by recent UN and ILO instruments.⁷ In the European Union, the adoption

² W van Ginneken “Making social security accessible to migrants” *World Social Security Forum* (2010) 3; Olivier (note 1) 31.

³ See, for example, ILO Convention 19 of 1925 (Equality of Treatment (Accident Compensation) Convention) and, of wider application, ILO Convention 118 of 1962 (Equality of Treatment (Social Security) Convention): this latter Convention requires of Member States to guarantee equality of treatment of social security provisions for migrant workers for any or all of the 9 branches of social security that are in force in its territory and for which it agrees to be bound.

⁴ See among others Article 9 of the International Covenant on Economic, Social and Cultural Rights (1966) and the interpretation accorded to this Article by the UN Committee on Economic, Social and Cultural Rights in its General Comment No 19 on the right to social security (E/C12/GC/19 of 4 February 2008).

⁵ D Weissbrodt *Final report on the rights of non-citizens* (UN Doc. E/CN.4/Sub.2/2003/23 (2003)) accessed at <http://hrlibrary.umn.edu/demo/noncitizenrts-2003.html> (June 2004) 4. In its General Comment 15 the UN Human Rights Committee explained that “the rights set forth in the Covenant [on Civil and Political Rights] apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness ... The general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”: See E/CN.4/Sub.2/2002/25/Add.1 paras 14, 50, 51, 63, 66.

⁶ See N Baruah and R Cholewinski *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* (2006) 154-155.

⁷ See Article 27 of the 1990 UN International Convention on the Protection of Rights of all Migrant Workers and par 6 of ILO Recommendation 202 of 2012, on National Floors of Social Protection, which suggests the extension, in principle, of a national social protection floor to “all residents”. And yet, the position appears to be particularly nuanced: there is a discernible trend, confirmed by both international standards and state practice, towards affording *enhanced protection to regular and longer-term migrant workers, often with reference to key principles operative in this domain, such as the lawful residence, lawful employment and means of subsistence criteria*: Olivier (note 1) 120.

of the EU Single Permit Directive⁸ provides an important example of a supra-national arrangement, which compels host countries (i.e. EU Member States) to extend both labour law and social security protection to lawfully residing migrants, in principle on the same basis of protection extended to their own nationals – as explained below.

Mainly as a result of the assumption that countries of destination will in accordance with international standards extend social protection to migrant workers, country-of-origin unilateral measures were deemed to be unnecessary: consequently, no binding international standards framework has yet developed. Nevertheless, increasingly reference to these measures is made in soft law and explanatory and implementing instruments, for example:

- 2007 ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers: Origin countries are encouraged to set up policies and procedures to protect their workers when abroad
- 2006 ILO Multilateral Framework on Labour Migration,⁹ which provides a comprehensive overview of principles and guidelines as to how labour protection for such migrant workers can be improved

Extended country-of-origin protection for national workers employed abroad: developing practice

In perhaps one of the most important and notable developments in recent years, several migrant-sending countries have introduced measures to provide some social security protection to their own workers abroad, invariably strengthened by an extensive raft of supporting measures, including a supportive, dedicated institutional and operational framework. For example, in ASEAN, no less than 6 out of the 10 countries have now done so.¹⁰ These measures include:¹¹

- Establishing special overseas workers' welfare funds by national and even (as in the case of India) state governments extending protection to workers and, at times, also their families (as in the case of India, the Philippines, Sri Lanka and Thailand). Examples include:
 - Philippines: Establishment of the (i) Social Security System (SSS) Programme to Overseas Migrant Workers, based on voluntary membership; and the (ii) Flexi-Fund Programme, on top of the voluntary SSS scheme, providing for individual worker accounts.
 - Sri Lanka: Contributory pension scheme for Sri Lanka's 2 million overseas migrant workers. Contributions may be paid monthly or as a lump sum, and are subsidised by government (60% of costs). The scheme provides an old age pension at age 60 and survivors' benefits.
- Voluntary affiliation in national social insurance schemes, for example, those of Albania, Jordan, Mexico, Mozambique,¹² the Philippines and the Republic of Korea.
- Exportability of social security benefits and the provision of related services (e.g. medical care) abroad.¹³

8 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

9 ILO *Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach in labour migration* (ILO, Geneva, 2006).

10 Olivier (note 1) 115.

11 See also the three case studies below: Philippines, Indonesia and Thailand.

12 Mozambican workers abroad who are not covered by the compulsory social security system of the host country may register for compulsory social security in -Mozambique, but the more limited scheme for self-employed persons will be applicable to them: Article 14.4 of the Law on Social Protection 4 of 2007, read with article 18.2. The Social Security Act 34 of 1994 (Namibia) provides for the coverage of Namibian citizens and permanent residents who work for a Namibian employer outside Namibia: see the definition of "employee" in s 1 of the Act.

13 The legislation of countries, especially countries that conclude bilateral social security agreements, often regulates the exportability of social security benefits.

The extension has been achieved through, among others:¹⁴

- The adoption of constitutional guarantees and statutory frameworks facilitating the protection of migrant workers abroad, for example, the 1987 Constitution of the Philippines,¹⁵ recent Filipino legislation,¹⁶ the 2008 Constitution of Ecuador¹⁷ and Mexico's migration law and regulations.¹⁸
- Provisions in bilateral social security treaties providing for continued coverage of certain categories of migrant workers in the social security system of the labour-exporting country, for example, the Indian–Belgian agreement of 2009, which requires that posted workers be covered by the social security legislation of their country of origin and that they pay social security contributions to their country of origin's social security system, as long as the period of posting does not exceed five years.¹⁹
- Measures and schemes aimed at supporting the flow of remittances and social insurance contributions to the country of origin.

These extension mechanisms are often supported by a range of complementary measures, including a dedicated emigrant Ministry and/or specialized statutory bodies to protect the interests of their citizens/residents in the diaspora (e.g., India, Philippines, Bangladesh, Sri Lanka, Nepal), and information on recruitment contracts and consular support.²⁰ The Philippines, for example, has established the Office of the Undersecretary for Migrant Workers Affairs (OUMWA) at the Department of Foreign Affairs; the Filipino Workers Resource Center; Social Security System offices in several countries; and has invested in the screening of and provision of information to applicants. Generally, other support services are invariably made available to migrant workers at three stages: pre-departure, at destination (i.e., in the host country) and upon return (e.g., via return settlement programmes); and include lobbying for the protection of migrant workers.

Shortcomings of country-of-origin measures

These unilateral measures appear to be particularly problematic, in the absence of a rights basis and appropriate and effective monitoring, enforcement and persuasion mechanisms. Moreover, often reliance has to be placed on the contributions by workers only, which could make participation in these arrangements costly or subject to reduced benefit entitlement. They are also associated with limitations of extra-territorial implementation – therefore, on-line transactions, using embassies as vehicles, and even arranging with

14 A Hall *Migrant Workers' Rights to Social Protection in ASEAN: Case Studies of Indonesia, Philippines, Singapore and Thailand* (Migrant Forum in Asia/Friedrich-Ebert-Stiftung, 2011); ILO *Best practices on social insurance for migrant workers: the case of Sri Lanka* (ILO Asian Regional programme on Governance of Labour Migration, Working Paper 12, 2008); N Ruiz *Managing Migration: Lessons from the Philippines* (Migration and Development Brief No. 6) (World Bank, Washington, DC, 2008). See also R. Ofreneo and J. Sale "Social security and migrant workers in the Philippines: Social protection for the country's economic protectors" in *Social Security and Migrant Workers: Selected Studies of Cross-Border Social Security Mechanisms* (editors: Roger Blanpain, Pablo Arellano Ortiz, Marius Olivier, Gijsbert Vonk) (Kluwer, 2014) 167-186 on the Philippines. For a general overview, see W van Ginneken "Social protection for migrant workers: national and international policy challenges" *European Journal of Social Security* (EJSS), vol 13(5), 2013, 209-221 at 213-214.

15 The 1987 Constitution requires of the State to provide full protection to labour, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all. Article XIII, section 3.

16 Section 2 of the *Overseas Workers Welfare Administration Act* of 2015 stipulates: "It is the policy of the State to afford full protection to labor, local and overseas, organized and unorganized, and promote full employment opportunities for all. Towards this end, it shall be the State's responsibility to protect the Overseas Filipino Workers (OFWs)."

17 Ecuador essentially provides for a 'universal citizenship' irrespective of where a person may reside – every person is equal and shall possess the same rights, duties and opportunities, and nobody shall be discriminated against on any grounds, including his/her migratory condition (Constitution of the Republic of Ecuador, 2008, Article 11(2)). See also Articles 416(6) and (7)). The constitutional imperative to protect Ecuadorians abroad is further reflected in the National Plan of Foreign Policy (*Plan Nacional de Política Exterior*) 2006–2020, which establishes 'protection to emigrants' as one of the priority axes of Ecuadorian foreign policy."

18 Article 2 sets guidelines for the formulation of migration policy, including: (i) respect for the rights of both Mexican and foreign migrants; (ii) facilitation of international mobility; (iii) complementarity of labour markets with countries in the region; and (iv) full equality between nationals and foreigners, particularly as it relates to civil liberties.

19 Agreement on social security between the Kingdom of Belgium and the Republic of India, 2009, Article 8.

20 See Van Ginneken (note 12).

host country institutions (such as the Netherlands has been doing in relation to many of its social security beneficiaries abroad) may be required. Furthermore, contributions are often too low to provide meaningful coverage and may place too much burden on migrant workers, in countries where these workers have to contribute. Innovative funding solutions are needed, including allowing the channelling of remittances to help fund contributions. Also, the benefit range provided for by these arrangements is often too unwieldy and goes beyond social security provision – such as repatriation costs. Therefore, a more focused arrangement is needed to ensure and enhance appropriate social security coverage.

Furthermore, at this stage affiliation to social security institutions in and access to social security arrangements of the country of origin are mostly of a voluntary nature. Evidently this has an impact on the efficacy of unilateral mechanisms. In addition, these arrangements do not generally cover informal workers and undocumented migrants. As a result, they do not guarantee a rights basis for the treatment of these vulnerable categories.

Conclusion/evaluation²¹

Unilateral arrangements emanating from countries of origin are of relatively recent origin, but seem to be growing in extent and popularity. They cover sizeable numbers of migrant workers – for example, in the case of the Philippines, 8 million, and in the case of Sri Lanka, 2 million migrant workers. Yet, they cannot effectively provide for the full extent of social (security) protection which a host country would be able to extend and can, therefore, never replace what should be the primary source of the protection of migrant workers' social security rights, i.e. coverage under the laws of the destination country. In fact, the effectiveness of unilateral measures is often constrained by the weakly developed social security systems of less-developed countries of origin.

It should be noted that these arrangements and interventions imply a shift of the social security burden to the country of origin and its structures, despite the fact that migrant workers also contribute to the development of the destination country concerned.

On the other hand, unilateral arrangements emanating from countries of origin provide interesting and important avenues of coverage, protection and support, where none or little is available in the destination country concerned. These arrangements and interventions can provide some protection and may be easier to adopt than bi- and multilateral frameworks. As has been noted, such promotional measures would principally affect those involved in circular and temporary migration, and could be defined and strengthened through international migration agreements.²²

It is therefore argued that unilateral measures, important as they are, should remain measures of last resort, to be available to the extent that bilateral and other arrangements do not make the necessary provision. Nevertheless, whenever these measures are required, much can be done to improve the extension thereof by migrant-sending countries, by learning from the experience of other countries of origin, in both the global South and the global North.

It is also clear that many sending (and receiving) countries are in need of technical advice to develop and implement an appropriate framework for country-of-origin unilateral measures. A well-developed compendium of good practice examples may be of considerable assistance. Also, there is an evident need to develop a framework of international standards and guidelines to inform and strengthen the use of country-of-origin unilateral measures.

Finally, with some important exceptions (e.g., the Philippines and Indonesia), from a domestic perspective, a statutory mandate and often also a policy and programme framework may be absent. These need to be developed to provide clarity to beneficiaries and to those who have to implement the measures, and to provide the necessary rights basis for enforcement. Associated with this requirement is also the need to address the lack of awareness regarding the insurance contracted, and to address complex claim mechanisms.

21 See M Olivier, O Dupper & A Govindjee "Enhancing the protection of transnational migrant workers: A critical evaluation of regulatory techniques" (with O Dupper and A Govindjee) in *The Transnational Dimension of Labour Relations: A new order in the making?* (eds: E Ales and I Senatori) (Giappichelli Publishers, 2013), 291-343; Olivier (note 1) 131-132.

22 Van Ginneken (note 12) 214.

Appendices

Case study I: The Philippines²³

- Filipino workers recruited by foreign-based employers abroad may be covered by the Social Security System (SSS), provided for under the Social Security Act, 1997, on a voluntary basis.²⁴ In fact, Filipino migrant workers have two (2) layers of social security protection under the SSS:²⁵
 - A defined-benefit, social insurance scheme, providing basic pension as safety net – This is the same regular coverage programme available to local workers in the Philippines. It has been noted that voluntarily insured persons pay the combined insured person and employer contributions of 11% of gross monthly earnings, according to 31 income classes;²⁶ and
 - A defined-contribution, individual account scheme, serving as a supplemental pension-savings plan – This is the so-called SSS Flexi-Fund Program, a provident fund offered exclusively to Filipino migrants.
- Coverage flowing from membership of/registration with the Overseas Workers Welfare Administration (OWWA), which has been granted a key institutional role in the provision of benefits and services, including social security services to OFWs²⁷ – registration (on a two-yearly basis) is compulsory for OFWs whose employment contracts have been processed at the POEA and voluntary for nationals who left as non-contract workers and later acquired foreign employment. Social Security benefits available against the payment of a contribution include among others:²⁸
 - Death benefits
 - Disability (including total disability benefit in the event of a permanent disability) and dismemberment benefits
 - Burial benefit
 - Health care benefits (to be developed within a two year period, taking into consideration the health care needs of women).

23 See Olivier (note 1) 84-87.

24 Social Security Act, 1997, section 9(c). It has to be noted that *compulsory* coverage is only for sea-based OFWs. ILO comments on a previous version of this country profile indicated that, based on the ABND discussions, one of the gaps identified for SSS is that there are limited number of land-based OFWs covered under SSS because of the voluntary membership policy. It would appear necessary to address the gap is by covering land-based OFWs as compulsory members of SSS.

25 See, J (Senior Vice-President for International Operations, Social Security System (SSS) *Negotiating Bilateral Social Security Agreements: The Philippine Experience* (Presentation made at the 9th ASEAN Forum on Migrant Labor (AFML), Vientiane, Lao PDR).

26 ISSA and SSA *Social Security Programs Throughout the World: Asia and the Pacific* (2017) 197, also indicating that the minimum monthly earnings used to calculate contributions are 5,000 pesos for voluntarily insured overseas workers; the maximum monthly earnings used to calculate contributions are 16,000 pesos.

27 The Overseas Workers Welfare Administration Act, 2015 stipulates in section 34, which deals with "Guiding Principles" as follows: "Pursuant to its mandate, the OWWA shall provide gender-responsive reintegration programs, repatriation assistance, loan and credit assistance, on-site workers assistance, death and disability benefits, health care benefits, education and skills training, social services, family welfare assistance, programs and services for women migrant workers and other appropriate programs that provide timely social and economic services.

Nothing in this Act shall be construed as a limitation or denial of the right of an OFW to avail of any benefit plan which may be adopted in the employment contract, or offered voluntarily by employers, or by the laws of the receiving country, over and above those provided under this Act."

28 *Ibid*, section 35(3).

- Compulsory insurance cover provided and paid for by licensed recruitment agencies, should the OFW have been recruited by the agency. Social security benefits are provided for by *Republic Act No. 10022 of 2009*,²⁹ amending the *Migrant Workers and Overseas Filipinos Act of 1995*,³⁰ and include:³¹
 - Accidental death;
 - Permanent total disablement;
 - Medical evacuation and medical repatriation;
 - Subsistence allowance in the course of a case or litigation for the protection of the OFWs' rights in the receiving country.
- Social security benefits or insurance provided for in the employment contract between the foreign employer/principal and the OFW, again in the event that the OFW has been recruited by a licensed recruitment agency – for which the employer/principal and the recruitment or placement agency incur joint and several liability.³²
- Several other legal, institutional and operational measures and interventions support the extension of social security support to OFWs. These include the stipulation that the issuance of permits of deployment abroad by POEA is only allowed where the rights of Filipino migrant workers are protected. In this regard, the *Migrant Workers and Overseas Filipinos Act of 1995* recognises any of the following as a guarantee on the part of the receiving country for the protection of the rights of overseas Filipino workers:³³
 - It has existing labour and social laws protecting the rights of workers, including migrant workers;
 - It is a signatory to and/or a ratifier of multilateral conventions, declarations or resolutions relating to the protection of workers, including migrant workers; and
 - It has concluded a bilateral agreement or arrangement with the government on the protection of the rights of overseas Filipino
- Other legal, as well as institutional and operational arrangements provide a broader contextual framework *supporting* the extension of social security benefits to OFWs include among others the following:³⁴
 - Regulating and monitoring recruitment/placement agencies
 - Legal assistance
 - Hearing of and deciding upon OFWs' money claims

29 An Act amending Republic Act No. 8042, otherwise known as the Migrant Workers and Overseas Filipinos Act of 1995, as amended, further improving the standard of protection and promotion of the welfare of migrant workers, their families and overseas Filipinos in distress, and for other purposes.

30 Republic Act No. 8042 of 1995: Migrant Workers and Overseas Filipinos Act of 1995.

31 *Ibid*, section 37A, inserted by section 23 of Republic Act No. 10022 of 2009.

32 Migrant Workers and Overseas Filipinos Act of 1995, section 10, amended by section 7 of Republic Act No. 10022 of 2009.

33 Migrant Workers and Overseas Filipinos Act of 1995, section 4, amended by section 3 of Republic Act No. 10022 of 2009; Ofreneo, R & Sale, J "Social Security and Migrant Workers in the Philippines: Social Protection for the Country's Economic Protectors" in Ortiz, P, M Olivier & G Vonk *Social Security and Migrant Workers: Selected Studies of Cross-Border Social Security Mechanisms* (Kluwer, 2014) 171.

34 See in this regard See, J (Senior Vice-President for International Operations, Social Security System (SSS) *Negotiating Bilateral Social Security Agreements: The Philippine Experience* (Presentation made at the 9th ASEAN Forum on Migrant Labor (AFML), Vientiane, Lao PDR) and Omnibus Rules and Regulations implementing the Migrant Workers and Overseas Filipinos Act of 1995, as amended by Republic Act No. 10022.

- Ascribing and delineating roles of a large number of government departments and other (in particular public) institutions, such as:
 - Departments of Health, Labour and Employment and Interior and Local Government
 - POEA, OWWA, NRCO (National Reintegration Center for OFWs), Migrant Workers and Other Overseas Filipinos Resource Centre; LGUs (Local Government Units), and an Inter-Agency Committee to implement a shared government information system for migration
 - A large number of SSS offices – 21 offices in 16 countries (seven in Asia-Pacific)
- Tailor-fit systems supporting the registration of OFWs, contributions modalities, and benefit payment arrangements
- A range of user-friendly service channels made available by the SSS to Filipino migrants (including: overseas e-payment centres; online access to records; SSS @ social media sites; unified multi-purpose ID; and dedicated contact centre).

Case study 2: Indonesia³⁵

Indonesia has been extending considerable support to Indonesian workers abroad. One of the key components of this support has been the establishment of a wide-ranging compulsory insurance scheme for overseas Indonesian workers (known as TKI insurance),³⁶ largely informed by several supportive regulatory instruments.³⁷ The lead provision is Article 68 of the 2004 *Act concerning the Placement and Protection of Indonesian Overseas Workers*. It stipulates that the private (recruitment/placement) agency is obliged to insure workers abroad in an insurance programme to be regulated per Ministerial decree.³⁸ The insurance premium is payable by the recruiting agency, although this is then recovered from the workers.³⁹

The insurance provided for by the law covers three stages: pre-placement, during placement and after placement.⁴⁰ At the pre-placement stage the following cover, in relation to the risks specified below, is provided for a period of five months:

1. Death;
2. Sickness and disability;
3. Accidents;
4. Failure to depart due to no fault of prospective migrants; and
5. Physical violence and rape / sexual assault.

35 See Olivier (note 1) 54-56.

36 See Ministry of Manpower of the Republic of Indonesia *Indonesian Workers Protection's Policy through TKI Insurance Program* (Powerpoint presentation, 29 September 2016), accessed at http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/--ilo-jakarta/documents/presentation/wcms_533051.pdf. See also ILO *Social Protection for Indonesian migrant workers: Efforts and challenges* (Brief, 2015) 1-3. Presently, TKI insurance is managed by a consortium of private insurance companies. The migration of TKI compulsory insurance to BPJS-Employment is currently considered.

37 E.g., Law No. 39 of 2004 on Placement and Protection of Indonesian Workers Abroad; Law No. 6 of 2012 on Ratification of International Convention on the Protection of the Rights of All Migrant Workers and their Families; Ministerial Law No. PER-07/MEN/V/2010 on TKI insurance with its amended Ministerial Law No. 1 Year of 2012 on amended Ministerial Law on TKI Insurance; Ministry Law No. 22 of 2014 on the Implementation of the Placement and Protection Indonesian Overseas Workers; Ministerial Decree No. 212 of 2013 on TKI Insurance Consortium JASINDO; Ministerial Decree No. 213 of 2013 on TKI Insurance Consortium ASTINDO (amended by Ministerial Decree No. 20 of 2014 on Amendment of Ministerial Decree No. 213 of 2013); Ministerial Decree No. 214 of 2013 on appointment of TKI Insurance "MITRA TKI: *Ibid*".

38 See in this regard Ministerial Law No. PER-07/MEN/V/2010 on TKI insurance and its amending Ministerial Law No 1 Year 2012 on amended Ministerial Law on TKI Insurance.

39 ILO *Social Protection for Indonesian migrant workers: Efforts and challenges* (Brief, 2015) 3: " ..., as nor the recruiting agency, neither the employer are obliged by law to bear a part of it." The Brief also indicates other challenges being experienced, including lack of clarity and claims procedures.

40 Ministry of Manpower of the Republic of Indonesia *Indonesian Workers Protection's Policy through TKI Insurance Program*.

During placement, the following coverage is extended, in relation to the risks specified below, and for a period of 24 months (which can be extended, as indicated below):

1. Death;
2. Illness and disability;
3. Accidents inside and outside of working hours;
4. Termination of employment (PHK) individually or in mass prior to the expiration of labor agreements;
5. Unpaid wages;
6. Problematic deportations;
7. Legal problems;
8. Physical violence and rape / sexual harassment;
9. Insanity;
10. Transfer of migrant workers to another workplace / other places that are not in accordance with the placement agreement; and
11. Failed placement through no fault of migrant workers;

For the period after placement, the cover foreseen (for a one month period), in relation to the following risks, includes:

1. Death;
2. Illness;
3. Accident; and
4. Actions of others during the return trip to the area of origin, such as the risk of physical violence and rape / sexual assault and risk of loss of property.

The insurance coverage can be extended if the labour contract is extended. A one-year extension attracts a premium of 40% of the (initial) insurance amount, while a two-year extension attracts an additional 80% of the insurance amount.⁴¹

It should be noted that at the pre- and post-placement stages, it is possible (and could indeed be imperative, especially if the Indonesian worker works in the formal sector) to be a registered member of and paying contribution to the BJPS schemes. The provisions in relation to those schemes, outlined in the previous section, would in these circumstances be applicable to the worker concerned.

⁴¹ *Ibid.*

Case study 3: Thailand⁴²

An extensive framework for the protection of Thai migrant workers abroad has been put in place. The welfare protection available in this regard is perhaps less pronounced, but has steadily been developing. In particular, voluntary participation of a Thai national whose employer has offices abroad or who regularly travels to work abroad in the national contributory social insurance scheme provided for under the *Social Security Act, 1990* is possible, on the basis of a legislative amendment in 2015.⁴³

Various modalities for moving overseas exist,⁴⁴ although many Thai migrant workers migrate irregularly.⁴⁵ One of the channels concern the range of bilateral labour agreements/memoranda of understanding concluded between Thailand and other countries – including Taiwan, South Korea, Israel, Japan, Brunei, Malaysia and the UAE. It is not clear to what extent provision is made for social security protection by either the host country, or Thailand, in favour of the affected Thai migrant workers.

Of particular importance though is the assistance available under the Fund for helping Thai overseas workers, namely the Fund for Job-Seekers Working Abroad. This Fund was established in terms of the provisions of chapter VI the *Employment and Job-Seeker Protection Act, 1985*.⁴⁶ It has been reported that the following benefits are provided by the Fund:⁴⁷

- *Health care*, including health care for accidents occurred before leaving Thailand
- *Disability compensation* caused by an accident both inside and outside Thailand
- *Death benefits*

An extensive range of measures to support Thai overseas workers have been put in place over the years. Of particular importance is the institutional framework of support that has been rolled out, including⁴⁸ –

- Thailand Overseas Employment Administration (TOEA), in charge of supervising and facilitating the process for Thai workers wishing to work overseas; coordinating with host countries; and providing a protective framework via the Fund mentioned above, and by establishing several Labour Affairs offices located mostly in Thai embassies (to provide information and assistance to Thai workers);
- The Protection of Thai Nationals Abroad Division within the Department of Consular Affairs, Ministry of Foreign Affairs, responsible among others for providing assistance to Thai nationals in distress; and promoting and protecting Thai workers abroad;
- Office of International Peoples' Rights Protection (OIPP), responsible among others for giving legal advice; and collaborating with the Ministry of Foreign Affairs and the Ministry of Labour to provide legal assistance to Thai nationals.

42 See Olivier (note 1) 109.

43 See the Social Security Act (No 4) B.E. 2858 (2015).

44 I.e. via recruitment agencies; self-managed migration; via the Department of Employment/Ministry of Labour procedure; employers sending migrant workers abroad; and employers sending migrant workers abroad for training; and based on the provisions of government-to-government arrangements.

45 Monrawee, L *Report that reviews laws, policies, programmes related to social protection of migrant workers in Thailand* (prepared for the ILO, in file with author) (June 2016) 25.

46 Employment and Job-Seeker Protection Act B.E. 2525 (1985).

47 *Ibid*, 32-33.

48 *Ibid*, 28-30.

Extending social protection to migrant workers unilaterally: the example of the EU Single Permit Directive⁴⁹

The adoption of the EU Single Permit Directive⁵⁰ provides an important example of a supra-national arrangement, which compels host countries (i.e. EU Member States) to extend both labour law and social security protection to lawfully residing migrants, in principle on the same basis of protection extended to their own nationals. This Directive establishes a single application procedure for third-country nationals to reside and work in the territory of a Member State, together with a common set of rights (including decent basic working conditions and access to social security) for third-country workers *legally residing* in a Member State.⁵¹ Third-country nationals will specifically be granted treatment equal with that of EU nationals in matters concerning pay and dismissal, health and safety at work, the right to join trade unions, and access to public goods and services, if they are working legally in Europe.⁵² Equal treatment is also provided for as regards social security, subject to some restrictions, such as that Member States are permitted to apply restrictions in the field of social security to third-country workers with contracts of less than six months' duration. The Directive essentially guarantees, with reference to the principle of lawful employment, that "all persons working legally in Europe must have the same rights as European workers".⁵³ It is also important to note that this Directive appears to adopt an *integrated* approach towards the areas of labour law and social security coverage and application, which is potentially relevant for the construction of a more co-ordinated legal response to the challenges associated with migrant work.

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49 Taken from M Olivier, O Dupper and A Govindjee "Enhancing the protection of transnational migrant workers: A critical evaluation of regulatory techniques" (with O Dupper and A Govindjee) in *The Transnational Dimension of Labour Relations: A new order in the making?* (eds: E Ales and I Senatori) (Giappichelli Publishers, 2013) (p 291-343).

50 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

51 Article 12 of the Directive. See Rozumek, M "EU Directive on a single application procedure for a single permit for third-country nationals to reside and work – groping towards harmonisation of EU migration law" in *migrationonline.cz*, 17 March 2014, accessed at <http://migrationonline.cz/en/e-library/eu-directive-on-a-single-application-procedure-for-a-single-permit-for-third-country-nationals-to-reside-and-work>

52 *Ibid.*

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