

# **Social Security for Migrant Workers**

## A rights-based approach

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# Foreword

In an increasingly globalizing world, the estimated number of migrant workers worldwide swelled to 105 million in 2010. The dynamic nature of global labour markets requires that national social security systems take necessary steps to ensure migrant workers' rights to social security through effective international coordination.

This publication is intended to serve as a comprehensive guide for the international coordination of social security, covering both basic principles and practical aspects. This publication is closely related to a series of training modules published by the ILO in 2010 dealing with the coordination of social security.

Part I was prepared by Kenichi Hirose, Senior Specialist in Social Security of the ILO Decent Work Technical Support Team and Country Office for Central and Eastern Europe (ILO DWT/CO–Budapest). Concerning international labour standards, this part largely relies on the existing literature but also includes up-to-date information. The author would like to thank Emmanuelle St-Pierre Guilbault, Legal Specialist, Social Security Department, ILO Geneva, for her technical comments.

Part II was written by Edward Tamagno, Policy Associate, Caledon Institute of Social Policy, Canada. It presents a step-by-step guide for negotiating and concluding bilateral social security agreements, highlighting issues and challenges that policy makers may face while also drawing on best-practice experiences in coordinating social security systems.

Part III was authored by Milos Nikac, Assistant Director, Institute for Social Insurance, Republic of Serbia. This part focuses on the implementation of social security agreements and the coordination of benefits-in-kind.

We hope that this publication will be a useful reference for those concerned with the international coordination of social security benefits.

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# I. Protecting the Social Security Rights of Migrant Workers – an international standards perspective

## 1. Introduction

As a member of society, every person has a right to social security. Effective social security systems are powerful tools to provide income security, prevent and reduce poverty and inequality, and promote social inclusion and dignity. As an important investment in the well-being of workers and the population at large, social security enhances productivity, employability and supports sustainable economic development, thereby contributing to a fair globalization with decent standards of living for all<sup>1</sup>.

Recently, globalization and regional integration have added impetus to the growing mobility of workers across borders in search of employment. Current international migration flows are becoming more complex and diverse, with changes in the form, status, direction and duration of the migration experience. In contrast to earlier trends of permanent and settler movements, temporary migration is becoming more prominent. International migrants today are a very diverse group, including seasonal workers, temporary contract workers, skilled migrant workers, students, asylum seekers and refugees, as well as workers with irregular status.

The number of international migrants worldwide is estimated at 214 million, with women comprising almost 50 per cent. Migrant workers (those persons who migrate for employment) total about 105 million, who together with their families comprise about 90 per cent of all international migrants. International migration is now high on national, regional and global policy agendas as the movement of labour across borders has established itself as an important and enduring global phenomenon associated with growth and development.

The greater flow of people across national boundaries and more diverse forms of migration are creating new challenges as migrant workers face multiple disadvantages in working conditions, including limited legal rights, discrimination, social exclusion, and the lack of social security. Due to the territorial nature of social security and the diversity of the systems in terms of their conditions for

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1 See: Conclusions concerning the recurrent discussion on social protection (social security), International Labour Conference, 100<sup>th</sup> Session, 2011.

entitlement to benefits, specific difficulties relating to social security may arise when workers migrate from one country to another. As migrant workers play an ever more important role in models of increased economic integration, more workers will run the risk of losing their entitlement to social security. In fact, of the nearly 200 million migrant workers and their family members today, only a small fraction is likely to enjoy social security benefits. In addition, the more a worker moves from one country of employment to another, the more vulnerable he/she becomes in this respect.

Protecting the right of migrant workers to social security is important, not only for securing the equality of treatment in social security for migrant workers, but also for extending social security coverage to currently unprotected population. Increasing social security coordination between countries through bilateral and multilateral agreements and the ratification of relevant international Conventions should be a high priority of social policy as the well-being of millions of migrant workers and their families are at stake. Furthermore, the portability of social security rights does not only bear significance for the workers and their families, but undoubtedly facilitates the free movement of labour within and across economic zones and is, therefore, indispensable for the proper functioning of integrated labour markets.

This paper is organized as follows. The next section analyzes the various limitations of national legislation in providing social security coverage and entitlements to migrant workers and describes the need for a coordinated action to fulfil this gap. It then presents general ILO social security standards and specifically those addressing the social security of migrant workers and their family members. More precisely, review will be made of two key ILO Conventions – the Equality of Treatment (Social Security) Convention, 1962 (No. 118) and the Maintenance of Social Security Rights Convention, 1982 (No. 157). These instruments establish a framework and a set of internationally agreed principles and rules for the protection of migrant workers' social security rights through coordination of social security. Next, the paper discusses unilateral measures that some labour sending countries have adopted in order to protect their nationals working abroad. It concludes with a summary of the challenges and of the possible ways of achieving better protection for migrant workers and their families.

As social security benefits are usually granted on the basis of periods of employment, economic activity or residence, the registration with the national social security scheme is a prerequisite for the acquisition of social security rights. For this reason, this paper will focus primarily on the right to social security of “regular” migrant workers (i.e. migrants with formal and legal employment contracts), rather than those described as migrant workers with an “irregular” status.

## 2. Need for the coordination of social security

### 2.1. Restrictions in national legislation affecting migrant workers' social security rights

Migrant workers often face disadvantages in social security coverage and entitlement to benefits compared with national workers who live and complete their whole working life in one country. Many of these problems have their roots in inherent features of national legislations.



One of these features is the *principle of territoriality*, according to which the scope of application of social security legislation, as of any national legislation, is confined to the territory of the country in which it has been enacted. This is not only a reflection of the sovereignty of the state but is also a result of the legal and administrative difficulty of enforcing mandatory legislation in another state. As a consequence of this principle, migrant workers may not only lose coverage under the national social security system in their country of origin, but run the risk of having limited or no coverage at all in their country of employment as well.

Migrant workers' social security rights may also be affected by the *principle of nationality*. Although a number of countries recognize the equality of treatment between national and non-national workers in their social security legislations, some countries discriminate against migrant workers through national legislation that excludes specific categories of migrants, or in more extreme cases, all non-nationals from coverage or entitlement to social security benefits, or applies less favourable treatment to such groups on the basis of this principle.

Regarding the payment of benefits abroad, many countries suspend the payment of benefits to migrant workers who reside abroad, even though they export benefits to their own nationals residing abroad. Some countries completely prohibit the payment of benefits abroad, while others make the export of benefits conditional on the conclusion of reciprocal social security agreements with the countries of residence. Still others may only offer a lump-sum benefit in place of a pension if the insured person leaves the country. Such limitations may be due to monetary restrictions or to administrative problems (e.g. benefits in kind such as medical services cannot be provided directly by the competent social security institution outside of its area of competence), but may also be based on the underlying conception that a State is only responsible for those persons living within its own borders.

## 2.2. Restrictions of migrant workers' social security rights due to lack of social security coordination

In the absence of coordination between national legislations, migrant workers face the risk of losing their social security rights when they are successively or alternately covered by schemes of two or more countries. In almost all countries, the payment of benefits, with the exception of employment injury benefits, is conditional upon a qualifying period of contributions, employment, or residence. While such qualifying periods tend to be relatively short for short-term benefits, they can be significantly longer (up to 15 years or more) for long-term benefits. Due to these qualifying periods, migrant workers risk losing their entitlement to benefits if they do not accrue the required periods of coverage in each country and, consequently, fail to qualify for benefits in any of the respective countries of employment.

In this respect, bilateral and multilateral social security agreements are essential in ensuring that periods of employment in other signatory countries are taken into account in granting the right to benefits conditional upon the completion of a qualifying period. Many countries allow migrant workers to accumulate social security rights only when bilateral or multilateral social security agreements have been concluded with the workers' country of origin. Moreover, most countries make the export of benefits abroad dependent on the ratification of international conventions or the

conclusion of social security agreements with the countries of residence in order to control the ongoing entitlement to benefits of insured persons.

Generally, multilateral agreements are considered to have the advantage of generating common standards and regulations, thus avoiding discrimination among migrants from various sending countries who might otherwise be granted different rights and entitlements through different bilateral agreements. On the other hand, bilateral agreements have the advantage of providing greater flexibility and a possibility to take into account specific situations of the countries concerned. In addition, it requires less time and procedures to reach a mutual consent of the two parties. For these reasons, bilateral agreements are the most widely used instrument for social security coordination.

### 2.3. Applications of multilateral and bilateral agreements on social security

The network of social security agreements is particularly dense among industrialized countries. The European Union (EU) especially has a long history of the coordination of social security systems which aims at facilitating the free movement of citizens. Over the years, several amendments have been carried out to enlarge the personal and material fields of application. With the continuing enlargement of the EU, a new set of regulations<sup>2</sup> were adopted which entered into force on 1 May 2010. These new regulations improve and complete the basic principles established in the previous regulations<sup>3</sup>, and place an emphasis on coordination and cooperation among national social security administrations.

However, a closer look at the existing bilateral and multilateral agreements reveals that very few agreements have been concluded between migrant sending and migrant receiving countries<sup>4</sup>. This is mainly due to the fact that social security systems of migrant sending countries are insufficiently developed and, in many cases, lack the administrative capacity to implement or enforce any such agreement, which prevents them from concluding social security agreements with migrant receiving countries. Provident fund schemes also tend to inhibit these countries from concluding such agreements.

To summarize, the majority of countries provide for the equality of treatment between national and non-national workers regarding social security coverage. Many of them, however, make the maintenance of migrant workers' acquired social security rights and their rights during the course of acquisition dependent on the existence of social security agreements with the worker's country of origin. In practice, few migrant sending countries, which are usually developing countries, have

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2 Regulation (EC) No 883/2004 on the Coordination of Social Security Systems, and its Implementing Regulation (EC) No 987/2009.

3 Regulation (EEC) No 1408/71 and its Implementing Regulation (EEC) No 574/72.

4 For example, the United States, which is the world's main country of destination for migrants, has concluded 24 bilateral social security agreements, almost all of which are with countries that would be considered as fully developed (source: [http://www.ssa.gov/international/agreements\\_overview.html](http://www.ssa.gov/international/agreements_overview.html)). The situation is very similar when considering major migrant sending countries. For example, Mexico, the world's second largest migrant sending country, has only concluded five bilateral social security agreements. Although Mexico and the United States signed a social security agreement in 2004, the agreement has not yet become effective.

concluded such agreements or are bound by social security conventions. In the absence of social security agreements, only a small minority of migrant workers are able to realize their entitlement to social security benefits upon returning to their country of origin.

### 3. International standards on social security coordination

#### 3.1. ILO standards on social security

International labour standards, comprised of Conventions and Recommendations, are the principal means of action of the ILO to pursue its mandate. Achieving “the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care”<sup>5</sup> is at the heart of the ILO’s mandate.

Since its first session in 1919 until its 100<sup>th</sup> session in 2011, the International Labour Conference has adopted 189 Conventions and 201 Recommendations. The ILO Governing Body reviewed these Conventions and Recommendations relating to social security in 2002 in light of the current needs of the international community, and confirmed that eight of these Conventions and seven of these Recommendations are up-to-date. A list of the up-to-date ILO social security standards is found in Annex I of this paper. These are detailed, comprehensive instruments that lay down social security rights for workers and their families and formulate concrete obligations for member States.

The Convention on Social Security (Minimum Standards), 1952 (No.102), is the flagship of ILO social security conventions as it is the only international instrument that sets global minimum standards for all nine branches<sup>6</sup> of social security. Hence, it serves as a benchmark and reference in the gradual development of comprehensive social security systems at the national level. Convention No. 102 has also had significant influence at the regional level as it was used as the blueprint for instruments such as the European Code of Social Security and the European Social Charter. The other up-to-date Conventions adopted subsequently in the field of social security set higher standards for the different branches of social security.

Convention No. 102 and other up-to-date Conventions in the field of social security contain explicit non-discrimination clauses. For example, Part XI of Convention No. 102 is devoted to equality of treatment of non-national residents. Article 68, which applies to all branches of social security covered by the Convention, sets forth the principle that all non-national residents must have the same rights as national residents. However, this principle is combined with two flexible devices. First, the Convention authorizes an exception to this principle in respect of benefits payable wholly

5 Declaration concerning the aims and purposes of the International Labour Organization, ILC, 26<sup>th</sup> session, Philadelphia, 10 May 1944 (also referred to as the “Declaration of Philadelphia, 1944”)

6 The nine branches of social security for which Convention No. 102 makes provisions comprise: medical benefit; sickness benefit; unemployment benefit; injury benefit; old-age benefit; invalidity benefit; family benefit; maternity protection; and survivor’s benefit.

or mainly out of public funds and in respect of transitional schemes. The reason for allowing such an exception is to prevent possible abuses and safeguard the equilibrium of non-contributory schemes, particularly for old-age, invalidity and survivors' benefit by, for example, retaining the possibility of requiring non-national residents to complete a period of residence which would not be required for nationals. The second element of flexibility concerns contributory social security schemes which protect all employees. The Convention authorizes States to limit equality of treatment in the application of a Part of the Convention to nationals of States which have also accepted the obligations under that Part. In this case, equality of treatment may be made subject to the existence of a bilateral or multilateral agreement providing for reciprocity.

### 3.2. ILO standards on social security of migrant workers

The International Labour Conference has adopted specific instruments on the social security rights of migrant workers and their family members<sup>7</sup>.

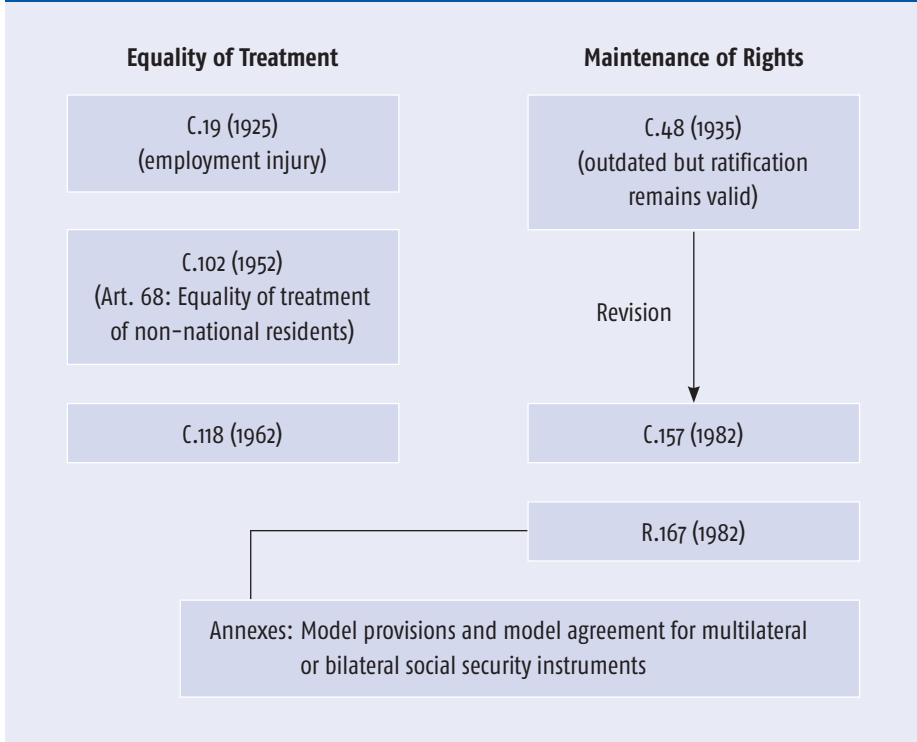
In the early years of the ILO, the Conference adopted the Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19), which guarantees to nationals of any member state that has ratified the Convention, and who suffer personal injury due to work accidents, equality of treatment with national workers without any condition as to residence.

The Equality of Treatment (Social Security) Convention, 1962 (No. 118) sets forth the right to equality of treatment between national and non-national workers and their family members with a view to specifically addressing the situation of migrant workers in relation to social security.

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7 The Conference has adopted instruments devoted exclusively to migrant workers and relating to all the aspects of protection required by the situation of these workers. Reference should be made in this respect to the Migration for Employment Convention (Revised) (No. 97) and Recommendation (No. 86), 1949, the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), and the Migrant Workers Recommendation, 1975 (No. 151). There also exist ILO Conventions and accompanying Recommendations that contain specific provisions for the social protection of certain categories of workers who move across borders, and notably the Maritime Labour Convention, 2006 (Art. IV, Regulations 4.1, 4.2 and 4.5) the Work in the Fishing Convention, 2007 (No. 188) (Art. 34-38) and Work in Fishing Recommendation, 2007 (No. 199) (para. 50-52), and the Domestic Workers Convention, 2011 (No. 189) (Art. 14) and the Domestic Workers Recommendation, 2011 (No. 201) (para. 20 and 26(2)).

FIGURE 1 • ILO STANDARDS ON SOCIAL SECURITY COORDINATION



The Maintenance of Migrants' Pension Rights Convention, 1935 (No. 48) was the first instrument addressing the maintenance of social security rights. This instrument proposed an international mechanism for the coordination of legislation respecting old-age, invalidity and survivors' pensions. It was undeniably a source of inspiration at the bilateral and the multilateral levels. The need to broaden and develop further such coordination was one of the elements which led to the revision of Convention No. 48 by the adoption of the Maintenance of Social Security Rights Convention, 1982 (No. 157)<sup>8</sup>, which provides for the maintenance of migrant workers' acquired social security rights or rights in course of acquisition.

8 Convention No. 157 is supplemented by the Maintenance of Social Security Rights Recommendation, 1983 (No. 167), which contains model provisions for the conclusion of bilateral or multilateral social security instruments, as well as a model agreement for the coordination of these instruments.

These Conventions establish five basic principles that form the backbone of all bilateral and multilateral agreements on social security.

- *Equality of treatment*, which means that a migrant worker should have, as far as possible, the same rights and obligations as the nationals of the destination country;
- *Determination of the applicable legislation* to ensure, by establishing the rules for determining the applicable legislation, that the social security of a migrant worker is governed at any one time by the legislation of one country only;
- *Maintenance of acquired rights and provision of benefits abroad*, which means that any acquired right, or right in course of acquisition, should be guaranteed to the migrant worker in one territory, even if it has been acquired in another, and that there should be no restriction on the payment, in any of the countries concerned, of benefits for which the migrant has qualified in any of the others;
- *Maintenance of rights in course of acquisition*, which means that where a right is conditional upon the completion of a qualifying period, account should be taken of periods served by the migrant worker in each country; and,
- *Reciprocity*, which is an underlying principle of all these Conventions, means that each country which is a party to an agreement undertakes to apply the same mechanisms as every other party to make its social security benefits more accessible to migrant workers. Reciprocity also means that there is a reasonable degree of comparability in the obligations that each party assumes as a result of an agreement. A country, which refuses equal treatment to workers from another country, cannot expect that the other country will grant equal treatment to its own workers in return. This feature of reciprocity is almost unique to this subject of labour migration.

### 3.3. The Equality of Treatment (Social Security) Convention, 1962 (No. 118)

#### (i) Scope of application

The scope of Convention No. 118 covers all the branches of social security envisaged by Convention No. 102. However, under Convention No. 118, States have the possibility of confining their ratification to one or more of the nine branches of social security. The Convention does not apply to special schemes for civil servants and war victims or to public assistance.

#### (ii) Equality of treatment

States that ratify Convention No. 118 undertake to grant, within their territory, equality of treatment to the nationals of any other State for which the Convention is in force. In contrast with Conventions Nos. 102, 121, 128 and 138, the equality of treatment envisaged by Convention No. 118 does not concern all non-national workers employed on the territory of the State which has ratified the Convention, but only those who are nationals of a State which has also ratified the Convention. It should also be noted that the provisions of the Convention are applicable to

refugees and stateless persons, for whom equality of treatment must be secured without any condition of reciprocity (Article 10).

Equality of treatment relates to coverage and the right to benefits and must be granted globally for all branches of social security for which member states have accepted the obligations of the Convention (Article 3). It should be noted that the principle of global reciprocity is combined with an option which allows States to make exceptions to the provisions of Article 3 for a specified branch in the case of nationals of any State which has legislation relating to that branch but does not grant equality of treatment in respect thereof to the nationals of the first State.

With regard to the right to benefit, equality of treatment has to be granted without conditions of residence (However, the right to certain benefits paid under non-contributory schemes may be made subject to a condition of residence prior to claiming benefit, the duration of which must not exceed the limits set out in the Convention). This provision does not mean that benefits must be granted in all cases to non-nationals without any condition of residence, but that equality of treatment must not be limited by a condition of residence imposed solely upon non-nationals.

(iii) Provision of benefits abroad

Article 5 of the Convention No. 118 lays down the principle of the provision of benefits abroad with respect to old-age, invalidity and survivors' benefits, death grants, and employment injury pensions. In case of residence abroad, these benefits must be paid to the nationals of the State and to the nationals of any other State which has accepted the obligations of the Convention in respect of the branch in question. Similarly, family allowances have to be guaranteed to nationals of the State and to nationals of any other State which has accepted the obligations of the Convention regarding the family benefit branch with respect to children who reside on the territory of any ratifying State (Article 6). These two Articles establish reciprocity on a branch by branch basis.

(iv) Maintenance of social security rights

Article 7 of the Convention provides that States that have ratified the Convention must endeavour to participate in schemes for the maintenance of acquired rights and rights in the course of acquisition under the legislation of the nationals of the States for which the Convention is also in force. This Article contains provisions for the totalisation of periods of insurance, employment, or residence that may be necessary for the acquisition, maintenance, or recovery of rights, as well as for sharing the cost of the benefits paid. The fact that it is impossible to conclude an agreement for this purpose cannot be interpreted as a failure to give effect to the obligation deriving from Article 7. When deciding to include provisions on the maintenance of rights in Convention No. 118, the International Labour Conference showed the importance that it attaches to this aspect of equality of treatment, which would subsequently be supplemented by the adoption of Convention No. 157.

## (v) Administrative assistance

Article 11 of the Convention requires corresponding State Parties to afford each other administrative assistance free of charge in order to facilitate the implementation of its provision and of their respective legislation.

### 3.4. The Maintenance of Social Security Rights Convention 1982 (No. 157) and Recommendation, 1983 (No. 167)

## (i) Scope of application

Convention No. 157 applies to all branches of social security for which States have legislation in force. Unlike Convention No. 118 which allows State Parties to choose one or more out of the nine branches, Convention No. 157 applies to general and special social security schemes, both contributory and non-contributory, as well as schemes consisting of obligations imposed on employers by legislation in respect of any branch of social security (Article 2). As in the case of Convention No. 118, Convention No. 157 does not apply to special schemes for civil servants, special schemes for war victims or social or medical assistance schemes (Article 2. para. 4).

Article 3 defines the persons protected by the Convention with reference to persons who are or have been subject to the legislation of one or more States which have ratified the Convention, as well as the members of their families and their survivors.

## (ii) Applicable legislation

Article 5 of the Convention provides that the legislation applicable in respect of the persons covered by the Convention must be determined by mutual agreement between the Members concerned, with a view to avoiding conflicts of laws and the undesirable consequence that might ensue for those concerned either through lack of protection, or as a result of undue plurality of contributions or other liabilities or of benefits. This Article sets forth the rules under which the States concerned are to determine such legislation.

The applicable legislation is normally that of the State in which the persons concerned carry out their occupational activity or, in the case of persons who are not active, in which they reside. However, the States concerned may agree to exceptions from this rule in the interests of the persons concerned.

## (iii) Implementation of the Convention

The objective of Convention No. 157 is to promote a flexible and broad form of coordination between national security schemes. This flexibility is demonstrated by Article 4 of the Convention, which makes a distinction between the provisions of the Convention which have to be applied immediately upon the enforcement of the Convention for the State concerned and the provisions for which the application depends on the conclusion of bilateral or multilateral



social security agreements. These agreements must specify, among other matters, the branches of social security to which they apply, the categories of persons to which they are applicable, the arrangements for the reimbursement of the benefits provided and the rules for avoiding undue plurality contributions or benefits.

(iv) Maintenance of rights in the course of acquisition

The acquisition of entitlement to social security benefits is not subject to the same conditions under social security legislation in different countries. Transfer from one country to another exposes migrants to the risk of losing the benefit of a qualifying period completed in the first country and having to complete a new qualifying period in a second country where the legislation makes the right to benefits conditional upon the completion of a qualifying period.

Article 6 of the Convention provides in this respect that each State must endeavour to participate with every other State concerned in schemes for the maintenance of rights in course of acquisition for each branch of social security covered by the Convention and for which every one of these States has legislation in force. This therefore consists of an obligation as to the means to be used.

Under Article 7 of the Convention, schemes for the maintenance of rights in course of acquisition have to provide for the adding together of periods of insurance, employment, occupational activity or residence in accordance with the legislation of the States parties concerned for the purpose of, firstly, participation in voluntary or optional insurance and, secondly, the acquisition, maintenance or recovery of rights, and the calculation of benefits. Periods completed concurrently under the legislation of two or more States are to be reckoned only once. These schemes also have to determine the formula for awarding invalidity, old-age and survivors' benefits, and pensions in respect of occupational diseases. They also have to determine the apportionment of the costs involved (Article 8).

(v) Maintenance of acquired rights

The maintenance of acquired rights is intended to remedy the disadvantages relating to the principle of the territorial application of rights in the provision of benefits. It consists of securing, particularly for long-term contingencies, the right to benefits for claimants who are not resident or are no longer resident on the territory of the State concerned, namely the State whose legislation was applicable during the acquisition of the rights. Convention No. 157 provides in Article 9 that each State must guarantee to the persons protected the provision of old-age, invalidity, and survivors' benefits, pensions in respect of employment injury and death grants, to which a right is acquired under its legislation, irrespective of their place of residence. This is an obligation which is directly applicable due to the mere fact of ratification.

However, States which participate in an international scheme for the maintenance of rights in course of acquisition, in accordance with Article 6 of the Convention, may agree to guarantee the provision of the benefits concerned within the framework of bilateral or multilateral social

security agreements. Furthermore, as for the maintenance of rights in the course of acquisition, the States concerned have to endeavour to participate in schemes for the maintenance of rights acquired under their legislation. These schemes may vary according to the benefits concerned and whether or not the States have legislation in force for the specific branch (Article 10).

(vi) Administrative assistance and assistance to persons protected

Convention No. 157 contains a series of provisions respecting administrative assistance and assistance to persons protected. Under Article 12, the competent authorities and institutions of the various States must afford one another assistance with a view to facilitating the application of the Convention. In principle, such assistance is free of charge, although States may agree to reimburse certain expenses. Article 13 and 14 contain a series of provisions related to assistance to protected persons. They cover, for example, the conditions under which protected persons may present their claims or lodge appeals outside the territory of the State concerned, as well as the obligation of the State to promote the development of social services to assist migrant workers in their dealings with the authorities, institutions and jurisdictions, particularly with a view to facilitating the award of benefits. Following this review of the content of the up-to-date standards relating to the various branches of social security and the common principles set out in these instruments, an examination is made below of certain difficulties to which their application gives rise in practice.

(vii) The Maintenance of Social Security Rights Recommendation, 1983 (No. 167)

Convention No. 157 is supplemented by the Maintenance of Social Security Rights Recommendation, 1983 (No. 167). This Recommendation proposes to States, with a view to implementing the principle set forth in Conventions Nos. 118 and 157 in relation to the maintenance of rights, model provisions for the conclusion of bilateral or multilateral social security instruments, as well as a model agreement for the coordination of these instruments.

The model provisions for the conclusion of bilateral or multilateral social security agreements cover all nine branches of social security and consider all types of schemes. In addition, the model provisions contain common definitions, rules on the applicable legislation, rules on two alternative methods of maintaining rights in the course of acquisition, alternatives for the maintenance of acquired rights and provision of benefits abroad, and miscellaneous provisions on mutual assistance between national institutions.

### 3.5. Ratification of ILO Conventions on social security of migrant workers

ILO Conventions for the protection of migrant workers' social security rights have not been widely ratified.

The Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19) is ratified by 121 ILO member states. The Equality of Treatment (Social Security) Convention, 1962 (No. 118) is ratified by 37 member states. The Maintenance of Social Security Rights Convention, 1982 (No. 157) has only been

ratified by four member states so far. A list of ratifications of ILO Conventions No 118 and No. 157 by branch is found in Annex II of this paper.

## 4. Unilateral measures to protect migrant workers' social security rights

Failing the ratification of ILO Conventions for the protection of migrant workers' social security rights or bilateral/multilateral agreements, a number of protective measures can be taken for migrant workers either by the country of employment or the country of origin.

Obviously, the *country of employment* can take the most progressive measures for migrant workers. First of all, the national legislation could provide equality of treatment between nationals and non-nationals, not only for social security coverage, but for the payment of benefits abroad as well. Such provision would protect family members left behind in the country of origin and ensure the export of benefits from the country of employment when migrant workers return home. In principle, long-term benefits can be transferred, but currencies suffering from convertibility issues or a severe devaluation can present a serious obstacle to the export of cash benefits. Exporting short-term benefits is possible but is subject to an agreement, since, for example, the medical verification of the beneficiary's condition is required in the case of medical care or sickness benefits. Similar problems arise for unemployment benefits, which are conditional upon the person being registered with an employment agency. Some national legislation provides for full or partial reimbursement of contributions in cases where a migrant worker leaves the country of employment. This solution does not properly replace social security cash benefits which would be paid periodically.

A *labour-sending country* faces difficulties due to a number of restrictions to extend the enforcement the national legislation beyond its territory. When labour-receiving countries are neither in a position to provide them nor willing to negotiate a social security agreement, the country of origin usually assumes responsibility for providing at least some basic level of protection for its nationals working abroad. Social security coverage can usually only be extended outside the usual territorial scope of national legislation for migrant workers abroad who still have a link with the State concerned. For example, in cases where the employer is based in the labour-sending country (e.g. *collective contract migration*, a type of migration where national companies export service comprising both labour and entrepreneurial components, as in the field of construction), national legislation can impose an obligation on the employer to provide social security under the national scheme. Some countries have also used *recruitment agencies* as a mechanism to ensure that their migrant workers continue to receive some social security by imposing a liability on these agencies to pay contributions (see, for instance, the agencies for the recruitment of seafarers in the Philippines).

In case a mandatory extension of national insurance schemes is possible only in exceptional cases, voluntary insurance would be the only tangible alternative. The following three examples illustrate a good practice of protecting nationals working abroad through voluntary insurance.

The Jordanian national social security system, administered by the Social Security Corporation (SSC), provides old-age, disability and death benefits to Jordanians working abroad. Due to the large number of Jordanian labourers working in Saudi Arabia and the United Arab Emirates without social security coverage, the SSC has established two liaison offices in those countries<sup>9</sup>.

The Philippines provides social security coverage to overseas Filipino workers through voluntary insurance with the Social Security System (SSS), the supplementary pension savings (SSS Flexi-Fund), and the Overseas Workers Program of the Philippine Health Insurance Corporation (PhilHealth). The SSS and the Philhealth provide assistance to Filipino migrant workers through their overseas branch offices in 13 countries<sup>10</sup>.

Pakistan provides their migrant workers with a group insurance programme concluded between the Bureau of Emigration of Overseas Employment and the State Life Insurance Corporation. This insurance is financed by a premium paid by applicants upon registration with the Bureau and provides benefits in the form of a lump sum in the event of disability or death within a period of two years<sup>11</sup>.

## 5. Conclusion

The protection of migrant workers has always been considered as an important issue for the ILO. The situation of migrant workers is diverse. Whatever their situation, however, their basic interest will invariably be to see the removal of restrictions in national legislation which impede their enjoyment of full social security coverage and eligibility for benefits, wherever they stay.

This can be achieved by social security agreements of different types, giving effect to the provisions of the ILO Conventions and Recommendations dealing with the social security rights of migrant workers and their families. These Conventions ensure basic principles and provide a framework and a set of common rules for the conclusion of social security agreements. The ratification of the relevant ILO Conventions, in particular Conventions No. 118 and No. 157, can be used as a tool to ensure that migrant workers benefit from equal protection and guarantee their right to social security.

However, the number of ratifications of these ILO Conventions is relatively low and the existing network of social security agreements still has a number of gaps, particularly in developing countries. These countries, which are mainly labour-sending countries, face a number of problems in achieving full and efficient social security coverage for their migrant workers, such as the insufficient development of their own social security schemes, which impedes them from concluding agreements on a "reciprocal" basis and insufficient administrative capacity to effectively implement complex agreements. In the absence of ratification of the relevant ILO Conventions or conclusion of social security

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9 Source: <http://www.ssc.gov.jo/english/> (June, 2011).

10 Source: <https://www.sss.gov.ph/>, <http://www.philhealth.gov.ph/> (August, 2011).

11 Source: <http://www.beoe.gov.pk/> (August, 2011).

agreements, some labour sending countries have adopted their own measures on a unilateral basis to protect their nationals working abroad.

Nevertheless, it must be acknowledged that there is no panacea for this challenge. The task of gradually improving the social security coverage of migrant workers is therefore likely to remain an important issue in the future. Within the framework of the ILO Plan of Action for Migrant Workers and the ILO Multilateral Framework on Labour Migration, the ILO is tasked to assist the governments and national social security institutions of the member states in building the capacity and knowledge base for prospective social security agreements.

## Annex I.

### List of up-to-date ILO social security standards

#### Conventions

- Social Security (Minimum Standards) Convention, 1952 (No. 102);
- Equality of Treatment (Social Security) Convention, 1962 (No. 118);
- Employment Injury Benefits Convention, 1964 (No. 121);
- Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128);
- Medical and Sickness Benefits Convention, 1969 (No. 130);
- Maintenance of Social Security Rights Convention, 1982 (No. 157);
- Employment Promotion and Protection Against Unemployment Convention, 1988 (No. 168);
- Maternity Protection Convention, 2000 (No. 183).

#### Recommendations

- Income Security Recommendation, 1944 (No. 67);
- Employment Injury Benefits Recommendation, 1964 (No. 121);
- Invalidity, Old-Age and Survivors' Benefits Recommendation, 1967 (No. 131);
- Medical and Sickness Benefits Recommendation, 1969 (No. 134);
- Maintenance of Social Security Rights Recommendation, 1983 (No. 167);
- Employment Promotion and Protection Against Unemployment Recommendation, 1988 (No. 176);
- Maternity Protection Recommendation 2000 (No. 191).

## Annex II.

### Ratification of ILO Conventions No. 118 and No. 157 by branch

Country	Date of ratification of C.118	Date of denouncement	Branch									Date of ratification of C.157
			Medical care	Sickness benefit	Maternity benefit	Invalidity benefit	Old age benefit	Survivors benefit	Employment injury benefit	Unemployment benefit	Family benefit	
Bangladesh	22/06/1972				✓					✓		
Barbados	14/10/1974			✓	✓			✓	✓	✓		
Plurinational State of Bolivia	31/01/1977		✓	✓	✓						✓	
Brazil	24/03/1969		✓	✓	✓	✓	✓	✓	✓			
Cape Verde	08/07/1987		✓	✓	✓	✓	✓	✓	✓		✓	
Central African Republic	08/10/1964				✓		✓		✓		✓	
Democratic Republic of the Congo	01/11/1967					✓	✓		✓			
Denmark	17/06/1969		✓	✓					✓	✓		
Ecuador	09/03/1970		✓	✓	✓	✓		✓	✓			
Egypt	12/01/1993		✓	✓	✓	✓	✓	✓	✓	✓		
Finland	15/08/1969		✓	✓					✓			
France	13/05/1974		✓	✓	✓	✓		✓	✓		✓	
Germany	19/03/1971		✓	✓	✓				✓	✓		
Guatemala	04/11/1963				✓							
Guinea	11/08/1967		✓	✓	✓		✓	✓	✓		✓	
India	19/08/1964		✓	✓	✓							
Iraq	28/04/1978		✓	✓	✓	✓	✓	✓	✓			
Ireland	26/11/1964		✓	✓					✓	✓	✓	
Israel	09/06/1965				✓		✓	✓	✓		✓	
Italy	05/05/1967		✓	✓	✓	✓	✓	✓	✓	✓		
Jordan	07/03/1963				✓	✓		✓	✓			
Kenya	09/02/1971					✓	✓	✓				
Kyrgyzstan												10/09/2008
Libyan Arab Jamahariya	19/06/1975		✓	✓	✓	✓	✓	✓	✓	✓	✓	
Madagascar	22/06/1964			✓	✓	✓			✓			
Mauritania	15/07/1968					✓	✓	✓	✓		✓	
Mexico	06/01/1978		✓	✓	✓	✓	✓	✓	✓			
Netherlands	3/07/1964	20/12/2004	(✓)	(✓)	(✓)	(✓)	(✓)	(✓)	(✓)	(✓)	(✓)	
Norway	28/08/1963							✓			✓	
Pakistan	27/03/1969				✓				✓			
Philippines	26/04/1994		✓	✓	✓	✓	✓	✓	✓			26/04/1994
Rwanda	21/09/1989					✓	✓	✓	✓			
Spain												11/09/1985
Suriname	15/06/1976								✓			
Sweden	25/04/1963		✓	✓	✓				✓	✓		18/04/1984
Syrian Arab Republic	18/11/1963					✓	✓	✓	✓			
Tunisia	20/09/1965		✓	✓	✓	✓	✓	✓	✓		✓	
Turkey	25/06/1974		✓	✓	✓	✓	✓	✓	✓			
Uruguay	22/02/1983		✓	✓	✓				✓	✓		
Bolivarian Republic of Venezuela	05/11/1982		✓	✓	✓	✓	✓	✓	✓			
<b>Number of current ratifications</b>	<b>37</b>		<b>22</b>	<b>24</b>	<b>27</b>	<b>20</b>	<b>20</b>	<b>22</b>	<b>32</b>	<b>8</b>	<b>13</b>	<b>4</b>

Source: ILOLEX (<http://www.ilo.org/ilolex/>), as of 1 October 2011.

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## II. Social Security Agreements – principles and practices

A social security agreement<sup>12</sup> coordinates the social security schemes of two or more countries in order to overcome, on a reciprocal basis, the barriers that might otherwise prevent migrant workers and the members of their families from receiving benefits under the systems of any of the countries in which they have worked.<sup>13</sup> Such barriers can take the form of restrictions on entitlement to benefits based on a person's nationality<sup>14</sup> or country of residence, or requirements for a lengthy period of affiliation to a country's social security system before entitlement can be established.

Social security agreements also ensure that a migrant worker will not have to contribute to the social security systems of two or more countries for the same work. In addition, agreements set out the terms and conditions under which the social security authorities and institutions of different countries will assist each other in order to enable migrant workers and the members of their families to apply for, and receive, benefits.

### 1. Definition of key terms

To describe how social security agreements operate, it is useful to define four key terms: social security, migrant worker, coordination, and reciprocity.

#### 1.1. Social security

The ILO's 2011 report *Social Security for social justice and a fair globalization* defines social security as:

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- 12 Some countries use the term 'convention' instead of 'agreement'. In international law, the two terms are interchangeable and are synonyms for 'treaty'. This is confirmed in Article 1(a) of the *Vienna Convention on the Law of Treaties*, which defines the term 'treaty' to mean 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation' [UN 1969].
- 13 In the case of countries with non-contributory programmes (for example, residence-based schemes), a social security agreement can also, depending on the terms of the agreement, assist migrant workers and the members of their families to qualify for benefits from countries in which they have resided even if they have not worked in those countries.
- 14 For the purposes of this paper, the terms 'nationality' and 'citizenship' are synonymous. The same is the case for the words 'national' and 'citizen'.

... all measures providing benefits, whether in cash or in kind, to secure protection, inter alia, from:

- lack of work-related income (or insufficient income) caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member;
- lack of access or unaffordable access to health care;
- insufficient family support, particularly for children and adult dependants;
- general poverty and social exclusion.

Social security schemes can be of a contributory (social insurance) or non-contributory nature [ILO 2011a: 9].

This definition of social security reflects the provisions of the ILO's flagship *Social Security (Minimum Standards) Convention, 1952* (No. 102) [ILO 1952] which established the first comprehensive international standards for social security systems. Convention No. 102 identified nine branches of social security, each addressed to a particular contingency:<sup>15</sup> medical (health) care, sickness benefits, unemployment benefits, old age benefits, employment injury<sup>16</sup> benefits, family benefits, maternity benefits, disability<sup>17</sup> benefits, and survivors benefits.<sup>18</sup>

A social security agreement can include any of these nine branches, as well as measures addressed to the reduction of general poverty and social exclusion. There are examples of agreements that include as few as only one of the traditional branches of social security or that cover all the contingencies that underlay the definition of social security.

Within each branch of social security, there are several possible types of schemes, differentiated by their financing method, whether they are administered by the public or the private sector, whether they provide periodical cash benefits or lump-sum payments, and the extent to which the amount of cash benefits is linked to previous earnings or to current income. It is not unusual for a

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15 As can be seen, the 'contingencies' – events giving rise to benefits – are not entirely mutually exclusive. It can happen, for example, that a person entitled to a survivor pension because of the death of a family member is also entitled to a disability pension if she/he becomes disabled. Such situations give rise to what are often referred to as 'overlapping benefits', which are discussed in section 3–5.

16 The category of employment injuries includes work accidents and occupational diseases.

17 Some countries use the term 'invalidity' instead of 'disability'. For social security purposes, the two terms are synonymous. In this paper, 'disability' is used since it is the term found in the ILO's most recent definition of social security [ILO 2011: 9]

18 In 1952, when Convention No. 102 was adopted, general poverty was not seen as one of the contingencies addressed by social security, and the concept of social exclusion had not yet emerged. Since then, the concept of social exclusion has been developed, and the range of contingencies addressed by social security has been expanded to include general poverty and social exclusion.

country to have more than one type of programme within its overall social security system and, in some instances, even within a single branch. The types of social security schemes: are social insurance, universal coverage, provident funds, individual private accounts, employer–liability, and social assistance.

- *Social insurance*, the most prevalent form of social security, consists of employment–related schemes that are publicly administered and financed primarily by contributions from workers and employers. Depending on the legislation establishing a scheme, additional income may come from the investment of the scheme’s reserve funds and from government subsidies. Most cash benefits under a social insurance programme are determined on the basis of a worker’s previous earnings and, in the case of long–term benefits (for example, old age pensions), on the length of time the worker has been covered by the scheme.<sup>19</sup> Cash benefits are payable for the duration of the contingency (in the case of old age, for example, until the beneficiary’s death). In–kind benefits such as medical care and prescription drugs may be subject to co–payments or user fees.<sup>20</sup>
- *Universal coverage* refers to schemes that are financed from general government revenues and that apply to the entire resident population, subject to whatever eligibility requirements may be prescribed in the scheme’s legislation (for example, age, minimum period of residence in the country etc). Cash benefits under a universal coverage scheme are usually in flat–rate amounts unrelated to previous earnings. As in the case of social insurance schemes, cash benefits are payable for the duration of the contingency, and in–kind benefits may be subject to co–payments or user fees.
- *Provident funds* are mandatory collective savings schemes that are publicly administered<sup>21</sup> and financed from contributions by workers and/or employers and from the investment earnings of the fund. Contributions made by, or on behalf of, a member are credited to the member’s

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19 In the case of notional defined contribution (NDC) schemes – hybrid systems that are essentially social insurance, but with features taken from individual accounts and/or provident funds – benefits are determined on the basis of the contributions that have been paid by a worker and her/his employer, including deemed investment earnings.

20 The term ‘co–payment’ refers to the portion, if any, of the cost of an in–kind benefit which the insured person must pay from her or his own resources. For example, a co–payment of 10 percent means that the insured person must pay 10 percent of the cost. The term ‘user fee’ refers to a flat–rate amount that the insured person must pay each time an in–kind benefit is provided. The principal argument in favour of co–payments and user fees is that they discourage unnecessary use of services. The principal argument against them is that the costs may cause low–income individuals and families from using services which they require. These negative effects can be mitigated by measures such as means–tested refundable tax credits to compensate low– and modest–income individuals and families for the cost (or part of the cost) of co–payments and user fees or exempting such individuals and families, on a means–tested basis, from co–payments and user fees.

21 In some countries, the term ‘provident fund’ is used to denote privately administered schemes sponsored by an employer, a group of employers or a trade union. These schemes, in usual international usage, are known as defined contribution (DC) pension arrangements. They are not included in the category of provident funds as that term is used in this paper.

account along with a part of the fund's investment earnings proportional to the balance in the member's account. When an insured contingency occurs – for example, when a member of a provident fund reaches retirement age – the member is entitled to withdraw part or all of the balance of her/his account as a lump-sum. The member has the option of using the lump-sum in whole or in part to purchase an annuity which will provide a periodic income. However, there is generally no mandatory requirement for the member to do so. Most provident funds allow a member to make withdrawals from his/her account before retirement age under prescribed circumstances (for example, in some provident funds, to purchase a home).

- *Individual private accounts*<sup>22</sup> are retirement savings schemes which are similar to provident funds in that they are financed from contributions by workers and/or employers, and those contributions are credited to a worker's account along with earnings from the investment of previous contributions. Usually, certain tax advantages are given to this type of scheme.<sup>23</sup> Unlike provident funds, however, systems of individual accounts are privately administered, subject to regulation and supervision by public agencies, and a member can choose the company investing the funds in his/her account. When the worker retires, the funds in her/his account must be used to provide some form of periodic benefit, usually through the purchase of an annuity.
- *Employer-liability schemes* are ones under which each employer is obligated to provide benefits or services to its employees when specific contingencies occur – for example, on termination of employment or if a worker suffers an employment injury. Unlike social insurance schemes, which pool risks across all participating employers, individual employers are fully responsible under employer-liability schemes. Employers may purchase insurance to cover their liability.
- *Social assistance schemes* are those providing benefits to which entitlement is based on the level of a recipient's (or family's) income – that is, that are means-tested<sup>24</sup> – or that use a similar form of targeting, such as a proxy means test.<sup>25</sup> 'Conditional' social assistance schemes

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22 These are sometimes called 'second pillar' schemes. This refers to the role they play in a three-tiered pension system in which the first tier (pillar) consists of a mandatory social insurance scheme and the third tier (pillar) consists of voluntary savings for retirement. In central and eastern Europe they are known as 'mandatory privately managed pension funds'.

23 The tax advantages can, for example, take the form of exempting contributions to an individual account from taxation (usually subject to an annual maximum on the amount of contribution allowed), exempting the investment earnings of the funds in an individual account from taxation, but taxing withdrawals and payments from individual accounts (including payments from annuities purchased with the funds in the account). This type of tax regime is often described as EET (Exempt contributions, Exempt investment earnings, Tax payments and withdrawals).

24 In usual international usage, 'means-tested' refers to the use of income or assets (or both) in determining entitlement to benefits. In some countries, however, a distinction is made between the use of income alone to determine entitlement to benefits and the use of both income and assets; in such cases, the former is usually referred to as 'income-tested' while the latter is referred to as 'means-tested'. In this paper, 'means-tested' is used in its usual international sense.

require beneficiaries (and/or their relatives or families), in addition to other conditions, to participate in prescribed public programmes, such as specified health or educational programmes [ILO 2011a: 9].

In principle, a social security agreement can include any of the six types of programmes just described. Starting in the early 20<sup>th</sup> century and continuing to this day, many agreements have been concluded that involve social insurance and universal coverage schemes, and some that involve employer–liability schemes. In recent years, a growing number of social security agreements have also involved schemes based on individual private accounts and social assistance. However, to the present time there is no social security agreement that includes a provident fund. The likely reasons for this are examined in section 3.7.

## 1.2. Migrant worker

Several definitions of migrant workers can be found in international instruments. For purposes of this paper, a broad definition is used to encompass as many persons as possible who go from one country to another in search of work. Such a definition is found in the United Nations *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, which was adopted by the UN General Assembly in 1990 and entered into force in 2003. Article 2(1) of the Convention defines a migrant worker as:

a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national [UN 1990].

The UN Convention excludes some specific categories of workers from the definition of migrant worker, in particular civil servants and other representatives of a country who are posted to another country in a diplomatic, consular or other official capacity on behalf of the sending country. Social security agreements either also exclude such categories of workers from the application of their provisions or have specific provisions regarding the social security coverage of such workers. This is discussed in more detail in section 2.3.4.

There is one group of workers who are excluded from the definition of migrant worker by the UN Convention but who are usually included in social security agreements. These are seafarers employed on board a ship registered in a country of which the seafarer is not a national and to which he or she has not been admitted as a resident. The importance of including provisions in social security agreements dealing with the coverage of seafarers is discussed in section 2.3.3

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25 A proxy means test involves the use of one or more indicators in place of income. Such indicators can, for example, be the size of the house in which a family resides, access to sanitary facilities, or access to potable water. Proxy means tests can be useful when income is difficult to determine (for example, because considerable economic activity takes the form of barter or exchange) or when income alone is not seen as accurately reflecting actual need.

### 1.3. Coordination

As already noted, social security agreements coordinate the operation of the social security systems of two or more countries. The choice of the word 'coordinate' is deliberate and important.

Coordination means establishing mechanisms through which the social security systems of different countries can work together to achieve mutually agreed objectives – in particular, ensuring that migrant workers and the members of their families have protection that is as complete and continuous as possible – while, at the same time, maintaining and respecting the separate definitions and rules of each system. Coordination does not involve replacing the different definitions and rules of each system with common definitions and rules, which is usually referred to as harmonization.<sup>26</sup>

In theory, there is no reason preventing the conclusion of an agreement that harmonizes, rather than only coordinates, the social security systems of different countries. In practice, however, this would be a formidable challenge that has rarely, if ever, been achieved. No two national social security systems are identical, even in instances in which they are based on the same model and are very similar in design. Harmonization would require substituting common rules and definitions for those found in national legislation and would preclude a country from subsequently making unilateral changes to those common rules and definitions. In most cases this would result in changes to a country's social security system, and a loss of a country's ability to modify that system in the future, a fact that most sovereign states would be unwilling to accept.

Coordination, on the other hand, leaves the rules and definitions of national legislation unchanged. It finds ways in which social security systems can be made to work together, in spite of the differences, in order, for example, to establish entitlement to their respective benefits when a migrant worker has been covered by the systems of two or more countries. While it can sometimes take considerable effort to find effective formulas for coordination, such formulas do not usually require the types of changes that would be needed for harmonization.

### 1.4. Reciprocity

Reciprocity, which is fundamental to all social security agreements, means that each country which is a party to an agreement undertakes to apply the same mechanisms as every other party to make its social security benefits more accessible to migrant workers. Reciprocity also means that there is a reasonable degree of comparability in the obligations that each party assumes as a result of an agreement.

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26 The distinction between coordination and harmonization discussed in this section follows the usual international usage regarding the two terms. It should, however, be noted that, in some countries and regions, a third concept – sometimes titled 'uniformization' (or similar term) – is also used. In such a schema, the definition given in this paper to harmonization is applied to uniformization, and harmonization is defined as a mid-way step between coordination and uniformization. The exact nature of the mid-way step is usually defined only vaguely, if at all, and often results in terminological and conceptual confusion.

Among countries that have concluded social security agreements, there is a wide-ranging consensus regarding the first aspect of reciprocity – the mechanisms that can be used to give effect to the principle of reciprocity. These mechanisms, which have evolved over the course of many years and are rooted in ILO conventions and recommendations,<sup>27</sup> are discussed in detail in the following section that examines the objectives of agreements and the means for implementing those objectives.

There is less of a consensus regarding the second element of reciprocity – what constitutes a reasonable degree of comparability of obligations. Some countries take an ‘accounting’ approach that focuses primarily on the projected costs of an agreement for each of the parties and whether those costs are approximately the same. Such a narrow view of comparability of obligations can, in particular, preclude agreements among countries that are at different stages of development. Other countries take a broader approach to comparability of obligations that factors in, for example, the levels of economic development among the prospective parties to an agreement and the relative capacity of the social security systems of the different countries to absorb the additional obligations that would result from an agreement.

## 2. Objectives of agreements

A social security agreement usually pursues five objectives to protect the social security rights of migrant workers and the members of their families. These fall under the headings of equality of treatment, payment of benefits abroad (export of benefits), determination of the applicable legislation, maintenance of rights in course of acquisition (totalizing), and administrative assistance.

### 2.1. Equality of treatment

Some countries base entitlement to social security benefits on a person’s nationality. When a country has such a nationality-based restriction in its social security system, a worker or a member of a worker’s family who is not a national of the country may not be eligible for any benefits at all, or may only be entitled to a lesser benefit than a national, or may be subject to more stringent eligibility requirements than a national. Whatever reasons a country may give to defend nationality-based restrictions to entitlement, the practical effect is to disqualify migrant workers and their family members from receiving benefits.

A primary objective of social security agreements is to overcome these nationality-based restrictions. Through an agreement, each country, as a party, undertakes to treat workers who are nationals of the other parties in the same way it treats its own nationals. Equal treatment is usually also extended to the worker’s family members, irrespective of their nationality, in relation to the rights

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<sup>27</sup> Of particular relevance are: *Equality of Treatment (Social Security) Convention*, 1962 (No. 118) [ILO 1962]; *Maintenance of Social Security Rights Convention*, 1982 (No. 157) [ILO 1982]; and *Maintenance of Social Security Rights Recommendation*, 1983 (No. 167) [ILO 1983].

they derive from those of the worker – for example, medical care if they fall ill, or survivor benefits in the event of the death of the worker.

In the past, nationality-based restrictions to eligibility were a common feature found in the social security legislation of many countries. These restrictions are now less common due to a variety of factors, including court decisions that have struck them down in some countries. However, even when nationality-based restrictions are no longer part of a country's social security legislation, a guarantee of equal treatment in an agreement is still a useful safeguard in the event that a country may decide, in the future, to introduce (or re-introduce) such restrictions.

While the equality of treatment provision of an agreement is concerned primarily with the social security *rights* of a worker who is not a national of the country in which he or she is employed, it also applies to *obligations* – for example, the obligation to pay contributions, and the obligation to inform the social security authorities of changes in circumstances that may affect ongoing entitlement to a benefit (for example, regaining the capacity for remunerated work which may affect entitlement to an employment injury or a disability benefit).

## 2.2. Payment of benefits abroad: Export of benefits<sup>28</sup>

A country's social security legislation may prohibit entirely the payment of benefits to persons who reside outside its borders, or it may impose more stringent requirements for receipt of those benefits abroad than for receipt within the country itself. The second objective of social security agreements is to reduce, and whenever possible eliminate entirely, restrictions on the payment of benefits and receipt of services when a worker who had previously been covered by a country's social security system is no longer in that country.

Two types of provisions regarding export of benefits are found in social security agreements. One guarantees export to the territories of the other countries that are parties to the agreement, but not to 'third states' (countries not party to the agreement). The other guarantees export to all countries, including third states.

Even when an agreement only guarantees the export of benefits to the territories of the countries that are parties, there may, nonetheless, be a right to the receipt of benefits in third states if a country, under its social security laws, gives its nationals the right to receive benefits abroad. As a result of the equality of treatment provision of an agreement, a worker who is a national of any party must have the same rights as the nationals of the country under whose legislation the benefit is paid or the service provided. Unless the equality of treatment provision of an agreement is specifically restricted to persons who are in the territories of the countries that are parties, the guarantee of equal treatment extends to all workers who are nationals of any party wherever they may be, and, as a result, gives such workers the right to receive benefits in a third state.

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28 Export of benefits is sometimes referred to as portability. However, some authors use the term portability more broadly to refer collectively to equality of treatment, export of benefits, totalizing and administrative assistance; see, for example, Holzmann et al [2005]. To avoid any possible confusion, the term portability is not used in this paper.



There are exceptions to the export of benefits that are commonly found in social security agreements. The most usual exception applies to social assistance benefits, including means-tested benefits that may be part of universal coverage and social insurance schemes. The argument is made that these benefits are intended to alleviate domestic poverty and are set in amounts that are based on the economic and social circumstances of the paying country. According to this argument, export of these benefits is, therefore, not appropriate.

The argument against the non-export of social assistance benefits is usually persuasive. However, there are instances in which it is not applicable, especially if social assistance benefits form the only, or the primary, part of a branch of a country's social security system. In such a case, reciprocity may well require the export of some or all of the country's means-tested benefits since, otherwise, that country would be assuming few if any obligations under the export-of-benefit provisions while the other parties with systems based on, say, social insurance, might be assuming substantial obligations.

### 2.3. Determination of the applicable legislation

In some instances migrant workers may be required to pay contributions to the social security systems of two countries for the same work. Left unresolved, such situations of 'double coverage' can impose a high financial burden on a worker. Social security agreements eliminate double coverage by setting out rules to determine which one of the two systems will apply to the worker and which one will not. Social security agreements may also fill gaps in coverage that leave some migrant workers without any protection.

The rules given in a social security agreement for determining the applicable legislation – sometimes referred to as the 'coverage provisions' of the agreement – usually begin by stating, as a general principle, that a person who is employed in a country should be subject *only* to the social security laws of that country for that employment (in other words, *no other country's* social security laws should apply to the employment in question<sup>29</sup>). The coverage provisions of the agreement then go on to address the particular situation of certain categories of workers who are especially likely to encounter double coverage or gaps in coverage and for whom the general principle is either not well suited or could be difficult to apply. These consist of posted workers, self-employed persons and seafarers. The coverage provisions also often address the situation of government employees of one country who perform their duties in another country. Finally, they usually contain a clause – referred to as the 'exception' or 'saving' provision – allowing the social security authorities of the countries that are parties to an agreement to make exceptions, by mutual consent, to the rules regarding coverage in specific cases when circumstances warrant.

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29 This refers only to *mandatory* coverage under another country's social security law. *Voluntary* coverage, which is permitted under some countries' social security laws, does not contravene the general principle.

### 2.3.1. Posted workers

The term 'posted worker', or the synonymous term 'detached worker', is often used in social security agreements. It refers to persons who are posted (assigned) by their employer to work in another country for a limited period of time for the same company or for a closely related company (for example, a parent or a subsidiary company).<sup>30</sup> Under the social security laws of the usual country of employment, a posted worker might remain subject to those laws even during a period of work abroad because the period abroad is temporary in duration and the worker remains employed for essentially the same company. However, under the laws of the host country, the worker might also be subject to its social security laws because the work is being carried out in its territory.

As just noted, as a general rule, work performed in a country should be subject only to the social security system of that country. However, through a social security agreement, an exception is usually made for posted workers, so that such workers can have unbroken protection under their own country's social security system during the period of the posting abroad.<sup>31</sup> As a result of this exception, posted workers remain covered by the social security system of their country of origin and are exempt from the social security laws of the host country.

Several considerations need to be stressed:

- In order for a posted worker to qualify for an exemption from the social security system of the host country, the worker must be covered by the system of the country of origin prior to the start of the posting. Otherwise, the posted worker will be covered by the system of the host country on the same basis as all other workers in that country. The requirement of prior coverage by the system of the country of origin ensures that the posted-worker provisions of an agreement are not used simply as a means of avoiding contributions to the system of the host country.
- The exemption from the social security system of the host country applies only to the employment which is the basis of the posting. If the worker takes up a second job with a different employer in the host country, he or she will be subject to the host country's social security system for this other job.

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30 In the usual wording of the provision regarding posted workers, there is often a requirement that the posting be to the same company as that by which the worker is employed or to a closely related company. However, given the conglomerates that are now commonplace around the world, the requirement of 'the same or a related company' can sometimes be difficult to interpret and may, if interpreted literally, exclude legitimate postings. For this reason, reference to 'the same or a related company' is sometimes omitted. If questions arise in particular cases, they can be resolved through consultations between the social security authorities of the countries concerned, including, when required, with recourse to the saving provision (see section 2.3.5).

31 There are several advantages from such unbroken coverage. In the case of long-term benefits, posted workers are more likely to have a complete career under the social security system of their usual country of employment, ensuring a single pension rather than several pensions, some possibly quite small. In the case of short-term benefits, since posted workers often return to their country of usual employment when a contingency giving rise to a benefit occurs, they will be more likely to meet the eligibility requirements when these include coverage at the time of the occurrence of the contingency.

- The period of the posting must be of limited duration. The meaning of the term ‘limited duration’ is set out in the applicable social security agreement. Under some agreements it can be as short as one year, and under others as long as five years. With the prior mutual consent of the social security authorities of the host and sending countries, the period can be extended beyond the time limit specified in the agreement in particular cases – for example, if the work that is the basis of the posting cannot be completed in the time originally foreseen and the posted worker must remain in the host country for an additional period.

Posted workers are often well-remunerated senior managers or professionals with specialized skills and knowledge. In this sense, they differ significantly from the great majority of migrant workers. They are, nonetheless, migrant workers. With the increasing globalization of the world economy, the role played by posted workers has become critical for many companies and countries. For some countries, resolving situations of double coverage for their posted workers can be the primary reason for seeking a social security agreement with another country or group of countries. In such situations, regulating the social security coverage of posted workers can be the starting point for an agreement that will benefit all migrant workers, including those who are in particular need of social security protection because of the precarious nature of their employment.

### 2.3.2. Self-employed persons

Self-employed persons who carry out their activities in more than one country often find themselves subject to double coverage. This is usually due to the fact that countries which cover the self-employed in their social security systems take different approaches to that coverage.

Some countries base the coverage of self-employment on where the self-employment is carried out. Self-employed activities performed in the territory of such countries are subject to their social security laws, irrespective of whether the self-employed person resides in the country or not, while self-employed activities performed outside their territory are not covered. Other countries, however, base the coverage of self-employment on where the self-employed person resides. A self-employed person who resides in such a country is subject to the country's social security laws for all self-employed activities in whatever countries the activities may be performed. On the other hand, a self-employed person who does not reside in the country is not subject to the country's social security laws for any self-employed activity performed there.

When a self-employed person who resides in one of the latter type of countries carries out activities in one of the first type of countries, double coverage will occur. On the other hand, when a self-employed person who resides in one of the first type of countries carries out activities in the one of the latter countries, there can be a gap in coverage.

Through a social security agreement, the double coverage of self-employed persons can be avoided and, in some instances, gaps in coverage of the self-employed can be filled. The means for accomplishing these goals vary considerably from agreement to agreement and depend on the specific legislation and practice of the countries concerned. In some instances, countries cannot find a mutually acceptable general approach regarding the legislation applicable to the self-employed and

opt instead to resolve each occurrence on a case-by-case basis through consultations between their respective social security authorities using the 'saving' provision (see section 2.3.5). While less than an ideal solution, it is sometimes the only practical one.

Before leaving the subject of self-employment, it should be noted that there is no universally accepted definition of what is considered as self-employment. An activity that may be considered self-employment in one country may be deemed 'regular' employment in another. For example, one country may view the partners in a professional group (for instance, medical doctors or legal practitioners) as each individually being self-employed, while another country may view the partners as being, effectively, the employees of the group.

When there are likely to be frequent instances of such conflicts in the meaning of self-employment, it can be useful for a social security agreement to contain specific provisions to determine which definition of self-employment will apply. In other cases, the saving provision discussed in section 2.3.5 can be used.

### 2.3.3. Seafarers

As noted earlier, seafarers are not migrant workers in the usual sense of the term. Seafarers do not usually leave their country of origin in order to work in another country. From a social security perspective, however, their situation while working on board a ship is not materially different from that of a migrant worker employed in another country, and seafarers often encounter precisely the same barriers to social security protection.

The 'classical' approach to social security for seafarers, which is still used by many countries, is to base coverage on the flag of the ship – that is, on the country in which the ship is registered. Under this approach, often referred to as the 'flag rule', persons employed on board a ship flying a country's flag are subject to that country's social security system.

The flag rule reflects the circumstances of a time in the past when most major coastal nations in the industrialized world had their own mercantile fleets. Those fleets were usually registered in the country of ownership, and crews were recruited either from the same country or from nearby countries.

Today, the situation is quite different. Crews are now often recruited from countries which are distant from the one whose flag the ship is flying. Irrespective of ownership, ships often fly flags of convenience for tax purposes. Most of the countries offering flags of convenience either have no social security system at all or only a minimal system. Enforcement of social security laws, even when they do apply, is often weak to non-existent, especially in regard to seafarers from other countries who have no attachment to the country whose flag the ship is flying.

An alternative to the flag rule is to base the social security coverage of the crews of ships on a seafarer's country of residence or on the country in which the contract of employment is concluded. This pre-supposes that seafarers are covered under the social security system(s) of the latter country(ies).

When a seafarer who resides or is recruited in one of the latter group of countries is employed on board a ship flying the flag of a country that uses the flag rule to determine the coverage of seafarers,

double coverage will occur. In such cases, a social security agreement can resolve the problem by specifying which criteria, flag or country of residence/recruitment, will be the determining factor.

An agreement can also provide coverage where none would otherwise exist – for example if a seafarer is recruited in a country other than his or her own to work onboard a ship flying the flag of a country that does not apply a flag rule (or that does not have a social security system). An agreement can, for example, specify that all persons who reside in any of the countries that are party to the agreement and who are recruited in any of these countries to work on board a ship will be subject, in regard to that employment, to the social security laws of their country of residence.

Although the preceding discussion has dealt exclusively with seafarers, the same difficulties can arise for the crews of airplanes and for persons working on off-shore oil rigs and installations for mining gas and mineral resources on or under the seabed. Solutions similar to those for seafarers can be used to resolve these difficulties.

#### 2.3.4. Government employees

As noted in section 1.2, government employees are not usually considered as migrant workers. However, social security agreements often have provisions regarding the social security legislation applicable to employment performed for the government of one country in another country. Therefore, in order to provide a comprehensive overview of agreements, some comments regarding government employment are in order.

Three distinct categories of government employment need to be considered: diplomatic and consular officials posted from one country to another, other posted government officials, and 'locally engaged' staff.

- *Diplomatic and consular officials*

Article 33 of the *Vienna Convention on Diplomatic Relations* [UN 1961] and Article 48 of the *Vienna Convention on Consular Relations* [UN 1963] provide that diplomatic and consular officials posted by one country to another are exempt from the social security laws of the receiving country.<sup>32</sup> Although the convention on diplomatic relations (but *not* the convention on consular relations) permits a social security agreement to override the exemption, no country is likely to allow this to happen, nor is there any reason for it to happen. The social security coverage of diplomatic and consular officials is clearly within the sole competence of the sending country.

Most social security agreements are silent concerning the social security coverage of diplomatic and consular officials since the conventions on diplomatic and consular relations are definitive in this regard. However, some countries nonetheless prefer an explicit statement in a social security agreement confirming that the provisions of the two conventions regarding social security are not affected by the agreement.

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<sup>32</sup> The conventions also deal with the social security coverage of a 'private servant' of a diplomatic official and a 'member of the service staff' of a consular official.

- *Other government officials*

Although there are no international instruments dealing generally with government officials, other than diplomatic and consular staff, who are posted by one country to another, the same principle that applies to diplomatic and consular officials also applies to other government officials. Such officials are covered only by the social security laws of the sending country and are exempt from the social security laws of the receiving country.

Most social security agreements do not define the term 'government official' or 'government employment' since the meaning of the terms is usually self-evident. If a question arises in a particular case, it can be settled by the competent authorities of the countries concerned through mutual consultations.

Some social security agreements, however, contain a specific definition of government official or government employment in order to prevent future misunderstandings. In a country with a federal system, for example, it might be necessary to state explicitly in an agreement that 'government officials' include officials of the sub-national entities (the states, provinces, länder or cantons) as well as the officials of the federal (central) government. Depending on a country's social security laws, it might also be necessary to state explicitly that members of the police force or personnel of the armed forces are included among government officials.

- *Locally-engaged staff*

The term 'locally-engaged staff' refers to persons who reside (usually permanently) in a country and who are employed in that country to work for a diplomatic or consular post, or a government ministry or agency, of another country. In keeping with the general rule for the coverage of workers discussed at the start of section 2.3, such workers should be covered by the social security system of their country of residence and employment (i.e. the host country), just like all other workers in the host country. However, the host country cannot impose its social security laws on another sovereign state without the concurrence of that other state. A provision in a social security agreement regarding locally-engaged staff constitutes, in effect, that concurrence.

### 2.3.5. Saving provision

However well the provisions of a social security agreement concerning the determination of the applicable legislation have been drafted, unusual cases will, from time to time, inevitably arise. Attempting to anticipate all such cases in advance would be a daunting task requiring a great deal of time and effort for situations that may occur only rarely, if at all. Moreover, the probability of comprehensively anticipating all possible eventualities, as the experience of many countries has shown, is low.

For this reason, social security agreements usually contain specific provisions dealing only with the situations in which questions concerning the determination of the applicable legislation are most

likely to arise – as already discussed posted workers, self-employed persons, seafarers and, in many instances, government employees.

For all other situations, agreements usually contain a ‘saving’ provision that allows the competent authorities of the countries concerned to determine the applicable legislation through consultation and mutual agreement. The saving provision can also be used when either the general rule for coverage, or the specific rules for categories of workers such as posted workers and self-employed persons, is not suitable in a particular instance.

It must be stressed that the saving provision can only be used after the competent authorities of the countries concerned have consulted one another and have agreed that an exception is in order. The saving provision does not allow a country to alter unilaterally the provisions of a social security agreement concerning the applicable legislation.

#### 2.4. Maintenance of rights in course of acquisition: Totalizing

To be entitled to benefits under a country's social security system, a worker must fulfil the eligibility requirements specified in the legislation establishing the system. One of those requirements, especially for long-term benefits such as old age and disability pensions, often involves a qualifying period<sup>33</sup> – a minimum period of affiliation that must be fulfilled in order to be entitled to a benefit. Depending on the type of programme, affiliation can mean a period of contribution, covered employment, or residence. In a social insurance programme providing old age pensions, for example, at least ten years of contributions might be necessary for entitlement to a benefit at the pensionable age. In addition to, or sometimes instead of, a minimum period of affiliation, a social security programme might require affiliation at the time of the occurrence of the contingency giving rise to the benefit (for example, for an old age pension, at the time of reaching the pensionable age) or for a period immediately before the contingency occurs (for example, in the case of a disability pension, for at least a year before becoming disabled).

Migrant workers often encounter situations in which they have been affiliated with a country's social security system, but not for a period of sufficient length to meet the requirements of the qualifying period. Even if a migrant worker has had a lengthy affiliation with the system, the period of affiliation might have been in the past, so it does not meet the requirement for affiliation at the time of the occurrence of the contingency or immediately before. The result, in any of these cases, is that the worker is ineligible for benefits. In the same way, members of the worker's family may be ineligible for derived benefits, such as a survivor's pension or medical care.

Social security agreements assist migrant workers and their family members to become eligible for benefits from the countries in which they have worked by adding together, or totalizing, the periods of affiliation to the social security systems of all the countries that are parties to the agreement in order to meet the requirements of a qualifying period.

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33 The qualifying period is sometimes referred to as a ‘waiting period’.

To take an example of how totalizing works in practice, suppose that four countries, designated A, B, C, and D, are all parties to an agreement and that the legislation of each country requires a minimum of 10 years of contribution to be eligible for an old age pension. Suppose further that a migrant worker has contributed for 20 years to the pension scheme in country A, 8 years to the scheme in country B, 5 years to the scheme in country C, and 3 years to the scheme in country D.

In the absence of a social security agreement between the four countries, the worker would only be eligible for an old age pension from country A. He or she would not be eligible for a pension from countries B, C, and D because the worker has not completed the minimum qualifying period of 10 years. Through the totalizing provisions of an agreement, however, the worker becomes eligible for pensions from all these countries because her or his combined period of contribution in the four countries – in the example, 36 years – is well above the minimum of 10 years required by each country's system.

Once eligibility for a country's benefit is established through totalizing, the amount of the benefit payable is usually determined in relation to the length of the period of affiliation to the country's social security system. The exact method for making the calculation is set out in the agreement. Two methods are commonly used: proportional calculation and direct calculation. In some social security agreements a different calculation method, known as integration, is used.

#### 2.4.1. Proportional calculation<sup>34</sup>

Proportional calculation involves first determining the theoretical amount of the benefit that would be payable if the totalized periods under the social security systems of all the countries, taken together, had been completed under the system of each country alone. In determining the theoretical benefit, the social security institution of each country applies the benefit-calculation rules specified in its own legislation. The actual benefit that an institution pays is determined by multiplying the theoretical benefit by a fraction that represents the ratio of the periods completed under the system administered by that institution and the totalized periods completed in all the countries taken together.

To return to the example just given, the institution of country B would calculate the theoretical benefit to which the worker would be entitled if she or he had completed 36 years in country B's social security system. The institution would then multiply the theoretical benefit by  $8/36$  to determine the benefit that it would pay to the worker (since, in the example, the worker had completed eight years under country B's social security system). The institutions of countries C and D would proceed in a similar manner, first by calculating the theoretical benefits payable under their respective systems if the worker had completed 36 years in each, and then multiplying the theoretical benefits by the appropriate ratios –  $5/36$  in the case of country C and  $3/36$  in the case of country D. Since the worker had already met the requirements of the qualifying period under the system of country A, without the need for totalizing (in the example, country A's system requires a minimum of 10 years

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34 Proportional calculation is sometimes called by the Latin phrase *pro rata temporis*.



and the worker has completed 20 years), the institution of country A would usually calculate its benefit directly under its legislation.<sup>35</sup>

It can sometimes occur that a worker's totalized periods exceeds the maximum period to be taken into account under a country's social security law. In such a case, the maximum period, not the totalized period, is used in the calculation for that country. Returning again to the example, suppose that, under the system of country B, 35 years of contribution gives entitlement to a full pension. Then the theoretical benefit under the system of country B will be based on 35 years, and the ratio used in calculating the actual benefit payable will be 8/35.

#### 2.4.2. Direct calculation

Under the method of direct calculation, as the name suggests, the institution of each country calculates the benefit it will pay using the rules specified in its legislation, without the need for determining a theoretical benefit. Since direct calculation is a one-step process that is simpler to administer than proportional calculation, it is the preferred option for most countries.

Direct calculation works well when the benefit formula provides for a uniform rate of accrual of a benefit for each period of affiliation – for example, two percent of adjusted lifetime-average earnings for each year of contribution. However, it can result in disproportionately large benefits in relation to the period of affiliation when the benefit formula includes a flat-rate amount (an amount that is payable irrespective of the length of previous affiliation) or if the benefit formula involves a variable rate of accumulation (for example, three percent of final earnings for each of the first 10 years of affiliation, and two percent for each of the next 30 years).

The decision whether to use proportional calculation or direct calculation in a social security agreement will depend largely on the way in which benefits are calculated under the systems of the countries that are parties to the agreement. An agreement does not have to specify the exclusive use of one calculation method for every party. Different parties can use different methods, as long as all agree that the principle of reciprocity – the comparability of obligations – is respected.

#### 2.4.3. Integration

Instead of each country paying a partial benefit calculated in relation to the time a worker has been affiliated with its social security system, some agreements employ a third method for determining the amount of benefit payable when eligibility is determined through totalizing. This method is usually referred to as integration.

Under integration, the institution of one country pays a full benefit calculated according to its rules and taking into account the periods completed in all the other countries that are parties to the

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35 Depending on the benefit calculation rules of a country's social security system, it sometimes happens that a benefit determined according to proportional calculation is greater than the benefit determined under direct calculation. In such a case, the social security agreement might specify that the person concerned is entitled to the higher of the two benefits. See footnote 108.

agreement. The other countries pay no benefits at all. The paying country is usually the one to whose system the worker was last affiliated with or the one in which the worker and/or family members are residing at the time of the occurrence of the contingency giving rise to the benefit.

Integration can be an effective solution (in fact, often the only practical solution) in the case of short-term benefits (for example, cash sickness and maternity benefits). However, for long-term benefits such as pensions for old age, disability,<sup>36</sup> and survivors, integration is generally only considered among countries in which the formula for calculating benefits, and hence the resulting amount of benefits, are similar and there is an approximately equal flow of migrant workers between them. If any of these conditions does not apply, integration will likely result in some countries incurring far higher costs than others. For this reason, integration is seldom used in relation to long-term benefits.

In the case of benefits in kind (medical care in the event of sickness, maternity, work accidents and occupational diseases, and rehabilitation and other services that may be linked with cash benefits for disability and employment injuries), there is no practical alternative to integration. One of the key issues in a social security agreement is to determine which country's system will be responsible for providing the benefits in kind and the rules for apportioning the costs of those benefits – for example, whether the institution providing the services will pay the full costs, or whether those costs will be charged in whole or in part to the other systems to which the worker has been affiliated. The issue of the apportionment of the costs of benefits in kind can often be difficult to resolve, especially when the range, quality and/or cost of the services in question can vary substantially between the countries seeking to conclude a social security agreement.

## 2.5. Administrative assistance

Ensuring that claimants are eligible for the benefits for which they are applying, and that beneficiaries remain eligible for the benefits they are receiving, can be challenging for any country's social security institution. The challenge becomes all the greater when the claimants or beneficiaries are

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36 There are two ways, generally speaking, in which the amount of a disability pension can be calculated under a country's social security laws. The most commonly used method basis the amount of the pension on the length of a worker's period of contribution and the wages of the worker before becoming disabled (or her/his adjusted average lifetime earnings prior to becoming disabled); a flat-rate component is sometimes added to the wage-related component. A worker's period of contribution may include part or all of the 'future period' between the onset of the disability and the time the worker reaches the age of entitlement to an old age or retirement pension. The second method for calculating the amount of a disability pension takes account *only* of the worker's wages before becoming disabled (or her/his adjusted average lifetime earnings prior to becoming disabled); *no* account is taken of the length of the worker's period of contribution. When a social security agreement applies to a system which uses one of the two methods just described to calculate the amount of a disability pension and to another system that uses the other method, the agreement usually contains provisions for calculating the amount of the respective benefits whether or not totalizing under the agreement is needed to determine eligibility for a disability pension. Otherwise, the disabled worker could receive, in effect, 'double benefits'. For example, both benefits may be prorated to reflect the period completed under the social security system of each country in relation to the combined period under the systems of both (all) the countries. Alternatively, the disabled worker may only be entitled to the benefit from the system to which she or he was affiliated at the time of becoming disabled.

outside the territory of the country in which the institution paying the benefit is located. These difficulties alone are sometimes cited to justify denying, or severely restricting, benefits to persons living abroad.

As discussed previously, one of the objectives of a social security agreement is to overcome, or at least reduce, barriers to the export of benefits. The related provisions in an agreement deal with the *legal* barriers to the export of benefits. The *administrative* difficulties remain, however. Another objective of agreements, therefore, is to reduce these administrative difficulties by providing for mutual administrative assistance between the social security authorities and institutions of the parties to the agreement.

There are different forms of administrative assistance. Under an agreement, the social security institution of a country will usually accept applications for benefits under the systems of the other countries that are parties to the agreement when the claimants reside, or are present, in the territory of the first country. Besides physically receiving the application and forwarding it to the institution of the other country, which remains responsible for deciding whether or not the application will be approved, the institution of the first country will also certify a variety of information that the institution of the other country will require to reach a decision. This can include, depending on the type of benefit, dates of birth of the applicant and family members, marital status, dates of death, and other such data. When totalizing is required to determine eligibility, the institution receiving the application will also provide the institution of the other country information on the worker's affiliation to the social security system it administers. In this way, the institution of the latter country can apply the totalizing provisions of the agreement, if needed, to determine the worker's entitlement to a benefit. In the case of applications for disability and employment injury benefits, it will provide any medical information it has regarding the applicant's condition. When required, the institution receiving the application will usually arrange additional medical examinations on behalf of the institution of the other country.

Administrative assistance is not limited to new applications for benefits. It can be equally important when an institution that is paying a benefit to a person in another country needs to verify that the person is still alive and continues to be eligible for the benefit – for example, in the case of a survivor pension which ceases on remarriage, that the beneficiary has not remarried. Administrative assistance can be particularly important for determining ongoing eligibility for disability and employment-injury benefits.

Generally, the cost of providing administrative assistance under a social security agreement is absorbed by each institution. However, agreements sometimes provide for the reimbursement of the costs of specific types of assistance – for example, arranging and conducting medical examinations – if those costs are appreciable and the institution providing the assistance does not require the resulting information for determining new or ongoing entitlement to benefits under the schemes it administers.

### 3. Issues and challenges

There are several issues that need to be examined in regard to social security agreements. These include: the choice between a multilateral agreement or a series of bilateral agreements; the conclusion of a limited agreement dealing only with the determination of the legislation applicable; the social security schemes to be included in an agreement (often referred to as the 'material scope' of an agreement); the persons to be covered by an agreement (often referred to as the agreement's 'personal scope'); the method for dealing with 'overlapping benefits'; access to voluntary insurance (when a country's social security legislation allows voluntary coverage); the coordination of provident funds and social insurance schemes (or other types of social security schemes); and the operational and administrative capacity required to implement agreements. To these issues, an emerging challenge needs to be added: coordination involving benefits included in a country's Social Protection Floor.

#### 3.1. Multilateral and bilateral agreements on social security

Most social security agreements are bilateral, involving two countries. However, there are some notable examples of multilateral agreements to which many countries are party to. These include, in particular, the regulations of the European Union (EU) that coordinate the social security systems of the 27 EU member-states,<sup>37</sup> the CARICOM (Caribbean Community) *Agreement on Social Security* involving 13 Caribbean states and territories, the *Unified Law on Insurance Protection Extension* covering the six member-states of the Gulf Cooperation Council, and the *Ibero-American Convention on Social Security* to which 12 Latin American countries, Portugal and Spain are signatories. In discussing social security agreements, it is worthwhile to consider the factors in favour of a multilateral or a bilateral approach to the conclusion of agreements.

As the ILO [1996; Kulke 2006] and the World Bank [Holzmann et al 2005] have pointed out, the greatest advantage of a multilateral agreement is that it sets common standards and rules for coordinating the social security systems of all the countries that are parties to the agreement. In particular, a multilateral agreement ensures equal treatment of all workers, irrespective of their countries of origin, in regard to their rights and obligations under all the participating countries' social security systems. In a network of bilateral agreements, on the other hand, migrant workers in a country might have different rights and obligations, depending on the terms of the bilateral agreement between their countries of origin and the country of employment. Thus, although one of the objectives of social security agreements is equality of treatment, bilateral agreements may result in 'inequality among foreigners in the same country of employment' [ILO 1996: 7].

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37 As noted in section 4.1, the EU regulations on the coordination of social security schemes also apply to Iceland, Liechtenstein, Norway and Switzerland.

A multilateral agreement can also ease the administrative burden of implementing agreements by setting common procedures and forms applicable to all dealings between the social security institutions of the participating countries. Under bilateral agreements, procedures and forms may vary from agreement to agreement, making administration more complex and increasing the chance for errors.

These significant advantages of multilateral agreements, however, need to be assessed in light of the time and effort that may be required to find terms and conditions for coordination that are mutually acceptable to all the parties. Considerable time and effort are sometimes needed to find solutions for the coordination of the social security systems of only two countries. There are examples of bilateral discussions that have extended over a decade or even more. A multilateral agreement, involving several parties, can require even longer before discussions can be successfully concluded.

Until a social security agreement – whether bilateral or multilateral – is in place, there is no coordination of the systems of the countries concerned, and the rights of migrant workers and the members of their families will be limited to those provided by national legislation alone. If a bilateral agreement, especially one involving two countries between which there is a substantial movement of migrant workers, can be concluded in appreciably less time than would be required for a multilateral agreement involving those and other countries, the countries concerned need to consider whether the theoretical advantages of a multilateral instrument that could be years in the future outweigh the tangible benefits of a bilateral agreement that could be in place much sooner.

Another consideration is that bilateral agreements can provide a basis for later multilateral agreements. Especially for countries with little or no experience in the negotiation and administration of social security agreements, bilateral agreements can provide a useful vehicle for gaining that experience and developing their own good practices.

If a country decides to follow a bilateral approach, at least initially, it is important that it first determine its preferences for achieving the five objectives of social security agreements, taking into account the particularities of its national legislation. For example, what is its preferred approach to determining the legislation applicable for self-employed persons and seafarers? What options would it be prepared to accept if its preferred approach is incompatible with the approach proposed by another country? What types of periods under the social security system of another country will be taken into account when totalizing is used to determine entitlement to benefits? How will its institution calculate the benefit payable when entitlement is determined through totalizing? These and other questions are discussed in section 6, which gives a checklist for preparing for negotiations.

Identifying in advance a country's preferences in regard to the five objectives of social security agreements will contribute significantly to ensuring consistency among its bilateral agreements. This will substantially reduce, although not necessarily eliminate altogether, a patchwork of different rights that vary according to a migrant worker's country of origin and the terms of the bilateral agreement with that country. It can also facilitate, at a later stage, the conclusion of a multilateral agreement to replace some or all of the bilateral agreements.

### 3.2. Limited agreements

Most social security agreements achieve all five of the objectives described in section 2. Sometimes, however, countries are only able to find mutually acceptable means for achieving some, but not all, of the objectives.

In such cases, an option that is sometimes used is to conclude a limited agreement that provides only for the objectives on which mutually acceptable solutions have been found. The social security agreements listed in the ILO's NATLEX database [ILO 2011b] include, for example, several agreements concluded by the United Kingdom that deal exclusively with the determination of the applicable legislation, and the related aspects of equality of treatment and administrative assistance, but not with export of benefits and totalizing.<sup>38</sup> Franssen and de Jonge [2006] describe agreements concluded by the Netherlands dealing only with export of benefits and related aspects of administrative assistance.<sup>39</sup>

Clearly, the most desirable outcome is an agreement that achieves all five objectives. However, when this does not seem possible, a limited agreement can at least remove some of the barriers that migrant workers would otherwise face. Moreover, a limited agreement can provide a foundation on which a broader agreement can be built in the future.

### 3.3. Benefits included in an agreement (material scope)

As noted in section 1.1, all branches of social security can, in principle, be included in a social security agreement, whether bilateral or multilateral. However, as also noted in that section, many agreements (in fact, the great majority) apply only to *some* branches. This is often the case even when each of the parties to an agreement has schemes in place for additional branches. It is, therefore, worthwhile to consider the factors that can justify the exclusion from a social security agreement of one or more branches of a country's social security system.<sup>40</sup>

In regard to long-term cash benefits – benefits in the event of old age (retirement), disability or death of a family member – under contributory schemes (social insurance schemes, provident funds, and schemes based on individual accounts and employer liability), it is difficult to justify any exclusion from an agreement's material scope, except possibly benefits that are means-tested and, in some instances, special schemes for civil servants.<sup>41</sup> Even for means-tested benefits, an agreement

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38 For the text of such an agreement, see 'Convention on Social Security between Canada and the United Kingdom of Great Britain and Northern Ireland'. Available at [http://www.hrsdc.gc.ca/eng/oas-cpp/international\\_agreements/uk-a.shtml](http://www.hrsdc.gc.ca/eng/oas-cpp/international_agreements/uk-a.shtml).

39 For the text of such an agreement, see 'Agreement between the Government of the Kingdom of the Netherlands and the Government of the Kingdom of Thailand on the export of social insurance benefits'. In *Tractatenblad van het Koninkrijk der Nederlanden*. Jaargang 2002, Nr. 219.

40 To simplify an already complex issue, the discussion that follows looks at entire branches of social security. However, in actual practice, the issue that often arises is the exclusion of specific programmes within a branch (when a country has more than one scheme within a branch) and/or the exclusion of specific benefits within a scheme (for example, means-tested benefits). The considerations are the same in deciding whether to exclude an entire branch, specific programmes within a branch, or specific benefits within a programme.

should at least ensure equality of treatment between migrant workers (and the members of their families) and the nationals of the country paying the benefits. As a consequence of an agreement's provision regarding equality of treatment, if the nationals of a country have the right, under a country's laws, to the payment of means-tested benefits abroad, migrant workers and the members of their families should have the same right.

Long-term cash benefits under universal coverage schemes should also, as a general rule, be included in an agreement's material scope. As with means-tested benefits, it is essential, at the least, for an agreement to ensure equality of treatment between migrant workers (and the members of their families) and nationals of the country paying the benefits. Again, as a result of equality of treatment, migrant workers should be entitled to receive benefits abroad if nationals of the country are allowed, under the country's laws, to receive the benefits abroad. However, there may be justification for putting more stringent eligibility requirements for the payment of benefits abroad,<sup>42</sup> provided these apply without regard to nationality.

Short-term benefits (benefits in the case of sickness, maternity, unemployment and employment injury), family support benefits<sup>43</sup> and in-kind health-care benefits can present particular challenges in terms of their inclusion in a social security agreement. Except for ensuring equality of treatment for migrant workers and, whenever possible, export of cash sickness, maternity and employment injury benefits, there may be reasons to justify the exclusion of many or all of these branches from a social security agreement.

Generally speaking, most schemes providing short-term benefits, with the exception of unemployment benefits, either have no requirement for a qualifying period or have a very short qualifying period. Therefore, totalizing is usually not required. (The case of unemployment benefits is discussed separately below.)

Export of cash sickness, maternity and employment injury benefits can be important for migrant workers. Many migrant workers would prefer to return to their countries of origin, where they have families and communities to assist them, in the event of maternity or if they suffer a sickness or an occupational injury that will last for a lengthy period of time.

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41 Some countries have special schemes for civil servants – which can include members of the armed forces and police – that are non-contributory or only nominally contributory (that is, where only a small fraction of the required revenues are derived from contributions). It is generally accepted international practice to exclude such schemes from social security agreements. Few, if any, migrant workers are adversely affected by such exclusions since employment in a country's civil service is usually restricted to its own nationals.

42 For example, in a non-contributory residence-based scheme financed from general tax revenues, a longer eligibility requirement may be prescribed for persons who reside outside the country paying the benefit than for those residing in the country (for example, ten years of prior residence to be entitled to receive a benefit if living in the country, and 20 years of prior residence if living abroad). However, it is important to emphasize that, as a result of the agreement's provision concerning equality of treatment, the *same* longer eligibility requirement must apply to *both* nationals and non-nationals of the country paying the benefit. Moreover, totalizing should usually be available to assist migrant workers to fulfil the eligibility requirement.

43 Family support benefits include benefits for dependent children (sometimes referred to as family or child allowances) and benefits for dependent adults (for example, elderly family members such as dependent parents or grandparents and other adult family members who are dependent because of a disability).

In the case of cash maternity benefits, there seems little reason to justify not allowing export of benefits. In the case of cash sickness and employment injury benefits, however, there is the complication that periodic medical examinations are usually required to verify continued entitlement. A social security institution can find such examinations difficult, if not almost impossible, to carry out, unless there are provisions for mutual administrative assistance in a social security agreement with the country in which a beneficiary resides. Even if such provisions for mutual assistance are in an agreement, there is the question of whether the social security institution of the other country is administratively able to carry out, or arrange, the required medical examinations.

The export of unemployment benefits can be especially problematic. On the one hand, it seems unfair to deny entitlement to unemployment benefit to a migrant worker who has contributed to this branch of social security and who returns to her/his country of origin (or goes to a third state) on becoming unemployed. The unfairness can be all the greater if a worker who has been in a country on a time-limited work permit for a specific type of employment is required to leave that country because, through no fault of her/his own, the employment ceases and, with it, the validity of her/his work permit.

On the other hand, continued entitlement to unemployment benefit is often conditional on the insured person looking for new employment, and on proving to the social security authorities of the paying country that he/she is making legitimate efforts in this regard. Verifying that such job-search requirements are being met when a worker is in a different country can be difficult. As with medical examinations to determine ongoing entitlement to sickness and employment-injury benefits, mutual assistance between social security institutions under the terms of an agreement can provide a solution. However, unlike medical examinations, in which relatively objective evidence is needed, evidence of legitimate efforts at finding a job can be much more subjective and can depend on circumstances that vary significantly from country to country – even between neighbouring countries.

If the export of unemployment benefits is not considered feasible for the reason just given, an alternative that should be considered to avoid the unfairness cited above is the payment of a lump-sum amount – for example, an amount based on the length of the period of insurance – to a migrant worker who leaves a country permanently on becoming unemployed.<sup>44</sup>

Export of family support benefits can be as problematic as the export of unemployment benefits when an insured worker is in one country and the family members in respect of whom benefits are claimed are in another.<sup>45</sup> Again, the problem is the verification of ongoing entitlement. The experience of countries that have allowed the export of family support benefits has generally shown that verification can be very difficult.

In regard to benefits in kind for health care and in the event of sickness and maternity, 'export', *per se*, is not applicable. The issue is whether the benefits in kind will be provided, under a social

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44 Payment of a lump-sum would only be made to migrant workers whose employment has been terminated through no fault of their own and not to those dismissed for malfeasance or illegal activity.

45 The case discussed here is usually applicable only to family support benefits financed through contributions by workers and/or their employers. In the case of family support benefits financed from general tax revenues (that is, universal benefit or social assistance schemes), entitlement is usually limited to family members in the country residing with the worker.



security agreement, in the migrant worker's country of residence (usually her/his country of origin) by the social security scheme of that country. As already noted, this raises the issue of the reimbursement of costs, which can become especially problematic when there is an asymmetrical flow of migrants between countries (many more persons going from country A to country B than the other way around) and/or if there are significant differences in the range (types), quality and cost of the health care services provided in different countries. This is not to say that benefits in kind should categorically not be included in a social security agreement, only that careful thought should be given before making a commitment.

There is one final comment that should be made regarding the material scope of a social security agreement.

Even if a branch is excluded from an agreement for purposes of the payment of benefits abroad and totalizing, it is useful to include the branch for purposes of the determination of the applicable legislation if the branch is financed through contributions. This will ensure that posted workers will be protected from 'double coverage' under all aspects of the social security systems of the countries that are parties to the agreement.

#### 3.4. Persons covered by an agreement (personal scope)

If at all possible, a social security agreement should apply to all persons who are, or who have been, subject to<sup>46</sup> the social security systems of the countries that are parties to the agreement, without regard to nationality. A social security agreement should also apply to all other persons who derive rights from them (for example, family members who qualify as dependants of an insured person, and persons who are entitled to survivor benefits on the death of an insured person), again without regard to nationality.

Some countries, however, take a nationality-based approach to the personal scope of a social security agreement. In such cases, it is critical that the agreement apply, at the least, to the following categories of persons:

- nationals of the countries that are parties to the agreement;
- refugees<sup>47</sup> and stateless persons,<sup>48</sup> as defined in the relevant United Nations conventions, who reside in a country that is a party to the agreement; and
- those who derive rights from a national, a refugee or a stateless person, irrespective of nationality.

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46 The phraseology 'subject to the social security system [of a country]' is widely used in social security agreements but is seldom, if ever, defined. In the case of a contributory scheme, the term 'subject to' means required to make (mandatory) contributions to the scheme. In the case of a residence-based scheme or a scheme based on covered employment, it means having completed a period of residence, or a period of covered employment, that can be used to acquire entitlement to a benefit.

47 The term 'refugee' is defined in Article 1 of the *Convention relating to the Status of Refugees* of 28 July 1951 [UN 1951], as amended by the *Protocol* to that Convention of 31 January 1967 [UN 1967].

48 The term 'stateless person' is defined in Article 1 of the *Convention relating to the Status of Stateless Persons* of 28 September 1954 [UN 1954].

An asymmetrical approach to the personal scope of an agreement can be taken if one country insists on nationality-based restrictions while the other country prefers broader coverage not limited by nationality. In such a case, the provision of the agreement giving its personal scope can be limited by nationality for the first country, but not limited by nationality for the second country.

It should be noted that the UN conventions regarding refugees and stateless persons contain provisions ensuring equality of treatment for these categories of persons in regard to the social security schemes of the countries that are parties to the conventions.<sup>49</sup> As a result, it is sometimes argued, no explicit reference to refugees and stateless persons is needed in a social security agreement, even when the personal scope of the agreement is limited by nationality.

This argument does not take into account two factors. Firstly, not all countries are parties to the two conventions: of the 192 member-states of the UN, only 145 are parties to the convention on refugees, and a much smaller number, 65, to the convention on stateless persons. Secondly, even in the case of countries that are parties to the conventions, the social security authorities and institutions may not be aware of the obligations regarding the schemes they administer that flow from the adherence of their countries to the conventions.

If the personal scope of a social security agreement is restricted to the nationals of the parties, it is strongly advised to include an explicit reference to refugees and stateless persons.

### 3.5. Overlapping benefits

A person can sometimes be simultaneously entitled to two (or more) benefits, each arising from a different contingency, under a country's social security system. For example, a widow receiving a survivor pension because of the death of her husband can become disabled and qualify for a disability pension in her own right. These are usually referred to as 'overlapping benefits'.<sup>50</sup>

In the social security systems of most countries, rules are in place to limit the total amount that a person can receive in the case of overlapping benefits. For example, he/she may be entitled to continue to receive the full amount of one benefit (perhaps the highest of the two, or the first to go into pay), but only a fraction of the second (say, 60 percent). Or the person may receive both benefits, but only up to a prescribed maximum total amount.

The question that can arise when coordinating social security systems through an agreement is how a country whose system has rules regarding the overlapping benefits should treat benefits under the systems of the other countries? In responding to this question, social security agreements often have a provision stating that each country, in applying its rules regarding overlapping benefits, can take into account the corresponding benefits under the social security systems of the other countries that are parties to the agreement.

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49 See Article 24 of the *Convention relating to the Status of Refugees* [UN 1951] and Article 24 of the *Convention relating to the Status of Stateless Persons* [UN 1954].

50 The phrase 'accumulation of benefits', which is a literal translation of the corresponding French term 'cumul des prestations', is also sometimes used.

Such a provision ensures fairness, in that a person who receives benefits arising from different contingencies from two (or more) countries will not be in a more advantageous position than someone receiving the corresponding benefits from one country alone. However, the argument in favour of fairness needs to be weighed against the administrative issues that can arise – for example, the frequency with which changes in the value of the benefit of another country due to fluctuating exchange rates will be taken into account, and the consequential unfairness that could arise if fluctuations in the exchange rate are *not* taken into account on a periodic basis.

If there are likely to be relatively numerous cases of overlapping benefits, and if the amount of the benefits is likely to be relatively high, the case for including a provision on overlapping benefits in an agreement may be strong. Otherwise, the administrative issues may warrant not including such a provision.

Three further comments regarding overlapping benefits and related issues are in order.

First, if it is included in an agreement, a provision regarding the overlapping of benefits applies only to benefits arising from *different* contingencies. It does not apply to benefits arising from the *same* contingency – for example, the old age pensions to which a person may be entitled from each of the countries in which she/he has worked.

Second, if there are means-tested benefits in a country's social security system, benefits from other countries, including those arising as the result of an agreement (for example, from totalizing), will usually be taken into account in applying the means-test *exclusively* in accordance with the national legislation of the country paying the means-tested benefit. If it is agreed in the course of negotiations that specific benefits paid under the legislation of one country will *not* be taken into account when determining the amount of means-tested benefits under the legislation of another country, this should be stated explicitly in the agreement. Consideration should also be given to putting an explanation of the reason for the exclusion in the minutes of the negotiations (see section 5.3).

Third, in cases in which one country is prepared to export a means-tested benefit to eligible persons residing in another country, and the latter country has a means-tested benefit whose amount takes into account benefits from other countries (including the exported means-tested benefit), there will be need for rules regarding how the two means-tests will simultaneously be applied. Otherwise, when one country reduces the amount of its means-tested benefit to take into account the means-tested benefit paid by the other country, the means-tested benefit of the latter country will increase. And this increase will result in a decrease in the first country's means-tested benefit etc. Such a 'teeter-totter' effect can only be resolved through a provision either in the agreement or its administrative arrangement (see section 5.7).<sup>51</sup>

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51 Since means-tested benefits are not usually exported, such instances of the simultaneous application of two means-tests are rare. However, they can occur. Moreover, as countries introduce means-tested elements to their social security systems as a way of reducing costs in the face of aging societies or as part of their Social Protection Floor (see section 3.9), they may become more common.

### 3.6. Voluntary insurance

Some countries allow persons who are not subject to mandatory contributions to their social security system to make voluntary contributions. Entitlement to make such contributions is usually predicated on a prior mandatory affiliation with the country's social security system. In many instances, the prior mandatory affiliation must be in a prescribed period before the start of voluntary contributions (for example, in the previous six months) and/or for a minimum period (for example, at least a year).

When a country's social security system allows for voluntary insurance, consideration should be given to including a provision in a social security agreement ensuring, first, equality of treatment in determining entitlement to make voluntary contributions (especially if this right is subject to nationality restrictions in a country's social security laws) and, second, the possibility of totalizing to meet conditions regarding prior mandatory affiliation.<sup>52</sup>

### 3.7. Coordinating with a provident fund

No social security agreement involving totalizing has ever been concluded between a provident-fund country and a social-insurance country. The likely reason is the difficulty of finding a way to ensure that such an arrangement would meet a key element of reciprocity: the relative comparability of the obligations each country would assume (see the discussion of reciprocity in section 1.4). Through totalizing, the scheme of the social-insurance country would be obligated to pay new ongoing pensions that would not otherwise be payable under its legislation alone (that is, pensions to persons who qualify only as a result of totalizing periods in the two countries), and the additional cost of those new pensions would be financed entirely from the scheme's own funds. However, the scheme of the provident-fund country would never be obligated to pay new benefits because there is no minimum qualifying period or other such eligibility requirement for which totalizing would be needed. With such asymmetrical result, a social-insurance country would likely be reluctant to enter into an agreement involving totalizing with a provident-fund country.

In the course of developing the model provisions for a social security agreement that are annexed to ILO Recommendation No. 167 [ILO 1983], the issue of coordinating a provident fund and a social insurance scheme was examined. Two alternatives are included in the model provisions. One of the alternatives is the usual totalizing of periods – for the reason just discussed, unlikely to be an acceptable solution for the country with the social insurance scheme. The other proposed method of coordination takes an entirely different approach – the transfer of money between the two schemes, as follows:

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52 It is important to note the difference between totalizing to determine entitlement to the right to voluntary insurance and the use of periods of voluntary insurance when totalizing to determine entitlement to benefits under an agreement. Even if an agreement does not have a provision allowing totalizing for purposes of determining entitlement to voluntary insurance, periods of voluntary insurance will usually be taken into account by all the countries that are parties to the agreement when totalizing to determine entitlement to benefits. If this is *not* to be the case, there should be an explicit provision to this effect in the agreement or, failing that, a clear statement in the minutes of the negotiations (see section 5.3)

- If a migrant worker moves from a provident-fund country to a social-insurance country, the worker could have the amount in his or her provident fund account transferred to the social insurance system of the latter country, and the worker could use this amount to ‘buy back’ periods under the latter system. While not entirely clear from the model provisions, ‘buy back’ appears to mean making retroactive voluntary contributions covering all or part of the period during which the worker was a member of the provident fund. The terms of the ‘buy back’ would be governed either by the social security laws of the social-insurance country (if those laws allow voluntary contributions, which many do not) or by specific provisions included in the social security agreement between the two countries.
- A migrant worker who moves from a social-insurance country to a provident-fund country, and who has not yet fulfilled the minimum qualifying period for a pension under the social insurance scheme of the first country, could have her or his contributions and those of the employer transferred from the social insurance scheme to the provident fund.<sup>53</sup> The social security agreement between the two countries would specify the method for calculating the amount to be transferred.

The alternative involving the transfer of money between the two schemes deserves further examination. The mechanism proposed – the transfer of money between schemes – would be reciprocal, in the sense that each scheme would send money to, and receive money from, the other scheme. Moreover, when the social insurance scheme takes on the obligation for new ongoing pensions as a result of the transfer of money, it will be compensated (at least in part) through the transfer.

The transfer approach just described appears to be *theoretically* feasible. However, it remains to be seen whether it is *practically* feasible – that is, whether the specific, mutually acceptable provisions required to implement the transfer approach between actual schemes can be found. For example, determining the amount to be transferred from the social insurance scheme to the provident fund would likely require a calculation of the commuted value of the rights accrued in the social security scheme (the amount of money that would be needed to purchase an annuity from which payments would be made equal to what would have been paid by the social insurance scheme). Such a calculation would, in most instances, be complex and would require the services of an actuary. This could be both costly and time-consuming.

### 3.8. Operational and administrative capacity

Section 2.5 summarized the types of administrative assistance that are usually provided within the ambit of a social security agreement. Providing such assistance requires the institutions concerned to assume a range of new responsibilities in addition to those they already have in administering their schemes within their own countries.

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53 In addition to the contributions of the worker and the employer, an additional amount reflecting interest on past contributions and/or the investment earnings, if any, realized by the social insurance scheme on those contributions would also have to be transferred.

Social security agreements usually set out only the general principles underlying the administrative assistance that the institutions will provide to one another. As noted in section 2.5, and explained in greater detail in section 5.7, the specific types of assistance must usually be agreed through the conclusion of an administrative arrangement for the implementation of the agreement.

Even if a country's social security institution is not directly responsible for the conclusion of the administrative arrangement (this is often the responsibility of the government ministry that oversees the institution), it must nonetheless be closely involved in the process since it will be responsible for implementation. The social security institutions of the countries concerned need to develop mutually acceptable procedures and forms for the administrative assistance they will provide one another. Each country will need to recruit and train staff in applying the procedures. Finally, and most important, each institution must ensure that it provides the administrative assistance to other institutions in a timely manner and in accordance with the agreed procedures, and that applications for benefits it receives from the institutions in other agreement-countries are adjudicated promptly and accurately.

The increased workload that a social security institution will experience as a result of a social security agreement will, clearly, depend on the number of persons affected by the agreement. The workload can be appreciable. In deciding to conclude a social security agreement, the operational and administrative capacity of a country's social security institution to handle the additional responsibilities and workload must be kept in mind. In addition, each country needs to weigh the resources required for other priorities against the resources that would be required for implementing social security agreements. Especially for countries in which social security coverage is low in relation to the overall workforce, extending general coverage to the national workforce is likely to be a higher priority – in fact, a *much* higher priority – than social security agreements.

### 3.9. Social Protection Floor

The ILO estimates that 75 to 80 percent of the world's population lives in a state of 'social insecurity' [ILO 2011a: 8], without access to social protection. The situation in many low-income, and even some middle-income countries, is worse. In sub-Saharan Africa, for example, social security covers only five to ten percent of the population [ISSA 2008].

The reasons for the low coverage by social security schemes in low- and middle-income countries are many and complex. The root of the problem lays in the fact that social security schemes have been primarily directed to workers in the formal (organized) sector of the economy, but the vast majority of the population in most developing countries is in the informal sector.

As part of its Global Campaign on Social Security and Coverage for All, the ILO has promoted the concept of the Social Protection Floor (SPF). In April 2009, the Chief Executives Board of the UN System adopted the SPF as one of nine priority initiatives to address the global economic and financial crisis.

Most recently, at its 100<sup>th</sup> Session in June 2011, the International Labour Conference affirmed that achieving universal social security coverage at some minimum level of protection is of the highest priority for equitable economic growth, social cohesion, and Decent Work for all men and women. The Conference concluded that, in light of renewed support for an SPF, there is a need for a

Recommendation complementing the existing standards that would provide flexible but meaningful guidance to member States in building social protection floors within comprehensive social security systems that are tailored to national circumstances and levels of development [ILO 201d: 8].

The SPF is defined as:

... a set of social rights, services and facilities that every person should enjoy ... [It] could consist of two main elements ...:

- services: geographical and financial access to essential services such as water and sanitation, health, and education;
- transfers: a basic set of essential social transfers, in cash or in kind, to provide minimum income security and access to essential services, including health care [ILO 201a: 9].

For purposes of this paper, the most significant elements of the SPF are cash transfers – payments financed out of general tax revenues – to the following:

- families with children, perhaps made conditional upon school attendance;
- unemployed adults of working age, conditional upon actively looking for work and perhaps linked to (limited) employment guarantees;
- elderly persons.

No specific design has been prescribed as to the form of the cash transfers. Each country will need to design its own SPF cash transfers, taking into account its social, political and economic situation and, most critically, its financial capacity. In practical terms, it seems likely, for reasons of cost, that SPF cash transfers will primarily take the form of relatively modest means-tested benefits.

While each country's SPF will be focussed principally on its own population, it is important that migrant workers not be forgotten as SPF cash transfers are designed. As experience in the past as shown, it would be all too easy for migrant workers to 'slip between the cracks' and left, again, with no coverage. Therefore, to the extent that, for example, nationality restrictions or minimum eligibility requirements (for example, minimum periods of residence) are part of the design of a country's SPF, consideration will need to be given to the inclusion of SPF cash transfers in social security agreements in order to ensure that migrant workers, and the members of their families, have access to benefits.

#### 4. Good practices in coordinating social security systems

In examining the network of social security agreements that are currently in force, six examples of good practices should be noted: the regulations of the European Union (EU) on the coordination of social security systems, the CARICOM (Caribbean Community) *Agreement on Social Security*, the *Unified Law on Insurance Protection Extension* of the GCC (Gulf Cooperation Council), the *Ibero-American Multilateral Convention on Social Security*, the CIPRES (Inter-African Conference on Social Insurance) *Multilateral Convention on Social Security*, and the 'third-state' totalizing provision found in some

bilateral social security agreements. These examples are noteworthy primarily for the important role they play in strengthening the social security rights of migrant workers and the members of their families. However they also reveal remaining gaps in protection and provide ‘lessons learned’ in implementation.

#### 4.1. EU regulations on the coordination of social security systems<sup>54</sup>

The EU regulations on the coordination of social security systems apply to the 27 member-states of the European Union<sup>55</sup> as well as to Iceland, Liechtenstein, Norway, and Switzerland. They constitute the most far-reaching multilateral agreement in existence, both in terms of the number of persons covered and the comprehensiveness of the coordination.

The key legal instrument is Regulation 883/2004 [EU 2004], which entered into force on 1 May 2010 and replaced Regulation 1408/71 [EU 1971]<sup>56</sup>. Regulation 883/2004 responds to all five of the objectives of social security agreements described in section 2, and covers all branches of social security.<sup>57</sup> It is complemented by Regulation 987/2009 [EU 2009], known as the Implementing Regulation, which sets out the administrative rules and procedures for the application of Regulation 883/2004.<sup>58</sup>

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54 For a detailed description of the EU regulations on social security, see *Coordination of Social Security Systems in the European Union: An explanatory report on EC Regulation No 883/2004 and its Implementing Regulation No 987/2009* [ILO 2010].

55 Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom

56 (a) Regulation 1408/71, which entered into force on 1 October 1971, was the first comprehensive mechanism for social security coordination in the European Economic Community, as the EU was known at the time of its adoption. It replaced an earlier limited coordination instrument, Regulation 3/58 adopted in 1958. Prior to the adoption of Regulation 3/58, the Council of Europe (CoE), a regional organization consisting (at the time) of the countries of western Europe, adopted in 1953 two *European Interim Agreements on Social Security* which provided for equality of treatment among the nationals of the signatory states in the application of their respective social security laws; one interim agreement covered old age, disability and survivor benefits, and the second all other branches of social security. In 1972, the CoE adopted the *European Convention on Social Security* which coordinated the social security schemes of the signatory states on the basis of the five objectives described in section 2. Except for Turkey, all the countries that have signed and ratified the Interim Agreements and/or Convention are now covered by the EU Regulation on the coordination of social security systems, which goes far beyond the CoE instruments. (b) Regarding Iceland, Liechtenstein, Norway and Switzerland, see footnote 59.

57 In accordance with Article 3, Regulation 883/2004 covers: sickness benefits, maternity and equivalent paternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits, pre-retirement benefits, and family benefits. Except for certain special schemes listed in an annex, the regulation applies to both general and special social security schemes, whether contributory or non-contributory, including schemes based on employer liability. It also applies to some 'special non-contributory cash benefits' which are, in effect, social assistance.

58 The Implementing Regulation effectively serves as the administrative arrangement discussed in section 5.7 of this paper. Regulation 987/2009 replaced Regulation 574/72, which was the implementing regulation for Regulation 1408/71.



Regulation 883/2004, like its predecessor Regulation 1408/71, applies to:

- all nationals of EU member-states and of Iceland, Liechtenstein, Norway and Switzerland;<sup>59</sup>
- refugees and stateless persons who are or who have been covered by the social security system of any EU country;<sup>60</sup> and
- the members of their families and their survivors (without regard to the nationality of the family members and survivors).<sup>61</sup>

Moreover, as a result of Regulation 1231/10 [EU 2010a], which entered into force on 1 January 2011,<sup>62</sup> the personal scope of Regulation 883/2004 is extended to include non-EU nationals who reside legally in the EU.<sup>63</sup> Taken together, regulations 883/2004 and 1231/10 ensure complete social security protection for all legal migrant workers and the members of their families in the EU.

The provision of Regulation 883/2004 regarding export of benefits ensures that benefits under the social security legislation of any EU member-state will be paid to persons included in the regulation's personal scope if they move to or reside in a different EU member-state. As a result of Regulation 1231/10, this includes third-state (non-EU) nationals who reside legally in the EU and who move from one EU country to another.

Regulation 883/2004 is silent, however, on the topic of the export of benefits to third states (countries outside the EU<sup>64</sup>). As a result, the right of a national of an EU country to receive a benefit from a different EU country while residing in a third state is governed by the export-of-benefit provisions of the social security legislation of the latter EU country (the country paying the benefit) read in conjunction with the equality-of-treatment provision of Regulation 883/2004. If a country's legislation gives its own nationals the right to receive a benefit in a third state, the nationals of all other EU member-states have the right to receive the benefit while in the third state. On the other hand,

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59 Regulation 1408/71 and its implementing Regulation 574/72 will continue to apply to Iceland, Liechtenstein, Norway, and Switzerland until the EU's agreements with these countries are amended to include reference to Regulations 883/2004 and 987/2009.

60 References in this section to 'EU countries', 'EU member-states', 'EU nationals', 'residing in the EU' etc should be taken to include Iceland, Liechtenstein, Norway, and Switzerland.

61 Regulation 883/2004 also applies to the survivors of non-EU-nationals in instances when the survivors are nationals of an EU member-state or refugees and stateless persons residing in an EU member-state.

62 Regulation 1231/10 replaced Regulation 859/2003 [EU 2003], which had comparable provisions regarding third-state nationals residing in the EU.

63 Regulation 1231/10 applies only to third-state nationals residing legally in the EU who 'are in a situation which is not confined in all respects within a single Member State' [EU 2010a]. Moreover, Regulation 1231/10 does *not* apply to the social security legislation of Denmark and the United Kingdom. However, Regulation 859/2003, read in conjunction with Regulations 1408/71 and 574/72, continues to apply to third-state nationals residing legally in the EU in regard to their rights under the United Kingdom's social security legislation.

64 Other than Iceland, Liechtenstein, Norway, and Switzerland.

if a country does not give its own nationals the right to export benefits to a third state, the nationals of other EU states also do not have the right of export of the first country's benefits to a third state.

The principal gap in the export-of-benefit provision of the EU regulations concerns the rights of third state (non-EU) nationals who move outside the EU (and the four other countries in which the EU regulations apply). Unlike EU nationals who, as just discussed, have the benefit of the equality-of-treatment provision of the EU regulations read in conjunction with the export provisions in national legislation, non-EU nationals have only the latter. Thus, if a country gives only its own nationals the right to receive its benefits abroad, the EU regulations afford no right of export to non-EU nationals when they move to a third state (in most instances, back to their countries of origin). This is the case even if a person has met the contributory requirements for a benefit stipulated in a country's social security legislation.

The European Commission is aware of this gap and the unfairness and hardship that result, especially in the case of migrant workers and members of their families who return (or would like to return) to their countries of origin and who have had long periods of affiliation (usually periods of contribution) under the social security system of an EU country whose legislation limits the right to the export of benefits. For some time there have been discussions within the EU to enact a regulation allowing third-state nationals who have met the eligibility requirements for long-term benefits under any EU country's social security legislation to receive those benefits anywhere in the world.

After much debate, it appears that agreement has been reached on a new regulation which will allow third-state nationals who have met the contributory requirements for a long-term benefit under the legislation of an EU member-state and who move outside the EU to be granted equal treatment with the nationals of that member-state in regard to receipt of its benefits. The regulation is expected to be submitted to the European Parliament and Council for approval later this year.

If implemented, such a regulation will be an important step in protecting the social security rights of migrant workers and the members of their families. However, gaps will still remain. In particular, the regulation will be of no help to migrant workers who have *not* completed a period of affiliation of sufficient length to meet the qualifying conditions under national legislation. Some EU countries require very long periods of affiliation – for example, in the Czech Republic, 26 years. In these instances, totalizing would be needed. There is no indication that the forthcoming regulation will provide for totalizing in regard to the rights of third-state nationals who move outside the EU.<sup>65</sup>

Regulation 883/2004 establishes an Administrative Commission for the Coordination of Social Security Systems. The Administrative Commission consists of government representatives from each of the countries to which the regulation applies. It is responsible for overseeing the operation of Regulation 883/2004 and its Implementing Regulation. Among other things, the Commission deals

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65 Christoph Schumacher-Hildebrand, former Director for European Affairs at the German Federal Ministry of Labour and Social Affairs, has made the point that Article 79(1) of *The Treaty on the Functioning of the European Union* calls for the 'fair treatment of third-country nationals' [author's emphasis] and that *fair* treatment goes beyond *equal* treatment. In his view, 'it is not fair treatment that when someone who had worked in [an EU] Member State for many years and went back to the home country there is no export of benefit he/she had paid for. This approach of fair treatment provided even for a wider approach than equal treatment – the latter often used as an argument by Member States which do not export benefits for their own citizens ...' [Gellérné et al 2011: 91].

with administrative questions and questions of interpretation arising from the application of the regulations. It is charged with 'promoting exchange of experience and best administrative practices' and 'foster[ing] and develop[ing] cooperation ... in social security matters' [EC 2004: L200/26].

The Administrative Commission is assisted in its work by a Technical Commission for Data Processing and an Audit Board. The Technical Commission plays an especially important role because of the provisions of the Implementing Regulation requiring that data be transmitted electronically. Such an electronic exchange of information, which has been used extensively among some EU countries for many years, will replace entirely the exchange of information by paper. It represents a major administrative advance but entails significant challenges because of the number of countries involved and the diversity in their computer systems. The Technical Commission is mandated to propose to the Administrative Commission 'common architecture rules for the operation of data-processing services, in particular on security and the use of standards' [EU 2004: L200/27].

In addition to the Administrative Commission, Regulation 883/2004 establishes a tripartite Advisory Committee for the Coordination of Social Security Systems, consisting of representatives of governments, workers and employers from each of the countries to which the regulation applies. The Advisory Committee has a mandate 'to examine general questions or questions of principle and problems arising from the implementation of the Community provisions on the coordination of social security systems, especially regarding certain categories of persons' [EC 2004: L200/28] and to make proposals.

The EU regulations on social security have largely replaced a complex set of bilateral and multilateral agreements that had previously coordinated the social security systems of many, but not all, of the EU member-states. In doing this, the regulations have filled the gaps within Europe that existed when countries did not have bilateral or multilateral agreements. The regulations have also instituted consistent provisions applicable to all the persons legally resident in the EU in place of provisions that varied according to many factors, particularly the nationality of the persons concerned.

Before leaving the subject of the EU regulations, one further point should be noted. As the numbering of Regulation 883/2004 indicates, the regulation was adopted in 2004. However, as already mentioned, it did not enter into force until 2010 – six years later. The reason for this delay was the need to adopt the Implementing Regulation, 987/2009, which is essential for the application of Regulation 883/2004. The Implementing Regulation is also critical for the social security institutions in the EU member-states to bring their procedures into conformity with the administrative requirements of the regulation (including the enhancement or, in some cases, introduction of electronic means for exchanging the required information).

Given the number of countries covered by the EU regulations (as noted, 31), the number of branches of social security included, and the diversity of schemes within those branches, the EU Implementing Regulation is especially complex, and the time needed for its conclusion was especially long. Nevertheless, even in the case of a bilateral agreement covering only long-term benefits, time will be needed to ensure that the mechanism similar to the EU Implementing Regulation – the administrative arrangement (see section 5.7) – is in place by the time the agreement enters into force and that the social security institutions are prepared for the new obligations they will assume under the agreement.

## 4.2. CARICOM Agreement on Social Security

The Caribbean Community (CARICOM) is a regional organization consisting of 14 independent states, most of which are former British colonies, and six British overseas territories. There has long been a significant movement of migrant workers within the English-speaking Caribbean. Since gaining independence from the United Kingdom starting in the 1960s, all the states that were former British colonies have established social security systems based on a social insurance model and containing similar provisions regarding the types of benefits and eligibility requirements. The same is the case for the British overseas territories.

In 1996, the *CARICOM Agreement on Social Security* [CARICOM 1996], coordinating the social security systems of the parties to the Agreement, was opened for signature. Since that time, 13 CARICOM states and territories have signed and ratified the Agreement,<sup>66</sup> which entered into force on 1 April 1997. In 2009 a Protocol amending provisions of the 1996 Agreement was concluded; four signatories to the Agreement have signed and ratified the Protocol.<sup>67</sup> The Protocol amends two provisions of the 1996 Agreement 'for clarity'. The provisions in question concern the payment of partial benefits.

The CARICOM Agreement responds to all five of the objectives of social security agreements described in section 2. Its material scope includes long-term benefits – old age/retirement, disability and survivor pensions, and disablement and death pensions resulting from employment injuries. Its personal scope covers all employed and self-employed persons who are or have been subject to the social security legislation of any of the signatory states and territories, without regard to nationality, and to their dependants and survivors.

An administrative commission – titled simply 'the Committee' – is charged with settling 'every administrative question arising out of the provisions of [the] Agreement.' The Committee consists of the heads of the social security schemes of the signatory states and territories.

The CARICOM Agreement differs from most other multilateral and bilateral agreements in that it does not have an administrative arrangement. Instead, the provisions usually found in an administrative arrangement are contained in the Agreement itself. The reason for this unusual structure, which was the outcome of the prolonged negotiations leading to the conclusion of the CARICOM Agreement, is not known.

In addition to its non-standard structure, the *CARICOM Agreement on Social Security* contains several key provisions regarding entitlement to benefits that are worded in an unusual way (in comparison to the wording found in most other multilateral and bilateral agreements). Some of these provisions are difficult for an outside observer to understand, and, according to reports, have resulted in lengthy debates regarding their interpretation at meetings of the Committee. The Protocol adopted in 2009 addresses two such provisions whose interpretation – or, more specifically, the lack of unanimity regarding their interpretation – has been especially problematic. The solution provided

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66 Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St Kitts and Nevis, Saint Lucia, St Vincent and the Grenadines, and Trinidad and Tobago.

67 Antigua and Barbuda, Bahamas, Saint Lucia, and St Vincent and the Grenadines.

by the Protocol – an interpretation legally binding on four of the signatory states and territories, but not on all 13 – is as unusual as the wording of the provisions themselves.

The key lesson from the CARICOM experience is the need for clear and comprehensive explanatory notes setting out the purpose of each provision of an agreement and how the provision is to be applied when, as sometimes happens, this is not entirely evident from the wording of the provision itself or if there is the possibility of differences of interpretation. To the extent possible, the explanatory notes should include the factors that led to wording which is unusual. While the production of such explanatory notes might not have avoided entirely the difficulties which have been encountered in interpreting some provisions of the CARICOM Agreement, it might have highlighted issues requiring further study before the Agreement entered into force.

In spite of the difficulties that have been encountered, the CARICOM Agreement is an important advance in the protection of the social security rights of migrant workers and the members of their families in a region with high labour mobility. It clearly demonstrates that multilateral agreements are entirely feasible among non-industrialized countries, even ones with small populations.

#### 4.3. Unified Law on Insurance Protection Extension of the GCC

The Gulf Cooperation Council (GCC) consists of six countries bordering the Arabian/Persian Gulf.<sup>68</sup> There is a significant movement of workers among the six countries. However, the social security systems of each GCC country have generally restricted coverage to the country's own nationals. The result has been that when the national of one GCC country has gone to another GCC country to work, he or she has not been covered by social security in the new country of employment.<sup>69</sup>

To address this problem, the GCC has adopted the *Unified Law on Insurance Protection Extension for Citizens of Gulf Cooperation Council States Working outside Their Countries in Any of the Council Member States*. The Unified Law, which entered into force on 1 January 2006, offers a very different solution for the social security protection of migrant workers from that given in the other multilateral agreements discussed in this section. It provides a model for possible consideration in regions in which a traditional multilateral social security agreement, based on the five objectives described in section 2, may not be feasible.

The material scope of the Unified Law includes long-term benefits for old age/retirement, disability, sickness and death of a family member under the social security schemes of the GCC member states.<sup>70</sup> The Law's personal scope covers all employed persons, whether in the public or the private sector, who (a) are nationals of a GCC member-state, (b) work in another GCC member-state,

68 Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates.

69 Before the adoption of the Unified Law, some GCC countries tried to address this issue unilaterally by allowing their nationals who go abroad to work to continue affiliation, on a voluntary basis, with the social security system of their country of nationality. However, as the experience of many countries around the world has shown, voluntary insurance is rarely an effective solution because of the small number of insured persons who avail themselves of the option.

(c) would be subject to the social security legislation of their country of work if they were nationals of that country, and (d) would be subject to the social security legislation of their country of nationality if the employment were performed in that country.

Under the provisions of the Unified Law, any person to whom the law applies remains subject, on a mandatory basis, to the social security legislation of his/her state of nationality while working in another GCC member-state.<sup>71</sup> The social security institution of the country in which the employment is performed is required to collect contributions from the employed persons and her/his employer on behalf of the social security institution of the country of which the employed person is a national. The contributions are deposited in a bank account established by the latter social security institution. The Unified Law sets out the types of administrative assistance that will be mutually provided by the social security institutions of the country of employment and the country of nationality. A contributor's eventual entitlement to benefits remains entirely within the jurisdiction of the country of nationality.

The Unified Law is silent on the issue of export of benefits. Thus, the provisions of national law continue to apply regarding the payment of benefits abroad.

A substantial number of persons benefit from the Unified Law. For example, at the end of 2010 there were more than 1,500 nationals of Saudi Arabia working in other GCC countries who remained covered by the Saudi scheme, and more than 1,250 nationals of other GCC working in Saudi Arabia who remained covered by the scheme of their country of nationality.<sup>72</sup> It should, however, be noted that the vast majority of migrant workers in the GCC countries are nationals of non-GCC countries and, hence, remain unprotected in their countries of employment. Given that the GCC has one of the highest ratios of migrant workers as a percentage of the total workforce of any region in the world (in fact, almost certainly *the* highest ratio), a very large gap remains in the social security protection of migrant workers in the GCC region.

The solution provided by the Unified Law avoids the need to address issues of equality of treatment, determination of the legislation applicable, and totalizing. In this regard, it is administratively and operationally simpler than social security coordination based on the five principles discussed in section 2. However, the model provided by the Unified Law will likely only work among countries with (more or less) similar social security systems and with (reasonably) effective mechanisms for ensuring compliance (collection of contributions). Both conditions are met by the GCC member-states. However, there are many other regions in which this is not the case. Nonetheless the GCC's Unified Law is a model that warrants possible consideration.

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70 The law refers specifically to 'social insurance/civil retirement' schemes. The latter are presumed to be non-contributory schemes.

71 The employed person and his/her employer, however, are subject to the legislation on employment injuries of the country of employment.

72 Data provided by the ISSA Liaison Office for Arab Countries, located in Amman, to which the author expresses his appreciation.

#### 4.4. Ibero-American Multilateral Convention on Social Security

The newest multilateral agreement, and one of far-reaching importance because of the number of persons covered, is the *Ibero-American Multilateral Convention on Social Security (Convenio Multilateral Iberoamericano de Seguridad Social)* [OISS 2007], which has been signed by Portugal, Spain, and 12 Latin American countries<sup>73</sup>. To date, 11 of the signatory countries<sup>74</sup> have ratified the Convention, and three<sup>75</sup> have signed the *Administrative Arrangement (Acuerdo de Aplicación)* [OISS 2009]. In accordance with the terms of the Convention, a country must sign and ratify the Convention, and sign the Administrative Arrangement, before the Convention can enter into force in respect of that country.

The Ibero-American Convention responds to all five of the objectives of social security agreements described in section 2. Its material scope includes cash benefits in the event of disability, old age, death of a family member, and employment injury (work accidents and professional diseases). In principle, the Convention applies to all of a signatory country's contributory schemes, whether general or special. However, a country may exclude special schemes by listing them in an annex.

Benefits in kind (e.g. medical benefits) related to the branches for which cash benefits are included in the Convention's material scope are excluded from the Convention. However, two or more signatory states can conclude bilateral or multilateral agreements among themselves extending the Convention's material scope to such benefits in kind and/or to other branches of social security.

The personal scope of the Ibero-American Convention covers all persons who are or who have been subject to the social security legislation of any of the signatory states as well as to their family members deriving rights from them. All persons included within the Convention's material scope, irrespective of nationality, are ensured equality of treatment under a signatory country's social security system with the nationals of that country. They are also ensured the right to export benefits under a country's social security system to the territories of any other signatory state and to receive benefits in third states (i.e. non-signatory) countries on the same conditions as the nationals of the paying country.

A Technical Administrative Committee (Comité Técnico Administrativo), consisting of representatives of each of the signatory states, is responsible for overseeing the operation of the Ibero-American Convention. The mandate of the Technical Administrative Committee is similar to that of the EU's Administrative Commission for the Coordination of Social Security Systems.

The Ibero-American Convention supplements, and in many cases replaces, a network of bilateral and multilateral agreements among Latin American countries, and between those countries,

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73 Argentina, Brazil, Bolivia, Chile, Columbia, Costa Rica, Ecuador, El Salvador, Paraguay, Peru, Uruguay, and Venezuela.

74 All but Columbia, Costa Rica, and Peru.

75 Bolivia, Brazil, and Spain.

Spain and Portugal.<sup>76</sup> It represents a major advance in protecting the social security rights of migrant workers and their families.

#### 4.5. CIPRES Multilateral Convention on Social Security

The Inter-African Conference on Social Insurance, usually referred to by its French-language acronym CIPRES (Conférence Interafricaine de la Prévoyance Sociale), consists of 15 French-speaking states in western and central Africa and the Indian Ocean. The Conference's primary objective is to provide a unified oversight function for the management of the social security schemes in the member-states. The Conference is also charged with 'harmonizing' the legal and regulatory provisions of the schemes in its member-states.<sup>77</sup>

In the latter capacity, the Conference has developed the *CIPRES Multilateral Convention on Social Security (Convention Multilatérale de Sécurité Sociale)* [CIPRES 1996], which was signed in 1996 by 14 CIPRES member-states.<sup>78</sup> The Convention was motivated by the recognition on the part of ministries of labour and social security institutions of the need to protect the social security rights of the large number of migrant workers, and the members of their families, who move between the CIPRES countries in search of employment.

The CIPRES Convention responds to all five of the objectives of social security agreements described in section 2. Its material scope encompasses all benefits, whether in cash or in kind, in the event of old age, disability, death of a family member, employment injury (work accidents and professional diseases), maternity or sickness, including family allowances, provided under 'all statutory social security schemes'<sup>79</sup> of the parties to the Convention [CIPRES 1996: 3]. The Convention's personal scope includes all workers<sup>80</sup> who are nationals of a party to the Convention and who are or

76 Note should be taken of the *Multilateral Agreement on Social Security of the Southern Cone Common Market (Acuerdo Multilateral de Seguridad Social del Mercado Común del Sur)*, which was signed on 14 December 1997 and entered into force on 1 January 2005. This multilateral agreement coordinates the social security systems of the member-states of the MERCOSUR (Argentina, Brazil, Paraguay, Uruguay, and Venezuela). It is not clear at the present time to what extent the Ibero-American Multilateral Convention will replace or supplement the MERCOSUR Multilateral Agreement.

77 See the discussion of the term 'harmonization' in section 1.3 and footnote 26. From discussions with senior CIPRES officials, it appears that the term 'harmonization' is meant to include a range of options, from coordination to, ultimately, uniformization, although there is little expectation that the latter is politically or economically feasible.

78 Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo (Brazzaville), Côte d'Ivoire, Equatorial Guinea, Gabon, Mali, Niger, Senegal, and Togo. At the time of the signing of the CIPRES Convention, the Democratic Republic of Congo (DRC, then known as Zaire) was not a member of CIPRES. It does not appear that the DRC has signed the CIPRES Convention on Social Security since becoming a CIPRES member.

79 Author's translation. In principle, statutory schemes include both general and special schemes; however, since the schemes to which the Convention applies must be listed in an annex, each member-state has the option of excluding special schemes simply by not listing them.

80 The social security schemes of the CIPRES member-states are based on the social insurance model and are primarily financed through contributions by workers and employers. The term 'worker' is defined in the CIPRES Convention to mean 'any person considered as or deemed a worker in accordance with the [social security] legislation of the [country] concerned' [author's translation].



have been subject to the social security scheme of any of the parties, as well to the members of their families and their survivors.

All persons included within the Convention's material scope, irrespective of nationality, are ensured equality of treatment under a signatory country's social security system with the nationals of that country. They are also ensured the right to export benefits under a country's social security system to the territories of any other signatory state. However, the CIPRES Convention is silent regarding the export of benefits to third states. Accordingly, the export of benefits to third states is governed by the national legislation of each signatory country, read (as regards nationals of signatory states other than the one paying the benefit) with the Convention's provision regarding equality of treatment.<sup>81</sup>

Since its conclusion in 1996, five of the 14 signatory states – Burkina Faso, Benin, Central African Republic, Mali, and Niger – have ratified the CIPRES Convention, thus bringing it into force between them.<sup>82</sup> All are primarily migrant-sending countries within the CIPRES region and among the poorest states in the world (measured by per capita GDP). None of the principal migrant-receiving countries in the region – in particular, Cameroon, Gabon, Senegal, and (until recent domestic events) Côte d'Ivoire – have ratified the CIPRES Convention, and there appears little likelihood that any will in the foreseeable future. Until the principal migrant-receiving countries, which are also the wealthiest in the CIPRES region, have ratified the Convention, it will have only marginal effect.

The reasons the principal migrant-receiving countries have not ratified the CIPRES Convention cannot be stated definitively, but informed guesses can be made. The Permanent Secretary of CIPRES has proposed four reasons: complexity of the ratification procedure, 'national egoism', non-management of migrant work, and 'political instability (frequent change of Ministers...)' [Mkoumbou 2011].

To these a fifth reason which is probably at least as significant should be added: the flow of benefits will be overwhelmingly from the richer, migrant-receiving countries to the poorer, migrant-sending countries to which the migrant workers and the member of their families will likely return when their work ends. In other words, the migrant-receiving countries will be net financial losers, virtually ensuring that their ministries of finance will oppose the ratification of the CIPRES Convention.

It is regrettable that migrant workers, and the members of their families, from some of the poorest countries of Africa are denied the benefits of the CIPRES Convention by their regional neighbours who are, overall, somewhat better off. However, this is a phenomenon that is not unique to the CIPRES region, or to Africa. It is replicated, in varying forms, within most other regions of the world as well as between regions.

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81 The social security legislation of most of the CIPRES member-states does not allow export of benefits.

82 Until recently, the authorities of CIPRES thought that ratification by seven signatory states (i.e. half of all the signatory states) was required for the Convention to come into force. However, a more careful reading of the Convention's provision regarding coming-into-force [Article 49(2)] has persuaded the CIPRES authorities that the Convention came into force once the second instrument of ratification was registered.

#### 4.6. 'Third-state' totalizing

Even when two countries have concluded a bilateral social security agreement that provides for totalizing, a migrant worker might nonetheless still not have sufficient periods of affiliation with the social security systems of the two countries to qualify for a benefit from either, or the worker might only qualify for a benefit from one country. Such a situation is especially likely to occur if a worker has been employed in several countries during his or her working life and the period of employment in some of those countries has been relatively short. To overcome this problem, some countries have included 'third-state' totalizing provisions in their bilateral social security agreements.

Under third-state totalizing, if a worker is not eligible for a benefit even after totalizing periods under the social security systems of the two countries that are parties to the bilateral agreement, but if the worker has completed periods under the social security system of another country (a 'third state'), periods in that third country can be added to periods in the first two countries to determine the worker's eligibility for a benefit under the social security systems of the first two countries. In order for third-state totalizing to apply, the third country must be one to which both of the first two countries are bound by bilateral or multilateral social security agreements that provide for totalizing.

As a practical example of third-state totalizing, consider the case of a worker who has spent part of her or his working life in Canada and part in two or more countries that are parties to the CARICOM Agreement on Social Security and that have also concluded bilateral social security agreements with Canada.<sup>83</sup> In spite of the totalizing provisions of Canada's social security agreements, the worker might still not have enough periods in Canada and any one of the Caribbean countries alone to qualify for a Canadian benefit. However, because of the third-state totalizing provisions in most of Canada's agreements with Caribbean countries, Canada, in such a case, would take into account the periods in Canada and all the other countries taken together to determine the worker's eligibility for a Canadian benefit.

Third-state totalizing links together the totalizing provisions of separate bilateral and multilateral social security agreements. It provides an additional element of protection for the social security rights of migrant workers.

## 5. Process for negotiating, approving and implementing a social security agreement

The conclusion of a social security agreement usually involves an eight-step process. Details of some of the steps will vary from country to country, depending on the requirements of national law and practice for the negotiation, approval and implementation of treaties. However, the general contents of the steps are essentially the same for all countries.

This section describes each of the steps. It is intended to assist countries unfamiliar with the conclusion of a social security agreement to anticipate what should be expected in the process.

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83 Of the 13 states and territories that have signed and ratified the CARICOM Agreement, Canada has concluded bilateral social security agreements with nine.

### 5.1. Preliminary discussions

The starting point for the conclusion of a social security agreement is usually an informal meeting of experts from the countries concerned to (a) exchange information on their respective social security schemes and (b) inform each other regarding their countries' preferences concerning the application of the principles underlying social security agreements (equality of treatment, export of benefits, determining the legislation applicable, totalizing and administrative assistance).

The information exchanged will generally include the branches of social security for which each country has schemes in place, the scope of coverage by those schemes (the categories of workers who are covered), the types of benefits provided by each programme, the eligibility requirements for the benefits, and any other information which will assist the experts of the other countries to understand the country's social security schemes. If there are branches of social security or specific types of benefits that a country does *not* include in its social security agreements, the experts from that country should provide an explanation of the reasons for the exclusion of the branches or benefits in question.

To the extent possible, the experts should provide each other copies of their respective social security legislation and examples of the social security agreements, if any, that their countries have already concluded. Since this type of information is often available on the websites of ministries or social security institutions, it suffices, in such instances, to provide the web address (URL) where the information can be found. While, as a matter of courtesy, it is helpful if the information can be provided in a language which the experts of the other countries can understand, a country is not normally expected to provide translations of its legislation or agreements.

In the course of the preliminary discussions, the experts will normally inform each other of the process that their countries follow for the conclusion of a social security agreement, including its approval (see section 5.6). They may also discuss the probable timing of the next steps in the process of concluding an agreement and agree on the country that will prepare a preliminary draft of an agreement (see the following section).

Preliminary discussions among social security experts are usually held 'without prejudice', in the sense that they do not commit any party to proceed to the formal negotiation of an agreement or to the terms and conditions that a country may propose in an agreement. This approach can be particularly helpful when a country is unsure whether it wishes to enter into an agreement but is, at least, prepared to consider the possibility.

### 5.2. Preparation of a preliminary draft of an agreement

Following the preliminary discussions, one of the countries usually prepares a preliminary draft of an agreement that will serve as the starting point for negotiations. It is helpful if the country that will undertake this work is agreed in the course of the preliminary discussions. However, if this does not prove possible, it can be done through a subsequent exchange of correspondence.

The preliminary draft should reflect, to the greatest extent possible, the preferences regarding the application of the principles of agreements that the experts of the countries have indicated during the preliminary discussion. If countries have indicated differing preferences, options could be given in the preliminary draft reflecting each of the preferences.

Sometimes it is decided that each country will prepare its own preliminary draft. This is especially done when countries have substantially differing views or if one or more countries have particular 'non-standard' provisions that they use in agreements and that reflect the specificities of their social security legislation or practice.

Whether there is one preliminary draft of more than one draft, the text(s) should be sent to all the countries well in advance of the negotiations so that their experts can analyze the draft(s) and develop their respective positions. Every effort should be made to avoid sending the preliminary draft on the eve of the negotiations or, worse yet, presenting it to the other countries at the start of the negotiations themselves.

If there are some provisions in the preliminary draft that a country finds especially problematic for it, that country may wish to prepare its own proposal (in effect, an alternative or counter-proposal) in writing and either send it in advance to the other countries or circulate it when the provision in question comes up for discussion at the negotiations.

### 5.3. Negotiations

The countries concerned will hold one or more rounds of negotiations to agree between them the text of the social security agreement. The starting point for the negotiations will be the preliminary draft or drafts just discussed.

The negotiations usually involve a clause-by-clause review of the preliminary draft or drafts, starting with the title and preamble and continuing until the signatory block. To the extent possible, the objective of the review of each clause will be to agree on the specific wording of the clause. Where the wording of a clause has been agreed, whether with or without modification to the wording given in the preliminary draft, the clause should be included in a revised draft which will be annexed to the minutes of the negotiations (discussed below).

It will not always be possible during a single review to agree on the wording of every clause of an agreement. There will be some clauses on which the parties will have differing views that cannot be immediately reconciled or regarding which the experts of a country may have to consult with officials of various ministries in their own government. Once all the points of view have been completely presented and questions, if any, answered, further discussion of such clauses should be deferred to the next round of negotiations or for resolution through an exchange of correspondence. In the revised draft of an agreement annexed to the minutes of the negotiations, such clauses are often indicated by the use of square brackets ([...]).

The number of rounds of negotiations required to conclude an agreement will vary. Most often, two rounds are required, each of three to five days' duration. Some agreements, however, can be concluded in as little as one round, while others may require several rounds. If there is more than one round of negotiations, it is the usual practice for the countries involved to host the rounds in a sequence agreed between them. For the negotiation of a bilateral agreement, this will mean alternating the rounds between the two countries.

Prior to the conclusion of each round of negotiations, minutes are usually prepared that summarize the outcome of the discussions. The revised draft of an agreement, reflecting the clauses

agreed (or, as the case may be, not agreed) during the discussions, is annexed to the minutes, along with a list of the participants and any other relevant material that may be agreed.

The country hosting the negotiations usually drafts the minutes. The minutes will be the principal subject of discussion at the last session of the round of negotiations. Whenever possible, the minutes will be signed at the closing of the round of negotiations by the heads of the respective delegations. However if this is not possible (for example, because the minutes must be translated), the minutes can be signed and exchanged afterwards through the mail or electronically. Each delegation should have an original, signed copy of the minutes.

The amount of detail given in the minutes will vary according to the practice of the participating countries and the contents of the negotiations. Generally speaking, minutes will be relatively brief (one to three pages, not including annexes). This will especially be the case if no contentious issues arose in the negotiations and/or if the agreed text of the agreement is clear from a simple reading. However, if some points have had to be deferred for consideration at the subsequent round of negotiations or for resolution through an exchange of correspondence, an appropriate explanation should usually be included in the minutes. This will serve, among other things, as an *aide memoir*.

In addition, if the meaning or intent of a provision of an agreement may not be entirely clear, even to an informed reader, or if some provision was a matter of contention and required significant compromise, an explanation in the minutes stating the provision's intent and purpose may be helpful. This can be particularly important if the provision gives rise, at a later date, to a dispute as to its meaning or application after the agreement has been signed. In this regard, note should be taken of Article 31 of the *Vienna Convention on the Law of Treaties* which states that, for purposes of confirming the meaning of a provision of a treaty<sup>84</sup> or interpreting it, 'recourse may be had to supplementary means of interpretation [of a treaty], including the preparatory work of the treaty and the circumstances of its conclusion' [UN 1969].

At the conclusion of the negotiations, when the complete text of the agreement has been agreed, the heads of each countries' delegation usually initial the text. This indicates the heads of delegation's formal concurrence in the text. However, unless explicitly stated otherwise, initialling does not preclude subsequent modifications as a result of a further review of the text (see the following section), provided all the countries concerned agree to the changes.<sup>85</sup>

#### 5.4. Review of the agreed text

Although the heads of delegations have initialled the agreed text of an agreement in good faith, the text must nonetheless usually be reviewed by the relevant authorities of each of the countries (for examples, the treaty experts in ministries of foreign affairs and legal experts in ministries of justice). The minutes of the last round of negotiations usually makes reference to such a review and the possibility that it may result in proposals to modify the agreed wording of specific provisions.

84 See footnote 12. A social security agreement unquestionably falls within the definition of a treaty given in the *Vienna Convention on the Law of Treaties* [UN 1969].

85 The United Kingdom's foreign ministry, for example, defines initialling as 'signif[y]ing only provisional assent to the text of a treaty by delegates following negotiation' [FCO 2007].

Any modifications resulting from such a review should be kept to a strict minimum and should only involve questions that are essential for a country. If the modifications involve treaty practice or legal issues outside of the sphere of social security (for example, constitutional questions), these should be resolved through direct discussions between foreign ministries through diplomatic channels. Social security experts cannot be expected to resolve issues outside their range of competence and responsibility.

If, as a result of this review, changes are required to the initialled text of the agreement, the changes must be agreed by all the countries concerned. In such a case, the concurrence of the other countries to the changes should be given in writing, whether by letter or e-mail, to avoid any possible future misunderstanding.

### 5.5. Signing of the agreement

Once the relevant authorities of each country have concurred with the final text of the agreement, the agreement is ready for signing. The time and location of the signing are determined through consultations between the countries concerned.

The country in which the signing will take place is usually responsible for preparing the copies of the agreement for itself and for all the other signatory countries. However, this practice can vary as circumstances require. In any case, it is essential that each country have an original copy of the signed agreement for deposit in the treaty registry of its ministry of foreign affairs.

It is the usual international practice that, in the copy of the agreement that a country will retain, the name of that country appears first in the title, preamble and signatory block. For example, in a bilateral agreement between country X and country Y, the title of the agreement in country X's copy will read 'Agreement on Social Security between country X and country Y', while in country Y's copy it will read 'Agreement on Social Security between country Y and country X'. In the treaty practice of some countries, the same rule may also apply to provisions of the agreement itself (for example, in the article stating the legislation of each country that is included in the material scope of the agreement).

Foreign ministries should be consulted regarding a country's treaty practice. In the event of differences in practice between countries, these should be resolved by foreign ministries through diplomatic channels.

If an agreement is being signed on behalf of a country by an official other than the country's head of state, head of government or minister of foreign affairs, an instrument of full power is often issued to certify to the other countries that the individual is authorized by her or his country to sign the agreement. The authority competent to issue an instrument of full power varies from country to country. It might, for example, be the head of state, the council of ministers (cabinet), the minister of foreign affairs after concurrence by the council of ministers, or another authority designated in national law.

### 5.6. Approval of the agreement

Most agreements do not enter into force simply by virtue of the fact that they have been signed. A further step is required. This step takes the form of approval or ratification by each country in accordance with its constitution, laws and/or treaty practices.

There is wide variation between countries as to the procedure to be followed for the approval or ratification of an agreement. In some countries, for example, the agreement must be submitted to the parliament for approval and it is subject to a vote in parliament. In other countries, the agreement must be tabled in the parliament, but it is deemed to be approved if the parliament has not decided to debate the agreement within a prescribed period (for example, within 30 days of its tabling).<sup>86</sup> In yet other countries, approval by the council of ministers is required.

In colloquial usage, the term 'ratification' is often used interchangeably with 'approval' in regard to an agreement. In law, however, 'ratification' refers to a specific and formal legal process.<sup>87</sup> The laws or constitutions of many countries require the ratification of treaties. In other countries, approval alone suffices.

### 5.7. Conclusion of an administrative agreement

The social security agreement establishes the legal framework for the coordination of the social security systems of the countries concerned. The agreement alters national social security legislation and creates rights and obligations that do not exist under the national legislation alone (for example, entitlement to a pension through totalizing when entitlement cannot be established only under national legislation). The social security agreement also sets out the principles that will underlie the administrative assistance that the social security authorities and institutions of each country will provide to the authorities and institutions of the other country or countries.

A subsidiary instrument, known as an administrative arrangement, describes in greater detail how the administrative assistance will be provided. It sets out the modalities for providing the assistance, the procedures that will be followed, etc.

Authorization to conclude an administrative arrangement is given in a provision of the agreement itself. Usually the ministries responsible for the application of the social security legislation of the countries concerned, designated in agreements as the 'competent authorities', are authorized to conclude the administrative arrangement. In some instances, the institutions responsible for administering social security legislation, designated in agreements as the 'competent<sup>88</sup> institutions', are given the authorization.

86 This procedure is often referred to as 'negative resolution'.

87 The United Kingdom's foreign ministry notes that ratification 'follows signature and signifies the consent of a State to be bound by the treaty. It consists of the deposit of an instrument of Ratification with the other State (bilateral), or the Depositary (multilateral). Any process of obtaining parliamentary approval for ratification is not ratification, though often mistakenly referred to as such' [FCO 2007]. The *Vienna Convention on the Law of Treaties* gives four terms – ratification, acceptance, approval and accession – that can be used to designate 'the international act ... whereby a State establishes on the international plane its consent to be bound by a treaty' [UN 1969].

88 In most social security agreements, the terms 'institution' and 'competent institution' are used interchangeably. However, a distinction sometimes needs to be made between an 'institution' – that is, *any* institution responsible for the administration of the social security programmes included in the material scope of an agreement – and the 'competent institution' in a particular case – that is, the institution that is authorized ('competent') under the applicable country's laws to act in that specific case.

Administrative arrangements are, essentially, contracts between the social security authorities and institutions that set out the terms and conditions through which the authorities and institutions will work together, and assist one another, to apply the agreement and the legislation to which the agreement applies.

There are some examples of administrative arrangements that go beyond administrative issues and that affect the rights and obligations of insured persons under an agreement. This often exceeds the authorization that has been given to the competent authorities and/or institutions to conclude an administrative arrangement and, generally speaking, should be avoided. If issues of rights and obligations are not dealt with sufficiently in the social security agreement itself, the agreement should be amended. The administrative arrangement should not and, in the law of most countries, *cannot* be a vehicle for dealing with gaps, omissions or imprecisions of an agreement.<sup>89</sup>

The administrative arrangement will usually designate, by name, the specific institution or institutions of each signatory country that will serve as that country's 'liaison agency' for the application of the social security agreement. The liaison agency is the one which, usually, is responsible for sending and receiving communications and documentation (for example, claims for benefits) related to the agreement. Depending on how a country's social security system is structured, there may be more than one liaison agency. For example, in the case of a country in which one institution collects social security contributions and another determines eligibility for benefits, the first institution (or one of its departments) may be the liaison agency for matters concerning the determination of the legislation applicable while the latter institution (or one of its departments) may be the liaison agency for all other matters arising from the agreement.

If the agreement does not explicitly name the competent authorities and/or competent institutions of the signatory countries, these authorities and/or institutions should be designated, by name, in the administrative arrangement.<sup>90</sup>

The administrative arrangement is essential to the implementation and administration of the agreement. Therefore, it should be concluded and signed before the agreement enters into force so it can take effect on the same date as the agreement.

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89 The administrative arrangement can be used to clarify, *for administrative and operational purposes*, terms used in the agreement and how specific provisions of the agreement will be applied. For example, if the provision of the agreement regarding totalizing states that periods under the social security system of one country which overlap with periods under the social security system of another country will be taken into account only once when totalizing, the administrative arrangement can provide rules for dealing with such overlapping periods.

90 Given that a social security agreement is a treaty and so may require considerable time and effort to amend, many countries find it advantageous to use a general formula in the agreement for designating its competent authorities and institutions. Such a general formula may, for example, define the term 'competent authority' to mean 'the ministry authorized under the social security legislation of a Party to administer that legislation'. By using such a formula, it is not necessary to amend the agreement if a country alters the title of a ministry or moves responsibility for a programme from one ministry to another. When such a general formula is used in an agreement, the authorities and/or institutions should be listed, by name, in the administrative arrangement concluded pursuant to the agreement. The administrative arrangement can be easily amended in the future, as required, by an exchange of correspondence between the competent authorities.



Although the administrative arrangement is essential to implement a social security agreement, it is not, by itself, usually sufficient. There is also need to agree on the forms that will be used to apply the agreement and the detailed operational procedures that will be followed. The forms and detailed procedures should usually be agreed upon between the competent institutions and liaison agencies of the countries concerned in the course of implementation discussions.

### 5.8. Entry-into-force of the agreement

The final step in the conclusion of a social security agreement is its entry-into-force. Once each country has completed its legal requirements for the approval or ratification of the agreement and the administrative arrangement has been signed, the agreement enters into force on a date that is usually determined in accordance with a provision of the agreement itself. This could, for example, be on a date agreed by the countries concerned through an exchange of diplomatic notes. A more usual formula found in most social security agreements is to state that the agreement will enter into force on the first day of the second (or third, or fourth<sup>91</sup>) month following the exchange of instruments of ratification or notification that national requirements have been met. For example, if the relevant provision of an agreement states that the agreement will enter into force on the first day of the second month following the exchange of instruments of ratification, and if the instruments of ratification are exchanged at any time in the month of November, the agreement enters into force on the following 1 January.

### 5.9. Length of time required to conclude an agreement

The time required to complete the eight-step process just described can vary significantly from one agreement to another. It seldom can be completed in less than a year and a half. Considerably longer is sometimes needed.

A country which has little or no experience in the conclusion of social security agreements will usually require more time for its first few agreements than a country with considerable experience. It is important that a country just embarking on the conclusion of agreements proceed with a degree of caution since the precedents set in its first agreements could determine the pattern for subsequent agreements and might be difficult to reverse or even substantially modify in later agreements.

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91 Although the first day of the second month is the most commonly used formula, the length of time will depend on legal and administrative considerations. For example, if a country's laws require the publication of the text of the agreement in the country's official gazette between the time of the exchange of instruments of ratification and the date of the agreement's coming-into-force, a longer period (e.g. three or four months) may be needed. Similarly, if a country's social security institutions prefer not to print forms for applying for benefits under an agreement until close to the time the agreement enters into force, a longer period may again be required.

## 6. A checklist for preparing for negotiations

In order for negotiations towards a social security agreement to proceed as effectively as possible, it is important to gather some key information beforehand, especially about your country's social security system and the system of the other country.<sup>92</sup> It is also important to consider your country's position in regard to the objectives described in section 2 and the issues discussed in section 3. This section provides a checklist – a list of questions – that should be considered.

### 6.1. Data about your country and the other country

Among the first questions likely to be raised by senior government officials (Ministers, Members of Parliament, Permanent Secretaries, Secretaries General, Directors General) when a request goes forward for authorization to begin discussions towards a social security agreement are: How many people will benefit? How much will the agreement cost?

Unfortunately, precise answers to these questions are rarely possible. The data required is usually not available, even in countries with highly developed statistical capacities. Estimates and interpolations from general statistical data are usually needed, sometimes supplemented by 'informed guesses'.

The key questions for which data should be sought are:

- How many migrant workers from the other country are in your country?<sup>93</sup>
- How many migrant workers from your country are in the other country?
- What is the annual flow of migrants between the two countries?
- Has the flow increased, decreased or stayed about the same in recent years (for example, in the past decade)?

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92 To simplify the discussion in this section, it is assumed that the negotiations are for a bilateral social security agreement. The considerations are the same in the case of negotiations for a multilateral agreement.

93 The number of migrant workers in a country is usually referred to as the 'stock of migrants' in the country. Data on the stock of migrants, if it exists at all, often does not differentiate between the migrant workers themselves and the family members (spouse and dependants) who accompany the migrant workers. If this is the case, further interpolations will be required. Also, although some countries have data on the number of nationals of other countries living in the country (sometimes very detailed data), the aggregate figures usually do not differentiate between the non-nationals who are in the country on a permanent or long-term basis and those who are real migrant workers; the figures also usually do not differentiate the number of non-nationals who arrived as children, or who have never worked in their country of origin, and hence who would not be affected by a social security agreement except, possibly, as recipients of dependant or survivor benefits. Particular care needs to be taken interpreting data from answers to questions from censuses regarding 'country of origin'. Some migrant workers will have passed through one or more third states, and perhaps have spent an appreciable time in those third states, before arriving in the host country, but nothing about those third states will have been recorded in the answers to the census question. Also, depending on how 'country of origin' is defined in the census (and understood by those answering the question), second and even third generations born in a country may respond with the country of origin of their parents or grandparents.

To the extent that the data needed to answer these questions is available, or can be reasonably estimated, it is useful to break it down, if possible, by destination (city or region), the gender and age of the migrant workers, and the sectors in which they are employed.

There are international databases on migrant workers. One is the Global Migrant Origin Database produced by the Development Research Centre on Migration, Globalisation and Poverty at the University of Sussex in the United Kingdom [DRC Migration 2007].<sup>94</sup> Another is the ILO's LABORSTA Internet database [ILO 2011c].

In addition to data on migrant stocks and migrant flows, it is also useful to know the practice of the other country in regard to the coordination of its social security system with the systems of other countries. The key questions are:

- Has the other country signed any bilateral or multilateral social security agreements?
- If it has, when were these agreements signed, and what are their provisions?
- Has the other country ratified any of the ILO conventions dealing with social security for migrant workers, in particular, *Equality of Treatment (Social Security) Convention, 1962*, (No. 118) [ILO 1962] and *Maintenance of Social Security Rights Convention, 1982*, (No 157) [ILO 1982]?

A wealth of information regarding the social security agreements signed by the member states of the ILO – including, in many instances, links to electronic copies of the texts of the agreements – can be found in the ILO's NATLEX database accessible through its website [ILO 2011b].

An analysis of the social security agreements concluded by the other country can give valuable insights into the positions that country is likely to take in negotiations with your country. This can help you fine-tune your country's position and, as circumstances may warrant, prepare counterproposals to offer in the course of the discussions. The analysis may also indicate concessions the other country has made in the past which it may not put on the table in the discussions with your country unless it is specifically asked.

## 6.2. Information about your country's social security system and the system of the other country

As noted in section 5.1, the first step in the negotiation of a social security agreement is usually preliminary discussions in which social security experts from the two sides exchange information about their respective systems. To make these preliminary discussions as productive as possible, it is useful to do research in advance about the other country's social security system and, of course, to have the same information about the social security system of your country available for the social security experts of the other country.

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<sup>94</sup> While the Global Migrant Origin Database is a useful tool, caution should be taken in interpreting its figures because much of the data is based on interpolations. As well, no differentiation is made between migrant workers, as that term is used in this paper, and migrants such as refugees whose principal motivation in migration is not seeking employment.

At first glance, research about the other country's social security system might seem unnecessary. Won't the other country's delegation tell you everything at the preliminary discussions that your country's delegation needs to know? They probably will, but technical experts often use jargon to describe their systems, and jargon that is well understood by experts in one country is sometimes not understandable to experts from another country, or it may be misinterpreted. As well, because of the complexity of social security systems, experts will sometimes omit details of their system that might be of interest to experts from another country. Research in advance will mitigate these problems.

Questions that should be researched include:

- *Structure of the social security system:* What branches of social security are part of the other country's overall social security system?
- What types of schemes are in each branch (for example, social insurance, universal benefits, provident fund etc)?
- *Persons covered:* Who is covered by each branch? Is coverage limited to nationals and/or permanent residents?
- Are all employees covered, or only employees in certain sectors of the economy or in companies with a minimum number of workers (for example, companies with more than five workers)? Are there other types of limitations to the coverage of employees – for example, coverage only of employees in urban areas?
- Are the self-employed covered? If they are, on what basis (as discussed in section 2.3.2, on the basis of the country in which the self-employed activities are carried out, or on the basis of the self-employed person's country of residence)?
- Are seafarers covered? If they are, on what basis (as discussed in section 2.3.3, a flag rule, the country of residence, the country in which the employment contract is signed, or some other basis)?
- *Special schemes:* Are there special schemes for some categories of workers (for example, railway workers, miners, civil servants<sup>95</sup>)? If there are special schemes, are they coordinated with the general scheme<sup>96</sup>? For example, if a worker has contributed to both a special scheme and the general scheme but does not have enough contributions to the special scheme to qualify for a benefit, are those contributions taken into account in the general scheme?

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95 In considering special schemes for civil servants, account is usually taken only of schemes in which membership is *in lieu of* membership in the general scheme. In many countries, civil servants are covered, on a mandatory basis, by the general scheme and, in addition, are covered by a complementary scheme for civil servants; the latter are equivalent to the employer-sponsored (workplace) schemes often found in the private sector in many countries. Such complementary schemes for civil servants would not usually be considered as special schemes and would, almost always, be outside the material scope of a social security agreement.

96 The term 'general scheme' is used to denote the social security scheme that applies to workers in the private sector who are not in special schemes. Where a country has only one scheme that covers all workers (and, perhaps, also self-employed persons), it is, by definition, the general scheme.

- If there is a special scheme for civil servants,<sup>97</sup> who is covered by this scheme besides the employees of government ministries and agencies? For example, are teachers in public schools covered by the special scheme for civil servants? Medical practitioners such as nurses and doctors working in public hospitals? Workers in state-owned enterprises? Are members of the armed forces and/or police covered by the special scheme for civil servants, or do they have their own separate scheme?
- *Financing (contributions)*: What is the contribution rate for each branch and, if there are special schemes, for each of those schemes? How much of the contribution is paid by the worker and how much by the employer? Is there a ceiling (maximum amount) on earnings subject to contributions? If there is, what is the ceiling? Are contributions charged from the first earnings, or is there an exempt band (for example, no contributions on the first 2,000 units of earnings in the national currency)? If there is an exempt band, how much is it?
- *Export of benefits*: Is the export of benefits allowed? If it is, can non-nationals receive benefits abroad, or is this right limited to nationals? If non-nationals can receive benefits abroad, are their benefits calculated in the same way as the benefits paid to nationals? Are there conditions to the export of benefits? For example, is there a longer qualifying period for entitlement to receipt of a benefit abroad than for receipt of a benefit within the country? Are the benefits paid abroad adjusted to rises in the cost of living in the same way as benefits paid within the country?
- *Entitlement to benefits*: What are the qualifying periods for benefits from each branch (the minimum period of contribution, residence, or covered employment required for entitlement to a benefit)?
- *Calculation of benefits*: In general terms, how is the amount of cash benefits calculated in each branch? For example, does the amount of benefit take into account the number of years of coverage (paid contributions, residence, covered employment)? If it does, how much is 'earned' for each year of coverage (for example, two percent for each year of contribution)? Are average earnings over a prescribed period taken into account in determining the amount of a benefit? If they are, what is the prescribed period? How, if at all, are earnings from previous years adjusted (increased) when calculating the average to reflect current wage levels at the time the benefit starts to be paid?
- Once a benefit starts to be paid, is it subsequently adjusted to take into account increases in the cost of living? If benefits are increased, are the cost-of-living adjustments automatic or are they ad hoc? If the adjustments are automatic, how often are they made? Is there a 'threshold' cost-of-living increase before an adjustment is made?<sup>98</sup>

97 Some countries may have more than one scheme for civil servants. For example, there may be one scheme for officials of the national government, another for officials of municipal governments, and still enough for employees of state-owned enterprises.

98 In the social security systems of some countries, benefits are only adjusted when the cost of living exceeds a certain amount – for example, three percent. Depending on the country's legislation, the adjustment either can be the full increase in the cost of living (including the threshold amount) or it can consist only of the amount above the threshold.

- Are supplements paid for dependants (for example, a spouse, dependent children, dependent adult family members such as parents and grandparents etc)? If there are such supplements for dependants, for whom are they paid? What are the entitlement conditions for supplements for dependants (for example, the maximum age for considering a child a dependant)?
- Are periodic controls made to verify that the recipients of benefits are still alive? If they are, how are they done?

There are additional questions specific to different branches:

- *Old age benefits:* What is the normal pensionable age (the age at which a full pension becomes payable)? Are early pensions available (that is, pensions before reaching the normal pensionable age)? If they are, what is the earliest age at which a pension can be paid? Is there a reduction for early receipt of an old age pension? If there is, what is the reduction? Is there an increase for deferring the start of receipt of an old-age pension beyond the normal pensionable age? If there is, what is the increase?
- *Disability benefits:* How is disability defined? How is disability determined? Is there a requirement that a person be insured at the time of becoming disabled in order to qualify for a disability benefit? Is there a requirement that a person have completed a minimum period of coverage in a prescribed period just before becoming disabled? If so, what is the prescribed period? Are there requirements for periodic medical examinations to determine ongoing entitlement to disability benefits? If such examinations are required, how often must they be performed? Who performs them (for example, medical practitioners such as doctors or nurses working for the social security institution, medical practitioners in private practice designated by the social security institution or chosen by the beneficiary etc)?
- *Survivor benefits:* Which survivors qualify for benefits? For a surviving spouse to be entitled to a benefit, must the spouses have been legally married, or are persons who have cohabited (sometimes referred to as 'common-law spouses') also entitled to benefits? Must the spouses have been of the opposite sex? Does a widow or a widower cease to be entitled to a survivor benefit if she/he remarries or enters into a new common-law relationship?
- Up to what age does a child of the deceased insured person qualify for an orphan benefit? Is there a higher age if a child is attending school or university? Is there any age limit if the child is disabled? Do orphan benefits continue if a child marries?
- *Health-care benefits in kind:* Must a person of working age be in insured employment when the contingency occurs in order to qualify for benefits? Are pensioners and/or recipients of short-term cash benefits (for example, unemployment benefits) eligible for health-care benefits in kind? Are non-working family members of an insured person entitled to health-care benefits in kind? If they are, which family members?
- *Sickness and maternity benefits:* Must a person be in insured employment when the contingency occurs in order to qualify for benefits?

- *Employment injury benefits:* Is a person eligible for benefits if the employment injury occurs on the way to or from work? Are occupational diseases included among the insured contingencies? If they are, what types of diseases are included? Are there requirements for periodic medical examinations to determine ongoing entitlement to employment injury benefits? If such examinations are required, how often must they be performed? Who performs the examinations?
- *Unemployment benefits:* Is there a maximum period for which benefits can be paid? If there is, what is the maximum period? To qualify for ongoing benefits, must a person prove that he/she is looking for work? If there is a job-search requirement, what does a person need to do to prove that she/he is meeting the requirement?
- *Family benefits:* Up to what age are family benefits for children paid? Are the benefits paid for both natural and adopted children? Must the children be residing with the insured person in order to qualify for benefits?
- *Means-tested benefits:* Which benefits, if any, in the social security system are means-tested? If there are such benefits, what is the means-test? For example, is the maximum amount of benefit reduced by one unit of national currency for every unit of other income? Are all forms of other income taken into account for purposes of the means test?<sup>99</sup> Is there a proxy means test?<sup>100</sup> If there is, what are the proxy measures?
- Are there nationality restrictions in the other country's social security legislation regarding entitlement to means-tested benefits? Are there territorial restrictions (in other words, are benefits only payable to persons residing in the country)? If means-tested benefits can be paid abroad, are there restrictions (for example, a maximum period during which the benefits will be paid abroad)?

There are various readily available sources of information on the social security systems of different countries. For the 31 countries covered by the European Union's regulations on social security described in section 4.1, detailed tables by country and branch can be found on the MISSOC website (Mutual Information System on Social Protection) [EU 2010b]. The MISSOC tables, which are updated twice a year, include information on financing and administration.

The Council of Europe (CoE) produces parallel tables for 12 European countries that are members of the CoE but not of the EU<sup>101</sup> and for three countries outside Europe having observer status at the CoE.<sup>102</sup> These tables, titled MISSCEO, can be found on the CoE's website [CoE 2010]. The MISSCEO tables are updated annually.

99 In some countries, for example, there is a means-tested old-age benefit that is directed to persons whose income from contributory pension schemes, whether public or private, is low or non-existent. In such a case, the means test takes into account only other pension income.

100 For a definition of proxy means test, see footnote 25.

101 Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Georgia, the Former Yugoslav Republic of Macedonia, Moldova, the Russian Federation, Serbia, Turkey, and Ukraine. Information on the social security system of Montenegro is expected to be added soon.

102 Australia, Canada, and New Zealand.

Less detailed, but nonetheless very valuable, information on the social security schemes of more than 170 states and territories in every part of the world is given on the website of the US Social Security Administration in the section titled Social Security Programs Throughout the World (SSPTW) [SSA 2010/2009]. The information in SSPTW is derived from surveys carried out by the International Social Security Association (ISSA) and is updated every two years. Descriptions of social security schemes can also be found on the ISSA website [ISSA 2011].

The descriptions of social security schemes in the databases just mentioned can, of course, be complemented by the actual legislation setting out a country's social security system. The social security authorities and institutions of an increasing number of countries post their legislation on their website. In addition, links to electronic copies of the social security legislation of many countries can be found in the NATLEX database, which can be found on the ILO's website [ILO 2011b].

### 6.3. Your country's position on key aspects of security agreements

Before starting negotiations, it is important to establish your country's position in regard to the objectives described in section 2 and the issues discussed in section 3. In establishing your country's position, consultations will usually be required with various ministries beyond those directly responsible for social security. These include the ministries of foreign affairs, justice and finance. In countries with foreign-exchange controls, consultations will often also be required with the central bank.

The questions that should be addressed include the following:

- *Material scope of a social security agreement:* Which branches of social security is your country prepared to include in a social security agreement? If there are branches of social security, or specific schemes within a branch, or specific benefits within a scheme, that your country will *not* include in a social security agreement, what is the reason for the exclusion?
- *Personal scope of an agreement:* Does your country want an agreement to apply to all persons, irrespective of nationality, who are or have been subject to its social security legislation,<sup>103</sup> as well as to their dependants and survivors, or does your country prefer a nationality-based approach?
- If your country prefers a nationality-based approach, how will you justify this limited personal scope in discussions with a country that prefers a broader (unlimited) approach? In spite of the nationality-based approach, will your country waive conditions of nationality in respect of dependants and survivors who derive rights from a national? Is your country prepared to include refugees and stateless persons living in your country's territory and the territory of the other country within the agreement's personal scope? Is your country prepared to allow the

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103 For elaboration on the meaning of 'subject to', see footnote 46.



coverage provisions of an agreement, especially the provisions regarding posted workers, to apply without consideration of nationality?<sup>104</sup>

- *Equality of treatment:* How broad an equality of treatment is your country prepared to grant (that is, will equal treatment apply to everyone who is or has been subject to your country's social security legislation and/or the legislation of the other country, or only to nationals of your country and the other country)? If equal treatment is limited to nationals, will your country nonetheless extend equal treatment to refugees and/or stateless persons? To persons deriving rights from a national, a refugee or a stateless person?
- *Export of benefits:* If your country's legislation does not allow the export of benefits, will your country be prepared to make an exception, under a social security agreement, to persons living in the other country that is a party to the agreement?
- If your country allows the export of benefits but imposes more stringent entitlement conditions on persons living (or moving) abroad, will your country be prepared to allow totalizing to meet these more stringent conditions?
- If your country is prepared to allow the export of benefits to persons who live in the other country that is a party to an agreement, will your country also be prepared to allow export of benefits if these persons move to a third state?
- *Determination of the legislation applicable:* If the other country with which you are negotiating a social security agreement uses a different rule from that of your country to determine the coverage of self-employed persons (see section 2.3.2), what will be your country's initial position in regard to this issue? If the other country does not accept your country's initial position, to what extent will your country be willing (able) to compromise? If your country and the other country are not able to find a mutually acceptable solution to the coverage of self-employed persons, will your country be prepared to allow instances of dual coverage to be settled on a case-by-case basis through consultations between competent authorities under the 'saving provision' (see section 2.3.5)?
- The preceding questions apply by analogy to the coverage of seafarers (see section 2.3.3).
- What should be the maximum period of posting abroad to which the posted-worker provision of a social security agreement applies?

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104 Countries which apply a nationality-based approach to the personal-scope provisions of an agreement often, for practical reasons, waive consideration of nationality in regard to the coverage provisions. In the absence of such a waiver, anomalous situations could arise. For example, a posted worker who is a national of one of the parties to the agreement would have the benefit of the posted-worker provision and would remain covered by the social security system of her/his usual country of employment during the posting, while another worker who is identical except that he/she is not a national of one of the parties would be covered by the system of the host country during the posting.

- Does your country's social security legislation allow for the coverage of locally engaged staff of the diplomatic missions and consular posts of other countries in your country's territory (see section 2.3.4)? Does your country have a policy regarding the coverage of the locally engaged staff of its diplomatic missions and consular posts abroad? Should the social security agreement have a provision to regulate the coverage of locally engaged staff of diplomatic missions and consular staff?<sup>105</sup>
- *Totalizing*: What periods under the social security system of the other country is your country prepared to accept for purposes of totalizing? For example, if the other country has an old-age benefit to which entitlement is determined by residence alone, will your country be prepared to accept periods of residence in the other country for purposes of determining entitlement through totalizing to the old-age benefits under the legislation of your country? If your country will not accept such periods of residence for purposes of totalizing, how will you explain this (seeming) deviation from reciprocity?
- Will your country accept all the 'equivalent periods' under the social security system of the other country<sup>106</sup> for purposes of totalizing to determine entitlement to benefits under your legislation? What about periods of voluntary insurance<sup>107</sup> (if the other country allows voluntary insurance)?
- If your country has special schemes for certain categories of workers, and if these schemes are included in the material scope of a social security agreement, what periods under the social security system of the other country will be used for purposes of totalizing to determine entitlement under your country's special schemes? For example, if your country has a special scheme for workers in category X (say, railway workers or miners) but the other country includes such workers in its general scheme, will your country be prepared to use the periods in the other country's general scheme for purpose of totalizing to determine entitlement to benefits under your country's special scheme, *provided* it can be determined that the work in the other country was carried out in the relevant sector (for example, on a railway or in a mine)? If yes, how will these determinations be made?

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105 In developing your country's response to these last two questions, it is strongly recommended to consult your country's ministry of foreign affairs.

106 The social security legislation of many countries deems certain periods to be equivalent to periods of contribution even though no contributions were actually paid. Depending on the legislation of the country, these might include periods attending school or university, periods of military service, periods raising a young child, and/or periods of receipt of social security benefits such as disability or unemployment benefits. Generally speaking, where such 'equivalent periods' are used by a country to determine entitlement to its social security benefits, they are accepted by the other country for purposes of totalizing under an agreement to determine entitlement to its benefits.

107 If periods of voluntary insurance are accepted for purposes of totalizing, it is understood that this will be the case only if they do not overlap with periods of mandatory insurance.

- Will your country be prepared to accept ‘third-state totalizing’ if a person’s periods under the social security systems of your country and the other country, even when totalized, are not sufficient to establish entitlement to a benefit and the person has periods under the social security system of a third state (see section 4.6)?
- *Calculation of benefits:* How will the amount of a cash benefit be determined if entitlement to the benefit is established through totalizing? Will your country use direct calculation or proportional calculation (see sections 2.4.1 and 2.4.2)? If your country will determine the amount of benefits through proportional calculation when totalizing is required to establish entitlement, what method of calculation will be used if entitlement can be established without the need to totalize? If proportional calculation is used when totalizing is required to determine entitlement, and if direct calculation is used when entitlement can be determined without the need to totalize, and if proportional calculation would result in a higher benefit than direct calculation, will the higher benefit be paid?<sup>108</sup>
- If the social security legislation of your country has rules to prevent, or to limit, overlapping benefits (see section 3.5), should the social security agreement have a provision extending these rules to the comparable benefits paid by the social security system of the other country?
- *Benefits in kind:* If benefits in kind are included in a social security agreement for purposes of ‘export’ (that is, for provision of medical services when a person who has been covered under the social security system of the other country is in your country), will these benefits in kind be provided only to persons who are ordinarily resident in your country? Or will they also be provided to persons who are temporarily in your country (for example, as tourists, or as students, or as persons on a time-limited work permit)? Will benefits in kind be available to pensioners from the other country who are in your country? To the family members of pensioners?
- How will the cost of benefits in kind be apportioned? Will your country absorb the full costs? Or will the costs be charged to the social security institution of the other country? Or will the costs be ‘shared’? If the latter, what will be the rule for allocating the respective parts to be paid by the social security institution of each country?
- *Administrative assistance:* What forms of administrative assistance are the social security authorities and institutions of your country prepared to give to their counterparts in the other country? What forms of administrative assistance will they expect from their counterparts in the other country? For example, in addition to accepting claims (applications) for benefits under the social security schemes included in the material scope of the agreement, will the social security

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108 In the great majority of instances, direct calculation and proportional calculation will result in the same, or virtually the same, amount of benefit. In some unusual circumstances, however, there may be a significant difference. The questions that arise, therefore, are: what is the chance of such instances occurring, and is the chance sufficiently high to justify the additional time and effort required to do double calculations (direct calculation and proportional calculate) in all cases? Usually, the answer to the second question will be ‘no’.

authorities and institutions of each country certify information such as dates of birth, marriage and death on behalf of the social security authorities and institutions of the other country? When such information is certified by the social security authority or institution of one country, will the counterpart authority or institution of the other country nonetheless require a copy of the justifying document (for example, the birth, marriage or death certificate)?

- Are there specific types of administrative assistance (for example, carrying out or arranging medical examinations) for which the reimbursement of costs will be expected from the authority or institution that has requested the assistance? If there are, what are the specific types of administrative assistance that will be subject to reimbursement of costs? Through what means, and how often, will requests for reimbursement be made?
- What forms will be used when persons living in one country wish to apply for a benefit from the social security system of the other country? Will domestic forms be used, or will special forms be designed? If the latter, how, and by whom, will this be done?
- Which will be the 'liaison agencies' responsible for sending and receiving claims for benefits and other documents related to the application of the social security agreement from one country to the other? Will a special liaison form be designed for sending documents, making requests for information, and responding to such requests? Will interchanges between the liaison agencies be done through hard-paper means (post, courier or fax), or are electronic means possible?
- What procedures will be followed when the liaison agency of one country receives a claim for benefits under the legislation of the other country?
- *Definitions:* What are your country's preferences in regard to the definition of terms which are usually contained in a social security agreement such as 'benefit', 'competent authority', 'competent institution', 'legislation', 'period of coverage' and 'territory'? Are there other terms that your country wants to be defined in a social security agreement? If there are, what are the terms and what definitions does your country propose for them?

The list of questions is long and, at first glance, might seem daunting. However, they can usually be covered in two or three days of preliminary discussions if the proper research has been done in advance. Moreover, having the answers to these questions can save considerable time and effort after the conclusion of a social security agreement, if questions arise as to the contents of, and the reasons behind, the provisions of the agreement.

## 7. Conclusion

Social security agreements are a tried and tested means for strengthening the social security of migrant workers and the members of their families. Agreements are not, to be sure, a panacea for addressing all aspects of the complex issue of enhancing the social protection of migrant workers. In particular,

agreements will generally only assist regular migrant workers in the formal sector. However, as experience around the world has shown, there are no panaceas for addressing the multi-faceted issue of extending social protection, whether to migrant workers or to the workforce in general. A range of different responses are required, and social security agreements are one part of a larger toolkit.

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# III. Implementation of Social Security Agreements

## 1. Introduction

Any instruments of social security coordination cannot achieve their aim without having an effective enforcement mechanism in place. Thus, this paper is primarily intended for the experts and policy makers involved in developing and implementing international coordination instruments in social security. It is divided into three main sections, each one focusing on a different specific issue of social security coordination.

The first section is dedicated to the coordination of social security benefits in kind. As is the case with any other type of social security benefit, the coordination of benefits in kind involves certain distinctive characteristics such as: aggregation of periods of coverage, entitlement conditions, personal scope, and reimbursement of costs. Special attention should be paid to defining periods of coverage, entitlement conditions, and compensation of costs for benefits provided.

The remaining two sections concern the aspects of implementing coordination instruments in general. The contents in these sections are broadly applicable to pensions, sickness, medical care, and unemployment benefits. The second section explains in detail the administrative provisions of social security agreements. The third section is designed to serve as a guideline for drafting, negotiating and concluding administrative arrangements as well as other implementation instruments. Despite the invaluable role that administrative arrangements play in implementing the agreements, there are very few descriptions of such implementation instruments in the current literature. Although these guidelines are the product of years of experience in this field, one should bear in mind that there are different approaches in the administrative arrangements.

## 2. Coordination of social security benefits in kind

### 2.1. Aggregation of periods of coverage

The principle of aggregation (or totalisation) of periods of coverage is of the utmost importance for the realisation of rights to benefits in kind because these rights are, as a rule, conditional upon completion of a qualifying period prior to exercising the right. Having in mind that providing benefits in kind is often connected with serious health problems which can lead to fatal outcomes, the importance of fulfilling entitlement conditions cannot be overstressed. Despite the fact that benefits in kind are a short-term benefit, their urgency and necessity are indisputably more important characteristics.

Every instrument of coordination provides rules of aggregation (totalisation) in situations where the legislation of a contracting party makes the acquisition, maintenance or recovery of the right to

a benefit in kind conditional upon completion of specified periods of coverage. These rules make sure that the institution which applies that legislation shall take into account the periods of coverage completed under the corresponding legislation of the other contracting party, in so far as they are not overlapping, as if they were periods completed under the legislation of the first party.

This rule can be stipulated within the document as a general rule (which is the case for the majority of international instruments) or it can be mentioned in parts of the document referring to the separate branches of social security (old age insurance, disability insurance, health insurance, unemployment insurance etc.). Some experts in this field consider it necessary to specify the rule in detail through separate articles when there exist differences in national legislation covering specific branches of social security.

## 2.2. Periods of coverage

Definition of periods of coverage must be given prior to stipulating rules on the aggregation of periods. In principle, there are three types of periods:

- *Period of insurance* – completed within an insurance scheme (general or special) and can be defined as the period of contribution, employment, occupational activity, or residence which are defined or recognised as periods of insurance according to the legislation to which they were completed, as well as other periods regarded by that legislation as equivalent to periods of insurance.
- *Period of employment or occupational activity* – defined or recognised as such according to the legislation within which they have been completed as well as any other period regarded by that legislation as a period of employment or occupational activity.
- *Period of residence* – defined or recognised as such according to the legislation under which it has been completed.

The definition of these periods, to a large extent, depends on the national legislations which are to be coordinated. Some national legislation considers the payment of contribution as *conditio sine qua non* for recognising certain periods as periods of insurance, in addition to employment or occupational activity. Some legislation is residence based (prescribed number of years of residence, after a certain age, completed in the country) or can sometimes have both insurance based and residence based schemes.

## 2.3. Entitlement

Entitlement to benefits in kind as well as cash benefits is a starting point for providing both types of benefits. The fulfilment of qualifying conditions should be judged by only one legislation, in line with the principle of the determination of applicable legislation, which is another basic principle of coordination. It would seem obvious that the applicable legislation should simply correspond either to where a person is insured or where a person permanently resides. However, when deciding upon the scope of medical services to be provided, questions may arise since standard services according to

legislation in one country may not be the same as the stipulated list of services of another country's legislation.

In the context of social security coordination, the process of providing benefits in kind always involves at least two insurance institutions – one competent institution where a person is insured and whose legislation is applicable and the other being the effective institution in the place of temporary stay or residence which is actually providing the benefits in kind. In practice, a dispute may arise when, for example, an institution of temporary stay provides certain benefits in kind which are not in concordance with the legislation that the competent institution is applying.

(i) Benefits in kind (medical care, hospitalisation, pharmaceutical supplies)

As the benefits in kind covers a wide range of medical care including hospitalisation, post hospital treatment, prosthesis, medical appliances, medicaments, and other pharmaceutical supplies, the definitions of the benefits in kind vary from one legislation to another. Therefore, instruments of coordination usually do not list them. Instead, the distinction between different benefits in kind is made on the basis of their costs. Coordination instruments, especially bilateral agreements, recognise benefits in kind in general and other substantial benefits in kind as well as major medical appliances (such as prostheses). Here, "substantial benefits in kind" refer to the cost of these benefits which can be granted only upon authorisation by a competent institution.

(ii) Short-term cash benefits (sickness cash benefit, maternity cash benefit etc.)

Closely connected to the benefits in kind are short-term cash benefits which can be provided under separate insurance schemes, depending on the case. Provision of these benefits is directly contingent on the specific health status of the person in question. For example, cash sickness benefits are intended to compensate one's income in a situation where a person is, due to sickness, temporarily incapable of performing work. Cash maternity benefits, on the other hand, compensate one's income throughout the prescribed period (maternity leave) after the birth of a child.

## 2.4. Provisions of benefits in kind

First and foremost, provisions regarding benefits in kind must clearly define categories of insured persons including any family members who may be entitled to different benefits in kind. Basically, there are two categories of persons who are entitled to benefits in kind. The first category includes those who are temporarily staying in the territory of the other contracting party (temporary stay), and secondly, those who reside in the territory of the other contracting party (ordinary residence). In national legislations, definitions of stay and residence are quite different hence it is essential to find common definitions for both terms within an agreement or other coordination instruments.

The competent institution must reimburse all costs of benefits in kind to the institution that provided them, regardless of whether they are provided to a person during their stay in the territory of the other contracting party or to a person residing within the territory of the other contracting party.

## (i) Temporary stay in the territory of the other contracting party

There are many categories of persons to whom benefits in kind are provided during their stay in the territory of the other contracting party, but the typical ones are: posted (seconded) workers, including members of diplomatic missions and consular posts, civil servants, travelling personnel, tourists, persons on business trips, and so on.

Persons who satisfy the conditions for entitlement to benefits in kind under the legislation of one contracting party and whose condition necessitates the immediate provision of benefits during their stay in the territory of the other contracting party shall receive benefits in kind. Benefits are provided at the expense of the competent institution, by the institution of the place of stay in accordance with the provisions of the legislation applied by the latter institution, as if those persons were affiliated with it.

As a rule, this can also apply, *mutatis mutandis*, to family members with respect to benefits in kind.

## (ii) Residence in the territory of the other contracting party

It should be noted that the provision of benefits in kind to persons who reside in the territory of the other contracting party is not conditional upon immediate necessity. This means that for these persons, *all* benefits in kind are provided as if they are insured within the institution of their place of residence.

Typical categories within this group are: frontier workers, cross border workers, members of the family of migrant workers, and so on.

Persons who satisfy the conditions for entitlement to benefits in kind under the legislation of one contracting party and reside in the territory of the other contracting party shall receive benefits provided at the expense of the competent institution by the institution of the place of residence in accordance with the provisions of the legislation which the latter institution applies, as if such persons were affiliated with it.

This will apply, as is in the case of a temporary stay in the territory of the other contracting party, *mutatis mutandis*, with respect to benefits in kind for family members who reside in the territory of the other contracting party in so far as they are not entitled to such benefits arising from their own insurance.

## 2.5. Pensioners and members of their family

As already mentioned, the competent institution is responsible for the reimbursement of costs for benefits in kind provided to persons during a temporary stay or who reside within the territory of the other contracting party. The same principle applies to pensioners and their family members. In this case, however, the situation is slightly more complicated because a pensioner can receive more than one pension from different insurance institutions in different countries. One typical situation which occurs in bilateral social security agreements is that of a person receiving two *pro rata*

pensions. This means that one pensioner has two (or more in the case of multilateral coordination instruments) competent institutions. As for benefits in kind, on the other hand, they can be provided at the expense of only one (competent) institution and are not divisible. Here we can make a basic distinction between pensioners receiving pensions from both contracting parties and those receiving pension from only one contracting party.

(i) Pensioners receiving pensions from both contracting parties

A pensioner receiving pensions under the legislation of both contracting parties shall receive benefits in kind under the legislation of the contracting party in the territory where he/she resides, as if he/she were a pensioner only under the legislation of that party and at the expense of the competent institution of that contracting party.

(ii) Pensioners receiving a pension from one contracting party and residing in the territory of the other contracting party

A pensioner receiving a pension under the legislation of one contracting party who resides in the territory of the other contracting party shall be entitled to the same benefits in kind that he/she would be entitled to if he/she were residing in the territory of the first contracting party. These benefits shall be provided by the institution of the place of residence, in accordance with the provisions of the applicable legislation, as if the pensioner were entitled to such benefits under that legislation. However, the cost shall be borne by the competent institution which means that there is practically no reimbursement of costs.

(iii) Family members of a pensioner

The same rules for providing benefits in kind to pensioners are applicable to their family members. Basically, the family members of a pensioner derive their rights from the pensioner and, on those grounds, are entitled to benefits in kind. It is understood that they are entitled to those benefits provided that they are not entitled to similar benefits arising from their own insurance.

When family members of a pensioner receiving a pension under the legislation of one contracting party reside in the territory of the contracting party other than that in which the pensioner resides shall receive benefits in kind as if the pensioner were resident in the same territory. These benefits in kind shall be provided by the institution in the family member's place of residence, in accordance with the provisions of the applicable legislation. These costs shall be borne, as is the case for pensioners, by the competent institution.

## 2.6. Additional provisions

Coordination instruments require that every corresponding detail of the two (or more) national social security schemes is coordinated precisely. This sometimes requires numerous additional provisions. Such provisions can address cases when authorisation by a competent institution is needed prior to providing a benefit. This is the case, for example, when a person entitled to benefits in kind is

returning to his/her place of residence for special medical treatment necessary according to the condition of a person's health, or for providing prosthesis or other substantial benefits.

(i) Cases of authorisation

Prompt provision of care is essential for benefits in kind. Medical care, in general, cannot be postponed; in cases of emergency it should be provided urgently. Nevertheless, in some cases it is necessary for a competent institution to provide written authorisation prior to providing certain benefits in kind by the other institution. Reasons for this procedure can be of legal nature (prescribed by national legislation) or because the benefits in kind are provided at the expense of the competent institution. The institutions which are supposed to provide benefits must, as soon as possible, request such authorisation from the competent institution.

(ii) Returning to the place of residence

One case in which authorisation by a competent institution is necessary is the case when contingency has occurred in the territory of one contracting party and a person which already is receiving benefits in kind wishes to continue to receive those benefits in the territory of the other contracting party (quite often the country of origin where the person resides). For the continuation of medical treatment in the territory of the other contracting party, authorisation of the competent institution is a prerequisite. It is obvious that in this case, a claim for authorisation is submitted by a person rather than by the institution of the other contracting party in the territory of which benefits will be provided.

(iii) Special medical treatment

Prior authorisation is also required in cases where the competent institution of one contracting party has permitted a person to go to the territory of the other contracting party for necessary medical treatment according to the condition of his/her health. In such a case, the competent institution will issue a document of authorisation in advance and take every necessary measure to ensure that the person in question receives adequate medical services.

(iv) Prostheses, major appliances and other substantial benefits in kind

In cases where a person needs prostheses, a major appliance, or any other substantial benefit in kind, it is also necessary that the institution which will provide such a benefit requests authorisation from the competent institution. The only exception to this rule refers to critical situations where providing such a benefit is absolutely urgent and failure to do so would seriously jeopardize the life or health of a person.

## 2.7. Reimbursement of costs

Benefits in kind are provided by the institution of place of stay or residence to which a person is not affiliated. For this reason, as a general rule, the competent institution is obligated to reimburse the

institution that has provided the benefits in kind for the actual amount of those costs. The development of coordination instruments shows that different solutions exist for different periods. For example, several existing (especially bilateral) coordination instruments contain provisions which stipulate that competent authorities or liaison bodies of contracting parties may agree upon other arrangements for the reimbursement of costs. Such arrangements can generally be applicable to all persons, or they can apply only to a specific category of persons.

(i) Reimbursement of actual costs

The competent institution shall reimburse the actual cost for benefits in kind provided on its behalf by the institution of the place of stay or residence. It is common practice to withhold administrative expenses from the amount to be reimbursed. Requests for reimbursement should be submitted to the competent institution within the prescribed time limit (for example, half a year or quarterly). Payment should also be realised in the prescribed time limit (usually less than two months).

(ii) Reimbursement on the basis of a lump sum

If contracting parties opt to make other arrangements for the reimbursement of costs, they can choose an arrangement that will be applicable for all the cases or just for specific ones. The most commonly used solution is reimbursement by a lump sum payment, i.e. average cost of benefits in kind provided to one person in one year (*per capita* calculation) or average cost of benefits in kind provided to the average family in one year. Lump sum payments are commonly used for large groups of recipients since the actual administrative efforts of making individual payments would require insurance institutions to cover additional administrative costs. The most common recipients of lump sum payments are pensioners, their family members, and members of the family of migrant workers.

(iii) No cost refund

The competent authorities of contracting parties may agree that there shall be no reimbursement of costs for benefits in kind between the institutions concerned. Such situations were more common among the coordination instruments which were created in the early years, especially those which referred to nationals. This means that for nationals of one contracting party who satisfy the conditions for entitlement to benefits in kind under the legislation of that party and whose condition necessitates the immediate provision of benefits during their stay in the territory of the other contracting party shall receive benefits in kind under the same conditions as a national of the other contracting party. This shall also apply, *mutatis mutandis*, to a national of one contracting party who ordinarily resides in the territory of the other contracting party while (temporarily) staying in first contracting party as well as to the nationals of one contracting party receiving a pension only from the other contracting party and residing in the first contracting party. This principle is considered as "territorial" and has practically been abandoned today.

### 3. Administrative provisions of social security agreements

#### 3.1. Mutual cooperation and assistance

Mutual cooperation and assistance are key words for an efficient enforcement of the social security agreement. Social security benefits are of vital importance for every person, regardless of whether they are paid in the short-term or in the long-term, in kind or in cash. Without adequate collaboration and assistance on the level of the competent authorities, liaison bodies, and competent institutions of contracting parties, the implementation of the agreement could not achieve its intended results. For this reason it is essential to create proper provisions on the mutual cooperation and assistance in the text of the agreements and administrative arrangements and to enforce them effectively in the day-to-day coordination efforts.

##### (i) Arrangement on the administrative measures

Administrative measures cover all implementation instruments such as arrangement, understanding, protocol etc., and different content, depending on which area of social security they apply to. Basically, these instruments prescribe enforcement procedures and can sometimes stipulate the procedure in great detail, especially in regards to arranging procedures for the mutual reimbursement of costs for the provided benefits.

Arrangements are concluded between institutions of the contracting parties which are competent for certain branches of social security. Those institutions can be competent authorities, liaison bodies, and insurance institutions, depending on the issue.

##### (ii) Liaison bodies

In the social security agreement, contracting parties should indicate liaison bodies whose role is to help facilitate the implementation of the agreement.

##### (iii) Scope of assistance

The competent authorities, liaison bodies, and institutions of the two contracting parties are supposed to assist one another on any matter related to the application of the agreement as if the matter affects the application of their own legislation. Assistance, in this sense, is not disputable, although the scope of assistance can be questionable. Certain cases require a court to resolve the questions as to whether the institution of one contracting party represents the interest of the other contracting party, even in court procedures. Practical solutions for this issue may vary depending on the solutions provided in national legislation.

##### (iv) Direct contacts

Bearing in mind that direct communication within administrative procedures can be limited according to national legislation, social security agreements should provide for exemption from such rules.



## (v) Use of official languages

The use of official languages in the process of acquiring rights and for communication in general is very important. One commonly used approach is that, for the purposes of the application of the agreement, the authorities and the institutions of the two contracting parties communicate with one another and with all interested persons, whatever their place of residence or stay, directly in their official languages. There is also a possibility to carry out the communication in another language (English for example) if contracting parties agree that such a solution can make the processes of implementation more efficient. At the same time, no claim or document shall be rejected on the grounds that it is written in the official language of the other contracting party.

## 3.2. Medical examinations

Due attention should be paid in the treatment of medical examination as part of the process of acquiring rights in the coordination. Each insurance institution of contracting parties (competent, of temporary stay, or residence) has its own specific role. Allocation of costs should be undisputable, especially since examinations are preformed at their explicit request.

## (i) Disability or other reasons

The medical examinations are essential for establishing the degree of one's incapacity for work which the basic guideline for granting disability benefits (pensions) and can also be obligatory as control examinations for the continuation of payments. Agreements prescribe that examinations performed exclusively for the application of the legislation of one contracting party and referring to persons having a residence or temporary stay in the territory of other contracting state, are carried out by the institution of their residence or temporary stay at the request and expense of the competent institution. On the other hand, medical examinations performed for the enforcement of legislation concerning both contracting parties are performed by the institution of residence or temporary stay at its own expense.

In addition, medical examinations or control examinations may be necessary in a case where a person who resides or stays in the territory of one contracting party is receiving benefits according to the legislation of the other contracting party. The competent institution or the institution of the place of residence or temporary stay of the first contracting party shall arrange for such examination if the competent institution of the latter contracting party requests so. The cost of the examination shall, in principle, be met by the competent institution of the contracting party which has requested the examination.

## (ii) Allocation of costs

Reimbursement of cost, in practice, can create a problem if procedures or applicable prices are not defined in detail. Enforcement in this aspect can be facilitated through periodical exchanges of data on mutual claims and debts between insurance institutions of the contracting parties.

Payment of uncontested claims should be realised in the same time limit as other payments within the frame of the agreement (for example within two months – same as the payment of actual amount of costs for provided benefits in kind).

### 3.3. Submitting claims, appeals, or other legal means

Claims, appeals, or other legal means which have been submitted over the course of the enforcement of the agreement or legislation of one contracting party to the authority or institution of one contracting state shall be considered as the same as those submitted to the authority or institution of the other contracting party.

Claims for benefits submitted according to the legislation of one contracting state shall be considered as a claim for corresponding benefits according to the legislation of the other contracting state, unless the claimant declares otherwise. This may be the case when a claimant is aware of the fact that he/she does not meet the eligibility conditions at that moment.

#### (i) Prescribed time limits

Every legislation and bilateral or multilateral agreement stipulates that certain legal action can be taken for claims, appeals, or other legal means within the prescribed time limit. In the process of the enforcement of the agreement, two legislations and several institutions are involved. For that reason, it must be clear that any claim or appeal which should have been submitted within a prescribed time limit to an authority or institution of one contracting party shall be treated as if it has been submitted to the corresponding authority or institution of the other contracting party.

#### (ii) Transmission without delay

The procedure for deciding upon certain rights regarding the coordination of two or more national legislations is a complex and time-consuming task. In order to shorten the time spent on this procedure, it is necessary that the authority or institution of one contracting party which receives the claim, appeal, or other legal means, forwards that document to the competent authority or institution of the other contracting party as soon as possible.

### 3.4. Administrative arrangements

Administrative arrangements, besides being a means for the implementation of the agreement, also explain the procedures for determining benefits. Defining and understanding the coordination of at least two procedures prescribed by the national legislation is critical for all parties involved (institutions as well as the persons). Therefore, it is very important to clarify the role of all participants in every step of the process. It is also significant to state time limits for certain actions or for key segments of processes. In every step of the process for determining benefits, all parties involved should inform each other of situations, especially after reaching the decision. Instructions on the appeal represent an important part of this process, thus they must be stated clearly with emphasised time limits.

### 3.5. Forms for the application

Forms are one of the most important tools for the implementation of the agreement. Without the forms, in their bilingual (or multilingual) version, linguistic obstacles will be immense and, consequently, would cause further delay in the already long procedures.

Creating the forms, to a large extent, depends upon previous experience in the use of forms in implementing coordination instruments. Their titles should be as precise as possible. There should be separate forms for different benefits referring to specific articles of the agreement and arrangement. Wording used in the forms should be simple and clear and boxes which are to be marked with "x" should be used where possible. The form should not be excessively large and, where possible, they should be created on one sheet of paper. Bearing in mind the advancement of the information technology, completing and exchanging the forms in an electronic form must also be kept in mind.

The responsibility for completing and exchanging the forms lays in the hands of the institutions which are involved in the daily enforcement of the agreement. This means that the determination of forms shall be done by liaison bodies or insurance institutions (sometimes even competent authorities).

The certificate of insurance periods and certificates of entitlement to a benefit in kind are the most important forms because they are the basis for granting or providing a benefit. Needless to say, all other forms play a respective role in facilitating and applying the agreement in a manner that is satisfactory for all participants.

### 3.6. Other provisions

The implementation of other provisions in the agreement is equally essential to the functioning of coordination instruments and acquiring the rights to benefits.

#### (i) Exemption from duties, fees and authentication

The exception or reduction of duties and fees, prescribed by the legislation of one contracting party, for written files or documents submitted for the enforcement of the agreement or its legislation shall also apply to these written files and documents of the other contracting party.

It is also important to mention that documents and other written files of any kind, enclosed over the course of the enforcement of the agreement, need not to be authenticated.

#### (ii) Recovery of undue or overpaid cash benefits (advance payments, social assistance)

In practice, institutions which are deciding upon and paying benefits can sometimes overpay the beneficiary. This can occur for various reasons. For example, advance payment of benefits, or payment of benefits from different social security schemes at the same time, can result in overpayment. An institution of one contracting party which has paid the benefit in the amount higher than the amount that the beneficiary should receive, may request from the institution of the other contracting party that the overpaid amount be balanced against the amounts of corresponding benefit due to be paid to the beneficiary.

Overpaid amounts shall be directly remitted to the institution that has submitted the request (i.e., the institution which has overpaid the benefit).

(iii) Transfer (export) of benefits – payment to the territory of the other contracting party

The institution competent for providing benefits according to the agreement fulfils its obligation by cash payments to the beneficiaries, in the territory of the other contracting party, in its national currency. This means that the calculation of cash benefits in the currency of the other contracting party (or often hard currency) shall be done according to the exchange rate at the date on which the competent institution made the payment. Costs for money transfers should be carried out by the “free to the border” rule, which specifies that there shall be no charge for the beneficiary within the territory of one contracting party although they will be responsible for expenses incurred by payments abroad

(iv) Protection of personal data (confidentiality)

In recent years, the protection of personal data is generally becoming more important in the process of implementing social security agreements. When personal data are transmitted between contracting parties, their competent institutions should apply the following rules.

Data may be transmitted to the competent institution of the receiving contracting party only for the purpose of implementing the agreement and the legislation to which it refers. The receiving contracting party may, however, in accordance with its own legislation, use the data for other purposes if they concern social security, including related court procedures. Any subsequent transmission of the data to third parties is subject to the consent of the institution that originally provided them.

The institution that provides the data undertakes appropriate measures to ensure their accuracy and that their contents are in proportion to the purpose indicated. In this respect, any restrictions concerning the transmission of data stipulated within national legislation must be respected. If inadequate or inappropriate data are transferred, the recipient shall be informed immediately and shall rectify or destroy the data in question.

The transmitted personal data shall be kept only as long as the purpose for which they were transmitted requires. Also, it shall not be assumed that their destruction may damage the interests of the persons concerned, relating to social security.

The transmitter and the recipient of the data shall undertake measures to protect all personal data provided against any non-authorized access, non-authorized modification, or non-authorized communication.

Data received by a competent institution of one contracting party shall also be governed by the national laws and regulations of that contracting party for the protection of privacy and confidentiality of such data.

## (v) Liability of a third party

Certain benefits, in particular disability benefits, can be the consequence of acts of a third party. If a person receives compensation for damages, according to the legislation of one contracting party, endured in the territory of the other contracting party and is entitled to compensation for damage from the third person, then the right for such compensation is transferred to the institution of the first contracting party, in accordance with its legislation.

If, in such a case, the institutions of both contracting parties are entitled to compensation for damages with regard to the same kind of benefits based on the same case of damage, the third party can pay the compensation for damage to one of the institutions while excluding the other. The institutions shall settle their requests for compensation in accordance to the ratio of benefits that they pay, respectively.

## (vi) Executive procedures

Enforceable decisions in the field of social security of competent authorities or institutions, as well as enforceable court decisions of one contracting party, are recognized as such in the territory of the other contracting party. Recognition can be refused only if it is contrary to the public order of the contracting party in which it should be recognised.

Enforceable decisions which are recognised shall be executed in the territory of the other contracting party. The executive procedure is performed in accordance with the legislation applied for the enforcement of such acts of the contracting party where the executive procedure should take place. All decisions must have approval for execution (clause of execution).

## 4. Administrative arrangements for the application of social security agreements

Coordination instruments require adequate administrative arrangements which enable their uninterrupted and efficient enforcement.

In general, the administrative arrangements are not considered to be international agreements (treaties). For this reason, there are no specific rules prescribed within the frame of national legislations referring to administrative arrangements.

For the purpose of implementing a social security agreement, contracting parties can conclude one or more administrative arrangements. The number of administrative arrangements depends on the number of branches of social security and the particular solutions of each branch. More comprehensive agreements will likely call for more than one administrative arrangement. For example, in addition to a general administrative arrangement that applies to all branches of social security, the contracting parties may agree to reimburse costs for benefits in kind as a lump sum. In that case, they will conclude an additional administrative arrangement which will specify the criteria for calculating the amount of the lump sum as well as the measures for enforcing that kind of payment.

#### 4.1. Structure of the administrative arrangement

In principle, the structure of administrative arrangements reflects the structure of the agreement itself. It is likely that contents and even the title of the arrangement will be nearly identical to the agreement itself. Keeping a close correspondence between the agreement and the administrative arrangement can ensure that each topic is resolved in the instrument before its implementation.

#### 4.2. Title and Preamble

The legal basis for concluding the administrative arrangement should be provided by the social security agreement. The preamble of the arrangement should clearly state its legal grounds and the title should precisely define the subject of the arrangement.

Depending on the national legislation and the provisions of the agreement, the arrangement can be concluded between competent authorities of contracting parties, liaison bodies, or competent insurance institutions. This also depends on the issues being covered since different institutions have different competencies in the field of social security according to the national legislation.

In some cases, contracting parties may have different opinions regarding the title. Alternative options vary from administrative agreement to accord, arrangement, or understanding. The primary reason for disagreement stems from the differences in legal practices observed across countries rather than in legal theory.

#### 4.3. General provisions

The importance of clearly defining the terms used in both the agreement and the administrative arrangement is undisputable. The most commonly used solution is to give each term used in the arrangement the same meaning as that which is given to them in the agreement. Therefore, the arrangement can only define the terms which have not already been defined in the agreement. Such terms, for example, could refer to “the institution of the place of temporary stay” or “the institution of the place of residence” or any other term that the contracting parties decide to mutually define in order to avoid confusion during enforcement.

For an efficient application of the agreement, the arrangement, or any other implementation instrument, contracting parties should define their liaison bodies. Depending on the national legislation, the liaison bodies can either be organised as separate institutions or as a competent insurance institution in the field of pension, health, or unemployment insurance. The role of the liaison bodies is to maintain direct communication with each other as well as with the competent authorities, competent insurance institutions, claimants, beneficiaries, and their representatives in order to provide an adequate and efficient enforcement of the agreement.

It is necessary to define concrete competencies of the liaison bodies so as to determine, by means of a special arrangement, the administrative measures available for a proper enforcement of the agreement via carefully constructed forms and procedures.

Forms play a crucial role in the realisation of rights through the coordination procedure, both for competent institutions as well as beneficiaries and their family members. Depending on the type of agreement (bilateral or multilateral), forms are created as bilingual or multilingual. Use of the

forms facilitates the communication between participants and shortens the time required for the procedures.

In the application of the agreement and the arrangement, liaison bodies shall provide official legal and administrative assistance free of charge.

#### 4.4. Provisions concerning the applicable legislation

The importance of determining the applicable legislation for social security coordination has already been emphasized. For example, to obtain benefits in kind during a stay in the territory of the other contracting party, a person is requested to provide a certificate of applicable legislation which proves that he/she is entitled to such benefits according to the applicable legislation. Administrative arrangements should specify which institutions are competent for issuing such certificates. Certificates can be issued separately (one for each person) or jointly (one for the insured person and the family members). Needless to say, certificates give entitlement over a prescribed period and can be revoked if circumstances change. This could happen, for example, if a person has ceased to perform professional activity and is no longer covered by the insurance scheme or, in the case of a posted worker, has taken on employment in the territory of the state to which he/she was posted.

One exception from the general rule is that competent authorities of the contracting parties may agree to extend the period of application of legislation of one contracting party to a certain person or group of persons. In such situations, the competent insurance institution of one contracting party shall inform the insurance institution of the other contracting party of that fact. As in other areas of implementation, institutions of contacting parties are obligated to exchange relevant information for establishing applicable legislation.

#### 4.5. Application of special provisions

The application of special provisions is divided into chapters in the same manner as in the social security agreement. Every chapter of the arrangement should be processed in such a way as to ensure that all measures and procedures necessary for the implementation are prescribed in details.

##### 4.5.1. Sickness and maternity benefits

One of the most important aspects in designing of the arrangement regarding these benefits is to make a clear distinction between each institution of both contracting parties involved in providing benefits in kind in cases of sickness or maternity. Both contracting parties have to indicate all competent institutions in the place of stay or residence in order to facilitate the procedure for receiving benefits in kind as well as cash benefits in case of sickness or maternity. Indication of these institutions has to be done in a direct way to reduce the possibility of misinterpretation to a minimum.

For practical purposes, it should be made clear as to which institution a claim for a benefit should be submitted, as well as any additional documents that should be submitted in order to prove one's fulfilment of the eligibility conditions for a certain benefit. For example, if a person submits a claim for a cash benefit in the case of temporary incapacity for work, it is necessary to attach a medical certificate which verifies the stated incapacity. Medical certificates should also state relevant

facts such as the date of commencement of the incapacity, the diagnosis, the expected duration of the incapacity, etc.

When claiming a benefit that is conditional on the completion of a certain period of insurance and for complying with the aggregated periods of insurance completed in the territory of the other contracting party, claimants are required to submit a certificate indicating the periods of insurance completed under the legislation of the other contracting party to the competent institution of one of the contracting parties. At the same time, the arrangement has to stipulate which insurance institutions, in relation to both contracting parties, are competent to issue the certificate. When issuing certificates, competent institutions use forms which liaison bodies have agreed upon. In a case where the person concerned does not present the certificate, the institution to which the claim for benefits was submitted shall request a certificate from the competent insurance institution of the other contracting party.

In order to receive benefits in kind, persons concerned must register themselves and their family members with the institution of their place of residence or temporary stay by submitting a certificate testifying that both the insured person and his/her family members are entitled to such benefits. This certificate shall also indicate the period during which benefits in kind can be provided.

In the event of hospitalisation of the insured person, the institution of the place of residence or temporary stay shall, within the prescribed time limit after being informed of the hospitalisation (usually three to five days), notify the competent institution of the date of entry into the hospital and the probable duration of hospitalisation. Likewise, at the date of the insured person's discharge from the hospital, the institution of the place of residence or temporary stay shall notify the competent institution of the date of discharge, also within a prescribed time frame.

As already mentioned, provision of prostheses, major appliances, or any other substantial benefits in kind is conditional upon prior written authorisation by the competent institution. This means that the institution of the place of residence or temporary stay of the insured person shall request from the competent institution prior to authorisation (consent) that such benefits can be provided at the expense of the latter. Competent institutions have the obligation to reply to the request within the prescribed time limit (usually one or two weeks), counting from the day on which the request was received.

In the event of an absolute emergency where benefits in kind must be provided before the competent institution can give its consent, the institution of the place of residence or temporary stay shall immediately inform the competent institution of the matter. Cases of absolute emergency are those where providing of the benefit cannot be delayed without seriously endangering the life or health of the person concerned.

To clarify the details as to what constitutes "substantial benefits in kind", usually liaison bodies agree upon a list of prostheses, major (orthopaedic) appliances, and other benefits in kind which are, bearing their cost in mind, considered substantial. The list of substantial benefits in kind should include all benefits that cost more than the prescribed amount. Determining this limit is a question of finding a "common denominator" or, if that is not possible, prescribing different limits for different contracting parties. These limits can be expressed in either hard currency or the national currencies of contracting parties.



The procedure for receiving benefits in kind for pensioners and their family members has to be elaborated in detail because pensioners are likely to use benefits in kind more frequently relative to other categories of persons and, as a consequence, their costs are likely to be higher than the average.

In order to receive benefits in kind, the pensioners and their family members need to register with the insurance institution of the place of residence by submitting the certificate issued by the competent insurance institution of entitlement to the benefits in kind. In cases where a certificate is not presented, the insurance institution of the place of residence shall request such a certificate from the competent institution. The competent institution shall immediately send a certificate in prescribed form to the insurance institution of the place of residence of the person concerned. Once issued, the certificate is valid until the date of cancellation by the competent institution which issued the certificate. Cancellation can result from a change of insurance status (more likely for family members) or death (more likely for pensioners).

Persons receiving medical services have no financial obligation towards the insurance institution which is providing the benefits in kind unless the national legislation prescribes a co-payment (in fixed amount or as percentage of service or medicament price). On the other hand, the competent institution has an obligation to compensate the institution of the place of temporary stay or residence for the benefits in kind that it has provided. The compensation shall cover the actual cost of benefits provided.

The competent authorities or liaison bodies may agree, according to the provisions of the agreement, upon another method of compensation of costs for all or part of the benefits in kind, or for certain groups of insured persons. Another method is the payment of a lump sum, although this is subject to a separate administrative arrangement which can be concluded between liaison bodies or competent institutions of contracting parties. Contracting parties may also agree on a reduced lump sum (in certain percentage) for administrative costs. In view of the fact that the calculation of mutual claims and debits regarding payments is made once a year for the past calendar year, it is prudent to consider the possibility of an advanced payment for the current calendar year. This can be of great importance in case a claim of one contracting party is disproportionately higher than the claim of the other contracting party.

If a person has not met the prescribed procedures (e.g. did not submit a certificate of right to benefit in kind to the insurance institution of temporary stay) and, for that reason, was charged for the provided benefit, the competent institution will reimburse that person for the incurred expenses in accordance with the applicable legislation. The institution of the place of temporary stay shall, at the request of the competent institution, supply the necessary information about the cost of the granted benefits in kind.

The extent of details of other provisions concerning the reimbursement of costs for benefits in kind depends on the conditions of the contracting parties. It is useful to stipulate the method of payment as well as the currency. For example, the compensation can be paid through the liaison bodies or directly to the competent institutions and transfers of assets can be realised in hard currency. This is especially of importance when the currency of one of the contracting parties is not convertible.

#### 4.5.2. Invalidity, old-age and death benefits

As mentioned in the previous section, all competent institutions of contracting parties which are providing long-term cash benefits in the case of old-age, invalidity, and death have to be clearly stated. In addition, procedures which are applied in the decision making process regarding a claim for a benefit should be defined.

The competent institutions have to inform each other, without delay, of any application for a benefit to which the corresponding part of the agreement is applicable. This information shall be supplied on an agreed upon form and will contain all information necessary for the competent institution of the other contracting party, in particular the data on periods of insurance, type of insurance (e.g. employment, self-employment), previous workplace, current employment or professional work, and employer data. There is no need for providing original documents as the form is sufficient.

The obligation of the competent institutions is to inform each other of all circumstances which are of importance when deciding upon a benefit and which are relevant for the continuation of the right to the benefit as well as for the payment. The competent institution shall decide upon the application and notify the applicant and the institution of the other contracting state of its decision.

Certification of insurance periods is essential for the realisation of long-term cash benefits. At the request of the competent institution of one contracting party, the institution of the other contracting party will certify the insurance periods that a person has completed, according to the legislation of that contracting party, as well as provide all other information which is required regarding those insurance periods in order to determine the entitlement to a benefit or calculate the amount.

Notification between competent institutions on relevant facts can influence the decision making or payment of benefits. Some of the most important facts that should be listed are as follows: termination of the right to a benefit or suspension of disbursement of benefit; change in insurance periods; commencement of new employment (insurance); new marriage status of the beneficiary widow/widower; changing residence to a third country; address changes; education of children; and, death of a beneficiary.

Provisions referring to the payment of benefits are, in practice, an issue of paramount importance for beneficiaries. Administrative arrangements should stipulate that all benefits are granted according to the provisions of the agreement and shall be paid out directly to the accounts of beneficiaries residing in the territory of the other contracting party or, as case may be, in the territory of a third country.

A separate provision should prescribe that at the request of the competent institution (which has obligation for payment) beneficiaries are obligated to provide a life certificate regularly (e.g. every six or twelve months).

#### 4.5.3. Unemployment benefits

The coordination of cash unemployment benefits differs from that of other benefits. The most significant difference is that these benefits, in general, are not exportable – that is, they are not transferable from the territory of one contracting party to another. Namely, a person can be at the disposal of the labour market of only one contracting party and for that reason it would be problematic to

permit persons to receive unemployment benefits in the territory of one party while being gainfully employed in the territory of the other contracting party.

However, one common characteristic with the other branches of social security is the aggregation of periods of insurance completed according to the legislation of the contracting parties. Therefore, when a person applies for an unemployment cash benefit, the competent institution of one contracting state (where claim has been submitted) will take the insurance periods completed according to the legislation of the other contracting party as well as periods of receiving such cash benefits from the institution of the other contracting party in the referent period (for example one year before submitting the claim) into consideration when determining one's entitlement to a benefit.

#### 4.6. Enforcement

Uninterrupted and efficient enforcement of the social security agreement and the administrative arrangement for its implementation is crucial for the realisation of all benefits.

The mutual assistance of the liaison bodies and competent institutions as well as communication with claimants and beneficiaries will facilitate the enforcement. Institutions of the contracting states may contact each other directly, as well as applicants, beneficiaries, their family members, or their authorised representatives. Diplomatic missions or consular posts can also be included in the process of implementation as they have no restrictions as to direct communication with other subjects.

For the purposes of implementing the agreement and the arrangement, the institutions of the respective contracting parties lend their good services and act as though implementing their own legislation. Mutual legal and administrative assistance is also provided free of charge.

The procedure for the realisation of rights of benefits on the basis of disability is very complex. Medical examinations which determine the health status and capacity for work are essential. Procedures regarding these medical examinations should be clearly defined. At the request of the competent institution of one of the contracting parties, the medical examination of an applicant, a beneficiary, or a member of his/her family residing or staying in the territory of the other contracting party shall be carried out by the competent institution of the latter contracting party.

In order to determine the extent of an applicant's ability to work or the health status of a beneficiary or a member of his/her family, the competent institution of a contracting party performing the examination shall use the medical reports and other data provided by the competent institution of the other contracting party. However, the competent institution of the former contracting party reserves the right to have an applicant, a beneficiary, or a family member undergo a medical examination by a doctor of its own choice or in the territory where the competent institution is situated.

The applicant, the beneficiary, or the family member shall comply with any request to undergo a medical examination. If the person concerned, for medical reasons, is unfit to travel to the territory of the other contracting party, he/she shall immediately inform the competent institution of that contracting party. In that case, he/she shall submit a medical certificate issued by a doctor designated for this purpose by the competent institution in whose territory he/she resides or stays. This certificate shall prove the medical reasons for his/her unfitness to travel as well as the expected duration.

The costs of the examination as well as travel or accommodation expenses shall be paid for by the competent institution at whose request the examination was carried out.

Data exchanges between all institutions of contracting parties are crucial in implementing the social security agreement. Liaison bodies play the most important role in the process of data exchange. On a regular basis they should exchange statistical and other relevant data such as the number of the beneficiaries residing in the territory of the other contracting state, type of benefits paid and their amounts of the previous year. Insurance institutions can also exchange data relevant to their field of work.

#### 4.7. Final provisions

The entry into force of the administrative arrangement is directly connected to the social security agreement. In principle, as an implementation instrument, the arrangement should enter into force at the same date as the agreement.

Just as with agreements, arrangements are signed in the required number of originals in agreed language(s) and all texts are equally authoritative.

## 5. Conclusion

This paper has covered various aspects of implementing coordination instruments with respect to all types of social security benefits.

In closing, two pragmatic suggestions must be mentioned. First, when developing coordination instruments, one should follow through with one general line rather than combining provisions of several models which, more often than not, simply leads to confusion. Second, it should be emphasized that when developing and negotiating an administrative arrangement, one should normally not mix solutions from two or more arrangements unless they are used to enforce very similar (in all aspects) coordination instruments. Drawing on two or more arrangements should be used only when appropriate.

As mentioned in the introduction, this paper presents just one of the many possible approaches to the implementation of coordination instruments. Nevertheless, since there are many similarities in different approaches, the approach presented in this paper can serve as a useful point of reference. It is hoped that experts and policy makers in this field can find the tools and knowledge in this paper useful and customize them to accommodate specific conditions of their national social security legislation.