

## **ASIL Insight**

### **The Maritime Labour Convention, 2006 Consolidates Seafarers' Labour Instruments**

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The Maritime Labour Convention, 2006 was adopted by the 94th International Labour Conference at a maritime session in Geneva in February 2006. There were no votes against the Convention, which is significant as it consolidates (in more than 100 pages) the subject matter of 66 maritime labour instruments relating to seafarers' conditions of work that had been adopted by the International Labour Organisation (ILO) between 1920 and 1996.[1] The Convention thus covers, inter alia, conditions of employment, hours of work and rest, accommodation, recreational facilities, food and catering, health protection, medical care, welfare and social security protection for seafarers, as well as the regulation of recruitment and placement services and flag State inspection systems.

The new Convention has been described by the Director-General of the International Labour Office, Dr. Juan Somavia, as "making labour history." It has taken the ILO's treaty-making activity since 1920 one stage further, in the sense that it reflects an international tripartite[2] consensus on the standards needed to achieve "fair globalization" in the maritime sector. It consists of agreed minimum standards to help secure conditions of decent work for workers and to also ensure fair competition among employers. The maritime sector, in particular international shipping, is one of the earliest and most internationalized industries, with the beneficial ownership of ships often based in one State even though the ships operate under the jurisdiction of yet other States (flag States) and the seafarers on board are drawn from numerous States. The jurisdictional problems this can create and the issue of ensuring flag State responsibility have been topics of concern for this sector since the 1950s. Under the 1982 United Nations Convention on the Law of the Sea and the 1958 Convention on the High Seas, the flag State has primary jurisdiction over social and labour conditions on board, and over ship safety and environmental protection standards. There have been extensive efforts, particularly by the International Maritime Organization (IMO), to address this issue with respect to marine environmental protection, ship safety and security, and crew competency.[3] The Maritime Labour Convention, 2006 is intended to complement the three key IMO Conventions and to become the "fourth pillar" of the international maritime regulatory regime. It draws upon the practices under the IMO regulatory regime and establishes an enforcement and compliance system based on inspection and certification of labour and social conditions for seafarers, which is carried out by the authorities of the State of the flag flown by the ship concerned. This inspection is complemented by inspection that is voluntarily carried out by authorities in ports of other States visited by the ship, to ensure compliance with the requirements of the Convention ("port State control"). The various obligations at the national level for inspection and compliance, including the need to keep proper records to evidence

compliance, are also intended to enhance the effectiveness of the ILO's long-established and successful supervisory system based on the expert review and tripartite discussion of the reports submitted by Members on the implementation of the Conventions that they have ratified. In addition, the Maritime Labour Convention, 2006 was consciously designed to integrate with existing maritime inspection and enforcement systems and build upon existing international cooperative arrangements relating to ship safety and security and environmental protection.

The basic purpose of the Maritime Labour Convention, 2006 was not, however, simply to consolidate the existing corpus of international maritime labour standards and to bring clarity and coherence into the various texts (of Conventions and Recommendations) adopted since 1920. The new Convention was principally designed to meet the serious concerns expressed by both the seafarer and shipowner communities, and later endorsed by Governments, that the existing instruments were losing their relevance. Their substance was of good quality, but they were unevenly applied and enforced and often were not widely ratified. Moreover, the existing procedures for the revision of international labour Conventions have not allowed the technical aspects to be rapidly updated so as to meet modern conditions in the industry. From a broader systemic perspective the underlying concern was that, with the increasing level of regulation in other aspects of shipping operations and increased international competition, labour would be the one remaining area for cutting costs. Paralleling these sectoral concerns, since the mid-1990s the ILO had also been undergoing a comprehensive review of its Conventions and standard-setting activities with a view to making them more effective and to increasing and broadening ratifications. To meet these concerns, the Maritime Labour Convention, 2006 embodies solutions that are innovative from a number of perspectives. First the process of development of the text, over a period of nearly five years, by the International Labour Office under the guidance of the tripartite constituents of the Organization, reflects a shift in ILO practice in the drafting of texts for submission to the International Labour Conference.<sup>[4]</sup> This process of more extensive consultation and international "social dialogue" led to the development of concrete tripartite solutions to address highly sensitive issues such as the provision of social security protection, employer liability and worker complaint mechanisms, before the Convention was considered for adoption. In addition, strategic approaches needed to be devised to facilitate discussion of such a comprehensive and lengthy instrument within the ILO's constitutional framework. The fact that very few amendments were submitted to the proposed text considered by the Conference and, of these, very few were controversial, testifies to the effectiveness of the tripartite process and of international social dialogue.

The principal challenge - and thus one of the reasons why innovation was essential - was to endow the new Convention with a far higher prospect for widespread ratification than had been achieved in the case of more traditional international labour Conventions. Much of the answer lay in allowing sufficient flexibility so as to accommodate national circumstances and economic diversity; but this flexibility had to be provided without prejudicing the strength of protection to be given to seafarers. The innovations relate not so much to the solutions adopted, but rather to their development in the Convention. Important concepts in the new Convention can already be seen in the ILO's Merchant Shipping (Minimum Standards) Convention, 1976 (No.147). The format of the new Convention and its terminology build upon and further develop the well-established format of IMO Conventions, but with adjustments to meet ILO values and approaches. Article XV, relating to a new "accelerated amendment" procedure (to allow for rapid

updating of more technical detailed provisions in the Code which is part of the Convention), is a good example of how an IMO procedure has been adapted to a tripartite environment and to the specificity of international labour Conventions. In essence, the procedure gives individual States parties to the Convention an opportunity to opt out of amendments to the Code approved by the tripartite General Conference of the ILO, which would otherwise apply to them, by tacit consent, if they do not opt out within a stated time. Similarly, the structure of the Convention resembles an IMO Convention more than a traditional ILO Convention, but the hierarchy of norms has been made more explicit and is in fact supported by an interpretative "Explanatory note." There are clear reasons why this new structure has been chosen: the Convention begins with 16 Articles setting out principles and rights and responsibilities and containing the amendment provisions and other final clauses. They are followed by the Explanatory note just referred to and then by the five Titles of the Convention. Each Title consists, at the highest level, of Regulations. Each Regulation is followed by the corresponding provisions of a two-part Code: Part A (mandatory Standards) and Part B (non-mandatory Guidelines). One of the main purposes of the division between the Regulations and the Code concerns the accelerated ("tacit consent") amendment procedure; as noted above, this can only be used for the Code provisions and any amendment must be consistent with the general provisions in the Articles and Regulations. The purpose of the Guidelines is to provide clear guidance as to the way in which each Standard should be implemented, while allowing flexibility for ratifying countries to provide for national implementation in a different way.

The five Titles are:

Title 1: Minimum requirements for seafarers to work on a ship;

Title 2: Conditions of employment;

Title 3: Accommodation, recreational facilities, food and catering;

Title 4: Health protection, medical care, welfare and social security protection;

Title 5: Compliance and enforcement.

[5] Flexibility is provided through the distinction drawn between Standards and Guidelines. In addition, the Convention has also been guided (especially in the case of social security protection) by the programmatic approach in the 1966 International Covenant on Economic, Social and Cultural Rights. [6] In addition, it includes some provisions to provide national flexibility in implementation based on principles of transparency and accountability. For example, the definition and scope provisions for the Convention, set out in Article II, relating to the terms "ship", "seafarer" and "shipowner," are intentionally broad and inclusive. There is national flexibility explicitly provided to address the problems some States will encounter in applying some or all of the Convention's requirements to particular categories of workers or ships or to smaller ships engaged only in domestic voyages. Any exemptions or exclusions made by national authorities require consultation with shipowners and seafarers organizations and reporting of the exemption or exclusion to the ILO. The ship certification system, consistently with other maritime Conventions, is mandatory only for ships of 500 gross tonnage and above engaged in international voyages. The Convention also includes provision for recognition of national standards or practices which are "substantially equivalent" to the Convention requirements. Finally, in order to encourage fair competition, the Convention requires port States to ensure that ships of non-ratifying States do not receive more favorable treatment during port State inspections than ships of ratifying States receive. These innovations in substance and in process reflect a renewed vitality and commitment in the ILO which will be of broader interest to the

international community. They signal a vigor and interest in seeking new ways to encourage the use of international law and international standards to balance the broader economic and social changes affecting most sectors in an era of increased globalization.

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### **Footnotes**

[1] For this reason it is also sometimes referred to as the consolidated Maritime Labour Convention. In terms of the ILO procedures regarding adoption and revision of Conventions, the new Convention revises 37 existing international labour Conventions (Article X) which will be closed to further ratification once the new Convention enters into force. It also consolidates the provisions of the 29 Recommendations that complement these Conventions.

[2] In accordance with Article 3, paragraph 1, of the ILO Constitution, reflecting the fundamental principle of tripartism, the International Labour Conference is composed of four delegates from each State Member of the Organization, two representing the Government of the country concerned and the two others representing respectively the employers and workers of the country. The draft text presented to the Conference was the fruit of nearly five years of intensive tripartite discussion.

[3] International Convention for the Safety of Life at Sea, 1974 (SOLAS) as amended; Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW), as amended; International Convention for the Prevention of Pollution from Ships, 73/78 (MARPOL 73/78).

[4] In January 2001, the ILO's Joint Maritime Commission (JMC), a bi-partite body (seafarers and shipowners) operating under the auspices of the Governing Body of the ILO, called for "the development of an instrument which brings together into a consolidated text as much of the existing body of ILO instruments as it proves possible to achieve ... in order to improve the relevance of those standards to the needs of all the stakeholders of the maritime sector," and recommended the main structure and content of such an instrument. This solution was endorsed in December 2001 by Government representatives in a High-level Tripartite Working Group on Maritime Labour Standards. The drafting work then began under the guidance of the High-level Group and a Sub-group, until it was taken over by a Preparatory Technical Maritime Conference in September 2004.

[5] Title 5 sets out a comprehensive system for flag State, port State and labour-supplying State activities aimed at ensuring ongoing compliance with the Convention, and enforcement on ships of the relevant national implementation through laws or regulations, collective bargaining agreements and practice to secure compliance with the "requirements of the Convention" (defined in Article 2 (e) as the Articles, Regulations and the Code, Part A only). It includes the flag State (or a "recognized organization" acting on its behalf) ship certification system and models for the Maritime Labour

Certificate and Declaration of Maritime Labour Compliance, which will be carried on board ships of 500 gross tonnage and above engaged in international voyages.

[6] UNGA Resolution 2200A (XXI) of 16 December 1966, 993 UNTS 3 (in force 3 January 1976). See, in particular, the approach suggested in Article 2 of the Covenant and related commentary (see: CESCR General Comment 3, 1990 on Art.2 para 1) which explicitly recognizes the concept of "taking steps" and "achieving progressively the full realization" of rights. This approach is consistent with the ILO Constitution (Article 19, Constitution of the International Labour Organisation) which expressly recognizes the importance of recognizing differing climatic, industrial or special circumstances of countries that may affect their ability to implement Convention related obligations. The objective is to encourage initial commitment and implementation with a view to securing increased, and finally, full implementation as national conditions allow (see for e.g., MLC, 2006, Standard A4.5, paragraph 3, "Each Member shall take steps according to its national circumstances to provide the complementary social security...."