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The MLC, 2006 – Reflections on Challenges for Flag State Implementation

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1. Introduction[2]

The *Maritime Labour Convention, 2006* (MLC, 2006)[3] comprising over 100 pages of text, elaborates a comprehensive code setting out rights and responsibilities as well as more technical minimum standards for working and living conditions for a diverse and wider range of ocean workers (inclusively called "seafarers"[4]). Consistent with the complexities of the earliest of the globalized economic sectors [5] the Convention

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[2] The introductory parts of this paper draw upon a guest editorial, Moira L. McConnell, "The ILO's *Maritime Labour Convention, 2006*: filling a gap in the law of the sea", *MEPIELAN E-Bulletin*, April 2011, available at: http://www.mepielan-ebulletin.gr/

[3] See the ILO's MLC, 2006 website which contains the Convention and other key resources: <http://www.ilo.org/global/standards/maritime-labour-convention/lang--en/index.htm>

[4] Article II, paragraph 1 (f) "*seafarer* means any person who is employed or engaged or works in any capacity on board a ship, to which the Convention applies." A ship is also inclusively defined in Art. II, paragraph 1 (i) as "*ship* means a ship other than one which navigates exclusively in inland waters or waters within, or closely adjacent to, sheltered waters or areas where port regulations apply." There are very few exclusions for ships and unlike IMO conventions there is no minimum tonnage for application of the Convention. The exclusions under Article II, paragraph 4 are: "Except as expressly provided otherwise, this Convention applies to all ships, whether publicly or privately owned, ordinarily engaged in commercial activities, other than ships engaged in fishing or in similar pursuits and ships of traditional build such as dhows and junks. This Convention does not apply to warships or naval auxiliaries."

[5] We cannot ignore the fact, as noted in Cleopatra Doumbia-Henry, Dominick Devlin and Moira L. McConnell, *The Maritime Labour Convention, 2006 Consolidates Seafarers' Labour Instruments (*2006) Vol. 10, Issue 23, *ASIL Insight* (e- publication), that:

> The maritime sector, in particular international shipping, is one of the earliest and most internationalized, 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 has been topics of concern for this sector since the 1950s.

establishes a system based on responsibilities for flag States, port States, and, to a lesser degree, coastal States. It also introduces a new "face" for State responsibility, under the framework of international law of the sea, the State with labour-supplying responsibilities Sometimes described as the "Seafarers' bill of rights" the MLC, 2006 is an instrument that seeks to achieve both social and labour rights ("decent work" for seafarers) that are interwoven with more economic fair competition considerations (achieving a level-playing field for shipowners). It has been described as the "fourth pillar" of the international maritime regulatory regime complementing the major IMO conventions, SOLAS, MARPOL and STCW, all of which are intended to ensure the safety , security of shipping and the protection of marine environment from ship source pollution.[6]

As an ILO legal instrument, the MLC, 2006 brings together and modernizes in some areas (for example accommodation and occupational safety and health (OSH)) the majority of the ILO 's maritime legal instruments adopted since 1920 (37 Conventions and related Recommendations). The 37 maritime labour Conventions that are consolidated (revised) will be gradually phased out as States that are now party to these Conventions ratify the MLC, 2006. The Convention sets out minimum requirements for seafarers to work on a ship (e.g., minimum age, medical fitness), conditions of employment, including important matters such as a contract of employment (seafarers' employment agreements (SEA) minimum hours of work or rest, wages, leave, repatriation), on board accommodation, recreational facilities, food and catering, as well as occupational safety and health protection, medical care, access to seafarer welfare centres and social security protection. It also introduces an important new certification requirement for some ships. In that respect it is an important example of inter-organization learning as it builds upon, and even, arguably, develops the best practices under the international regulatory regime for the International Maritime Organization (IMO).[7] The MLC, 2006 contains a compliance and enforcement system based on inspection and certification of labour and social conditions for seafarers, carried out by the authorities of the flag States or recognized organizations (ROs) on their behalf. This is complemented by port State inspection (port State control – PSC) , as well as being linked to the extensive and long established ILO supervisory system which formally examines legal implementation at the State level. In order to encourage fair competition, the Convention requires port States to ensure that ships of non-ratifying States receive "no more favorable treatment" during port State inspections, than that given to ships of ratifying States. [8] The Convention expressly seeks to attract widespread ratification through a mix of firmness on rights combined with flexibility on implementation supported by a tripartite approach to implementation at the national level. Typically, for

[6] Speech to the ILC by Mr. Efthimios Mitropoulos, Secretary-General, International Maritime Organization, 94th (Maritime) Session, ILC, February 20, 2006, Fourth Sitting, *Provisional Record* 10, p. 2 *International Convention for the Safety of Life at Sea, 1974*, as amended (SOLAS); *International Convention on Standards of Training, Certification and Watchkeeping, 1978,* as amended (STCW); *International Convention for the Prevention of Pollution from Ships, 73/78* (MARPOL).

[7] Although now primarily concerned with the IMO conventions, it is interesting to note that the Paris PSC MOU as in fact developed in response to an ILO Convention *Merchant Shipping (Minimum Standards) Convention, 1976* (No.147 (No. 147) adopted in 1976.

[8] MLC, 2006, Article V, paragraph 7.

an ILO Convention it allows implementation in laws and/or regulations or collective agreements or other measures, thus emphasizing the important role of the national social partners, the workers and employers, in implementing international obligations.

It is important to keep in mind the point mentioned above: the MLC, 2006 is intended to establish decent work for seafarers and a level playing field for shipowners. In that equation these two are inseparable and are predicated on the idea of some uniformity in implementation, albeit with some flexibility to address specific national situations. This is also central to the idea, new for an ILO convention, of certifying labour standards in the maritime sector.

The key features of the MLC, 2006, which as discussed below also create challenges for implementation, can be summarized as :

- comprehensive approach to the issues covered
- comprehensive approach to coverage of seafarers and ships (no tonnage limit)
- a new system mainstreaming labour standards within the international maritime regulatory system to achieve effective enforcement and compliance - a *certification system* for conditions of "decent work" (some tonnage/voyage parameters on certification)
- a "no more favourable treatment" provision to help ensure a level-playing field (in the context of port State control measures)
- specific areas for national flexibility based on national social (tripartite)dialogue.

2. The current status of the MLC, 2006 ratification and implementation

This year is an important marker year for the MLC, 2006. February marked the fifth anniversary of the adoption of the Convention by the 94th International Labour Conference (ILC), the 10th maritime session since 1920. This year also the tenth (10th) anniversary of the famous "Geneva Accord", an agreement that was reached in 2001 by the international representatives of the Seafarers and Shipowners on the Joint Maritime Commission. This Accord called for a legal instrument that would more effectively address the needs of the seafarers and shipowners in the earliest of the globalized industries, and provided the impetus for the five years of intensive international tripartite meetings leading to the adoption of the MLC,2006.

Despite what was, essentially, unanimous adoption in 2006, the Convention has not yet achieved the formula for entry into force - 12 months after ratification by 30 Members (ILO Member States) with a total share in the world gross tonnage of ships of at least 33 per cent (Article VIII)). Although most of the major flag States have ratified the Convention, with ratifications currently covering seafarers on nearly 48 per cent of the world fleet, as of early May 2011 the Convention has been ratified by only twelve

countries.[9] This means that eighteen (18) more ratifications are needed meet the 30/33 formula in 2011, with actual entry into force 12 months later. As recently noted [10] by Cleopatra Doumbia- Henry, Director of the ILO's International Standards Department "At the time the Convention was adopted it was thought it would take about 5 years to achieve the challenging formula which was intended to avoid creating a "paper tiger". The formula is intentionally demanding because of the importance of ensuring that the MLC, 2006 is not a "paper tiger" but an instrument that results in real change: decent work for seafarers and a level playing field for shipowners." Clearly it is an ambitious Convention that aims for as close to universal ratification as possible.

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It had been expected, with the ddecision by the European Union (EU) in 2007 regarding ratification by its Members by the end of December 2010 and the agreement between the social partners in the EU, an agreement that will become a Directive once the Convention into force[11], that the other requirement, ratification by at least 30 Members would be achieved by December 2010. This date has now passed, however the goal of five years may still be possible, as there has been ssignificant progress in other countries, particularly in parts of Europe, Asia, Southeast Asia and the Pacific region. Many countries in the Caribbean are moving forward quickly, as well as several countries in Africa. It is believed that a number of ratifications will be announced at the June 2011 ILC or shortly afterwards.[12]

Not surprisingly, global economic destabilization combined with political and other difficulties in some countries and regions, as well as major environmental disasters has had a serious impact on national legislative agendas. These are all certainly what could be

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[9] In order of ratification they are: Liberia, Marshall Islands, Bahamas, Panama, Norway, Bosnia and Herzegovina, Spain, Croatia, Bulgaria, Canada, St Vincent and the Grenadines, and most recently Switzerland.

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[10] "Overview of the MLC, 2006, status of implementation and emerging issues" opening presentation to the "Asia-Pacific A Regional Dialogue on the Maritime Labour Convention" organized by the Australian Maritime Safety Authority (AMSA) 3-6 May 2011 Cairns, Queensland, Australia.

[11] The Council adopted a Decision on 7 July 2007 authorizing member States to ratify the ILO's MLC, 2006 in the interests of the European Community, preferably before 31 December 2010 (see EU *Official Journal:* L 161/63, 22 June 2007). On 19 May 2008, the EU social partners representing management and labour in the maritime transport sector (European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF)) entered into the Agreement on the MLC, 2006, and requested the European Commission to propose a Council Directive giving effect to their Agreement and its Annex A under EU law, in accordance with article 139 of the Treaty. A Directive was adopted in February 2009. See:"Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners Association the European Transport Workers' Federation on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC". It will enter into force at the same time as the MLC, 2006.

[12] An online ILO news release, dated May 9, 2001 "Asia-Pacific towards the ratification of the MLC, 2006" MLC Asia-Pacific meeting in Cairns, Australia (3-6 May 2011)" reported that:

> The ratification by a number of countries, including Antigua, Latvia and Poland appear imminent. Others, including India, have announced their intention to ratify within the next six months. During the Asian-regional Dialogue, the indications suggest that at least nine countries in the region could be in a position to ratify the MLC, 2006 before the end of 2011.

Available at; <http://www.ilo.org/global/standards/maritime-labour-convention/WCMS_155179/lang--en/index.htm>

described as the more unpredictable exogenic factors that pose a challenge to governmental efforts, for all States, including flag States, to move forward on ratification and implementation.

3. Challenges for (flag State) implementation

3.1 A brief note on other than flag State obligations

Although the focus of this paper is flag State implementation it is important to keep in mind the fact that the Convention also contains important obligations for countries with labour-supplying responsibilities as well as coastal and/or port State responsibilities. These also provide some challenges for governments – particularly those related to the regulation of private seafarers' recruitment and placement services (if any) that operate in country and the always complex issue of providing social security for seafarers ordinarily resident in the country. Although both of these matters have some elements of flag State responsibility related to verification of the situation during ship inspections, the regulatory responsibilities are not primarily directed to flag States. In the first case it is the State in which the service is located and in the second it is the State in which the seafarer is "ordinarily resident" (unless flag State's social security system covers foreign seafarers on ships under its flag). There are also important obligations relating to adopting policies to promote employment opportunities, again a labour-supplying responsibility. Other obligations, which could be considered as coastal or port State concerns, such as encouraging the establishment of seafarer welfare centres and the provision of access to shore-based onshore medical advice and services to passing ships and ships entering the territory are also important and possibly difficult for some countries. There are also, potentially, some implementation issues in connection with elements of port State responsibilities, particularly where the procedures under the MLC, 2006 vary somewhat from those that are well established under the various PSC MOUs, e.g., the onshore seafarer complaint-handling procedures.

3.2 Implementation challenges for flag States

It is, however, clear that the majority of the obligations under the MLC, 2006 are directed to States in their capacity as flag States. These challenges, which are endogenous to the Convention overlap to some extent but for purposes of this paper are divided into two categories

3.2.1 Challenges related to inspection system capacity

The first most obvious issue is capacity to implement and operate the ship inspection/certification system. As was the case with the introduction of the major IMO instruments, MARPOL or in more recent times the ISM Code or ISPS Code this change in the system will inevitably have some teething problems and generate uncertainty at all levels for a period of time. For flag States with a high tonnage level there is the need to

inspect and certify, if required, a large number of ships. As noted above in the Introduction, the Convention is comprehensive, covers existing ships (except for construction and equipment aspects of accommodation) and, although there is some flexibility, does not have a tonnage limit. Nor does it have broad exclusions based on the ships' trading patterns (other than ships that are not commercially operated or engaged in fishing or are of traditional build or warships or naval auxiliaries). To a large extent the problem of capacity to inspect, at least for ships engaged in international voyages, may already be addressed through the services provided by the ROs that have moved forward rapidly to make sure that they have staff that are competent to inspect and certify ships for MLC, 2006 compliance. In that respect there may be one difficulty in that there has been a concern about ensuring some degree of uniformity in the way that ROs are interpreting the Convention's requirements, particularly at this infancy stage when many flag States are still developing the legal details of implementation. It should be noted that the MLC, 2006 differs from the IMO conventions because of its emphasis on national flexibility, and specifics of the onboard documentation, particularly the requirement for a Declaration of Maritime Labour Compliance, Part I (DMLC) to be filled out by governments.

To help achieve more harmony, if not uniformity, in connection with the ship inspection obligations the ILO organized an International Tripartite Experts meeting in 2008 to adopt the G*uidelines for Flag State Inspections Under the Maritime Labour Convention, 2006*[13] and the *Guidelines for Port State Control Officers Carrying Out Inspections Under the Maritime Labour Convention, 2006.*[14] These Guidelines are not binding but are intended as tripartite advice to flag States, in particular, about the system for inspection and what is should be checked in an inspection. The Paris PSC MOU guidance, which is nearly completed, is not exactly the same as these Guidelines but generally follows the ILO's MLC, 2006 Guidelines for PSCOs.

These Guidelines have been combined with other initiatives such as the Maritime Labour Academy, based at the ILO's International Training Centre in Italy[15] which is part of a major effort by the ILO to develop training for inspectors to ensure some degree of consistency in practice and understanding in all regions. The first course a two week residential course that was developed in 2009 was the "Train the Trainers and maritime inspectors on the application of the Maritime Labour Convention, 2006"[16]. Since then more than 190 MLC, 2006 trainers have attended from all regions, with more courses planned for 2011, including courses in partnership with the ITF for ITF inspectors[17] and workshops and courses for shipowners and ships' officers, the cruiseship sector[18] and for

[13] See the ILO's MLC, 2006 website which contains the Convention and other key resources, including these Guidelines:
<http://www.ilo.org/global/standards/maritime-labour-convention/lang--en/index.htm>
[14] *Ibid*.
[15] http://mlc-training.itcilo.org/training-courses
[16] *Training of trainers and maritime inspectors on the application of the Maritime Labour Convention, 2006.* The course was developed with the assistance of the Italian Government, the MCA of the United Kingdom, Sweden, Korea and the Singapore Maritime Officers' Union (SMOU).
[17] Two have already taken place involving 42 ITF inspectors drawn from most regions.
[18] Developed in cooperation with the Costa Cruises Group.

national legal counsel/advisers. Numerous regional and national level courses delivered by the ILO or trainers who have taken the ILO course have also taken place[19] in addition to many other industry or national activities.

Clearly, capacity to operationalize the MLC, 2006 inspection system is being developed by both public and private actors in the maritime sector. There have also been many industry reports of ships already being inspected, either on a trial basis or under voluntary certification, as well as initiatives to include MLC, 2006 compatible terms in various industry collective agreements and other tools such as courses and training offered by ROs and others.

But these inspection challenges for governments should not be overstated. It is important to keep in mind the fact that the MLC, 2006 builds upon obligations that have been in place for many countries since the adoption of the ILO Convention No.147[20] which was an early attempt at consolidation and also contained a form of port State inspection/action. It is now one of the Conventions included under many of the PSC MOUs. Convention No. 147 and the *Labour Inspection (Seafarers) Convention, 1996* (No.178) [21] form the basis of the current compliance and enforcement system in the MLC, 2006. In principle this means that for countries that have ratified those Conventions, the "upgrade" to the MLC, 2006 while certainly a "plusher" system should not in fact require a major change in the basic ship inspection operation.

3.2.2 Challenges relating to legal implementation (and ratification) by flag States

The challenges related to legal implementation are perhaps more difficult and certainly, along with the exogenous factors noted above constitute a large part of the explanation of the slower than expected pace of ratification. Many countries, for example Canada, Australia and Singapore do not normally ratify international agreements until their legislation is in place, even though there is a clear 12 month (or longer if a country ratifies before the 30th ratification) "grace period" after ratification before the Convention obligations enter in force for, and are, therefore, binding on the ratifying country. There is then a further period before a country would have to report to the ILO on its implementation.

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[19] AUSAID/ AMC (in Tasmania) April - May 2010 for South Pacific inspectors); In November 2010 a (pilot) 3 day regional inspector training workshop was organized by the ILO in cooperation with the Jamaican Maritime Administration and the Caribbean PSC MOU. That workshop was attended by 40 participants. As of March 2011, 193 people from all regions of the world were trained at this course. A survey carried out in February 2011 by the ITC had a very high level of response - 88/176 (176 trained as of February). These 88 people reported that after their course they carried out activities on their return home resulting in a total of at least 2,893 more people being trained or exposed with respect to the MLC, 2006.

[20] *Supra* note 7, <http://www.ilo.org/ilolex/english/convdisp1.htm> It has been ratified by 56 States. There is also a Protocol that was adopted in 1996 adding to the list of conventions covered by the general obligations under C147. P147 has been ratified by 24 States.

[21] <http://www.ilo.org/ilolex/english/convdisp1.htm> It has been ratified by 15 States.

One of the main difficulties for implementation is that the MLC, 2006 is both a labour Convention and a maritime convention. Interaction with the ILO including implementation of labour conventions is usually a matter dealt with by the labour departments or ministries in each country. However the compliance and enforcement approach, including PSC and the possible use of ROs and the express alignment with IMO instruments in the MLC, 2006 is intended to "mainstream" it with the current flag State inspection and the PSC MOU approaches under the wider maritime regime. For some countries the question of which department should handle the implementation of the MLC, 2006 has been difficult as this is a labour matter, usually involving labour inspectors, however the Convention is obviously predicated, from a systemic perspective, on implementation by the competent authority or authorities that are already working with ship inspection and certification and with PSC. On the other hand many of the topics such as social security and the possibility of implementation through a collective bargaining agreement are not within the usual practice or jurisdiction of most maritime administrations.[22]

While there are some countries where the labour department and labour inspectors will play a central role, in many countries implementation has occurred through cooperative agreement between the relevant departments. This is especially important since some topics may be matters on which the maritime administration cannot develop regulations. To use the example of Canada, the majority of the MLC, 2006 provisions are addressed in a Regulation under the *Canada Shipping Act, 2001* [23], a statute dealt with by Transport Canada. However some elements dealing with OSH and seafarers' on-board accommodation are in a Regulation under the *Canada Labour Code*[24], a statute under the purview of Human Resources & Skills Canada. These institutional and legal issues are complex to work out, particularly in countries where departments have not worked together before to develop MOUs or other cooperative arrangements to address issues and legislation that straddles departmental boundaries and requires an integrated approach in order to achieve implementation.

The comprehensive coverage under the Convention also provides a challenge because the subject matter may span more than these two departments or in some cases even levels of governments (e.g., in federations). For example, the provision of social security to seafarers "ordinarily resident" in country or access to onshore medical services may require discussion between a number of departments. This means that other ministries, particularly where financial or border security matters may be involved, need

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[22] In the late 1990s Edgar Gold wrote about this issue in connection with national implementation of the law of the sea and the trend to what he described as "'departmental chauvinism". Edgar Gold, "From process to reality: Adopting Domestic Legislation for the Implementation of the Law of the Sea Convention" in *Order for the Oceans at the Turn of the Century,* eds. D. Vidas and W. Ostreng (Norway: Friedtjof Nansen Institute, 1999) at p. 383.

[23] <http://www.tc.gc.ca/eng/acts-regulations/acts-2001c26.htm > *Marine Personnel Regulations*, Part 3, <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2007-115/>

[24] *Canada Labour Code,* <http://laws-lois.justice.gc.ca/eng/acts/L-2/>
Maritime Occupational Health and Safety Regulations (SOR/2010-120)
<http://laws-lois.justice.gc.ca/eng/regulations/SOR-2010-120/>

to also understand and support the Convention, These are all matters that can be difficult and take time to negotiate.

As mentioned earlier although the MLC, 2006 consolidates older ILO Conventions, some dating back to 1920, it also updates and " modernizes" the requirements in a number of areas particularly in connection with OSH. There are very few models for some requirements e.g., OSH regulation and risk assessment or the form of financial security required of ships (in connection with repatriation) or shipowners (in connection with death or long term disability) or recruitment an placement services (for a failure by the service or a shipowner to meet their respective obligations).

For some flag States that breadth of the Convention has also provided difficulties in connection with specific sectors, most notably commercial yacht owners and the cruiseship industry where on-board accommodation and other work place practices have not easily meshed with the MLC, 2006 requirements, even for future build ships.[25]

Another difficulty that has been encountered by some flag States relates to the exercise of the national flexibility that exists under the Convention. In most cases this must be exercised in or after consultation with the seafarer and shipowners organizations concerned. However a number of countries either do not to have these organizations, or if they do exist, may not represent the seafarers on the ships or the shipowners concerned. This problem was, however, foreseen. When the Convention enters into force, or at least achieves the entry into force formula, the ILO Governing Body is expected to establish the Special Tripartite Committee (under Article XIII). This Committee in addition to considering amendments and reviewing how the Convention is working has a special role, under Article VII, whereby it can act as the relevant organization for countries that do not yet have social partners. There is an obvious gap at until the Committee is established. However in 2010 at a meeting of the Preparatory MLC, 2006 Committee the establishment of transitional arrangements was not accepted.[26]

Another major difficulty for some countries, particularly less developed economies, is the problem of capacity to undertake the legal drafting task involved.[27] This problem is not unique to labor conventions, for example the IMO has prepared and delivered numerous model laws and workshops to assist with implementation of IMO conventions. However this approach is relatively rare for the ILO, perhaps because of the importance placed on promoting social dialogue in national implementation. However as result of requests for this form of technical cooperation, model national provisions are now being finalized.

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[25] Unless flag States provide otherwise, some elements of the Convention under Regulation 3.1 relating to construction and equipment do not apply to existing ships: See MLC, 2006, Regulation 3.1, para. 2.

[26] *Final report*, Preparatory Tripartite MLC, 2006 Committee, September 2010, IL0 Doc. No. PTMLC/2010/4, at Appendix, "Outcomes" at page 29 and see also para. 131. Available at: <http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/meetingdocument/wcms_150401.pdf>

[27] Based on advice received at these seminars and at a meeting of the Preparatory Tripartite MLC, 2006 committee in September 2010, model national legal provisions are now under development with a workshop planned for September 2011 at Maritime Labour Academy, ILO ITC, Turin, Italy.

The ILO has also supported national legal gap analysis in over 40 countries to assist countries to move forward.

Nonetheless, as noted earlier, while flag States may have had some difficulties in many respects the industry has moved ahead of government with some organizations developing collective agreements and seafarer employment agreements that are in line with the MLC, 2006. In some cases ships have already been certified along with private seafarer recruitment and placement services.

At the level of the broader international maritime law regime, some elements of the MLC, 2006 have strongly influenced the text of the recent amendments that were adopted by the IMO for its STCW Convention (the Manila amendments). These amendments are expected to enter into force in early 2012. This means that, even before the MLC, 2006 comes into force, its requirements relating to medical examinations and certificates, minimum age and hours of rest and training will already be mandatory for seafarers covered by the STCW.

4. Conclusion

It is clear that there are some challenges for flag State implementation of the MLC, 2006 however, as also suggested above, these should not be overstated. In fact the industry seems to be moving forward, perhaps because like most major regulatory changes it generates a new market for some services or technologies, irrespective of the rather slow pace of the mechanics of legal implementation and ratification. Even on the latter point it seems clear that reaching the requisite 30/33 formula is now simply a question of precisely "when" rather than "if". When the Convention enters into force the very interesting experiment of certifying labour standards to achieve "decent work and a level-playing field" will also, perhaps, finally address long held concerns about the problem created by the lack of a "genuine link" [28] between ships and the flag States.

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[28] See: McConnell, Devlin, Doumbia- Henry, *supra* note 1, at p. 24, footnote 66 :
M. L. McConnell, "Business as usual: An evaluation of the 1986 United Nations Convention on Conditions for Registration of Ships," (1987) 18 *Journal of Maritime Law and Commerce* 435; M. L. McConnell, "Darkening confusion mounted upon darkening confusion: The search for the elusive genuine link," (1985) 6 *Journal of Maritime Law and Commerce* 365. See also, for example, the resurrected call for a definition of the 'genuine link' or even , in the fishing sector, a new convention to 'define' the genuine link in Resolutions 58/240 (at para. 42) and 58/14 adopted by the UN General Assembly at its fifty-eighth session. These resolutions invited the IMO and other relevant agencies to study, examine, and clarify the role of the genuine link in relation to the duty of flag States to exercise effective control over ships flying their flag, including fishing vessels. Resolutions 59/24 (para. 41) and 59/25 (para. 30) also requested the Secretary-General to report to the General Assembly at its sixty-first session on the study undertaken by the IMO in cooperation with other competent international organizations on the role of the genuine link and the potential consequences of non-compliance with duties and obligations of flag States described in relevant international instruments. The IMO reported on 23 June 2006 and the lengthy report comprising reports from the various organization concerned was reported to the General Assembly (Item 69(a) of the provisional agenda in connection with Oceans and the law of the sea, General Assembly, 61st Session, UN Doc. A61/160, 17 July 2006). Despite some resurgence of interest in the meaning of the genuine link in cases before the International Tribunal on the Law of the Sea, that report commented, *inter alia*,

28. Participants in the Meeting took the view that the exclusivity attached by the United Nations Convention on the Law of the Sea to the right of States to fix conditions for the grant of nationality, as reaffirmed by the authoritative interpretations of the International Tribunal for the Law of the Sea in the M/V Saiga (No. 2) and subsequent cases, as well the other agreements referred to in section 2 above, indicated that the questions relating to the precise criteria or conditions adopted by a State with respect to the grant of its nationality to a ship were a matter beyond the purview of the organizations participating in the Meeting. However, participants in the Meeting also considered that issues relating to securing the objective and purpose of the "genuine link" requirement, that is, assuring the ability of the flag State to effectively exercise its jurisdiction over ships flying its flag, were matters of central concern to all of the organizations and formed a substantial part of their programmes of regulatory initiatives and technical cooperation activities in the shipping and fishing sectors.