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Sea Change: New Rulemaking Procedures at the International Labour Organization

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“To improve is to change; to be perfect is to change often.”

- Winston Churchill

Change is important, but the ability to anticipate and implement change is difficult. In particular, international organizations are frequently accused of resisting change and holding on, instead, to archaic

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procedures.¹ Indeed, most of these organizations were established in the early twentieth century, and their rules and procedures were designed to respond to the global conditions confronting nation states at that time.² Nearly a century later, however, those organizations are accused of maintaining their twentieth century procedures, notwithstanding modern global advancements that have marked “a period of transition of historical significance.”³

Perhaps as a response to this period of transition, or to the accusations, many international organizations are attempting to adapt to the modern century – at least on the surface. An online examination of their websites illuminates high-resolution videos and flash photography, while activities and initiatives are broadcast through new internet personalities by way of Twitter and Facebook.

The International Labour Organization (“ILO”) turns 100 years old in 2019, and is accordingly one of the oldest international organizations.⁴ Its mandate to promote decent work through standard-setting and norm supervision has been challenged by rapid changes in the world of work brought on by globalization, technological advancements, and an increasingly migratory workforce.⁵ These changes require the ILO to maintain a flexible system of norm creation and rulemaking that can adapt just as rapidly.

To ensure a flexible system, the ILO should be able to revise its instruments in a sufficiently responsive time. The ILO’s rule to amend⁶ its instruments, however, was not initially defined in its Constitution and Standing Orders. As a consequence, the ILO has developed this rule over time, which has not been an easy feat. In fact, the ILO has taken three different approaches to amending its instruments.⁷ Despite those approaches, it has retreated to its initial practice, which it put in place during its very first years, of going through a formal and lengthy

1. See, e.g., BRUCE JENKS & BRUCE JONES, UNITED NATIONS DEVELOPMENT AT A CROSSROADS p. iii (NYU Center on Int’l Cooperation, August 2013), (“the UN development system is hopelessly fragmented and has not adapted to fundamental changes in the global economy, and as a consequence, its impact is in doubt”); see also Devesh Kapur, *Processes of Change in Int’l Orgs.*, in GOVERNING GLOBALIZATION 334, 336 (Deepak Nayyar ed. 2002) (“institutional change as a broader phenomenon is invariably incremental, evolutionary, and, in some cases (and to some observers), even glacial.”).

2. JENKS & JONES, *supra* note 1, at iv.

3. See *id.* (“The global economy has undergone a transformation of historic dimensions over the last two decades.”).

4. HECTOR BARTOLOMEI DE LA CRUZ ET AL., THE INT’L. LABOUR ORG.: THE INT’L. STANDARDS SYSTEM AND BASIC HUMAN RIGHTS 4–5 (1996).

5. JENKS & JONES, *supra* note 1, at iii.

6. This article refers to the terms “amendment” and “revision” because both terms are in conformity with the ILO’s terminology, as ILO drafting history and instruments have referred to amendments and revisions interchangeably.

7. BARTOLOMEI DE LA CRUZ, *supra* note 4, at 51.

procedure of adopting new revising instruments through multiple discussions in the annual International Labour Conference (“ILC”).⁸

As the ILO reaches its 100-year mark, the need to re-examine its rules in light of a rapidly changing world has received increasing attention, both within and outside⁹ of the ILO. Acknowledging this need, the ILO’s Director General has promised that “the ILO has embarked upon a major process of change and reform designed to equip it to respond better to the needs and expectations of its constituents.”¹⁰

This article examines the ways in which that promise has been put into action. Part I briefly explains the ILO’s system of international norms and then reviews the historical development of its traditional amendment process. It highlights that, since the 1920s, the ILO has adopted three different approaches to its amendment procedures, none of which it has continued to follow in practice. Part II reviews the design and adoption of a new, accelerated amendment procedure in the Maritime Labour Convention, 2006 (“MLC, 2006”),¹¹ and describes the first application of this procedure in May 2014. It further analyses the new procedure in light of the ILO’s objectives to ensure the legal certainty of its instruments. Finally, this article explores the potential of the new procedure, in particular its applicability to other ILO instruments.

I. THE ILO’S SYSTEM OF INTERNATIONAL NORMS

The ILO was established in 1919 under the Treaty of Versailles with the ambitious mandate to improve the global conditions of work in order to achieve social justice.¹² To achieve this objective, the ILO, through its tripartite constituency,¹³ has developed a system of international labour instruments, or “standards,” designed to establish minimum conditions for all forms of work. As a tripartite organization, the ILO has always required support from workers, employers, and governments; this

8. *Id.*

9. See, e.g., Laurence R. Helfer, *Understanding Change in Int’l Orgs.: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649, 651 (2006) (“In the debates over globalization and institutional change, one IO—the Int’l Labour Org. (“ILO”)—has been given surprisingly short shrift”); Guy Standing, *The ILO: An Agency for Globalization?* 39 DEV. & CHANGE, no. 3, 355, 355 (2008) (“In recent years, the ILO has struggled to retain relevance in the era of globalization.”).

10. See Director-General of the Int’l Labour Conference, *Towards the ILO centenary: Realities, renewal and tripartite commitment*, ILC.102/DG/1A 1, para. 2 (2013), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_213836.pdf [hereinafter *Towards the ILO Centenary*].

11. INT’L LABOUR CONFERENCE, MARITIME LABOUR CONVENTION (Feb. 23, 2006), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/normativeinstrument/wcms_090250.pdf [hereinafter MLC, 2006].

12. Int’l Labour Org. [CONSTITUTION] preamble, May 10, 1944 [hereinafter ILO CONST.], http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO.

13. INT’L LABOUR ORG., RULES OF THE GAME: A BRIEF INTRODUCTION TO INT’L LABOUR STANDARDS (ILO 3rd rev. ed. 2014), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_318141.pdf [hereinafter INT’L LABOUR ORG.].

requirement is demonstrated in its procedures for adopting and revising its instruments.¹⁴

The ILO is made up of three organs, all of which are involved in the adoption and revision of instruments.¹⁵ First, the ILC is the ILO's parliament. It meets once a year in a tripartite setting, determines the Organization's policies, and adopts the ILO's instruments by a two-thirds majority vote.¹⁶ Second, the Governing Body is the executive body. It meets three times a year and determines the Conference's agenda.¹⁷ Finally, the International Labour Office ("the Office") serves as the Secretariat and, in this capacity, provides assistance to the Governing Body and the ILC, as well as to the ILO's supervisory bodies.¹⁸

A. Legal Instruments

The ILO's body of international labour standards takes the form of Conventions (treaties)¹⁹ and Recommendations that give guidance to the basic principles laid out in the Conventions.²⁰ To date, the ILO has adopted 189 Conventions and 204 Recommendations.²¹

The ILO's procedures concerning the adoption of new instruments are set out in its Constitution, which as stated, requires that new instruments must be adopted by a two-thirds majority vote at the ILC.²² Procedurally, as illustrated in Box 1 below, this procedure requires first that the problem, i.e., need for new standard, be identified at the ILC. The Governing Body then places the item on the ILC's agenda, and from that point, the tripartite constituents (identified in Box 1 as the governments ("Gs"), workers ("Ws") and employers ("Es")) are repeatedly consulted while the ILC, through the Office, organizes their comments in a report.²³ The ILC discusses the proposed instrument

14. See generally BARTOLOMEI DE LA CRUZ, *supra* note 4, at 6–7.

15. ILO CONST., *supra* note 7, art. 2.

16. *Id.* art. 3, 19.

17. *Id.* art. 14.

18. *Id.* art. 10.

19. At the ILO, Conventions are legally binding international treaties. There is some debate concerning the exact nature of Conventions, i.e., whether they are "treaty laws" or "treaty-contracts". However, it is generally agreed that they constitute legally-binding instruments. BARTOLOMEI DE LA CRUZ, *supra* note 4, at 6. Accordingly, this Article will refer to the term "Conventions". See Int'l Labour Org., *Conventions and Recommendations*, ILO, <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (last visited Oct. 7, 2015) [hereinafter *ILO Conventions and Recommendations*].

20. The ILO also has Protocols, Codes of Conduct, and Declarations. For an explanation of those instruments, see LEE SWEPSTON, *ADOPTION OF STANDARDS BY THE INT'L LABOUR ORG.: LESSONS AND LIMITATIONS* 70–72 (Geneva, 2005).

21. *Id.*

22. *Id.*

23. *Id.*

during two annual sessions, a process that takes over two years, before an instrument may go to vote.²⁴

Box 1: The ILO's Double-Discussion Procedure



Within one year of its adoption, states must submit the new instrument to their national legislative bodies for potential ratification.²⁵ There is no obligation for ILO member States to ratify the Convention, but once having done so, they must accept all of the Convention's provisions because reservations are not permitted.²⁶ Furthermore, once a

24. *Id.*

25. SWEPSTON, *supra* note 20.

26. See J.F. McMahon, *The Legislative Techniques of the Int'l Labour Org.*, 41 BRIT Y.B. INT'L L. 1, 77–78 (1965-1966) (the impermissibility of reservations derives from the practice of the organization, rather than from any provision in its Constitution); see, e.g., Int'l Labour Conference, 6th Session, *Report on the Institution of a Procedure for Amendment of Conventions* 70–72 (June 1924), http://staging.ilo.org/public/libdoc/ilo/1924/24B09_8_engl.pdf [hereinafter *ILC* 6th sess.] (dismissing the proposal to permit reservations at the time of ratification due to, among other considerations, the fact that the ILO is a tripartite organization and, as such, decisions concerning the extent of adoption should not unilaterally be determined by governments; sufficient flexibility could be written into draft Conventions to expressly take into account national circumstances such as climate, imperfect development or other special circumstances; the object of international Conventions, i.e., to secure standardization, would be threatened; and the ILO supervisory bodies would struggle with the large number of different reservations which would “inevitably be made.”). While Conventions must be adopted without reservations, some Conventions do permit ratifying States to choose between different parts of a Convention. See, e.g., Int'l Labour Convention, 42nd Session, *Plantation Convention*, art. 3 (June 24, 1958), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312255 [hereinafter *Plantation Convention*] (requiring ratifying States to comply with “at least two of Parts II, III, V, VI, VII, VIII,

state has ratified a Convention, under the ILO's Constitution,²⁷ it must submit reports to the ILO's supervisory bodies²⁸ concerning the application of the Convention in national practice.

B. *The ILO's Amendments Procedure*

Since its earliest years, one of the ILO's main objectives has been to ensure that its instruments, in particular its Conventions, will be widely ratified.²⁹ To that end, the procedure for ratifying Conventions, and the ILO's mandate to encourage their ratification, are both expressly laid out in the ILO's Constitution³⁰ and its promotional instruments.³¹ To obtain widespread support, the ILO's procedures are designed to ensure that the instruments reflect tripartite ownership and are legally sound. As a result, the ILO relies on the double-discussion procedure, illustrated in Box 1 above, to ensure that its tripartite constituents have multiple opportunities to provide input in the drafting of instruments, and that the instruments may be adopted only if at least two of the three groups agree.³²

X, XII and XIII" but further requires that "if it has excluded one or more Parts from its acceptance of the obligations of the Convention, specify, in a declaration appended to its ratification, the Part or Parts so excluded.").

27. See ILO CONST., *supra* note 12, art. 22

Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request.

28. These bodies consist of: The Committee of Experts on the Application of Conventions and Recommendations and the Conference Committee on the Application of Standards. See INT'L LABOUR ORG., *supra* note 13.

29. See, e.g., ILC 6th Session, *supra* note 26, at 14–15 (highlighting that ILO procedures should "considerably increase the chances that Conventions ultimately are adopted by the Conference would be ratified").

30. See ILO CONST., *supra* note 12, art. 19.

31. See, e.g., *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, ILO (June 18, 1998), <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm> [hereinafter *Declaration on Fundamental Principles*].

32. See Treaty of Versailles Part XIII art. 405, June 28, 1919, Yale L Sch.: The Avalon Project; see also ILO CONST., *supra* note 12, art. 19; *Int'l Labour Conference*, 14th Session, League of Nations, 106 (1930), [http://www.ilo.org/public/libdoc/ilo/P/09616/09616\(1930-14\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09616/09616(1930-14).pdf) [hereinafter *ILC 14th sess.*]

Just as national legislation, in order to be a success, must take account of existing conditions and adapt itself to their requirements, so international regulations cannot be constructed solely on the basis of theory. In view of the fact that conditions throughout the world vary from one part of the world to another, it is much more difficult to take account of these differences in

The ILO's double-discussion procedure to adopt new instruments was expressly included in its Standing Orders. In contrast, its procedure to revise those instruments was not formally included until ten years after the ILO's establishment. As a result, the ILO developed its own revision procedure through trial and error.³³ To encourage widespread ratification of its instruments, the ILO's priority was to ensure legal certainty by guarding against frivolous changes.³⁴

A review of the ILO's amendments history, laid out below, illustrates that the ILO's scales have repeatedly tipped in favour of ensuring legal certainty, and thus attracting ratifications, at the expense of enabling revisions to be adopted and implemented rapidly. This balance has resulted in the Organization's decision, reaffirmed over the years, that revisions to its instruments should take the form of new instruments that revise the older ones. Going even further, the ILO has required that this procedure entail a double-discussion in the Conference to ensure full consideration by the tripartite constituents.

This procedure has proven incredibly slow and cumbersome. The ILO has acknowledged this³⁵ and has attempted to adopt new rules and structures for amending its Conventions through three different approaches. Despite those approaches, however, the ILO has eventually

preparing international regulations than it is in preparing national regulations.
In spite of these difficulties, we must endeavor.

33. The ILC's first sessions notably demonstrate the Organization's brainstorming on how best to define its amendments procedure, including by leaving the formal rules silent and relying, instead, on language inserted into the instruments themselves. See, e.g., *Report of the Director, Int'l Labour Conference*, 3rd Session, League of Nations, 119–120 (1921), [http://www.ilo.org/public/libdoc/ilo/P/09383/09383\(1921-3\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09383/09383(1921-3).pdf) [hereinafter *ILC* 3rd sess.] Observing that the Conference might, as regards future conventions, provide

[I]n the formal Articles for a method of amendment, say, by requiring that any amendment should be regarded as taking effect if approved by a vote of the Conference in which was included the majority of the Conference and of each delegation representing the States which had already ratified the Convention in question.

See also *Report of the Director, Int'l Labour Conference*, 4th Session, League of Nations, 827 (1922), [http://www.ilo.org/public/libdoc/ilo/P/09383/09383\(1922-4\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09383/09383(1922-4).pdf) [hereinafter *ILC* 4th sess.] ("some amendment of secondary importance would appear to be required in the terms of the Convention itself in order to remove an obstacle to ratification which may have presented itself in one or more countries.").

34. See generally *ILC* 3rd sess., *supra* note 33, at 54.

35. See, e.g., Int'l Labour Org., *Sub-Group of the High-Level Tripartite Working Group on Maritime Labour Standards: First Meeting*, 21, STWGMLS/2002/1 (2002), <http://ilo-mirror.library.cornell.edu/public/english/dialogue/sector/techmeet/stwgmls02/stwgmls-1.pdf> [hereinafter *Sub-Group of the High Level Tripartite Working Group*] (noting that, under the typical ILO amendments procedure, several decades might be needed for full entry into force due to the fact that in most cases even simple and uncontroversial changes need national acceptance by acts of legislative bodies, and referred to examples in which technical changes required more than 30 years to enter into force for about half the number of contracting parties to the Convention concerned).

reverted to its initial practice of the double-discussion procedure. Because that procedure takes several years for its revisions to be adopted, the new, revising instruments are no longer current—thus defeating the purposes of the amendments.

1. The First Approach: A Move to the Single-Discussion

In 1924, the ILO took up the question concerning its amendments procedure under a broader question concerning its objective to obtain a high rate of ratification of its new Conventions.³⁶ The constituents, during debates in the ILC, were concerned that states might not ratify Conventions that were vulnerable to constant change and question, because this vulnerability could undermine their legal certainty.³⁷

The ILO's initial decision to amend its Conventions through the double-discussion procedure was not codified, but nevertheless remained its practice until 1928.³⁸ Yet, concerns began to arise, even during its earliest years, that requiring a double-discussion defeated the purpose of the amendments.

These debates resulted in the adoption of Article 44, which is formally included in the Standing Orders and introduces a single-discussion procedure for amendments.³⁹ This approach was adopted to permit a speedier process, because it entails only one session of the Conference. Under this procedure, the Governing Body first decides

36. Although initial proposals centred on the double reading, above, this procedure was ultimately found to be unsatisfactory because the provisional text of Draft Conventions and Recommendations was, for a period of about a year, exposed to criticisms that could subsequently hinder the ratification of the text. See Governing Body, Int'l Labour Org., 43rd Session, *Note by the Legal Advisor of the Int'l Labour Office in the Legal Problems Connected with the Revision of Int'l Labour Conventions* 91 (1929), [http://www.ilo.org/public/libdoc/ilo/P/09616/09616\(1929-12\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09616/09616(1929-12).pdf) [hereinafter *ILC* 43rd sess.]. Accordingly, in 1926, that procedure was replaced by the double discussion procedure. See Int'l Labour Conference, 24th Session, App. XIII art. 6, para. 4, 5, 6 (1938), [http://www.ilo.org/public/libdoc/ilo/P/09616/09616\(1938-24\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09616/09616(1938-24).pdf) [hereinafter *ILC* 24th sess.].

37. See *ILC* 6th sess., *supra* note 26, at 14–19. Notably, the topic of the interpretation of Conventions was also discussed at this time, as the Office and the Conference initially considered that the Governing Body would be the most appropriate ILO mechanism to provide replies to questions concerning the interpretation of Conventions. The constituents, in particular, worried that the inclusion of such a procedure would dissuade States from ratifying Conventions that had already been ratified by other States based on the uncertainty over the nature of the amendments that could be proposed in the future. See *id.* at 10–15 (expressing the hope that the hope that it would “considerably increase the chances that Conventions ultimately are adopted by the Conference would be ratified”).

38. See *ILC* 24th sess., *supra* note 36.

39. See Standing Orders of the Int'l Labour Conference, Int'l Labour Org., art. 44, http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:3088520:NO [hereinafter *Standing Orders*] (along with Art. 44, the Conference adopted new model final provisions to be included in future Conventions that expressly states that the adoption of a revising Convention would result, from its coming into force, in the automatic denunciation of the earlier Convention, which would also cease to be open for ratification. Of course, the earlier Convention remains in force for states that have ratified it and not the new Convention.)

whether a previously ratified Convention should be amended in whole or in part, and the Conference's discussion is limited to the Governing Body's decision.⁴⁰

Article 44, accordingly, had the potential to alleviate the ILO's procedural problems. Its potential was cut short, however, by the adoption of yet another new article in the Standing Orders, Article 38, in 1938.⁴¹ Article 38 provides for the single-discussion procedure for the adoption of new instruments⁴² and was designed to accelerate that procedure. However, it quickly became the preferred approach for the adoption of amendments,⁴³ as well. Unlike the Article 44 procedure, Article 38 permitted the Conference to revise any of a Convention's provisions, rather than being limited to the provisions decided by the Governing Body. At the same time, the new approach assuaged the ILO's fears that the Conference would "run the risk of being besieged . . . with numerous proposals for the revising of Conventions, even to the alteration of a comma or a semi-colon."⁴⁴

2. The Second Approach: A New Design for Technical Conventions

The ILO continued to follow its single-discussion procedure until the 1960s, even while acknowledging that despite its intent, even the single-discussion could take decades before effectively amending a Convention.⁴⁵ Meanwhile, the ILO continued to adopt new Conventions, including those of an incredibly technical nature, such as social security and occupational health and diseases, which needed to be updated

40. *Id.*

41. See *ILC* 24th sess., *supra* note 36.

42. See Standing Orders, *supra* note 39, art. 38.

43. See Governing Body, Int'l Labour Org., 276th Session, *Report of the Working Party on Policy Regarding the Revision of Standards*, ¶ 12, GB.276/LILS/5 (Nov. 1999), http://www.ilo.org/public/libdoc/ilo/GB/276/GB.276_LILS_5_engl.pdf [hereinafter *Report of the Working Party*].

44. For example, attempts in 1931 to adopt a Convention revising the Convention employment of women during the night took four years. See *Int'l Labour Conference*, 15th Session, League of Nations, 345 (1931), [http://www.ilo.org/public/libdoc/ilo/P/09616/09616\(1931-15\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09616/09616(1931-15).pdf) [hereinafter *ILC* 15th sess.]. This four-year lag is due in part to the failure of the ILC to adopt at its 15th Session the proposed amendments. At that time, there was confusion concerning the interpretation given to the application of the Convention to women holding management decisions. The Permanent Court of International Justice gave an advisory opinion on the matter in 1932, and the proposed amendments were accordingly placed back on the Conference's agenda for 1934. See *Int'l Labour Conference*, 18th Session, League of Nations, 192 (1938), [http://www.ilo.org/public/libdoc/ilo/P/09616/09616\(1934-18\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09616/09616(1934-18).pdf) [hereinafter *ILC* 18th sess.].

45. See, e.g., *Sub-Group of the High Level Tripartite Working Group*, *supra* note 35, ¶ 5 (noting that, under the typical ILO amendments procedure, several decades might be needed for full entry into force due to the fact that in most cases even simple and uncontroversial changes need national acceptance by acts of legislative bodies, and referred to examples in which technical changes required more than 30 years to enter into force for about half the number of contracting parties to the Convention concerned).

periodically. Unfortunately for the ILO, its amendment procedure did not facilitate that possibility because by the time the updates were adopted, they would always be outdated.⁴⁶

To redress this problem, the ILO experimented with re-designing its technical Conventions to include separate provisions, called Annexes or Schedules, which could be revised separately from the Convention itself.⁴⁷ However, as demonstrated in the example in Box 2, below, even that approach proved insufficient to implement changes in time to keep up with industrial demands. In that example, the ILO adopted a new social security instrument, the Employment Injury Benefits Convention, 1964 (No. 121),⁴⁸ with a separate Schedule that would contain the relevant list of diseases that could, in principal, be easily updated. However, as explained below, the ILO's attempts to place amendments for a discussion in the Conference under that approach were not successful, because the Governing Body did not select it among the ILO's other priorities to be addressed in the Conference.

46. The ILO has continued to acknowledge that the amendments system, even under the single-discussion procedure, does not provide a sufficiently timely reaction to changed circumstances. *See, e.g., Report of the Working Party, supra* note 43, ¶ 39.

47. BARTOLOMEI DE LA CRUZ, *supra* note 4, at 51.

48. *See generally* Employment Injury Benefits Convention, Int'l Labour Org. (July 8, 1964), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312266:NO [hereinafter Employment Injury Benefits Convention].

Box 2: Schedules for Technical Conventions -- A Better Structure for Amendments?

At its 140th Session (November 1958), the Governing Body decided to revise its numerous pre-war Conventions concerning social security,⁴⁹ based on the finding that modern developments in the field of social security had rendered older instruments obsolete.⁵⁰ In doing so, it sought to establish

a set of standards that would be sufficiently advanced to take into account the progress that has taken place in this field of social security and, at the same time, would be flexible enough to allow ratification by many countries with diverse social security schemes and in different stages of development.⁵¹

The solution to this problem was provided in the form of a Schedule that could be amended without recourse to the formal procedure.⁵²

The Conference accordingly adopted the Employment Injury Benefits Convention, 1964 (No. 121).⁵³ Schedule 1 of Convention No. 121 lists those diseases that are common and well recognized and the risk factors usually involved.⁵⁴ To facilitate the revision of the list, the Conference included Article Thirty-One, which provides for a special procedure for amending the list of occupational diseases: the Conference may, at any session at which the matter is included in its agenda, adopt amendments to Schedule I to the Convention by a two-thirds majority.⁵⁵ The ILO was unable to trigger the procedure in 1991, although a list of occupational diseases had arisen since the Convention's adoption, because the Governing Body declined to place it among the competing priorities to be addressed in the Conference.⁵⁶

49. See Governing Body, Int'l Labour Org., *Minutes of the 140th Session of the Governing Body*, 169–70, ¶ 26, 27 (1958), [http://www.ilo.org/public/libdoc/ilo/P/09601/09601\(1958-140\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09601/09601(1958-140).pdf).

50. See Int'l Labour Conference, 47th Session, Report VII (1), *Benefits in the Case of Industrial Accidents and Occupational Diseases*, 3 (1963), [http://www.ilo.org/public/libdoc/ilo/P/09616/09616\(1963-47\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09616/09616(1963-47).pdf).

51. See Int'l Labour Conference, 48th Session, 27th Sitting, 400 (1964), [http://www.ilo.org/public/libdoc/ilo/P/09616/09616\(1964-48\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09616/09616(1964-48).pdf); see also Int'l Labour Conference, 48th Session, 28th Sitting, 413 (1964), [http://www.ilo.org/public/libdoc/ilo/P/09616/09616\(1964-48\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09616/09616(1964-48).pdf) (“[T]he new instruments should not contain unnecessary details, [. . .] they should be realistic and [. . .] sufficiently flexible to ensure ratification by as large a number of countries as possible.”).

52. Governing Body, Int'l Labour Conference, *Agenda of the 49th Session of the International Labour Conference*, ¶¶ 26, 29–31, 33 (1963), http://staging.ilo.org/public/libdoc/ilo/GB/155/GB.155_2_1_engl.pdf; see also Employment Injury Benefits Convention, *supra* note 48.

53. See generally Employment Injury Benefits Convention, *supra* note 48.

54. Employment Injury Benefits Convention, *supra* note 48, art. 39.

55. Employment Injury Benefits Convention, *supra* note 48, art. 31.

56. Although the question of revision was proposed to the Governing Body at its session in May–June 1992, the Governing Body did not select it for inclusion in the agenda of the ILC. See generally Int'l Labour Conference, 90th Session, Report V(1), *Recording and Notification of Occupational Accidents and Diseases and ILO List of Occupational Diseases* (2002),

In the case of technical Conventions, as demonstrated with Convention No. 121, the ability to amend Annexes or Schedules still requires that the item receive priority in the ILC, and even if so, it will require agreement during the Conference.⁵⁷ Where agreement is not reached, the proposed amendments must wait until the next annual Conference for a new opportunity.⁵⁸ It should come as no surprise, therefore, that some technical amendments have taken thirty years to take effect.⁵⁹

3. The Third Approach: A Simplified Amendments Procedure

By the 1960s, the ILO's amendments procedure was clearly not flexible or rapid enough to address modern challenges.⁶⁰ As noted by the ILO Director General, the ILO's procedure resulted in a plethora of legal instruments because there was no official procedure to remove outdated Conventions that had been revised.⁶¹ In addition, many Conventions contained technical provisions that needed to be periodically updated but, even with procedures in place that aimed to facilitate rapid updating, those provisions had proven difficult to amend.⁶²

In 1965, the ILO adopted the Director General's proposal for a simplified amendment procedure that attempted to balance the need for a more flexible procedure with the "need for caution and appropriate safeguards" to protect legal instruments from constant revision.⁶³ Under

<http://www.ilo.org/public/english/standards/relm/ilc/ilc90/rep-v-1.htm>; see generally Int'l Labour Conference, 90th Session, Report V(1), *Recording and Notification of Occupational Accidents and Diseases and ILO List of Occupational Diseases* (2002), <http://www.ilo.org/public/english/standards/relm/ilc/ilc90/rep-v-1.htm> (discussing the historical developments concerning this list and other occupational health and safety matters in the ILO).

57. *Sub-Group of the High Level Tripartite Working Group*, *supra* note 35, at 21.

58. *Id.*

59. *Id.*

60. See Governing Body, Int'l Labour Conference, *Revision of International Labour Standards – Proposals for giving effect to the suggestions contained in the Director – General's Report to the 47th Session of the Conference*, ¶¶ 2, 3, at 1–2 (1963), http://staging.ilo.org/public/libdoc/ilo/GB/157/GB.157_SC_D.2_4_engl.pdf ("there is no procedure whereby a Convention which has failed to fulfil its purpose, or alternatively has wholly fulfilled its purpose, can be taken off the I.L.O. statute book").

61. *Id.* ¶¶ 1, 3, 5, at 1–3.

62. *Id.* ¶ 2, at 1.

63. See Int'l Labour Conference, 49th Session, Report I (Part I), *Report of the Director General*, 31 (1965), [http://www.ilo.org/public/libdoc/ilo/P/09383/09383\(1965-49-part-1\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09383/09383(1965-49-part-1).pdf)

There was widespread agreement that, with [. . .] continuing evolution in technological and social conditions in the world, the time had come to devise a procedure or procedures which would facilitate the partial revision of certain instruments which could easily be adapted to present conditions by the modification of some particular provision, and which would also permit the

the new procedure, the ILO would establish a technical revision committee, which would select instruments that needed revising, while obsolete instruments would be eliminated.⁶⁴

The Director General's new simplified amendments procedure was anticipated to be put into effect the following Conference in 1966. However, despite the adoption of the new procedure, the ILO never put it into practice.⁶⁵ Indeed, since the 1960s, the ILO returned to its conservative initial practice of the double-discussion procedure.⁶⁶ This return took place despite the Director General's optimism that "the time had come to devise a procedure or procedures which would facilitate the partial revision of certain instruments which could easily be adapted to present conditions by the modification of some particular provision . . ."⁶⁷

C. *The Working Party on Policy and Recommendations to Change*

The ILO never implemented the simplified amendment procedure and consequently, tension continued to escalate concerning the numerous and outdated instruments on the one hand, and the lack of an efficient amendment procedure on the other.⁶⁸ As a result, in 1995, the Governing Body launched a new revision process through a committee, the Working Party on Policy regarding the Revision of Standards ("the Working Party"), which was mandated to undertake a case-by-case examination of all international labour Conventions and Recommendations.⁶⁹

The Working Party held fourteen meetings in total and concluded its work in March 2002.⁷⁰ Based on its proposals, the ILO addressed 183

removal from the statute book of those instruments which no longer serve any useful purpose.

64. See Governing Body, Int'l Labour Conference, *Revision of International Labour Standards – Proposals for Giving Effect to the Suggestions Contained in the Director – General's Report to the 47th Session of the Conference*, ¶¶ 8, 12 (1964), http://staging.ilo.org/public/libdoc/ilo/GB/158/GB.158_SC_D.2_2_engl.pdf.

65. Governing Body, Int'l Labour Org., 276th Session, *Committee on Legal Issue and International Labour Standards, Report of the Working Party on Policy regarding the Revision of Standards*, ¶ 17, GB.276/LILS/WP/PRS/2 (Nov. 1999) www.ilo.org/public/english/standards/relm/gb/docs/gb276/prs-2.htm [hereinafter *Committee on Legal Issues*].

66. *Id.* ¶ 12.

67. See Int'l Labour Conference, 49th Session, Report I (Part I), *Report of the Director General*, 31 (1965), [http://www.ilo.org/public/libdoc/ilo/P/09383/09383\(1965-49-part-1\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09383/09383(1965-49-part-1).pdf).

68. *Committee on Legal Issues*, *supra* note 65, ¶ 17.

69. *Id.* ¶ 26.

70. See Governing Body, Int'l Labour Org., *Working Party on Policy regarding the revision of standards (Cartier Working Party)*, ¶¶ 1, 2, 4, at 1, (June 2002), www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/genericdocument/wcms_125644.pdf [hereinafter *Cartier Working Party*].

Conventions and 191 Recommendations.⁷¹ It proposed a classification of existing standards into three categories, including:

- 1) instruments that were up to date and should be promoted;
- 2) instruments that should be revised; and
- 3) “other existing instruments”, e.g., Conventions and Recommendations, which did not fit into any other category.⁷²

Those instruments could include standards still of value as an intermediary objective for states that were not yet in a position to apply more modern instruments.⁷³ Furthermore, the Working Party identified subjects that should be the basis of new instruments.⁷⁴

Based on those recommendations, the Governing Body proposed that twenty four Conventions should be revised⁷⁵, that thirty five Conventions were up-to-date⁷⁶, and that twenty four Conventions “no longer corresponded to current needs and had become obsolete” and thus should be “shelved.”⁷⁷ The results of these recommendations have been anything but clear. To illustrate, the Governing Body has attempted to explain that legal status of its twenty-four “shelved” Conventions with the following: Ratification of shelved Conventions is no longer encouraged and their publication in Office documents, studies and research papers will be modified. Shelving also means that detailed reports on the application of these Conventions will no longer be requested on a regular basis. However, the right to invoke provisions relating to representations and complaints under Articles Twenty-Four and Twenty-Six of the Constitution remains intact. In addition, employers’ and workers’ organizations may still submit observations in accordance with the regular supervisory procedures, for a review by the Committee of Experts resulting, where necessary, in requests for detailed reports. Finally, shelving has no impact on the status of these

71. *Id.* ¶¶ 2, 3, at 1.

72. *Id.* ¶¶ 4–7, at 1—2.

73. See INT’L LABOUR OFFICE, INT’L LABOUR STANDARDS: A GLOBAL APPROACH, 8 (2002), www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_087692.pdf.

74. *Id.* at 8–9.

75. See Int’l Labour Org., Governing Body, 283rd Session, *Working Party on Policy regarding the Revision of Standards, Follow-up to the Recommendations of the Working Party*, GB.283/LILS/WP/PRS/1/2, ¶ 7, at 2 (Mar. 2002), <http://www.ilo.org/public/english/standards/relm/gb/docs/gb283/pdf/prs-1-2.pdf>.

76. *Id.* ¶ 17, at 9.

77. *Id.* ¶ 31, at 13.

Conventions in the legal systems of member States that have ratified them.⁷⁸

Despite acknowledging that 24 Conventions were out of date, the ILO did not adjust its amendment procedures to accommodate their rapid revision. In fact, the ILO has gone full circle during its near century of examining its revision process, having transitioned from a double-discussion to a single-discussion, to a proposed simplified procedure, back to the double-discussion procedure.

II. OLD INDUSTRY, NEW RULES: THE MARITIME LABOUR CONVENTION

The ILO's goal to create instruments that reflect modern-day work standards has proven difficult. The retreat to the double-discussion procedure has resulted in the production of numerous instruments, many overlapping in subject matter. It has also flown in the face of the findings of its own Working Party, which concluded that out of 183 Conventions, only thirty-five (nineteen percent) were sufficiently up-to-date.

Flowing from the recommendations of the Working Party to shelve certain Conventions—which included some maritime instruments—the ILO's maritime constituents acknowledged the need to revise its instruments to remain up-to-date with the modern industrial challenges.⁷⁹ By then, the ILO had adopted over sixty-eight maritime instruments, many as revising instruments. Consequently, states that had ratified many of those instruments were burdened with heavy reporting requirements.⁸⁰ The ILO, in turn, continued to witness new and significant changes in the maritime industry that had a significant impact

78. *Id.* ¶ 32, at 14.

79. See MOIRA L. MCCONNELL, ET AL., *THE MARITIME LABOUR CONVENTION*, 2006; A LEGAL PRIMER TO AN EMERGING INTERNATIONAL REGIME, 39–40 (Martinus Nijhoff Publishers, 2011).

80. *Id.* at 119–120 (Many of the maritime instruments had not been ratified or had not come into force, mainly due to their level of regulatory detail, outdated requirements, or the number of revised Conventions that had not been ratified.).

on seafarers' living and working conditions.⁸¹ These changes required new forms of protection not previously contemplated.⁸²

A. *Design of a New Procedure*

In their maritime meetings, the ILO's constituents pressed the Organization to adopt a "forward-looking" instrument that "explicitly recognizes the increasingly rapid changes affecting working conditions in this sector, and provides a mechanism for future updating of its more technical standards without the need to adopt a Convention with entirely new substantive provisions."⁸³ To that end, during a High-Level Tripartite Working Group on Maritime Labor Standards, the ILO decided to design a consolidated instrument that could remain relevant and responsive in a rapidly-globalizing industry. This opportunity arose in the form of a new maritime Convention: the MLC, 2006.⁸⁴

In designing the amendment procedure to be included in the formal Articles of the MLC, 2006, the ILO turned to its sister organization, the International Maritime Organization ("IMO"),⁸⁵ which had long before

81. These changes included including open registries and flags of convenience, marine pollution incidents, gender discrimination, and occupational health and safety standards. *See generally* T. ALDERTON, ET. AL., *THE GLOBAL SEAFARER. LIVING AND WORKING CONDITIONS IN A GLOBALIZED INDUSTRY* (International Labour Organization, 2004); INT'L. LABOUR ORG., *REVIEW OF RELEVANT ILO MARITIME INSTRUMENTS. REPORT JMC/29/2001/1* (2000); Int'l. Labour Conference, 94th Maritime Session, Report II, *Report of the Director-General on Developments in the Maritime Sector* (2005), <http://www.ilo.org/public/english/standards/relm/ilc/ilc94/rep-ii.pdf> [hereinafter *Developments in the maritime sector*]. The historical development of the MLC, 2006, is incredibly extensive, the details of which extend beyond the present paper. For an in-depth examination of the historical origin of the MLC, 2006, as well as a description of the intense consultations that took place in the JMC and in the High-level Tripartite Working Group on the Design of the MLC, 2006. *See* MCCONNELL, ET. AL., *supra* note 79, at 39–62.

82. *Developments in the Maritime Sector*, *supra* note 81, ¶1, at 1.

83. *Id.* ¶ 3, at 1.

84. *See, e.g.,* Int'l Mar. Org., Int'l Labour Org., *Final Report: Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation Regarding Claims for Death, Personal Injury and Abandonment of Seafarers*, ILO/IMO/WGPS/8/2008/5, ¶¶ 1, 3–5 (July 2008), http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_099962.pdf [hereinafter *Joint IMO/ILO Ad Hoc Expert Working Group*].

85. While the ILO is the United Nations specialized agency mandated to establish working conditions for all workers, including seafarers, the IMO is the specialized agency with the explicit mandate to regulate safety matters. Accordingly, in order to comprehensively address the conditions of seafarers—most of which involved both working and safety issues—the ILO and IMO have formed "Joint ILO/IMO Working Groups" on matters such as liability and compensation regarding claims for death, personal injury and abandonment of seafarers, medical fitness examination of seafarers and ships' medicine chests, and the fair treatment of seafarers in the event of a maritime accident. *See, e.g., Joint IMO/ILO Ad Hoc Expert Working Group*, *supra* note 84 ¶¶ 1, 3–5. Many of the ILO's maritime Conventions, while regulating standards of living and working conditions, are premised on states' adherence to IMO safety standards. *See* Int'l Labour Conference, Int'l Labour Office, 77th Session, *General Survey on the Labour Standards on the Merchant Shipping (Minimum*

adopted a “tacit acceptance procedure”⁸⁶ to ensure that its own maritime treaties could be rapidly updated by its Members. Under this procedure, an amendment enters into force on a specified date unless, before that date, objections to the amendment are received from an agreed number of Parties (see Box 3).

*Standards) Convention (No. 147) and the Merchant Shipping (Improvement of Standards) Recommendation (No. 155), 1976, 3 ¶ 4 (1990), [www.ilo.org/public/libdoc/ilo/P/09661/09661\(1990-77-4B\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09661/09661(1990-77-4B).pdf); see also Governing Body, Int’l Labour Org., 322nd Session, Report of the first meeting of the Special Tripartite Committee established under Article XIII of the Maritime Labour Convention, 2006, GB.322/LILS/3 (Oct.–Nov. 2014) ¶ 11, [hereinafter 322nd Session, Report of Special Tripartite Committee], http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_315447.pdf. (intervention by the representative of the IMO, describing joint actions among the two Organizations); see also Convention of the Intergovernmental Maritime Consultative Organization, art. 1(a) (1948), http://avalon.law.yale.edu/20th_century/decad056.asp#1 (The purpose of the Organization is to provide machinery for cooperation in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade, encouraging and facilitating the general adoption of the highest practicable standards in matters concerning maritime safety, as well as the efficiency of navigation and prevention and control of marine pollution from ships.); Int’l Labour Office, Int’l Labour Org., *Final Report: High-Level Tripartite Working Group on Maritime Labour Standard* (Dec. 2001), TWGMLS/2001/10, ¶¶ 49, 58–59, 70, 78, <http://ilo-mirror.library.cornell.edu/public/english/dialogue/sector/techmeet/twgmls01/twgmls-fr.pdf> [hereinafter *High-Level Tripartite Working Group on Maritime Labour Standard*]*

86. Under the IMO’s tacit amendments procedure, amendments are deemed to have been accepted unless the number of Contracting Governments that object to them, within a certain period, exceeds a specified level. Press Release, Mar. Env’t Protection Committee, IMO Environment Meeting Adopts Revised Regulations on Ship Emissions, Int’l Maritime Org. (Oct. 10, 2008), http://www.worldshipping.org/pdf/imo_release_on_annexvi.pdf

The amendments enter into force six months after the deemed acceptance date, 1 January 2010, unless within the acceptance period an objection is communicated to the Organization by not less than one third of the Parties or by the Parties the combined merchant fleets of which constitute not less than 50 per cent of the gross tonnage of the world’s merchant fleet.

INT’L MAR. ORG., ADOPTING A CONVENTION, ENTRY INTO FORCE, ACCESSION, AMENDMENT, ENFORCEMENT, TACIT ACCEPTANCE PROCEDURE (2015), <http://www.imo.org/en/About/Conventions/Pages/Home.aspx>; See also, *High-Level Tripartite Working Group on Maritime Labour Standard*, supra note 8, ¶ 54, 65, 67, 74, 81; Lei Shi, SUCCESSFUL USE OF THE TACIT ACCEPTANCE PROCEDURE TO EFFECTUATE PROGRESS IN INTERNATIONAL MARITIME LAW, 11 U.S.F. MAR. L.J. 82300-307(1998–99).

Box 3 The IMO's Tacit Acceptance Procedure

The IMO was established in 1958 to promote safe, secure, environmentally sound, efficient and sustainable shipping.⁸⁷ In 1960, it adopted the revised version of the Safety of Life at Sea ("SOLAS"), a maritime safety treaty that had originally been adopted in 1914 in response to the 1912 Titanic disaster.⁸⁸ During its early years, the IMO constituents found that the initial amendment procedures in the SOLAS were prohibitively slow.⁸⁹ Consequently, it introduced a new version of SOLAS in 1974 to, among other things, ensure that it could remain up to date based on periodic amendments.⁹⁰

Under Article VIII of the SOLAS, amendments to the chapters that contain the technical provisions shall be deemed to have been accepted within two years (or a different period fixed at the time of the adoption) unless they are rejected within a specified period by one-third of Contracting Governments or by Contracting Governments whose combined merchant fleets represent not less than fifty percent of the world gross tonnage.⁹¹

The IMO's amendments procedure has been deemed as "enormous progress in international law"⁹² and has been included in most IMO instruments since 1970.⁹³ Amendments under this procedure have notably entered into force just eighteen or twenty four months after adoption⁹⁴ and have nearly always been adopted unanimously.⁹⁵

To borrow from the IMO, however, the ILO needed to ensure that its new procedure would be compatible with the ILO Constitution,⁹⁶ such as ensuring tripartite participation and remaining subject to a vote within

87. Lei Shi, *supra* note 86, at 300.

88. *Id.*

89. *Id.* at 303.

90. *Id.*

91. International Convention for the Safety of Life at Sea (SOLAS) art. VII, November 1, 1974, 1184 U.N.T.S. I-18961.

92. See MARKUS J. KACHEL, PARTICULARLY SENSITIVE SEA AREAS: THE IMO'S ROLE IN PROTECTING VULNERABLE MARINE AREAS, 149-150 (Springer-Verlag Berlin Heidelberg, 2008); see also MCCONNELL, ET. AL., *supra* note 79, at 39-40.

93. See *Frequently Asked Questions: Why does it sometimes take a long time for IMO measures to take effect?*, IMO, <http://imo.org/en/About/Pages/FAQs.aspx> (last visited Oct. 24, 2015).

94. See KACHEL, *supra* note 92, at 149.

95. See Olaf Merk, *The role of the International Maritime Organization*, in INTERNATIONAL REGULATORY CO-OPERATION AND INTERNATIONAL ORGANISATIONS: THE CASES OF THE OECD AND THE IMO, 85-124 (OECD Publishing 2014).

96. See Int'l Labour Office, Int'l Labour Org., *High-level Tripartite Working Group on Maritime Labour Standards (Second meeting)* (2002), TWGMLS/2002/2, 2 ¶ 3, ilo-mirror.library.cornell.edu/public/english/dialogue/sector/techmeet/twgmls02/twgmls-9.pdf [hereinafter *Second meeting 2002*] (Recalling that the Conference is free to include, in a Convention, different procedures for the establishment or amendment concerning details relating to the manner in which the obligations laid down in the Convention are to be implemented.).

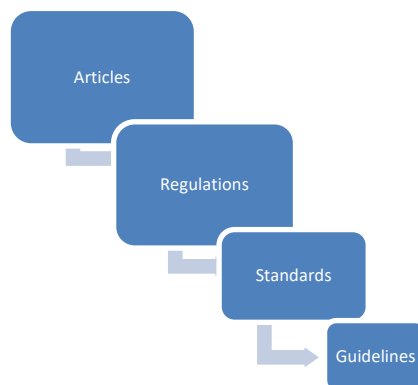
the ILC.⁹⁷ With those considerations in mind,⁹⁸ the MLC, 2006 amendment balanced the IMO's procedure with the ILO's principal philosophy and Constitutional requirements. This was accomplished through the following:

(1) *Accelerated process*: The ILC's tripartite constituents maintain their final vote of approval. However, in contrast to the single and double-discussions in the Conference, the amendments are discussed during a meeting of the special maritime Committee and are then provided, as adopted, to the Conference for final approval; and

(2) *Tacit acceptance*: Members are deemed to have accepted the amendments unless they designate otherwise within a specified period of time.

In designing the MLC, 2006, the ILO had to modify the entire structure of its Convention. ILO Conventions typically contain mandatory provisions covering one topic, which is either of a fundamental or technical nature (such as a Convention prohibiting forced labour versus a Convention on minimum wages). The non-binding guidelines are then left to Recommendations. As opposed to this design, the MLC, 2006 includes both fundamental provisions (its Articles and Regulations) and technical provisions (its Standards and Guidelines), and it also merges binding provisions with non-binding guidelines. As demonstrated in Box 4, below, the Convention is accordingly divided into four parts (i) Articles; (ii) Regulations; (iii) Standards; and (iv) Guidelines.

Box 4: The hierarchical structure of the MLC, 2006



97. See Sub-Group of the High-Level Tripartite Working Group, *First Meeting*, *supra* note 35, ¶ 8.

98. An additional consideration in favour of the new amendment procedure arises with respect to the certification system inherent in the new design of the MLC, 2006. More concretely, the MLC, 2006 requires that ships flying the flag of ratifying Members carry on board a Maritime Labour Certificate and Declaration of Maritime Compliance. However, if the Conference amended the MLC, 2006 with a revising Convention, the validity of those documents would be called into question, which would lead to confusion, particularly during port State inspections. See, e.g., MCCONNELL, ET. AL., *supra* note 79, at 86–87.

The Articles and Regulations of the Convention set out the core rights and principles, i.e., the basic obligations of ratifying Members. According to the express provisions of the Convention, the Articles and Regulations may be amended only through the ILO's traditional amendments procedure.⁹⁹ In contrast, the Standards and Guidelines both contain the technical details (mandatory and non-mandatory, respectively). According to the Convention, amendments to the Standards and Guidelines may follow the "more rapid amendments process," which is contained in Article XV of the Convention.¹⁰⁰ Indeed, the distinction between the mandatory and non-mandatory parts of the MLC, 2006, and the special treatment given to the non-mandatory parts, was "a long-discussed and carefully balanced application of the maxim referred to earlier of flexibility with respect to implementation, and inflexibility with respect to rights, thus helping to find a solution to what would otherwise appear as an insoluble problem."¹⁰¹

B. *The More Rapid Amendments Process*

The amendment procedure in the MLC, 2006 continues to honor the ILO's need to safeguard against excessive changes to the instruments. Its procedure specifies that only states that have ratified the instrument may submit proposed amendments or, if submitted by representatives of the employers (ship owners) or employees (seafarers), five ratifying states must support the proposals before they will be accepted.¹⁰²

Proposed amendments, once duly received, are transmitted to all ILO member States with an invitation to submit comments or suggestions during a specified period (normally six months).¹⁰³ The proposals for

99. See *Second meeting 2002*, *supra* note 96, ¶¶ 13–14. This innovation was intentional to make the Convention more ratifiable than the previous maritime instruments. One of the reasons for the lack of success of the earlier Conventions was attributed to the high level of detail of those Conventions, which had created an obstacle to ratification even though the system of protection in the areas covered may be at least as strong in the countries concerned as that required under the Convention. See generally *id.*

100. See MLC, 2006, *supra* note 11, art. XV.

101. See Int'l Labour Office, Int'l Labour Org., *Preparatory Technical Maritime Conference, Consolidated maritime labour Convention: Commentary to the recommended draft*, ¶ 4, PTMC/04/2 (Sept. 2004), <http://www.ilo.org/public/english/standards/relm/ilc/ilc94/ptmc/pdf/cmlc-comment.pdf>.

102. See MLC, 2006, *supra* note 11, art. XIV–XV. During the preparatory work, the largest issue discussed was, in fact, the prerequisite number of ratifying Members that were needed to support a proposal. The draft procedure initially called for ten government sponsors but was reduced to five sponsors out of concerns that this would create too high of a barrier. See Int'l Labour Office, Int'l Labour Org., *Preparatory Technical Maritime Conference, Report of the Committee No. 1*, ¶ 170–71, PTMC/04/3-1 (Sept. 2004), <http://www.ilo.org/public/english/standards/relm/ilc/ilc94/ptmc/pdf/ptmc-04-3-1.pdf>; see also Int'l Labour Office, Int'l Labour Org., *Tripartite Intersessional Meeting on the Follow-up of the Preparatory Technical Maritime Conference*, ¶1–3, PTMC/2005/23 (Apr. 2005), ilo-mirror.library.cornell.edu/public/english/dialogue/sector/techmeet/ptmc05/ptmc05-23.pdf.

103. MLC, 2006, *supra* note 11, art. XIV–XV.

amendments and any comments made during this period are then considered by a special MLC Committee¹⁰⁴ at a meeting and, if adopted, are submitted to the ILC at its next session for approval. In this respect, the amendments procedure facilitates a more rapid adoption rather than the single or double-discussion procedures, because the amendments are presented to the Conference already adopted. In contrast to the former procedures, the Conference only has the role of giving the final approval.¹⁰⁵

C. *The First Amendments*

The MLC, 2006 was adopted nearly unanimously on February 23, 2006.¹⁰⁶ The “landmark” Convention was the result of years of intense tripartite consultation between the State governments and the representatives of shipowners’ and seafarers’ organizations. The Convention consolidated (and updated, where necessary) some sixty-eight maritime instruments concerning seafarer employment, conditions of living (accommodations and recreational facilities), food and catering, health, medical care, welfare and social protection, and inspections.¹⁰⁷ Pursuant to its Articles, the Convention entered into legal force on August 20, 2013, after the prerequisite ratifications were received,¹⁰⁸ and became

104. The MLC Committee is also referred to in the MLC, 2006 as the “Special Tripartite Committee.” See MLC, 2006, *supra* note 11, art. XIII. The text of the MLC, 2006 amendment procedure required the establishment of this new Committee for the purpose of, proposed amendments are to be considered by the Committee and, accordingly, the ILO needed to “keep the working of this Convention under continuous review” and to adopt amendments under art. XV. *Id.* art. XIII, XV.

105. *Id.* art. XV.

106. While no votes were cast against adoption, the government representatives of Lebanon and Venezuela abstained. See Int’l Labour Org., Int’l Labour Conf., *Ninety-fourth (Maritime) Session, Provisional Record No. 17* (Feb. 2006), www.ilo.org/public/english/standards/relm/ilc/ilc94/pr-17.pdf.

107. The Convention effectively revised 37 of the maritime labour Conventions adopted since 1920, which are listed in Article X of the MLC, 2006, and 31 related Recommendations. The MLC, 2006 does not consolidate the two Conventions that deal with seafarers’ identity documents, the Seafarers’ Identity Documents Convention, 1958 (No. 108), and the Seafarers’ Identity Documents Convention (Revised), 2003 (No. 185), both of which treat a separate topic concerning national security and identification. This is in accordance with a decision at the High-Level Tripartite Working Group and the Preparatory Technical Maritime Conference. See Int’l Labour Office, Int’l Labour Org., *Preparatory Technical Maritime Conference, Report of Committee No. 2*, ¶ 223, PTMC/04/3-2 (Sept. 2004), <http://www.ilo.org/public/english/standards/relm/ilc/ilc94/ptmc/pdf/ptmc-04-3-2.pdf>. Notably, as of 20 August 2013, the outdated Conventions are no longer open for ratification, although Members that have ratified them but have not yet ratified the MLC, 2006, will remain bound by the older Convention(s) in question. See Int’l Labour Conference, Int’l Labour Org., *103rd Session, Provisional Record No. 2*, ¶ 5 (June 2014), www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_243783.pdf.

108. The Convention also differs from typical ILO Conventions, which require only two ratifications prior to entering into force. The MLC, 2006, under Article VIII, requires registered

binding international law for the first thirty member States that had registered ratifications by August 20, 2012.

In 2012, before the Convention had entered into force, the Governing Body had already convened the first MLC Committee session for April 2014.¹⁰⁹ By this time, fifty-six out of the ILO's 185 member States had already ratified the Convention,¹¹⁰ and the maritime constituents had already identified areas that they needed to amend.

Thus, pursuant to the new procedure,¹¹¹ two proposals for amendments¹¹² were jointly submitted by the shipowners' and seafarers' representatives and were communicated to all member States for comment.¹¹³ The first set addressed the specific problems faced in cases of the abandonment of seafarers.¹¹⁴ The second set of proposals elaborated the existing requirement for shipowners to provide financial security to assure compensation in the event of death or long-term disability of a seafarer due to occupational injury, illness, or hazard.¹¹⁵

On October 4, 2013, the Director General invited ILO member States to transmit, by March 2014, any observations or suggestions concerning the two sets of proposals for amendments.¹¹⁶ In response,

ratifications by at least 30 Members with a total share in the world gross tonnage of ships of at least 33 per cent. See MLC, 2006, *supra* note 11 art. VIII.

109. Governing Body, Int'l Labour Org., 318th Session, *Minutes of the 318th Session of the Governing Body of the Int'l Labour Office*, ¶ 84, GB.318/PV (June 2013) [hereinafter *Minutes of the 318th Session of the Governing Body*], [www.ilo.org/public/libdoc/ilo/P/09601/09601\(2013-318\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09601/09601(2013-318).pdf).

110. 322nd Session, *Report of Special Tripartite Committee*, *supra* note 85, app. IV, ¶ 8.

111. MLC, 2006, *supra* note 11, art. XV, ¶¶ 2, 5.

112. Both sets of proposed amendments stemmed from discussions held from 2010 through 2013, at the Preparatory Technical Maritime Labour Committee (PTMLC). Prior to those discussions, problems arising from the abandonment of seafarers, as well as the difficulties experienced by families resulting from a seafarer's death or long-term disability, had been intensively discussed for over a decade in tripartite ILO and IMO meetings. See 322nd Session, *Report of Special Tripartite Committee*, *supra* note 85, ¶ 8.

113. Int'l Labour Standards Dep't, Int'l Labour Org., *Background Paper for Discussion at the first meeting of the Special Tripartite Committee established under Article XIII of the Maritime Labour Convention, 2006*, ¶ 11, STCMLC/2014 (Apr. 2014) [hereinafter *Background Paper for Discussion 2014*], www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_235062.pdf.

114. See Int'l Labour Standards Dep't, Int'l Labour Org., *First and Second Sets of Joint Proposals*, at 1, NORME-130904-1 (2015) [hereinafter *Proposals for Amendments*], www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms229695.pdf.

115. *Id.* at 5.

116. Int'l Labour Standards Dep't, Int'l Labour Org., *Summary of observations and suggestions on the two sets of joint proposals for amendments to the Code of the Maritime Labour Convention, 2006*, ¶ 1, STCMLC/2014/1, NORME-140321-2 (Apr. 2014), www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/genericdocument/wcms_240267.pdf.

twenty-three governments submitted comments,¹¹⁷ the majority of which welcomed or generally supported the proposals but also had comments on specific points.¹¹⁸ Only two governments, Estonia and Switzerland,¹¹⁹ indicated that, for differing reasons, they did not support the proposals for amendments.

These comments were then compiled in a report submitted to the MLC Committee Session along with the proposed amendments.¹²⁰ The discussions took three and a half days, and on the last day of the Session,¹²¹ the members of the MLC Committee voted overwhelmingly in favour of both proposed sets of amendments.¹²²

Thereafter, the amendments to the Code, accompanied by a commentary, were submitted to the Governing Body, which in turn transmitted them to the next Session of the ILC (June 2014) for final approval.¹²³ The vote taken at the 103rd Session of the Conference, on June 11, 2014, easily satisfied the requisite two-thirds majority.¹²⁴

On July 18, 2014, the ILO submitted the amendments to the ratifying states (i.e., those whose ratification of the MLC, 2006, was registered prior to the date of the Conference's approval).¹²⁵ Those states will now have a period of two years from that notification, July 18, 2016, to communicate to the Director General a formal expression of disagreement to the

117. The governments are as follows: Algeria, China, Estonia, Germany, Honduras, India, Japan, Latvia, Marshall Islands, Mauritius, Namibia, Netherlands, Nigeria, Norway, Panama, Portugal, Singapore, Spain, Sweden, Switzerland, United Republic of Tanzania, Thailand, and United Kingdom. *Id.* ¶ 2.

118. *Id.* ¶ 7. Other governments did not expressly indicate generally support but, rather, provided editorial and other suggestions for adjustments to the text of the proposals. *Id.* ¶ 7, n. 6.

119. Estonia and Switzerland. *Id.* ¶ 7, n.8.

120. See *Background Paper for Discussion*, *supra* note 113, ¶ 11.

121. A novel voting system was established under Art. XV, paragraph 4, of the MLC, 2006, which contained three requirements, namely:

(a) at least half the governments of Members that have ratified this Convention are represented in the meeting at which the proposal is considered; and (b) a majority of at least two-thirds of the Committee members vote in favour of the amendment; and (c) this majority comprises the votes in favour of at least half the government voting power, half the Shipowner voting power and half the Seafarer voting power of the Committee members registered at the meeting when the proposal is put to the vote.

MLC, 2006, *supra* note 11, art. XV, ¶ 4.

122. There were 8,890 votes in favour of the adoption of the amendments, no votes against the adoption of the amendments, and 140 abstentions. In addition, 61 Government members had voted in favour of the amendments, as well as all ten Shipowner representatives and all 21 of the Seafarer representatives. See 322nd Session, *Report of Special Tripartite Committee* *supra* note 85, app. IV, ¶ 383.

123. See 322nd Session, *Report of Special Tripartite Committee* *supra* note 85, app. IV, ¶ 9.

124. *Id.*

125. *Id.* ¶ 10.

amendments.¹²⁶ The amendments should then enter into force on January 18, 2017, six months after the end of the two-year period.¹²⁷ Consequently, amendments that were first proposed in 2014 will enter into force three years later, compared to the thirty years taken for technical amendments to enter into force under the ILO's double-discussion procedure.¹²⁸

The Governing Body has already convened the second meeting of the MLC Committee for 2016,¹²⁹ and it is now scheduled to take place in February 2016. Since that meeting was scheduled, two new sets of amendments have already been proposed: one by the shipowner representatives to align the renewal of the certificates under the MLC, 2006 with the renewal of IMO certificates,¹³⁰ and one by the seafarer representatives to address seafarers' wages in the event a seafarer is held captive by pirates, as well as to address on-board harassment and bullying.¹³¹

III. DESIGN FOR THE FUTURE?

The ILO's new amendment procedure essentially accelerates the revision of its Conventions by ensuring that discussions take place in a technical Committee before going to a final vote in the Conference. At the same time, it addresses the specific concerns that have resurfaced over the years concerning the widespread support of (and hence ratification of) Conventions and safeguards against frivolous change. In this respect, it requires that proposed amendments receive requisite support from the governments, and it still requires a two-thirds majority vote in the ILC.

In the maritime context, the MLC's amendment procedure has been well received. As noted above, the first amendment process took only three and a half days, versus the traditional amendment procedure that

126. *Id.*

127. In accordance with the terms the amendment procedure in the MLC, 2006, the amendments will enter into force unless more than 40 per cent of the Members that have ratified the Convention and that represent not less than 40 per cent of the gross tonnage of the ships of the Members that have ratified the Convention have communicated to the Director-General their formal expressions of disagreement with the amendments. *Id.*

128. *Id.*

129. *Report of the Special Tripartite Committee*, *supra* note 85, ¶ 17; see also Int'l Labour Org., *Second meeting of the Special Tripartite Committee*, ILO, http://www.ilo.org/global/standards/maritime-labour-convention/events/WCMS_386795/lang-en/index.htm.

130. Int'l Labour Standards Dep't, Int'l Labour Org., *Proposal from the group of Shipowner representatives appointed to the Special Tripartite Committee to amend the Code of the Maritime Labour Convention, 2006*, NORME-150702-4, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_386809.pdf.

131. Int'l Labour Standards Dep't, Int'l Labour Org., *Proposal from the group of Seafarer representatives appointed to the Special Tripartite Committee to amend the Code of the Maritime Labour Convention, 2006*, NORME-150713-2, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_386796.pdf.

can span decades. At the closing of the first meeting of the MLC Committee, the delegates confirmed that the procedure “operated well and served the enterprise, which had started a decade ago, for the benefit of the shipping industry and the continuous improvement of seafarers’ working and living conditions.”¹³² The Governing Body, in turn, expressed appreciation for “the added value of the modern mechanisms of the MLC, 2006, which worked on the basis of social dialogue and tripartism”¹³³ and went so far as to ask why the second meeting had been scheduled for 2016 and not for 2015.¹³⁴

Nevertheless, the new amendment procedure’s success in the maritime context does not necessarily mean that the ILO will adopt the new rule with respect to its other instruments. History has proven that the ILO is not inclined to abandon its double-discussion procedure easily. In addition, the procedures that are agreed to within the maritime context are not necessarily transferable to the whole ILO, given the unique and close-knit maritime constituency at the ILO.¹³⁵

On the one hand, the maritime constituents have always had their own forum to discuss the labour conditions of the world’s seafarers, and have thus had their own style and approach to the ILO’s legal instruments.¹³⁶ In 1920, the ILO acknowledged that “the question of the position of the seamen navigating the great inland waters of this continent—the lakes and rivers—should be investigated and considered along with the position of those engaged in ocean transportation.”¹³⁷ The ILO has always held separate Maritime Sessions, with constituents from

132. *Report of the Special Tripartite Committee*, *supra* note 85, app., ¶ 450 (the representative of the Government of Greece, speaking on behalf of the Member States of the European Union that had ratified the MLC, 2006).

133. Governing Body, Int’l Labour Org., 322nd Session, *Draft Minutes, Legal Issues and International Labour Standards Section*, ¶ 11, GB.322/LILS/PV/Draft (Oct.–Nov. 2014), www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_322419.pdf.

134. *Id.* ¶ 12; McCONNELL, ET. AL., *supra* note 79, at 38.

135. McCONNELL, ET. AL., *supra* note 79, at 62 (“The story of the MLC, 2006 is about process as much as it is about content. It reflects a bond built between people . . .”).

136. See, e.g., Int’l Labour Conf., Int’l Labour Org., 41st Session, *Social Conditions and Safety (Seafarers) Recommendation, 1958 (No. 108)*, ¶ 6, R108 (May 1958), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312446:NO. (“Considering that labour conditions have a substantial bearing on safety of life at sea . . .”); see also *General Survey on the Labour Standards on Merchant Ships*, *supra* note 85, ¶ 3.

137. See *Int’l Labour Conference, First Annual Meeting*, League of Nations, 117 (1919), [www.ilo.org/public/libdoc/ilo/P/09616/09616\(1919-1\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09616/09616(1919-1).pdf).

the shipowners, seafarers, and maritime government administrations,¹³⁸ to deal exclusively with seafarers' working and living conditions.¹³⁹

On the other hand, the active participation of the ILO's constituents is not limited to the maritime industry. The Organization has always operated on a tripartite basis and has uniformly acknowledged the need for change. Indeed, during its March 2015 session, the Governing Body established a Standards Review Mechanism ("SRM") with the objective of ensuring that the entire ILO "has in place a clear and robust body of up-to-date international labour standards that responds to the needs of the world of work, the protection of workers and promotion of sustainable enterprises."¹⁴⁰ Its terms of reference were approved at the 325th session of the Governing Body in November 2015, which decided to convene two additional meetings in 2016.¹⁴¹

The SRM will thus establish a review body, much like the body proposed in the simplified amendments approach adopted fifty years prior but never put into effect. The Organization may finally be prepared to consider a more efficient manner to ensure that its instruments are

138. *Id.* at 197.

139. The importance of the maritime instruments, and of the Maritime Session of the Conference, was confirmed the following year in 1921, when the Conference adopted a resolution stating:

Seeing that misunderstanding may arise as to the position of those employed in the Mercantile Marine with regard to Conventions and Recommendations to be passed by International Labour Conferences, it is hereby resolved that, no such Conventions or Recommendations shall apply to those employed in the Mercantile Marine unless they have been passed as a special maritime question on the Agenda. All questions on maritime affairs put forward for consideration by Conferences should be previously considered by the Joint Maritime Commission of the International Labour Office.

Int'l Labour Conference, Third Session, League of Nations, 767, 868 (1921), [www.ilo.org/public/libdoc/ilo/P/09616/09616\(1921-3\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09616/09616(1921-3).pdf); see also *Report of the Special Tripartite Committee*, *supra* note 85, at app. IV, ¶ 7

ILO Director-General, reconfirming that, almost 100 years after the ILO's inception,

the world's seafarers and ships continued to operate in a sector which was, by definition, global and essential to the operation of the world's economy with approximately 90 per cent of the world's trade carried on ships. The maritime sector deserved special attention from the ILO to ensure its effective operation and to ensure that seafarers' working and living conditions were secured.

MCCONNELL, ET. AL., *supra* note 79, at 16.

140. See Governing Body, Int'l Labour Org., 312th Session, *Improvements in the standards-related activities of the ILO*, i, GB.312/LILS/5 (Nov. 2011), www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_166502.pdf.

141. See Governing Body, Int'l Labour Org., 325th Session, *Decision on the third item on the agenda: The standards initiative: Terms of reference of the Standards Review Mechanism Tripartite Working Group*, ¶ 5, GB.325/LILS/3 (2015), http://www.ilo.org/gb/decisions/GB325-decision/WCMS_423373/lang--en/index.htm.

responsive to global change.¹⁴² In these considerations, the SRM might draw on the most recent success of the ILO's amendment procedure in the MLC, 2006. In particular, it could note the new procedure's ability to effectuate change rapidly and the active participation of (and thus ensuring ownership by) the tripartite constituents.

For example, in reviewing the ILO's standards, the SRM may select the instruments on social security. In this respect, the ILC recently observed that the social security area has been confronted by "[o]ngoing transformations including those driven by technology; globalization; changes in policies, business models and practices, such as outsourcing; and labour migration flows, have profoundly changed patterns of employment and the world of work."¹⁴³ The Conference concluded that future priorities should "[a]nalyse whether there are gaps in international labour standards or instruments that do not sufficiently respond to the reality of the contemporary world of work, including, but not limited to, using the Standards Review Mechanism."¹⁴⁴ In this respect, the SRM could consider a new instrument, like the MLC, 2006, that could consolidate the ILO's thirty-one Conventions and twenty-four Recommendations on social security.¹⁴⁵ Importantly, this instrument could address the need to quickly revise social security standards to remain abreast of the "ongoing transformations" in the area by including the MLC, 2006 accelerated amendment procedure.

IV. CONCLUSION

International organizations have a reputation for resisting change; in the case of the ILO, that reputation has a sound basis. Since the 1920s, the ILO has taken several approaches to ensure that its treaties may be amended and updated rapidly to keep up with changing work environments. Despite those approaches, the ILO has consistently reverted to its traditional practice of requiring entirely new, revising instruments to go through a lengthy double-discussion in the Conference.

142. An additional and significant indication that the ILO is in a period of change has also taken place with respect to the abrogation of Conventions. As noted, the ILO has never had a system which permits the abrogation, or deletion, of older instruments that have been updated. On October 8, 2015, the ILO's 1997 Constitutional Amendment – which will enable the Organization to abrogate obsolete Conventions and thus eliminate their legal effects – received the requisite ratifications to enter into effect. See Int'l Labour Org., *Significance and effects of abrogation*, ILO http://www.ilo.org/public/english/bureau/leg/1997_amend.htm.

143. Int'l Labour Conference, Int'l Labour Org., 104th Session, *Resolution concerning the recurrent discussion on social protection (labour protection)*, 2 ¶ 3 (2015), www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_380781.pdf.

144. *Id.* ¶ 20, at 5.

145. See Int'l Labour Conference, Int'l Labour Office, 100th Session, *General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization*, 8 ¶ 22 (2011), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_152602.pdf.

Yet, the ILO has recently shown signs of accepting change. In the maritime context, it adopted a new instrument, the MLC, 2006, which introduces an accelerated amendment procedure. In 2014, it put that procedure into practice and adopted two new amendments, and it has scheduled another maritime session to consider amendments for 2016. Simultaneously, it has established the SRM to consider how the ILO might effectively ensure a robust body of up-to-date norms.

Whether the amendment procedure in the MLC, 2006 is adopted in future instruments or not, the ILO has clearly accepted that its approach to revising its instruments needs to improve. The Organization is about to turn 100. As it prepares to do so, its attempts to adapt and change have thus far broken the surface and promise that, at the least, the ILO is willing to consider plunging into new waters.