



International Labour Office
Bureau international du Travail
Oficina Internacional del Trabajo

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TO ALL MEMBER STATES

Ref. BIT/ILO

ACD 5-186-1

Votre réf.

Geneva, 7 July 2011

Dear Madam/Sir,

On 12 November 2010, the Workers' Group requested that the International Labour Office provide a view on the question of the meaning of Article II, paragraph 1(i) of the Maritime Labour Convention, 2006 (MLC, 2006). In particular, the Workers' Group expressed concerns about the distances that might reasonably be envisaged by the phrase, "inland waters or waters within, or closely adjacent to, sheltered waters", contained in the definition of a ship under the Article II, paragraph 1(i), which provides that:

- (i) "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.

The Workers' Group also expressed concerns about ensuring some consistency with the IMO's STCW Convention, whilst also recognizing that the MLC, 2006 is intended to cover a larger category of seafarers and ships than those covered by STCW.

As is the case with all opinions of the International Labour Office, the information is provided subject to the usual understanding that the Constitution of the International Labour Organization confers no special competence on the Office to give an authoritative interpretation of an international labour Convention and that the opinions expressed are without prejudice to any position that the ILO's supervisory bodies might take with respect to the subject matter.

Information about Article II, paragraph 1(i) MLC, 2006

Article II, paragraph 1(i) of the MLC, 2006 provides the following definition of a ship:

"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.

With a view to preparing this advice, the Office has consulted the Assistant Secretary-General for Legal Affairs of the United Nations, who confirmed that the term "sheltered waters"

has not been used in any conferences on the law of the sea. The Office has also consulted the Legal Office of the International Maritime Organization, which indicated that, even though similar wording is to be found in the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended (STCW), these terms were not clarified or questioned in the preparatory work. Finally, by circular letter dated 3 March 2011, the Office requested all member States to provide their views with respect to the terms "sheltered waters" and "closely adjacent to". To date, the Office has received 26 replies. Some countries felt that this was a matter for national determination and that some consistency with the STCW was important. In some countries, the term "sheltered waters" was seen as synonymous with internal waters and meant waters between the coastal line and the baselines from which the breadth of the territorial sea is measured. In others, a "sheltered waters voyage" means a voyage on a lake or a river where a vessel can never be further than one nautical mile from the closest shore; and "near coastal voyage", which is considered the equivalent to "closely adjacent to sheltered waters", means a voyage that is not a sheltered waters voyage and during which the ship is always within 25 nautical miles from shore in waters contiguous to the country (and its neighbours by agreement). In other countries, the term sheltered waters denotes waters within a three-mile radius from a port. The great majority of the respondents, however, indicated that these terms are not defined in their national law.

With respect to the question of the definition of a ship, the provisional records and drafting history of the provision indicates that it was based on a similar provision under the IMO's STCW Convention (Article II(g)). The MLC, 2006 has been designed as "a single, coherent instrument" embodying as far as possible all standards of, *inter alia*, 37 existing international labour Conventions considered up-to-date by the Governing Body, including the Merchant Shipping Minimum Standards Convention, 1976 (No.147) (see the 2nd preambular paragraph and Article X) and therefore was intended to clearly include, as a minimum, all ships previously covered by the term "every seagoing ship" (Convention No. 147, Article 1, paragraph (1)).

Article II, paragraph 1(i) of the MLC, 2006 does not explicitly define the terms "closely adjacent to" or "sheltered waters". Indeed, it is impossible to determine this question on an international level for all member States, since this determination could to a certain extent depend upon the geographical or geological situations in each State. In principle it would be for the competent authority of a Member that has ratified the MLC, 2006 to determine, in good faith and on a tripartite basis, taking into account the objectives of the Convention and the physical features of the country, which areas could be considered as covering "sheltered waters" and what distance away from those waters could be considered as "closely adjacent to sheltered waters".

Such a determination by a competent authority should take into account two principles. One, as noted above, is the principle of good faith, which is one of the pillars of the application of international obligations assumed by a State, and is set out in the 1969 Vienna Convention on the Law of Treaties which provides, in Article 26 (*Pacta sunt servanda*) that, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Article 31, paragraph 1 provides a general rule of interpretation that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The application of this means, *inter alia*, any determination regarding waters that are closely adjacent to sheltered waters should not render the Convention meaningless.

This would imply that the determination of which waters are closely adjacent waters to sheltered waters should not result in undermining the clear intention that the Convention applies to ships of all sizes, including those not engaged in international voyages (see Article II, paragraph 6). Any questions of doubt are to be resolved on the basis of consultation with the national social partners in accordance with paragraph 5 of Article II.

The specific terms of the definition introduce some elements which are objective though not measurable in nautical miles. In particular, the term "sheltered waters", if a literal interpretation were adopted, might entail a calculation of the average height reached under normal weather conditions by the waves (as indicated in the information provided by one of the countries referred to above). However, the countries consulted seem to have adopted more manageable interpretations from the point of view of applying the definition in practice.

Little indication has been given, however, as to the criteria countries adopt in this respect. Several different approaches and criteria appear possible. One possible approach might be to make a rough estimate of the distances from shore of the areas to which waters that can reasonably be considered to be physically sheltered extend in the country concerned and define "sheltered waters" as a certain distance, based on those estimated distances, from shore. The term "closely adjacent" involves a double limitation: adjacency and proximity. As far as the precise measurement of proximity is concerned, as explained above, this would be a matter for national determination, based on the need to achieve the objectives of the MLC, 2006 and taking into account various safety and related navigational training and other geographical considerations indicated above. The distance should certainly not be disproportionately long, having regard to the distance from the shore used to determine "sheltered waters". There could be other possible approaches, based not so much on the concept of "closely adjacent to sheltered waters" but rather on similar concepts under the national law or practice of the country concerned which have been traditionally used – in the context of the protection of seafarers' rights or safety – in relation to ships which navigate close to shore. Any such approaches should, however, also consider the requirement under the Constitution of the International Labour Organization, as referred to in the preamble to the MLC, 2006 regarding the obligation of article 19, paragraph 8, which provides that "in no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation".

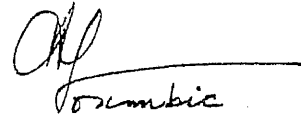
In other words, the determination by the competent authority of a Member that has ratified the Convention could be based on differing approaches and criteria from country to country, provided that those approaches and criteria can be justified within the general framework of the country's obligations under international law and, in particular, with respect to the MLC, 2006.

In conclusion it seems clear that in determining the parameters of "sheltered waters" and "closely adjacent to sheltered waters":

- Members should take fully into account the Convention's object and purpose of ensuring protection of all seafarers and in case of doubt, should make a determination favourable to their protection. In this regard it is recalled that Article 1, paragraph 1 of the MLC, 2006 states that "Each Member which ratifies this Convention undertakes to give complete effect to its provisions in the manner set out in Article VI in order to secure the right of all seafarers to decent employment";
- the intention is that the MLC, 2006 should cover seafarers working on all ships irrespective of tonnage or voyage;
- the MLC, 2006 requires firmness and flexibility in its application: firmness in adopting clear criteria that are consistent with the actual terms of the definition in

Article II, paragraph 1(i) of the MLC, 2006, and are clearly linked with the objectives that the MLC, 2006 seeks to achieve; flexibility in deciding the criteria that best fit the law and practice and the physical features of the country concerned subject however to the requirement that national implementation should be carried out in good faith as provided under the 1969 Vienna Convention on the Law of Treaties.

Yours faithfully,
For the Director General:



Cleopatra Doumbia-Henry,
Director of the International
Labour Standards Department.