

Seafarers' Group

Paper on Title 5 of CMLC

1. Executive Summary

- 1.1 This paper seeks to provide an overview of the original objectives behind the development of the CMLC and a general overview of Port State Control in the context of ILO Instruments. It also examines the current regime established by ILO Convention No. 147 and how it is in practice enforced.
- 1.2 The paper seeks to build on current practice and to draw on relevant experience elsewhere and, based on that logical approach, to set out the Seafarers' position and expectations on Port State Control Enforcement, in the context of the CMLC. We have said from the very beginning that the provision of an effective control and enforcement mechanism was a fundamental prerequisite for the Seafarers' Group and we have been consistent in this regard.
- 1.3 Port State Control has developed due to the difficulties caused by or unwillingness of certain flag States to exercise effective control over vessels which fly their flag and this still remains a problem. It is the seafarers who suffer the consequences of the decent work deficit in the maritime sector which results from flag State failure.

2. Background

- 2.1 The 1st session of the HLTWG agreed, through the adoption of the Chairperson's summary:

many observations were made stressing the importance of effective enforcement mechanisms:

- *both flag States and port States should be responsible for enforcement;*
- *the principle of "no more favourable treatment" was supported;*
- *consideration should be given to the appropriateness of the following enforcement mechanisms, inter alia:*
 - *extension of port state control as provided for in Convention No. 147 and strengthening of related remedial measures;*
 - *the IMO "panel of competent persons" (there were however drawbacks that would need to be studied);*
 - *obligation on Members to submit their enforcement procedures for review at the time of ratification;*
 - *integration into IMO instruments such as the ISM Code or creation of similar mechanisms could be explored;*
 - *creation of a database for violation of social rights;*

- 2.2 The 1st session of the HLTWG also agreed that the principal consideration should be the achievement and maintenance of a level playing field. It went on to agree that the process should:

give proper consideration in a maritime context to the essential aspects of Decent Work, the components of which are:

1. Human rights at work.
2. Employment and incomes.
3. Social protection and social security.
4. Social dialogue.

- 2.3 The 2002 ILO Meeting of Experts on Working and Living Conditions of Seafarers on board Ships in International Registers adopted a Consensual Statement which, inter alia, included:

The experts stress the need for the strongest possible national and international measures to be taken against breaches of international labour standards, including violations of freedom of association and right to organize and collective bargaining, which undermine decent living and working conditions for seafarers.

The experts consider that it is urgent to effectively address the decent work deficits in the shipping industry. It is recognized that conditions of employment, social protection, social security and social dialogue, including collective bargaining, are matters that will require particular attention. To this end, the experts recognize the importance of the decent work at sea programme and invite the Governing Body to instruct the Office to secure further action, in consultation with the constituents.

The experts recognize that consideration should be given to a possible mechanism by which a performance measurement for flag States in respect of ILO instruments might be introduced.

- 2.4 At the PTMC the Seafarers Group submitted a written information paper (Annex 1) on the on-shore complaints procedure.

3. Substandard shipping

- 3.1 The IMO has defined substandard shipping in IMO Assembly Resolution A.787 (19) as amended by Assembly Resolution A.882 (21) (Amendments to the Procedures for Port State Control) as:

In general, a ship is regarded as substandard if the hull, machinery, equipment, or operational safety, is substantially below the standards required by the relevant conventions or if its crew is not in conformance with the safe manning document, owing to, inter alia:

- 1) *the absence of principal equipment or arrangements required by the conventions;*
- 2) *non-compliance of equipment or arrangements with relevant specifications of the conventions;*
- 3) *substantial deterioration of the ship or its equipment, for example, because of poor maintenance;*
- 4) *insufficient operational proficiency, or unfamiliarity of the crew with essential operational procedures; and*
- 5) *insufficiency of manning or insufficiency of certification of seafarers.*

- 3.2 The OECD 2002 policy statement on substandard shipping provides:

For the purposes of this policy statement a “substandard ship” is regarded as a vessel that, through its physical condition, its operation or the activities of its crew, fails to meet basic standards of seaworthiness and thereby poses a threat to life and/or the environment. This would be evidenced by

the failure of the vessel to meet regulations contained in international maritime conventions to the extent that it would be considered unfit to sail by a reasonable flag state or port state inspection.

3.3 The 2002 Quality Shipping Conference, hosted by Denmark, adopted a Resolution that inter alia, included the issue of decent working and living conditions for seafarers. The text provides that:

1. All parties should realize the vital importance of decent working and living conditions for seafarers being integrated in the concept of quality shipping.

2. All parties, being aware of the structural changes in the industry, should work for a new approach on global living and working conditions, including global enforcement.

3. All relevant parties should engage constructively in the process initiated by the International Labour Organization aimed at designing and promoting a single, consistent international maritime labour standard, incorporating as far as appropriate the substance of current international maritime labour standards, so as to deliver decent working and living conditions for seafarers and a level playing field for quality operators.

4. All shipowners should provide and be responsible for safe and decent working conditions for seafarers they employ or engage.

5. In order to effectively exercise its jurisdiction in social matters, every State should have a sound maritime administration with a firm legislative framework complying with, as a minimum, international labour standards, and a strong enforcement mechanism.

6. All States should have in place the necessary mechanism for monitoring working and living conditions on ships visiting their ports, in accordance with international instruments in force.

3.4 The 2002 JMC adopted the attached (Annex 2) Resolution concerning substandard shipping.

3.5 It is clear from the above that we have a mandate and there is an expectation that the CMLC will go beyond the limited Port State Control Provision provide for by ILO Convention 147 and its Protocol.

4. ILO Convention No. 147

4.1 Article 4 of ILO Convention 147 provides:

Article 4

1. If a Member which has ratified this Convention and in whose port a ship calls in the normal course of its business or for operational reasons receives a complaint or obtains evidence that the ship does not conform to the standards of this Convention, after it has come into force, it may prepare a report addressed to the government of the country in which the ship is registered, with a copy to the Director-General of the International Labour Office, and may take measures necessary to rectify any conditions on board which are clearly hazardous to safety or health.

2. In taking such measures, the Member shall forthwith notify the nearest maritime, consular or diplomatic representative of the flag State and shall, if possible, have such representative present. It shall not unreasonably detain or delay the ship.

3. For the purpose of this Article, "complaint" means information submitted by a member of the crew, a professional body, an association, a trade union or, generally, any person with an interest in the safety of the ship, including an interest in safety or health hazards to its crew.

5. PMOU application of ILO 147

5.1 The Paris Memorandum on Port State Control, in its 2003 Annual report, lists the major categories of detentions in relation to inspections/ships. The ILO 147 related ones are:

- Crew and accommodation;
- Accident prevention;
- Food and catering;
- Working space; and
- Mooring arrangements.

It also includes a safety in general category.

5.2 In the 2003 Blue Book the PMOU provides a detailed sub-division of the above four headings (Annex 3).

6. IMO and Port State Control

6.1 Port State Control is well developed in IMO Conventions including the International Convention for the Safety of Life at Sea, 1974, as amended, (SOLAS), 1974, by the Protocol relating to the International Convention for the Safety of Life at Sea, 1974 (SOLAS Protocol 1988); the International Convention on Load Lines, 1966 (Load Lines 66); the Protocol of 1988 relating to the International Convention on Load Lines, 1966 (Load Lines Protocol 88); the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978, as amended (MARPOL 73/78); the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended and the International Convention on Tonnage Measurement of Ships, 1969.

6.2 The IMO has through IMO Assembly Resolution A.787 (19) as amended by A.882 (21) adopted detailed Procedures for Port State Control. This includes the following definitions:

Clear grounds: Evidence that the ship, its equipment, or its crew does not correspond substantially with the requirements of the relevant conventions or that the master or crew members are not familiar with essential shipboard procedures relating to the safety of ships or the prevention of pollution. Examples of clear grounds are included in section 2.3.

Deficiency: A condition found not to be in compliance with the requirements of the relevant convention.

Detention: Intervention action taken by the port State when the condition of the ship or its crew does not correspond substantially with the applicable conventions to ensure that the ship will not sail until it can proceed to sea without presenting a danger to the ship or persons on board, or without presenting an unreasonable threat of harm to the marine environment, whether or not such action will affect the normal schedule of the departure of the ship.

Inspection: A visit on board a ship to check both the validity of the relevant certificates and other documents, and the overall condition of the ship, its equipment, and its crew.

More detailed inspection: An inspection conducted when there are clear grounds for believing that the condition of the ship, its equipment, or its crew does not correspond substantially with the particulars of the certificates.

Port State Control Officer (PSCO): A person duly authorised by the competent authority of a Party to a relevant convention to carry out port State control inspections, and responsible exclusively to that Party.

Recognised Organisation: An organisation which meets the relevant conditions set forth by resolution A. 739(18), and has been delegated by the flag State Administration to provide the necessary statutory services and certification to ships entitled to fly its flag.

Stoppage of an operation: Formal prohibition against a ship to continue an operation due to an identified deficiency(ies) which, singly or together, render the continuation of such operation hazardous.

Substandard ship: A ship whose hull, machinery, equipment, or operational safety is substantially below the standards required by the relevant convention or whose crew is not in conformance with the safe manning document.

Valid certificates: A certificate that has been issued directly by a Party to a relevant convention or on its behalf by a recognised organisation and contains accurate and effective dates, meets the provisions of the relevant convention and with which the particulars of the ship, its crew and its equipment correspond.

6.3 “Clear grounds” to conduct a more detailed inspection include:

- 1) The absence of principal equipment or arrangements required by the conventions;
- 2) Evidence from a review of the ship’s certificates that a certificate or certificates are clearly invalid;
- 3) Evidence that documentation required by the conventions and listed in appendix 4 are not on board, incomplete, are not maintained or are falsely maintained;
- 4) Evidence from the PSCO’s general impressions and observations that serious hull or structural deterioration or deficiencies exist that may place at risk the structural, watertight or weathertight integrity of the ship;
- 5) Evidence from the PSCO’s general impressions or observations that serious deficiencies exist in the safety, pollution prevention or navigational equipment;
- 6) Information or evidence that the master or crew is not familiar with essential shipboard operations relating to the safety of ships or the prevention of pollution, or that such operations have not been carried out;
- 7) Indications that key crew members may not be able to communicate with each other or with other persons on board;
- 8) The emission of false distress alerts not followed by proper cancellation procedures;
- 9) Receipt of a report or complaint containing information that a ship appears to be substandard.

6.4 A more detailed inspection should take the following into account:

- structure;
- machinery spaces;
- conditions of assignment of load lines;
- life-saving appliances;
- fire safety;
- regulations for preventing collisions at sea;
- Cargo Ship Safety Construction Certificate;
- Cargo Ship Safety Radio Certificates;
- equipment in excess of convention or flag State requirements;
- guidelines for discharge requirements under Annexes I and III of MARPOL 73/78 – which include:
 - ⇒ inspection of crude oil washing (COW) operations ;
 - ⇒ inspection of unloading, stripping and prewash operations;
- guidelines for control of operational requirements – which include:
 - ⇒ muster list;
 - ⇒ communication;
 - ⇒ fire drills;
 - ⇒ abandon ship drills;
 - ⇒ damage control plan and Shipboard Oil Pollution Emergency Plan;
 - ⇒ fire control plan;
 - ⇒ bridge operation;
 - ⇒ cargo operation;
 - ⇒ operation of the machinery;
 - ⇒ manuals, instructions etc.;
 - ⇒ oil and oily mixtures from machinery spaces;
 - ⇒ loading, unloading and cleaning procedures for cargo spaces of tankers;
 - ⇒ dangerous goods and harmful substances in packaged form;
 - ⇒ garbage;
- minimum manning standards and certification;
- STCW 78;
- ISM; and
- ISPS Code.

6.5 The IMO Procedures provide:

“When a Port State Control Officer determines that a ship can be regarded as substandard as specified in section 4.1 and appendix 1, the port State should immediately ensure that corrective action is taken to safeguard the safety of the ship and its passengers and/or crew and to eliminate any threat of harm to the marine environment before permitting the ship to sail”. (Para 4.4 of Resolution A.787 (19) as amended by A.882 (21))

6.6 Central to the IMO operation of Port State Control is the Port State Control Officer exercising his/her professional judgement and, on that basis, making a determination. The IMO Guidelines provide:

“When exercising control, all possible efforts should be made to avoid a ship being unduly detained or delayed. It should be borne in mind that the main purpose of port State control is to prevent a ship proceeding to sea if it is unsafe or presents an unreasonable threat of harm to the marine environment. The PSCO should exercise professional judgement to determine whether to detain a ship until the deficiencies are corrected or to allow it to sail with certain deficiencies, having regard to the particular

circumstances of the intended voyage.” (Para 2.6.5 of Resolution A.787 (19) as amended by A.882 (21))

- 6.7 Resolution A.787 (19) as amended by A.882 (21), in its Appendix I, provides an indicative – but not exhaustive – list of examples of deficiencies, which are considered to be of such a serious nature that they warrant the detention of the ship involved (provided in Annex 4).
- 6.8 There has been a discussion on whether the CMLC should use the term “deficiency” or “non-conformity”. It is therefore appropriate to note the ISM Code definitions :

“non-conformity means an observed situation where objective evidence indicates the non-fulfilment of a specified requirement;”

and:

“major non-conformity means an identifiable deviation that poses a serious threat to the safety of personnel or the ship or a serious risk to the environment that requires immediate corrective action and includes the lack of effective and systematic implementation of a requirement of this Code.”

7. Port State Control in the context of the CMLC

- 7.1 The Seafarers’ Group sees Port State Control in the context of the CMLC as following the IMO model. It should be noted that the IMO concept of operational Port State Control involves the Port State Control Officer believing that the master or crew are not familiar with essential shipboard procedures relating to the safety of ships (SOLAS Chapter XI-1 Regulation 4 (1)). Port State Control in the ILO context would be based on compliance with the CMLC at a shipboard level rather than at flag State level. It would not displace the primary obligation of the flag State nor replace the ILO oversight system, which would be directed more to flag States. Every ship coming within the scope of the Convention will be required to have a maritime labour certificate, complemented by a declaration of maritime labour compliance, which shall constitute prima facie evidence that the ship has been duly inspected by the Member whose flag it flies and that the requirements of this Convention relating to working and living conditions of the seafarers have been met to the extent so certified. The maritime labour certificate would cover:

- Minimum age;
- Medical certification;
- Qualifications of seafarers;
- Seafarer employment agreements;
- Use of licensed [and certified] private recruitment and placement services;
- Hours of work or rest;
- Manning levels for the ship;
- Accommodation;
- On-board recreational facilities;
- Food and catering;
- Health and safety and accident prevention;
- On-board medical care; and
- Payment of wages.

- 7.2 A duly qualified Port State Control Officer, who is duly authorised by the competent authority of the Member, shall check the validity of the maritime labour certificate and declaration of maritime labour compliance and the overall condition of the ship, its

equipment and crew, as provided for in the CMLC. A more detailed inspection should be conducted when there are clear grounds for believing that the condition of the ship, its equipment, or its crew do not correspond substantially with the particulars of the maritime labour certificate and declaration of maritime labour compliance or there is a serious breach of the requirements (including seafarers' rights) provided for in this Convention.

7.3 The Port State Control Officer would note any areas of non-compliance and:

- bring the non-conformities and the measures needed to rectify them to the attention of the master of the ship and notify the nearest maritime, consular or diplomatic representative of the flag State accordingly;
- provide the competent authorities of the next port of call with relevant information; and
- bring the deficiencies and the measures needed to rectify them to the attention of the appropriate seafarers' and shipowners' organisations in the Member in which the inspection is carried out.

7.4 Where the detailed inspection has revealed that the ship does not conform to the requirements of the Convention, the Port State Control Officer should exercise his/her professional judgement and determine whether to detain a ship until the deficiencies are corrected or to allow it to sail with certain non-conformities, having regard to the particular circumstances of the intended voyage or approved plan of action to rectify the non-conformity, provided the Port State Control Officer is satisfied that the plan will be implemented in an expeditious manner and overseen by the Competent Authority or a recognised organisation duly authorised for this purpose.

7.5 In making the determination on whether the ship should be detained the Port State Control Officer will use his/her professional judgement to assess whether the non-conformities:

- constitute a serious breach of the requirements (including seafarers' rights) provided for in this Convention; or
- are clearly hazardous to seafarers' health or safety or security; or
- could, in all likelihood, cause serious material hardship to seafarers; or
- constitute a serious violation of the requirements of this Convention; or
- threaten the safety or security of the ship or would present an unreasonable threat of harm to the marine environment.

7.6 In making such a determination the Port State Control Officer will also have to consider the practicability of requiring the non-conformity to be corrected prior to the vessel leaving port or whether, given its nature, it should be remedied through an approved plan of action. The seafarers accept that it is clear that not all serious violations can be remedied in a foreign port, for example, the absence of social security protection.

7.7 However, as Guideline 5.2.1 (2) (b) makes clear, other serious violations should be remedied before the vessel is permitted to sail.

7.8 The Seafarers consider that there is a link between the requirements of this Convention and other maritime instruments. This would include the ISM Code. The ISM Code requires the:

"motivating the crew in the observation of that policy [safety and environmental-protection policy of the Company]".

It is clear that this requirement will not be met if the seafarers have not been paid their wages for a considerable period of time. The non-payment of wages is unfortunately widely prevalent in certain sectors of the shipping industry, as evidenced by the frequency of reported ship arrests and by the activities of the ITF network of Inspectors. In 2002 ITF Inspectors collected unpaid wages for seafarers of over US\$27.6 million, along with a further US\$4.8 million recovered by the Actions Unit, which brought the year's total to US\$32.4 million in back pay won for the seafarers concerned.

- 7.9 Similarly, if the employment agreement contains a clause seeking to prevent or restrict seafarers from being able to exercise the right to freedom of association or to be able to make a complaint to the Port State Control Authorities this is a serious breach and a serious violation which should be rectified prior to the vessel being permitted to sail. Such clauses, which are a serious violation of Article III, are also detrimental to the safety of the vessel and incompatible with the ISM Code or securing proper accident prevention procedures.
- 7.10 Article III sets out the fundamental rights and principles which should be respected in the context of the Convention, some of which are built on by more detailed provisions in the Regulations and the Code, while others are well known as they relate to core labour standards.
- 7.11 Article IV sets out the legal framework for the seafarers' employment and social rights, which are further elaborated in the Regulations and the Standards established by the Code.

8. Detention of ships under the CMLC

- 8.1 A Port State Control Officer who conducts a more detailed inspection after determining that, in his/her professional judgement, there were clear grounds to do so, should note non-conformities with the provisions of the Convention. The Port State Control Officer should determine whether the non-conformity should be remedied before the vessel sails through an agreed action plan or just reported to the flag State. However, as is the case in the IMO, serious violations should, in general, be remedied before the vessel is permitted to sail.
- 8.2 The term "serious violation" is defined in Guideline B5.2.1 (2) (b) as:

"With respect to the term "serious violation" in paragraph 6(c) of Standard A5.2.1, the seriousness could be due to the nature of the deficiency concerned. This would be particularly relevant in the case of the violation of fundamental rights and principles or seafarers' employment and social rights. The employment of a person who is more than six months under age, for example, should be considered as a serious violation even if there is only one such person on board. In other cases, the number of defects found during a particular inspection should be taken into account: for example, several instances of defects relating to accommodation or food and catering (which do not threaten safety or health) might be needed before they should be considered as constituting a serious violation."

- 8.3 Another key term, which was found in square brackets Guideline B5.2.1 (2) (b) is "serious material hardship" as:

"The term "serious material hardship" in paragraph 6(b) of Standard A5.2.1 would normally be of a financial nature and threaten the livelihood of the seafarers concerned. A typical example of a deficiency giving rise to such hardship would be the non-payment of wages over several months. In such cases, the inspectors should consider the normal effect of such a situation on seafarers, in general. They should not, for example, be required to look into any other means of support that may be available to the persons concerned or the precise situation in the countries where the seafarers reside."

- 8.4 As is made clear in paragraph 4.1 above, Article 4 (1) of ILO Convention No. 147 authorises a Port State Control Officer to take measures necessary to rectify any conditions on board which are clearly hazardous to safety or health.
- 8.5 In determining whether a vessel should be detained for non-conformity with the Convention, the professional judgement of the Port State Control Officer needs to be guided by the 3 key terms:
- clearly hazardous to safety or health;
 - serious violation; and
 - serious material hardship.
- 8.6 The Seafarers' Group consider that the following factors and areas of the CMLC could cause a Port State Control Officer to detain a ship:
- maritime labour certificate or declaration of maritime labour compliance invalid;
 - serious violation of fundamental rights and principles (Article III);
 - serious violation of seafarers' employment and social rights (Article IV (5));
 - a person below the minimum age engaged, employed or working on the ship (Article III and Regulation 1.1);
 - seafarers not certified as medically fit to perform their duties are working on the ship (Regulation 1.2);
 - seafarers employed, engaged or working on the ship have come from a private recruitment and placement system which does not comply with the provisions of the Convention (Regulation 1.4);
 - the seafarers on board do not have a seafarers' employment agreement (Regulation 2.1);
 - the seafarers' employment agreement contains clauses which seriously violate the standards set out in the CMLC or are clearly hazardous to safety or health or are likely to result in serious material hardship;
 - the seafarers have not been regularly paid their wages and it is likely to result in serious material hardship (Regulation 2.2);
 - the hours of work or rest are not regulated in accordance with the provisions of the Convention (Regulation 2.3);
 - seafarers have not been granted shore leave and it is clearly hazardous to their safety or health or likely to cause serious material hardship (Regulation 2.4 (2));
 - the ship does not provide financial security to ensure that seafarers would be duly repatriated in accordance with the Convention (Regulation 2.5 (2));
 - the ship does not have a sufficient number of seafarers employed on board to ensure it is operated safely, efficiently and with due regard to security under all conditions taking into account concerns about seafarer fatigue and the particular nature and conditions of the voyage (Regulation 2.7);
 - the ship does not provide and maintain decent living accommodation and recreational facilities and it is clearly hazardous to safety or health or is likely to result in serious material hardship (Regulation 3.1);
 - the ship does not have a supply of sufficient food of good quality, drinking water and catering arrangements that secure the health and well-being of seafarers living on board and take account of differing cultural, religious and gastronomic backgrounds and the ship's cook is not properly trained and qualified and the catering staff are not properly trained or instructed for their positions (Regulation 3.2);

- the requirements for on-board health protection and medical care do not comply with the requirements of the Convention and constitute a serious violation or are clearly hazardous to safety or health or are likely to result in serious material hardship (Regulation 4.1 (1), (2) and (4)); and
 - the occupational health and safety and accident prevention arrangements on board the ship do not comply with the provisions of the Convention and constitute a serious violation or are clearly hazardous to safety or health or are likely to result in serious material hardship (Regulation 4.3).
- 8.7 It should be clear that not all the above provisions will automatically lead to the detention of a vessel. Rather it will depend on the circumstances and the professional judgement of the Port State Control Officer. Likewise they are not exhaustive as a Port State Control Officer may form a judgement that a combination of other non-conformities, taken together, merit the detention of a vessel until they have been rectified.
- 8.8 The CMLC will contain a no more favourable treatment clause and this may give rise to complications in the case of ships which fly the flag of a State that has not ratified the Convention or is not even a Member of the ILO. However, this also applies in the case of IMO instruments and the IMO Procedures for Port State Control provide:

“1.5.1 Article II (3) of the Protocol of 1978 to SOLAS 74, article 5(4) of MARPOL 73/78, and article X (5) of STCW 78, provide that no more favourable treatment is to be given to the ships of countries which are not Party to the Convention. All Parties should as a matter of principle apply the procedures set out in this document to ships of non-parties and ships below convention size in order to ensure that equivalent surveys and inspections are conducted and an equivalent level of safety and protection of the marine environment are ensured.

1.5.2 As ships of non-parties and ships below convention size are not provided with SOLAS, Load Line or MARPOL certificates, as applicable, or the crew members may not hold valid STCW certificates, the Port State Control Officer (PSCO), taking into account the principles established in this document, should be satisfied that the ship and crew do not present a danger to those on board or an unreasonable threat of harm to the marine environment. If the ship or crew has some form of certification other than that required by a convention, the PSCO may take the form and content of this documentation into account in the evaluation of that ship. The conditions of and on such a ship and its equipment and the certification of the crew and the flag State’s minimum manning standards should be compatible with the aims of the provisions of the conventions; otherwise, the ship should be subject to such restrictions as are necessary to obtain a comparable level of safety and protection of the marine environment. “

- 8.9 The Seafarers’ consider that similar provisions should be applied to the CMLC. That is:
- Members should as a matter of principle apply the procedures set out in the Convention to ships of non-parties in order to ensure that equivalent living and working conditions are provided for the seafarers employed, engaged or working on the vessel and that the rights and principles set out in the CMLC are provided on an equivalent basis;
 - the Port State Control Officer may take the form and content of any documentation onboard the ship into account in the evaluation of that ship;
 - the condition of the ship and the living and working condition of the seafarers should be compatible with the aims of the provisions of the Convention;
 - Inspections should ensure that the ship and living and working conditions of the crew (including fundamental rights and principles), as provided for in the Convention, are not clearly hazardous to safety or health or are not in serious violation of the aims of

the provisions of the Convention or are not likely to result in serious material hardship for the seafarers; and

- otherwise, the ship should be subject to such restrictions as are necessary to obtain comparable living and working conditions (including fundamental rights and principles) as provided for in the Convention.

9. Conclusions

- 9.1 It is clear that the enforcement provisions of the CMCL, including those related to Port State Control, need to go further than those provided for under ILO Convention No. 147 regime. If that is not the case, the Seafarers would consider that the mandate we were given had not been fulfilled and that the delicate package the consolidation process was supposed to deliver was fundamentally flawed. We set out to deliver a “bill of rights” for seafarers, which would provide meaningful minimum standards which will be effectively implemented in practice and which establish a level playing field. Our target is to secure decent living and working conditions for seafarers and, in doing so, to further the decent work agenda of this Organisation. We should recall that the ILO is the United Nations specialised agency which seeks the promotion of social justice and internationally recognised human and labour rights. It has often been said that the aim was to provide a third pillar on labour and social standards, which would complement the current regime established by SOLAS and MARPOL.
- 9.2 The inclusion of the Port State Control provisions in the CMLC is to put social and labour standards, as set out in the CMLC, on a par with the technical and operational requirements set out in IMO instruments. As can be seen above, the intention is not to go further than extending already well established IMO principles and practices to the CMLC.
- 9.3 The provisions of Article III (Fundamental rights and principles) clearly state that they are given effect to through the provisions of laws and regulations. Similarly, Article IV (Seafarers’ employment and social rights) provides that they are to be fully implemented through national laws and regulations, through applicable collective bargaining agreements or through other measures or in practice. As previously stated, Port State Control in the ILO context would be based on compliance with the CMLC at a shipboard level rather than at flag State level. It would neither displace the primary obligation of the flag State nor replace the ILO oversight system, which is directed at the flag State. Therefore, the Seafarers’ Group recognises the inherent limitations of Port State Control and that it is not an appropriate vehicle to interfere with national laws, regulations or collective bargaining agreements. However, the Port State Control Officer would be required to report any non-conformity, which was identified as a result of a ship inspection, which related to the application of national laws, regulations or collective bargaining agreements to the flag State and also to the ILO. It would then be a matter for the flag State or, failing that, for the normal ILO oversight system.
- 9.4 It is hoped that the inclusion of equivalent Port State Control provisions will meet a number of long standing aims of the international community, including contributing to the elimination of sub-standard shipping and facilitating the establishment of a functioning safety culture onboard ships. There has been general acceptance that a safety culture cannot be established by legislation and that certain prerequisites are essential if seafarers are, in practice, to be able to exercise what the IMO has set out as:

“The challenge for trainers and training, and managers ashore and afloat, is how to minimise these unsafe acts, how to instil not only the skills but also the attitudes necessary to ensure safety objectives

are met. The aim should be to inspire seafarers towards firm and effective self-regulation and to encourage personal ownership of established best practice. Internationally recognised safety principles and the safeguards of best industry practice have to become an integral part of an individuals own standards."

- 9.5 It is also clear, as was the case for ILO 147 and as is provided for in the IMO, that at a later date there will be a need for the production of a set of guidelines for Port State Control Officers on the application of Port State Control provisions set out in the CMLC. It will not be possible to include all the necessary detail in the text of the Convention, including in Part B.
- 9.6 It is evident that the Port State Control provisions set out in Title 5 are complex and, as has previously been stated, the Seafarers' Group believes that it is essential that there is the possibility of being able to fine tune them, at a later date, using the simplified amendment procedure.

Seafarers Comments on the on-shore complaints procedures

The on-board complaints procedures relate to violations of the Convention. It is therefore much more than just covering simple grievances. It addresses, inter alia, issues related to the non-payment of wages, compensation for injury or death, denial of medical care, the non-provision of food, the non-provision of protective equipment, abuse and harassment. It is therefore not limited to the seafarer's employment agreement and concerns issues over which the ship has no control.

As Regulation 5.1.5 {4}, which is mature text, makes clear:

"The provisions in this Regulation and related sections of the Code are without prejudice to a seafarer's right to seek redress through whatever legal means he or she considers appropriate."

As the issues in question include violation of fundamental rights it is not appropriate to establish that there is a hierarchy of levels at which the complaints must be made. If it were limited to simple grievances rather than the breach of fundamental rights, this might be appropriate. However, a grievance procedure is generally established through collective bargaining and it would not be appropriate for the Convention to contain provisions which are that detailed. Therefore, it is appropriate that a seafarer whose rights have been breached should have the full freedom of action and be able to seek recourse to external procedures, which may include recourse to a civil action through judicial mechanisms.

Section 5.2 addresses Port State Responsibilities and establishes the basis for an essential control mechanism. Section 5.2.2 concerns the ability for seafarers to make complaints to a Port State Control Officer about violations of the provisions of the Convention which are related to seafarers working and living conditions, with the scope being set out in Appendix A5-III. There is a reference on whether the on-board complaints system has been explored. While this may be appropriate to some issues it is clear that it does not apply to all aspects. In this regard it should be noted that the IMO provisions on operational Port State Control expressly provided for the anonymity of the complainant. ILO Convention No. 147 establishes a Port State Control regime and ships have been detained for accommodation problems, insufficient food or potable water etc. In this context a "complaint" is defined as meaning information about the safety of the ship, including the safety or health hazards to its crew (Article 4 (3)).

There are attempts in Section 5.2.2 on the onshore complaints-handling procedures to establish a choice of law clause and a requirement that the only administrative or judicial systems that can be used are those of the flag State. This is totally unacceptable to the seafarers and would place them in a uniquely disadvantaged position in terms of equality before the law. As previously said this is not a grievance procedure and will be addressing issues which are a breach of the Convention and which may very well also constitute a breach of the employment agreement or situations where there an act or omission by the shipowners which gives a seafarer a legal right of action. It would result in the "bill of rights" trying to deprive seafarers of long established fundamental rights and freedoms.

This has led the Seafarers to propose the addition, in the mature text, of the following principle:

"Seafarers, like shipowners and all other persons, are equal before the law and are entitled to the equal protection of the law and shall not be subject to discrimination in their access to courts, tribunals or other dispute resolution mechanisms."

It should be recalled that the Assembly of the International Maritime Organization (IMO) and the Governing Body of the ILO adopted Resolution A.931 (22) (Guidelines on Shipowners' Responsibilities in Respect of Contractual Claims for Personal Injury to or Death of Seafarers) which provided:

"CONSIDERING ALSO that, given the global nature of the shipping industry, seafarers need special protection,"

The international community has long recognised the special nature of shipping and the highly mobile nature of ships, by establishing the legal concept of action in rem, which permits the enforcement of claims against a ship rather than having to pursue the shipowner. This is essential given the widespread use of one-ship shell companies whose only asset is the vessel itself and the lack of transparency in terms of real ownership. To this end the International Convention on Maritime Liens and Mortgages (1993) and the International Convention on Arrest of Ships (1999) (which revised a previous Convention) have been adopted.

Article 6 of the Universal Declaration of Human Rights establishes that "Everyone has the right to recognition everywhere as a person before the law." This is an inalienable human right and fundamental freedom. It is also repeated in widely ratified international instruments like the International Covenant on Civil and Political Rights of 1966 (Article 16).

The issue of private international law is complex and the actual rules are generally determined at the national level. The possible exception is rules formulated within the framework of regional economic integration structures, for example the European Union's Rome Convention. However, such regional agreements generally only regulate the rules and procedures within States which are members of such arrangements. Private international law addresses issues related to which is the most appropriate forum and may result in a court determining that there is a more suitable forum (forum non conveniens). It may however be determined that an action may be pursued within the forum where the complaint was initially lodged. If so, the national rules, regulations or precedents on procedural aspects (the laws of the forum) and the substantive law (taking into account the extent to which any foreign law will be relevant), will determine the case. It is clear that this is a very complex issue and that it is outside the competence of the ILO, with the United Nations Law Commission perhaps being the competent body.

The issues which may involve recourse to an on-shore dispute resolution mechanism are not just related to the seafarer's employment agreement but concern breach of contract and the pursuit of establish legal rights. In this regard it is worth noting that the IMO/ILO Guidelines on Shipowners' Responsibilities in Respect of Contractual Claims for Personal Injury to or Death of Seafarers also provide:

"that full and prompt contractual compensation should be paid without prejudice to any other legal rights that seafarers or their next of kin may have,"

The exclusive jurisdiction of the flag State is limited to when the vessel is on the high seas. When the ship enters the territorial water of another State, it also brings the vessel partly within the jurisdiction of the coastal State. It is also generally accepted that when a vessel voluntarily enters a port (the internal waters) it comes within and consents to the jurisdiction of the port State. For example, if a murder is committed on board a ship while it is in port, the police and criminal law of port State has jurisdiction. Similarly, the concept of *lex loci delicti* (the law where the act occurred) is an established legal principle within many jurisdictions.

For the ILO to seek to regulate issues that are beyond its competence and which would be incompatible with the principles found within many Member State's constitutions or legal systems (which are related inter alia to their rules on private international law) or conflicts with other international instruments would constitute a fundamental impediment to ratification.

It is also noted that there are no suggestions that the States which are arguing for the draft convention to establish the choice of law and the choice of forum are offering to meet the costs of seafarers flying to and subsisting within the flag State during the processing of the complaint, nor of meeting the costs of legal representation or of providing the necessary translation facilities in order for a seafarer to be able, in practice, to use such systems.

The Seafarers consider that the ILO should think long and hard before adopting a provision which would be or could be interpreted as impinging on the fundamental rights and freedoms of a group of vulnerable workers, seafarers. We are seeking to establish a "bill of rights" for seafarers and not to take away fundamental rights and freedoms.

We suggest that the current text confuses a number of issues. Firstly, a requirement to establish a grievance procedure and that would be better addressed in Title 2. Secondly, the ability of a seafarer or other interested person to "complain" (that is, pass information) to a Port State Control Officer. The current regime established by ILO Convention No. 147 should be retained and the text should reflect the previously taken political decision to substantially expand Port State Control for non-compliance with the Convention. Thirdly, the attempts to impose a choice of law clause and the selection of a legal forum should be dismissed. It is ludicrous to try to use an ILO maritime labour convention to address such issues, which would have other far reaching implications.

Resolution concerning sub-standard shipping

The 29th Session of the Joint Maritime Commission,

Having met in Geneva from 22 to 26 January 2001,

Noting with concern that a sub-standard shipping or operation has been defined in terms of being substantially below the requirements established by the International Maritime Organization, without also giving due regard to compliance with other applicable international requirements,

Noting also that the United Nations Convention on the Law of the Sea requires flag States to exercise effective jurisdiction in relation to social and labour conditions over vessels which fly their flags,

Noting further the discussion document on “the impact on seafarers’ living and working conditions of changes in the structure of the shipping industry” (JMC/29/2001/3),

Requests that the Governing Body invite the Director-General to take all necessary measures to ensure that applicable social and labour standards of the ILO are given due consideration in determining whether a ship or operation is sub-standard.

From PMOU Blue Book 2003

Accommodation [and crew]

Access/structure
Berth dimensions, etc.
Clear head
Dirty, parasites
Drainage
Electrical devices
Flying wires
Furnishings
Heating
Laundry
Lighting
Medical Equipment
Messroom (location)
Minimum age
No direct openings into sleeping rooms cargo/mach.
Noise
Oil skin locker
Other (crew and accommodation)
Pipes, wires (insulation)
Record of inspection
Sanitary Facilities
Sickbay
Sleeping room
Ventilation

Accident prevention (ILO147)

Entry dangerous spaces
Other (working spaces ILO)
Personal equipment
Pipes, wires (insulation)
Protection machines/parts
Structural features (ship)
Warning notices

Food and catering

Cleanliness
Cold room
Cold room cleanliness
Cold room temperature
Food personal hygiene
Food segregation
Food temperature
Galley, handlingroom (maintenance)
Lighting
Other (food)

Provisions quality
Provisions quantity
Record of inspection
Ventilation
Water, pipes, tanks

Working spaces and accident prevention

Danger areas
Electrical
Emergency cleaning devices
Entry dangerous spaces
Gas instruments
Heating
Lighting
Machinery
Obstruction/slipping, etc.
Other (working space)
Other (working spaces ILO)
Personal equipment
Pipes, wires (insulation)
Protection machinery
Protection machines/parts
Safe means of access
Safe means of access Deck - hold/tank, etc.
Safe means of access Shore - Ship
Steam pipes and pressure pipes
Structural features (ship)
Ventilation
Warning notices

Mooring arrangements (ILO 147)

Adequate lighting
Anchoring devices
Other (mooring)
Ropes and wires
Winches & capstans

Detainable deficiencies

To assist the PSCO in the use of these guidelines, there follows a list of deficiencies, grouped under relevant conventions and/or codes, which are considered to be of such a serious nature that they may warrant the detention of the ship involved. This list is not considered exhaustive but is intended to give examples of relevant items.

Areas under the SOLAS Convention

- 1) *Failure of proper operation of propulsion and other essential machinery, as well as electrical installations.*
- 2) *Insufficient cleanliness of engine room, excess amount of oily-water mixture in bilges, insulation of piping including exhaust pipes in engine room contaminated by oil, and improper operation of bilge pumping arrangements.*
- 3) *Failure of proper operation of emergency generator, lighting, batteries and switches.*
- 4) *Failure of proper operation of the main and auxiliary steering gear.*
- 5) *Absence, insufficient capacity or serious deterioration of personal life-saving appliances, survival craft and launching arrangements.*
- 6) *Absence, non-compliance or substantial deterioration, to the extent that it can not comply with its intended use of fire detection system, fire alarms, fire-fighting equipment, fixed fire-extinguishing installation, ventilation valves, fire dampers and quick-closing devices.*
- 7) *Absence, substantial deterioration or failure of proper operation of the cargo deck area fire protection on tankers.*
- 8) *Absence, non-compliance or serious deterioration of lights, shapes or sound signals.*
- 9) *Absence or failure of proper operation of the radio equipment for distress and safety communication.*
- 10) *Absence or failure of proper operation of navigation equipment, taking into account the relevant provisions of SOLAS regulation V/12(o).*
- 11) *Absence of corrected navigational charts and/or all other relevant nautical publications necessary for the intended voyage, taking into account that electronic charts may be used as a substitute for the charts.*
- 12) *Absence of non-sparking exhaust ventilation for cargo pump rooms.*
- 13) *Serious deficiency in the operational requirements listed in paragraphs 3.5.1 to 3.5.69.*
- 14) *Number, composition or certification of crew not corresponding with safe manning document.*
- 15) *Non-implementation of the enhanced programme of inspection under resolution A.744 (18).*

Areas under the IBC Code

- 1) *Transport of a substance not mentioned in the Certificate of Fitness or missing cargo information.*
- 2) *Missing or damaged high pressure safety devices.*
- 3) *Electrical installations not intrinsically safe or not corresponding to the Code requirements.*
- 4) *Sources of ignition in hazardous locations.*
- 5) *Contravention of special requirements.*
- 6) *Exceeding of maximum allowable cargo quantity per tank.*
- 7) *Insufficient heat protection for sensitive products.*

Areas under the IGC Code

- 1) *Transport of a substance not mentioned in the Certificate of Fitness or missing cargo information.*
- 2) *Missing closing devices for accommodation or service spaces.*
- 3) *Bulkhead not gastight.*
- 4) *Defective air locks.*
- 5) *Missing or defective quick-closing valves.*
- 6) *Missing or defective safety valves.*
- 7) *Electrical installations not intrinsically safe or not corresponding to the Code requirements.*
- 8) *Ventilators in cargo area not operable.*
- 9) *Pressure alarms for cargo tanks not operable.*
- 10) *Gas detection plant and/or toxic gas detection plant defective.*
- 11) *Transport of substances to be inhibited without valid inhibitor certificate.*

Areas under the Load Lines Convention

- 1) *Significant areas of damage or corrosion, or pitting of plating and associated stiffening in decks and hull effecting seaworthiness or strength to take local loads, unless properly authorised temporary repairs for a voyage to a port for permanent repairs have been carried out.*
- 2) *A recognised case of insufficient stability.*
- 3) *The absence of sufficient and reliable information, in an approved form, which by rapid and simple means enables the master to arrange for the loading and ballasting of the ship in such a way that a safe margin of stability is maintained at all stages and at varying conditions of the voyage, and that the creation of any unacceptable stresses in the ship's structure are avoided.*

- 4) *Absence, substantial deterioration or defective closing devices, hatch closing arrangements and watertight/weathertight doors.*
- 5) *Overloading.*
- 6) *Absence of, or impossibility to read, draught marks and/or load line marks.*

Areas under the MARPOL Convention, Annex I

- 1) *Absence, serious deterioration or failure of proper operation of the oily-water filtering equipment, the oil discharge monitoring and control system or the 15 ppm alarm arrangements.*
- 2) *Remaining capacity of slop and/or sludge tank insufficient for the intended voyage.*
- 3) *Oil Record Book not available.*
- 4) *Unauthorised discharge bypass fitted.*
- 5) *Failure to meet the requirements of regulation 13G(4) or alternative requirements specified in regulation 13G(7).*

Areas under the MARPOL Convention, Annex II

- 1) *Absence of P and A Manual.*
- 2) *Cargo is not categorised.*
- 3) *No Cargo Record Book Available.*
- 4) *Transport of oil-like substances without satisfying the requirements.*
- 5) *Unauthorised discharge bypass fitted.*

Areas under the STCW Convention

- 1) *Failure of seafarers to hold a certificate, to have an appropriate certificate, to have a valid dispensation or to provide documentary proof that an application for an endorsement has been submitted to the Administration.*
- 2) *Failure to comply with the applicable safe manning requirements of the Administration.*
- 3) *Failure of navigational or engineering watch arrangements to conform with the requirements specified for the ship by the Administration.*
- 4) *Absence in a watch of a person qualified to operate equipment essential for safe navigation, safety radiocommunications or the prevention of marine pollution.*
- 5) *Inability to provide for the first watch at the commencement of a voyage and for subsequent relieving watches persons who are sufficiently rested and otherwise fit for duty.*

Areas which may not warrant a detention, but where, e.g. cargo operations have to be suspended

Failure of proper operation (or maintenance) of inert gas system, cargo related gear or machinery will be considered sufficient grounds to stop cargo operation.