
INTERNATIONAL LABOUR ORGANIZATION
Sectoral Activities Programme

**High-level Tripartite Working Group
on Maritime Labour Standards
(Third meeting)**

**Consolidated maritime labour Convention (First draft)
Commentary**

Geneva, 2003



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Commentary

General

The first draft for a Convention on maritime labour standards (2005), to which this commentary relates, has been prepared for the third meeting (June-July 2003) of the High-level Tripartite Working Group on Maritime Labour Standards.

This draft seeks to implement the decisions of the High-level Group at its second meeting in October 2002. The Office prepared a preliminary draft text, which was considered by the Tripartite Subgroup at its meeting in February 2003. The new draft takes into account the discussion and guidance provided at that meeting as well as advice received in an ongoing consultation with constituents.

At the meeting in February the Subgroup identified a number of concerns and provided guidance on the further development of the draft text. An important point of concern identified by the Subgroup was the complexity and length of the preliminary draft, which embodied the actual text of all provisions of existing maritime labour instruments that appeared to be still relevant today. The length and, in some cases, the overlapping provisions as well as the more traditional legal formal style made it difficult to read. This created a barrier to adoption and implementation by governments and to the social partners in identifying rights and standards. It was felt that the preliminary draft did not clearly provide a statement of the core employment rights of seafarers. Adoption of a “plain language” drafting approach was recommended as well as inclusion of simple-purpose statements for the Regulations. Another point of concern related to the need indicated in the High-level Group at its last meeting to transfer some of the more highly detailed technical provisions from the mandatory to the non-mandatory part of the Convention. These details, taken from existing Conventions, were considered as partly responsible for inhibiting ratifications. The Subgroup emphasized the importance of the Office adopting a radical approach in this respect, without however compromising the general substance of existing mandatory standards. There were suggestions that some parts of the Convention would be more useful to the constituents if they were presented as separate publications on specific technical matters. It was also suggested that the Convention would be more readable if it were presented in separate parts reflecting the different levels of obligation under the Convention. The present “first draft”, does not itself always reproduce the wording of existing relevant maritime labour standards, but seeks to distil the essence of the obligations and rights contained in them in order to develop a text that will be possible for all Members to ratify and implement.

In accordance with the guidance provided to the Office, this first draft is presented in the following three documents, which together would make up the Convention:

1. **Articles and Regulations** (in document TWGMLS/2003/2) – These would set out the core rights, principles and obligations in the Convention. They could only be changed by the General Conference in the framework of article 19 of the ILO Constitution. The Regulations are divided into five general areas:
 - *Title 1:* Minimum requirements for seafarers to work on a ship.
 - *Title 2:* Conditions of employment and crewing.
 - *Title 3:* Accommodation, welfare facilities, food and catering.

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- *Title 4: Health protection, welfare, medical care and social security protection.*
 - *Title 5: Compliance and enforcement.*
2. **The Code** – This is a two-part document, Parts A and B, which could be amended either by the General Conference, in the framework of article 19 of the ILO Constitution, or by a simplified amendment procedure described in Article XV of the Convention. The simplified procedure responds to the concern for more rapid and less costly updating of the detailed requirements for implementing the rights, principles and obligations under the Articles and Regulations. The Code is presented in two documents comprising:
- *Code, Part A, Standards* (in document TWGMLS/2003/3) – This part would contain mandatory minimum standards for the implementation of the Regulations. It follows the same five-part division of topic areas as the Regulations and is numbered in the same way as the Regulations to ensure ease of reference.
 - *Code, Part B, Guidelines* (in document TWGMLS/2003/4) – This part would contain detailed guidelines, as well as recommendations and model documents. Although these would not be binding, Members would be required to take them into account and consider them when implementing the Standards. This part of the Code also follows the same five-part division of topic areas.

Accordingly, in order to review, as a whole, the first set of provisions proposed for Title 2, for example, the reviewer would need to look at:

- *Regulation 2.1*, in document TWGMLS/2003/2;
- *Standard A2.1*, in document TWGMLS/2003/3; and
- *Guideline B2.1*, in document TWGMLS/2003/4.

The Articles dealing with the core rights, Members' obligations, matters relating to the scope of the Convention and procedures for entry into force and amendment, including a proposed Special Tripartite Committee, at the start of the draft Convention, can be regarded as at an advanced state given the comprehensive discussions of the High-level Group and the Subgroup.

The substantive content of the Regulations is also well developed, on the basis of a document submitted to the High-level Group at its second meeting and of discussions in the Subgroup. The commentary that follows these general comments relates to the Articles and Regulations, with specific points arising under the Code being discussed in relation to the Regulations that they implement. Square brackets [] have been placed in the text around points requiring further discussion before a proposal is made by the Office.

Comments on the Articles

Comment 1 (on Article I)

The first Article, on general obligations, begins: "Each Member which ratifies this Convention". In accordance with the practice in drafting international labour Conventions, subsequent references in the Convention to "each Member" or "a Member", for example,

would be understood as referring to Members that have ratified the Convention unless the context requires otherwise.

Comment 2 (on Article II)

1. Article II sets out general definitions (paragraph 1) of terms occurring in different parts of the Convention, as well as (paragraphs 2 to 6) the general scope of application of the Convention. The general definitions and the scope may be the subject of specific variations for the purpose of particular provisions of the Regulations or the Code; this is provided for in the opening words of each of the first two paragraphs of this Article.

2. At the Subgroup meeting in February there was extensive discussion about the definition of a “seafarer”. International labour Conventions¹ such as Nos. 164, 166, 178 and 179² define seafarers to include any person working or employed on board in any capacity. Others simply leave the matter of definition to national law (i.e., a “seafarer” may be whoever is considered a seafarer under national law – see Convention No. 108). However, the content of many maritime labour Conventions primarily speaks to the employment situation of personnel involved in some way in the operation of the ship – the “crew”. In most cases the crew are engaged directly or indirectly by the shipowner (broadly defined). There are a number of people working on board ships, particularly passenger ships, who may not fall within this category (such as aestheticians, sports instructors and entertainers). The employment situation and protection available to these maritime industry workers is less clear. The difficulty with leaving the matter of determining which workers are protected by the Convention solely to national law is that it may perpetuate unevenness within the global maritime labour force with respect to the application of standards.

3. At its meeting in February, the Subgroup did not reach a consensus on which workers should be considered as “seafarers” covered by the Convention. It agreed however on a working definition, which is used in the present draft (paragraph 1(f) of Article II). It basically corresponds to the definition in the Conventions cited above. With a definition of this kind, the new Convention would in principle cover all maritime workers; however the Convention would, at the same time, be drafted to allow for tailoring of the scope of some standards so as to make them apply only to specified groups. The working definition proposed in the Subgroup has been modified in this draft to exclude personnel such as dockworkers. This was done to address a concern raised by some members of the Subgroup that personnel temporarily executing a task on board a ship might be inadvertently included under the Convention regime. The exclusion is drawn from the exceptions under Convention No. 73 (Article 2) for medical certification.

4. The Subgroup’s discussion referred to above suggests that this is an issue that may need further consideration by the High-level Group. The point of departure for the working definition would be all-inclusive, but allowing exclusions or limitations of scope when it is considered that a particular provision should only apply to the crew of a ship, for example. Another possibility would be to separate the different categories of persons involved, right from the start, restricting the term seafarer to the master or an officer or rating, and having other definitions such as “other employed persons on board” and “self-employed persons on board”.

¹ Convention No. 147 does not address the matter.

² Convention No. 178 also provides for consultation with the social partners when there is doubt as to whether someone is a seafarer.

5. With respect to the scope of application of the Convention, paragraph 3(a) of Article II may need special attention: the determination of a tonnage limit, if any, is an important issue. Any determination should include a consideration of the full range of requirements under the Convention. It is noted that Convention No. 147 does not have a tonnage limitation. Another important question relates to domestic, coastal and near coastal services. At the second meeting of the High-level Group, the Shipowner representatives considered that these services should be excluded from the scope of the Convention. The Seafarer representatives could not accept such exclusion, but recognized that particular cases could be discussed on a case-by-case basis. The Government representatives, in general, considered that all seafarers should indeed be covered, but that some flexibility could be left to each Member to decide to exclude ships on coastal voyages, subject to tripartite consultations. Paragraph 6 seeks to offer an intermediate solution that ensures that core rights are respected but provides some flexibility in the strict application of the standards and of the certification system designed to implement these rights. Paragraph 7 establishes the principle of “no more favourable treatment” approved by the High-level Group. This principle may provide an incentive for ratification of the Convention and help to secure a level playing field with respect to employment rights.

Comment 3 (on Articles III and IV)

1. These two Articles set out fundamental rights and principles and seafarers’ employment rights pursuant to the Decent Work Agenda. The substantive content of Articles III and IV derives for the most part, from the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147). In addition to stating certain basic employment rights, Convention No. 147 and its 1996 Protocol refer to some of the fundamental international labour Conventions in their appendices, as well as to other maritime labour Conventions, and require each ratifying Member “to satisfy itself that the provisions of [its relevant] laws and regulations are substantially equivalent to the Conventions or Articles of Conventions ..., in so far as the Member is not otherwise bound to give effect to the Conventions in question”. Certain Members which may be interested in ratifying the new Convention have expressed difficulties concerning specific provisions of fundamental Conventions listed in the appendices referred to. They are however under an obligation to respect the principles concerning the fundamental rights that are the subject of those Conventions: according to the ILO Declaration on Fundamental Principles and Rights at Work, “all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions”. The Declaration, including this legal statement, was agreed without dissent by the International Labour Conference in 1998. It is accordingly proposed that the new Convention include a mandatory provision – namely Article III – under which each ratifying Member would reaffirm the principles and rights that are the subject of the eight fundamental Conventions.

2. The first draft goes on – in Article IV – to require each ratifying Member to ensure decent conditions of work. On the recommendation of the Subgroup the terms “secure” and “health” were included among the seafarers’ employment rights to take into account heightened concerns about the issue of security, in particular. All the standards set out elsewhere in the Convention should be read in conjunction with the fundamental principles and rights referred to in Article III and the basic employment rights referred to in Article IV.

Comment 4 (on Article V)

Article V provides the legal foundation for the provisions on compliance and enforcement in Title 5 of the Convention. Explanations are provided in comment 14 below. The obligations are implicit in such instruments as Convention No. 147 and the Labour Inspection (Seafarers) Convention, 1996 (No. 178). Paragraphs 2 and 7 are directed to encouraging Members to develop an effective exercise of their jurisdiction through the adoption of a systematic approach to compliance and enforcement of the legal standards. The level and nature of any sanctions for violations are not specified beyond the requirement that they be developed and that they be enough to discourage violations of the standards. Paragraph 5, relating essentially to labour-supplying responsibilities, requires Members to exercise “effective jurisdiction and control” over seafarer recruitment and placement services and only “effective jurisdiction” over seafarers’ employment agreements; the reason for this different wording is explained in comment 14 (point 16) below.

Comment 5 (on Article VI)

1. Paragraphs 1 and 2 of this Article set out the legal relationship between the parts or levels of the new Convention as agreed in the High-level Group. The Articles are at the first level of the Convention, with further elaboration of the rights and obligations being set out in the binding Regulations (Titles 1 to 5; second level). Each Regulation is then implemented through a combination of mandatory Standards (Code, Part A, third level) and Guidelines (Code, Part B, fourth level). The provisions of Part B of the Code, like those of international labour Recommendations, would not be mandatory. The nature of the Part B provisions would however slightly differ from those of Recommendations in two respects:

- (a) Under article 19, paragraph 6, of the ILO Constitution, Members have an obligation to submit each international labour Recommendation to their competent legislative authority for “consideration with a view to effect being given to it”. It is proposed in paragraph 2 of Article VI that a Member ratifying the consolidated Convention should undertake to give “*full* consideration to implementing its responsibilities in the manner provided for in Part B”.
- (b) Recommendations adopted at the same time as a Convention often assist in the interpretation of the Convention. In the proposed consolidated Convention, this role would take on a greater importance. As explained further below (comment 9, point 2), Part A of the Code would often consist of general obligations. Precise requirements corresponding to those obligations would be recommended in Part B. The (non-mandatory) guidance given by Part B would in many cases be essential in order for ratifying Members to have a precise idea of the mandatory obligations involved and for the supervisory bodies to assess whether those general obligations are being adequately implemented.

2. Paragraphs 3 and 4 set out the main element of flexibility that might be introduced into the Convention. With respect to national implementation of Convention requirements, paragraph 3 relates to the concept of “substantial equivalence”, a possibility which was approved by the High-level Group provided that the concept was applied in a clear and transparent way. In this connection, the draft introduces an element not contained in Convention No. 147, which first referred to “substantial equivalence”. Under Convention No. 147 (Article 2(c)), it is up to the ratifying Member to “satisfy itself” that the provisions it adopts are (at least) substantially equivalent to those referred to in that Convention. There appeared to be a need to also provide some objective means of assuring others that the measures (however adopted – law, regulation, collective bargaining agreement, codes

or other measures) were being adequately implemented and to also provide guidance for port state officials (see comment 14, point 6 below). Paragraph 4 provides a general definition of substantial equivalence, which is based on the analysis made by the Committee of Experts on the Application of Conventions and Recommendations in its 1990 General Survey on Convention No. 147,³ and cited with approval at the last meeting of the High-level Group. The Committee of Experts made it clear that the precise application of the concept might often depend upon the specific provision concerned; paragraph 4 thus provides for the possibility of further directions being given in the Code (either in the binding Part A or as guidance in Part B) with respect to particular provisions of the Convention.

3. The flexibility which would allow a Member ratifying the new Convention to “pick and choose” between the different families of rights (following the “MARPOL approach”)⁴, or to exclude the application to it of specific rules, has not yet been the subject of any conclusions in the High-level Group. The Shipowner representatives and certain Governments have expressed support for such an approach. The Seafarer representatives are opposed to it. In general, Governments have indicated that a conclusion would depend upon the content of the new instrument and the flexibility provided in it. As far as flexibility is concerned, it seems to be agreed that the concept of substantial equivalence should be applicable and also that some of the detailed obligations of existing international labour Conventions should be transferred from the binding Part A of the Code to the non-binding Part B. For these reasons, the “MARPOL approach” is not reflected in the present first draft.

Comment 6 (on Articles VII to XI)

1. These “final clauses” are based on the standard provisions of international labour Conventions, with particular reference to Convention No. 147. Unlike in Convention No. 147, Article 5, there are no preconditions for Members seeking to ratify the new Convention.

2. The number and weight of ratifications required for entry into force, in accordance with paragraph 3 of Article VII still need to be discussed. Two suggestions are made in the current draft. The formula of 10 Members constituting 25 per cent of gross tonnage of the world’s merchant shipping was used in Convention No. 147. The 25 Members/50 per cent gross tonnage formula is used by the International Convention for the Safety of Life at Sea (SOLAS), 1974. Other options include the 1988 SOLAS Protocol 15/50 per cent and ILO Convention No. 180 (1996) (requiring ratification by “five members, three of which have at least 1 million gross tonnage.” A Government representative in the Subgroup advised that the SOLAS 1974 formula was the correct one because of the proposed inclusion in the Convention of the “no more favourable treatment” clause (see paragraph 7 of Article II); in his opinion, such a clause would be justified only if it were agreed to by Members making up at least half of the world’s merchant shipping tonnage.

3. Another consideration may be the desirability of early entry into force weighed against the undesirability of having a long transitional period in which some countries are bound by the new Convention and others by the present Conventions.

³ ILO: *Labour standards on merchant ships*, International Labour Conference, 77th Session, Geneva, 1990, paras. 65-79.

⁴ See the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL, 73/79), Article 14.

4. Article IX is in outline form only. It is intended simply as a reminder of choices that will have to be made at a later date, when the content of the new Convention and its potential for speedy ratification become clear. It deals with the situation with respect to the Conventions which will be revised by the new Convention, which could comprise all existing maritime labour Conventions. Difficult questions are raised in connection with the options provided by a provision to be found in more or less similar terms in international labour Conventions adopted since 1929. In Convention No. 147, for example, the provision reads as follows (Article 11):

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides:
 - (a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions [restricting the possibility of denunciation to specified times], if and when the new revising Convention shall have come into force;
 - (b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

Thus, if an existing instrument (containing the above provision) is identified as a revised Convention, each Member that has ratified it which becomes a party to the new Convention would cease to be a party to the revised Convention. In addition, the latter Convention would be blocked to further ratification when the new Convention came into force. This would be the normal consequence and the question arises as to whether or not the new Convention should “otherwise provide”. On the one hand, it is clearly undesirable for a Member to be party to two different Conventions covering the same subject matter (although duplication in such matters as reporting under article 22 of the ILO Constitution could no doubt be avoided in practice). Moreover, allowing other Members to ratify the revised Conventions would tend to perpetuate a system which it is desired to replace as soon as possible by a single Convention. On the other hand, those other Members may not be in a position to ratify the new Convention, in particular because of the vast scope of its subject matter. Would the desirability of quickly replacing the old system be a sufficient justification for preventing such Members from assuming any further obligations with respect to maritime labour standards?

Comment 7 (on Article XII)

1. Article XII would invite the ILO Governing Body to establish a Special Tripartite Committee. This Committee would be charged with generally reviewing the working of the new Convention, and be given specific functions with respect to the proposed simplified amendment procedure for the Code (see comment 8 below). It would consist of representatives of Governments which had ratified the new Convention and of Shipowner and Seafarer representatives chosen by the Governing Body (who might in practice be the same as the members of the Joint Maritime Commission).⁵ There would thus not be national tripartite delegations, as in the International Labour Conference. The social dialogue in this case would rather operate on a global basis, on the model of the Governing Body. This is justified in view of the essentially globalized nature of the maritime sector.

2. The Government representatives of non-ratifying Members could participate in the Committee but would have no right to vote. During the discussions at the second meeting

⁵ ILO: *Simplified amendment procedure for the proposed new maritime labour Convention*, High-level Tripartite Working Group on Maritime Labour Standards (second meeting), Geneva, 2002, doc. TWGMLS/2002/2, para. 18.

of the High-level Group, a number of Government representatives expressed the view that those non-ratifying Members should also have the right to vote. They also stressed the need for equitable regional representation. The degree of participation of such Members in the adoption of amendments to the Code under the simplified procedure is discussed below in comment 8 (point 10). It should be noted that, if the Convention limited the right to vote on amendments to the representatives of Governments that had ratified the Convention, it could at the same time accord full voting rights to all Members of the Organization on other matters. The question of equitable regional distribution would depend upon whether or not the Committee should be open-ended, as at present conceived. The task of ensuring such distribution with respect to the appointment of officers and the membership of subcommittees could perhaps best be left to the Governing Body.

3. Paragraph 4 contains a proposal concerning voting rights on this Committee, which reflects the views of the Subgroup at its meeting last February. The question discussed was whether Government representatives in the Committee should have equal voting power with the Shipowner and Seafarer representatives, as in the committees of the International Labour Conference, or twice as many votes; this is the case in the Plenary of the International Labour Conference. It was noted that there was no precedent for the envisaged situation: on the one hand, the proposed tripartite committee could not of course be equated with the International Labour Conference itself; on the other hand, it would be entrusted with a greater responsibility than a Conference Committee in that (as will be seen in comment 8 below), it would actually adopt (rather than only recommend) certain amendments to the Convention (subject to Conference approval). The Government representatives in the Subgroup, considered that the 2-1-1 configuration should be adopted and, realizing the need for Governments to be fully involved in the amendment process, the Shipowner and Seafarer representatives voiced no objection. The 2-1-1 configuration would mean that, in the (probably unlikely) event of a formal vote being needed in the Committee, the Governments would have 50 per cent of the votes, and the Shipowners and the Seafarers would each have 25 per cent. This would meet the concern that has been expressed by some Government representatives relating to the risk of being outvoted, especially in the case of the adoption of amendments (see below), which would require a majority of 66.67 per cent. In addition, in the case of the adoption of amendments, a further provision is proposed (Article XV, paragraph 4(c)) to protect any one of the three tripartite groups from being outvoted.

Comment 8 (on Articles XIII to XV)

1. These articles address the procedures for amendment of the new Convention, dealt with in a report prepared for the second meeting of the High-level Group.⁶ Article XIII provides that the Convention can be amended by the General Conference in the framework of article 19 of the ILO Constitution. In addition the Code could be amended by a simplified process that has been developed to meet the need for more rapid updating of the technical parts of the Convention, without the need for an entire revision.

2. Article XIV sets out the procedures, in the framework of article 19 of the Constitution, for amendment of the Convention as a whole, involving an express ratification procedure. The procedure envisaged would be an innovation for the ILO, but the legal effects of this amendment procedure would be the same as that of the procedures used in the ILO for the revision or modification of instruments, with one important exception: there would be no separate revising Convention or Protocol; there would be a single amended Convention, in which the legal link between all the ratifying Members

⁶ *ibid.*

would be retained (see the last sentence of comment 6, point 1, above), even though some of them might be bound by different versions of the same provision, rather than by different Conventions, as at present. Members subsequently ratifying the Convention would be bound by all amendments adopted so far unless provided otherwise in any amendment (Article XIV, paragraph 8). The legal effect would thus be the same as that of closing a revised Convention to further ratification. This is also the reason for the distinction made in this Article with respect to the object of ratification: since Members which had not yet ratified the Convention would be bound by its latest version, they would receive, for consideration with a view to ratification, a copy of the whole Convention as amended up to the current time (paragraph 3). Members which had already ratified the Convention would receive only the specific amendment for consideration (paragraph 2). The amendment would only come into force if the ratifications of the amendment taken together with the ratifications of the Convention as amended fulfilled the requirements set out in paragraph 4. These requirements might be the same as those set for the initial entry into force of the Convention itself (under Article VII) or they might be set at a lesser amount (this is the case with the requirements for the entry into force of the Protocol to Convention No. 147, for example, as compared with the entry-into-force requirements for that Convention itself).

3. Under the ILO's standard provision enabling the revision of Conventions, reproduced above (in point 4 of comment 6), once a revised Convention comes into force the provisions of the previous Convention can no longer be the subject of new ratifications "unless the new Convention otherwise provides". Similarly, paragraph 9 of Article XIV would enable the Committee to adopt an amendment, while still allowing new Members that ratify the Convention to apply the previous version of the Convention.

4. Article XV introduces the most important innovation of the new Convention: the amendment of certain provisions (the Code) through a tacit acceptance procedure rather than express ratification. This subject was dealt with in depth in the report submitted to the High-level Group, referred to above, and discussed in detail at the second meeting. There was general agreement on the concept itself and on the main elements of the amendment procedure proposed.⁷ This comment will not repeat the explanations given in this respect in the Office report referred to. However, differences of opinions were expressed at the meeting on important issues. These are discussed below.

5. *Level of amendment.* Most of the Government representatives at the second meeting considered that the simplified amendment procedure could only be used for the third and fourth levels of the Convention (Code, Part A and Part B). One or two Government representatives, however, reserved their position with respect to the binding Part A of the Code or stated that certain provisions, particularly those relating to enforcement, should always be subject only to the express amendment procedure. The Seafarer representatives strongly considered that it should be possible to use this tacit acceptance procedure also at the second level, i.e. that of the Regulations setting out basic principles and rights, provided that the revision was made at a maritime session of the International Labour Conference. Some Government representatives agreed, subject to the proviso that any amendment adopted without express ratification, normally involving national parliamentary processes, should be justified by reference to a specific provision at the first level, covering fundamental principles and rights. The position of these and other Government representatives reflects a constitutional requirement at both the national level

⁷ An adjustment has been made with respect to the support needed for proposed amendments (see Article XV, para. 2) to take account of the fact that, as the number of representatives on the Special Tripartite Committee increases, the requirement of support by half the Members of the Group concerned might become too onerous.

and, as explained in the Office's report on the subject,⁸ at the international level (article 19 of the ILO Constitution). Whereas the International Labour Conference or a national parliament is not required to legislate down to the last detail, but can arrange for the detailed implementation of a Convention or law to be drafted or amended in accordance with a procedure at a lower level, each detailed provision must be clearly based on a general provision that has passed through the process of express ratification or parliamentary approval. In the Subgroup meeting it appeared that there was support for the availability of the simplified amendment procedure to both Parts A and B of the Code (levels three and four). However the issue of whether Title 5, Code A, should be amended only by the express ratification procedure (see Article XIV) that applies to the Regulations and Articles, was not resolved, a situation reflected in the current draft.

6. In the light of the above constitutional requirement, the Office has proposed an approach under which the Regulations would be sufficiently specific to clearly provide the necessary basis for amendment of the Standards and Guidelines through a tacit acceptance procedure. The provisions exemplified in this connection were generally considered to be too detailed at the second meeting of the High-level Group, and the Shipowner and Seafarer representatives largely reached agreement on simple and concise statements of the proposed basic principles and rights of the Convention. There was insufficient time for these to be discussed by the meeting as a whole. However, discussion at the Subgroup continued to support the view that the Regulations, while needing to contain sufficient detail to provide legal support for the provisions in the Code, and any amendment to it, should also be drafted as concisely and as simply as possible to avoid entrenching detailed requirements that may not be broadly applicable in the long term. In this first draft the Office has sought to satisfy the need for sufficient detail to enable ratification whilst also meeting requirements for simplicity and modernization. It seems difficult to devise a system which would provide the necessary authority for the simplified amendment of the concise statements (the Regulations) themselves. However, through the accompanying provisions, to the extent that they are acceptable to national governments and parliaments, it may be possible to meet the concern expressed by the Seafarer representatives for the greatest possible flexibility with respect to the use of the tacit acceptance procedure in order to be able to cover future unforeseen problems.

7. A Government representative in the High-level Group also proposed that it should be possible for a ratifying Member to notify the Organization, prior to entry into force of an amendment, that it would be bound by the amendment only after it had expressly accepted it. Members would in addition have the right to declare, at the time of ratification of the Convention, that all amendments would enter into force for them only upon their express acceptance. These suggestions were based on provisions of the recent International Convention on the Control of Harmful Anti-fouling Systems on Ships, adopted in the framework of the International Maritime Organization on 5 October 2001.

8. The proposal to allow a Member to make a notification that a particular amendment must be expressly accepted by it would seem to be in the general interest provided that this notification is made during the period when the Member concerned could have notified its disagreement. Such a provision would ensure that Members which were unsure whether or not to accept an amendment could safeguard their individual positions without blocking the entry into force of the amendment for other Members. On the other hand, to allow individual Members, at the time of ratification of the Convention, to totally exempt themselves from the tacit amendment procedure would seem to be inconsistent with the concept of a level playing field. It would seem preferable for

⁸ Doc. TWGMLS/2002/2, op. cit., para. 3.

Members to identify the areas concerned, such as that of enforcement mentioned above, during the preparation of the Convention, and to remove them from the scope of the simplified amendment procedure. These considerations are reflected in this draft.

9. Further consideration might be given to the question whether amendments to the non-binding Part B of the Code, which have the same force as international labour Recommendations, should be required to be submitted for tacit acceptance by Members. International labour Recommendations enter into effect upon adoption by the International Labour Conference.

10. *Position of non-ratifying Members.* Under the simplified amendment procedure as presented to the second meeting of the High-level Group, ILO Members which had not ratified the new Convention could take part in the Special Tripartite Committee (see comment 7 above) that would adopt the amendments, but they would not have the right to vote in that Committee, and they would not be entitled to formally propose an amendment. All such amendments would, however, have to be approved by a two-thirds majority of the International Labour Conference, in which non-ratifying Members would, of course, take part on the same footing as other Members. A number of Government representatives at the second meeting considered that non-ratifying Members should also have the right to propose amendments, and a few of them maintained that such Members should have the right to vote on the amendments. Two representatives were of the view that all Members should have the right to notify their disagreement with an amendment during the actual tacit acceptance procedure. Many other Government representatives considered that voting should be restricted to ratifying Members. The importance was stressed of ensuring that obstacles to ratification by particular Members were properly taken into account. While it may be problematic to allow Members which are not bound by the obligations of the Convention to have a decisive role over the way in which the parties to the Convention are to implement those obligations, it may indeed be useful to allow non-ratifying Members to make proposals for amendments that might permit ratification by them. At the second meeting, emphasis was placed on the importance of having the necessary flexibility to ensure the widest possible ratification of the Convention. Provided that the Convention is made sufficiently flexible to place its obligations within reach of all Members of the Organization, it would seem reasonable to make ratification a condition for full participation in the development of the new Convention. These considerations are reflected in paragraph 3 of Article XII and paragraph 2 of Article XV of this first draft.

11. The consolidated Convention would respect the principle (now followed in the ILO with respect to revisions, and also in the International Maritime Organization (IMO)) that once a Member has accepted the text of a Convention by ratification, it cannot be bound, against its will, by any changes to that text. New ratifying Members are of course in a different situation as they had not agreed to become bound by the original text. A problem arises as to what happens if a ratifying Member decides not to accept an amendment, and its ships enter into a port of a Member which is bound by the amendment. Paragraph 12 of Article XV proposes the SOLAS solution under which the latter Member would have the right to apply the relevant provision in its amended form (except during any period of exemption referred to in paragraph 8(b) of Article XV).

Comments on the Regulations and the Code

Comment 9 (General remarks on Titles 1 to 5)

1. *Structure.* As explained in Comment 8 (point 6) above, this draft adopts the approach, favoured by the Shipowner and Seafarer representatives, of having the basic employment rights and principles of the Convention expressed in concise statements

including a simple statement of the purpose of each Regulation. In addition the terminology has been changed to more clearly delineate the nature of the Part A and Part B requirements. Part A provisions, which are mandatory, are called Standards. Part B provisions which are not binding are called Guidelines. A numbering system has been adopted which facilitates easier cross-referencing between the Regulations and the Code provisions. There is a Regulation that corresponds to every Code provision. However, where no additional text was proposed in order to elaborate on the obligation, there may be no Code A or Code B provision.

2. *Relationship between Part A and Part B.* Some provisions proposed in the first draft may still be too detailed or specific; in other cases, on the other hand, this first draft may be considered as insufficiently specific. As indicated above, the Office's intention has been to move as much detail or specificity away from the Regulations to Code A and away from Code A to Code B, subject to the following two overriding considerations:

- (a) as far as the Regulations are concerned, it is important to ensure (as explained in comment 8 above) that Government representatives agree that there is sufficient direction provided in the Regulations to support the simplified amendment procedures for the Code's provisions;
- (b) in order to avoid any dilution of existing international labour standards where detailed requirements are moved from Part A to Part B of the Code, it appears equally important to ensure that Part A of the Code, in principle, retains a general obligation adequately reflecting those requirements.

3. *Seafarers who are not shipowner employees.* Another general aspect needing consideration relates to the problem that the existing maritime labour Conventions that will form the basis of the new Convention were, in general, not drafted with a view to the situation of workers that are not engaged by or on behalf of a shipowner. This has come up in a number of ways as discussed in the following paragraphs.

4. Comment 2 above outlined the issues regarding the definition of seafarer and the scope of the Convention. This has required development of some provision to address the situation of seafarers who are not involved in the operation of the ship per se. As much as possible the intent of the original Convention obligations regarding matters such as qualifications for working on board or standards of accommodation have been retained and parallel wording has been developed to deal with seafarers that would not be subject to requirements under the IMO's International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), to carry out night watches, for example. Since the Convention is intended to provide minimum standards for decent work for all workers on board, every effort has been made to provide broad coverage to all sectors of the maritime labour force. For the most part this has been done without finding it necessary to propose the exclusion of any worker from the protection of the Convention. The question of who is a seafarer does however highlight some important related issues with respect to many of the provisions and for this reason is discussed here. For example, a national policy of continuity of employment derived from ILO Convention No. 145 (1976), which was originally directed only to assuring employment of seafarers described as "crew", has been tentatively proposed as Regulation 2.6 (point 9 of comment 11 below).

5. A corresponding question arises as to the responsibility of the shipowner for "seafarers" who are not members of the crew. In certain Conventions, the answer is clear. Under the Repatriation of Seafarers' Convention (Revised), 1987 (No. 166), the shipowner has liability for the repatriation of seafarers – a term which, under that Convention, means any person working on board in any capacity. The predecessor Convention, No. 23, dealt with "seamen" and "masters". Seamen were defined as every person engaged or employed

on board and entered on the ship's articles. This meant that indentured apprentices or masters were not covered. Convention No. 166, therefore, in principle broadened the liability and responsibility of shipowners to repatriate all workers on board the ship, irrespective of their employment relationship to the shipowner. The question that needs to be clarified in this context is how far the example of repatriation should be extended to the other provisions of the Convention that cover seafarers as broadly defined. One way of addressing this problem would be for the Convention to make it clear that legal responsibility would in all cases lie with the shipowners, who would therefore have to cover their own potential liability by appropriate agreements with other employers of seafarers serving on their ships. Another way might be to broaden the net of liability under the Convention to cover other employers when the shipowner (broadly defined) is not the employer. Another approach might be simply to exclude seafarers who are not employees of the shipowner, directly or indirectly (i.e. crew and master), from standards giving them entitlements which are not strictly within the shipowner's control, such as minimum wage levels, regular salary payments, annual leave entitlements and sickness benefits.

6. *Possible transitional provisions.* Consideration has also been given to the case where there are several maritime labour Conventions on the same subject. In principle, the first draft is based on the most recent of those Conventions. The question arises as to whether a Member which is already bound by one of those Conventions, such as Convention No. 23 referred to above, and would thus already have embodied a right to repatriation in its national law, would have to amend its legislation to take account of the more recent provisions before it could ratify the new Convention. For such cases, the Convention could contain transitional provisions giving the Members in that situation a longer period of grace (perhaps three years) in which to make the necessary legislative changes. No proposal of this kind is however made in the first draft, as the flexibility proposed for Part A of the Code may be considered sufficient to cover the situations referred to.

7. *Separation of technical parts.* During the consultation process resulting in this draft the Office received commentary from the Shipowners and Seafarers recommending that some of the more technical parts of the Convention, particularly in Code B and in some parts of Code A should be reviewed for utility in terms of the technical content and modernized. It was suggested that this kind of review might usefully be carried out through the Joint Maritime Commission or some other body. It was also suggested that some parts could be moved to annexes. An example of such a part might be the extensive provisions relating to accommodation and vocational training for seafarers that seek a career as a member of a ship's crew. The comprehensive text on national planning for maritime education and training and overall vocational/career planning has been moved to an appendix. The Office took the view, however, that there may be some discussion regarding the appropriate division of provisions between Parts A and B of the Code as it relates to matters such as accommodation or medical facilities and has not proposed the transfer of any of these provisions to an appendix at this point.

Comment 10 (on Title 1, Regulations and Code, Parts A and B)

1. *Title 1* sets out the minimum standards that must be observed before seafarers can work on board ship: they must be above a minimum age, have a medical certificate attesting to fitness for the duties they are to perform, have training and qualifications for the duties they are to perform on board and have been issued with seafarer identification. In addition, seafarers have an entitlement to access employment at sea through a regulated recruitment and placement agency.

2. *Regulation 1.1* sets out the minimum age for any kind of work at sea, in accordance with existing maritime labour standards, at 16 years. However, it states that this is to be the minimum age “at the time of the initial entry into force of this Convention”. Because of the importance of the establishment of a minimum age, and the far-reaching effect of any change in it, it is proposed that the age should be established in the Regulations, where amendments would be subject to express ratification procedures. After a reasonable interval, it would still be possible to change the age through the simplified amendment procedure. The Regulation would leave it to the Code to establish the circumstances (such as hazardous work) in which a higher minimum age would be required.

3. *Regulation 1.2* deals with medical certificates. Standard A1.2 adds an explicit recognition of medical certification requirements under the STCW Convention. Guideline B1.2 simply sets out the basic content requirements for medical certificates and refers to the international guidelines for medical fitness examinations.

4. *Regulation 1.3* deals with training and qualifications. The Office had envisaged using the terminology of certificates, but at the Subgroup meeting it was suggested that provisions on training and qualifications could more appropriately describe the range of qualifications a seafarer (broadly defined) might have. The Regulation would explicitly recognize other training requirements such as those under the STCW Convention. A new provision is recommended regarding initial and on-board training to ensure that personnel have the opportunity to keep their knowledge and skills up to date (lifelong learning). Paragraph 4 of Standard A1.3 proposes a possible new requirement that might ensure, for example, that all seafarers have basic personal safety and emergency training for work on board ship. During consultations it was recommended that the terminology already developed under the STCW, Code, Chapter IV, and Section VI/1 be either adopted or referenced. It is understood that the question of certification for positions such as able seamen may be under discussion with the IMO. It was the view of the High-level Group that such a transfer to the IMO framework would be appropriate, if a satisfactory arrangement could be made in the case of certificates of qualification for able seamen.

5. It had initially been envisaged that there would be a Regulation regarding vocational training. However, the present first draft has not proposed such a provision because of concerns about the need for substantial review so as to avoid duplication with the relevant provisions of the STCW Convention, as amended. As noted above, the more detailed provisions on national planning for vocational training for crew members have been retained as an appendix to Code B and may perhaps be considered for publication as a separate booklet or other educational material to assist Members.

6. *Regulation 1.4* deals with recruitment and placement agencies and requires ratifying Members to regulate such agencies (if they operate on their territory). The details, specified in Standard A1.4 or recommended in Guideline B1.4, are largely drawn from the texts of existing international labour Conventions and Recommendations.

7. *Regulation 1.5*, dealing with seafarers’ identity documents, is in a summary form so as not to prejudice the discussions with a view to the adoption of an instrument revising Convention No. 108 by the International Labour Conference in June 2003. In addition it has not been finally agreed as to whether the subject of seafarers’ identification should be covered by the consolidated Convention.

Comment 11 (on Title 2, Regulations and Code, Parts A and B)

1. *Title 2* deals with the terms and conditions of employment including matters such as the context for signing the agreement; basic minimum terms of employment such as wages, annual leave, repatriation and the requirement that ships have a sufficient and qualified crew to provide a safe work environment.

2. Some concerns had been raised about use of the terms “contract of employment” and “articles of agreement”. It appeared that they posed difficulties for some legal systems. In addition the system of articles was seen by some Members as falling into disuse. Other Members had raised the situation of lump sum task-oriented arrangements. The all-embracing term “seafarers’ employment agreement” is proposed in this first draft.

3. *Regulation 2.1* deals with the conditions under which a seafarer signs an employment agreement. As much as possible it seeks to ensure that they are signed under conditions that ensure informed consent by the employee to the terms governing their employment. The extent to which a Member can monitor each situation is, of course, limited. This is a problem common to all areas of regulatory activity. However an important first step is to adopt national standards that require fairness and, in cases where there is a violation, to respond. For example, Standard A2.1 requires that Members adopt laws and regulations that provide for some basic matters, such as prohibiting employment agreements from containing anything contrary to this Convention. It also requires that Members adopt laws and regulations for the essential terms that must be in each agreement, taking into account the guidance provided in Guideline B2.1.1 (i.e. the name of the ship, the name of the employer, wages, termination, etc.).

4. *Paragraph 4 of Regulation 2.1* makes it clear that a seafarers’ employment agreement could incorporate the provisions of collective bargaining agreements covering the matters to be included under the Convention. There would be no requirement in this respect. Since the agreement may be a matter for inspection in port an English translation would be required (except for ships only making domestic voyages – Standard A2.1, paragraph 1(c)).

5. *Regulation 2.2* deals with the wages. At present there is no international labour standard explicitly requiring that seafarers are to be paid for their work. An express provision to that effect is now proposed. The principle of equal remuneration for work of equal value is enshrined in the Preamble to the ILO Constitution and is expressed in the Seafarers’ Wages, Hours of Work and the Manning of Ships Recommendation, 1996 (No. 187). At the second meeting of the High-level Tripartite Working Group, the Shipowner and Seafarer representatives presented a proposal on the main content of the Convention, but were unable to reach agreement on the inclusion of the principle referred to. There has also been some concern expressed by Governments about its inclusion in the mandatory part of the Convention. The principle as contained in Recommendation No. 187 has been retained in Guideline B2.2, which also provides detailed guidance as to the calculation of wages as set out in that Recommendation.

6. *Regulation 2.3* deals with hours of work or rest and annual leave entitlements and also includes shore leave. The need to explicitly refer to seafarer fatigue was suggested in the Subgroup. The Regulation provides for this but also responds to recommendations that some flexibility must be allowed for emergencies and other situations where, due to ship safety and navigation needs, strict compliance with the hours of work or rest cannot always be met. The provision for shore leave is proposed for inclusion in this Regulation as it is related to decent work conditions and seafarer fatigue, health and well-being. Some Government representatives in the Subgroup indicated that their countries had problems

with the existing standards (which are incorporated in the Code). More information would be required, however, before proposals for some flexibility in this area could be made.

7. *Regulation 2.4* deals with the right to be repatriated. The hardship caused when shipowners or flag States fail to respect their obligations under the present labour standards is recognized as a major problem that must be addressed. The posting of some form of financial security is a solution that has been proposed within a Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers. At some later stage, when there is full international agreement, especially with respect to the feasibility, an appropriate provision could be added to the Code; it might, for example, make it one of the conditions for the issue of a certificate of compliance that shipowners have adequate arrangements in place to cover their liability in this respect.

8. In an effort to provide some reinforcement to the existing standards, Guideline B2.4.4 (paragraph 2) would recognize that a Member may detain a ship of a shipowner (or request its detention if in a foreign port) if the latter fails to carry out the obligations relating to repatriation and the repatriation costs are consequently borne by the Member concerned (which might be the flag State, the port State or the State of the seafarer's nationality). The legal basis for a detention of this kind would be the creditor's right of attachment on the debtor's property until the debt is paid. It would thus not be the same as the basis for port state detentions referred to under Title 5 discussion in comment 14 (point 13) below. The mention of this course of action in the Convention might however be useful as an incentive to port States to take the necessary action in the case of a shipowner's failure to repatriate.

9. *Regulation 2.6*, on continuity of employment, has been placed inside square brackets as many if not most governments have expressed the view that it is no longer appropriate to have such a policy with respect to one sector of the workforce and many no longer have a national register for seafarers. The Shipowners have recommended that the provision be considered as a part of social security protection. It is understood that governments might be unable to accept a requirement that they have a policy of full and continuous employment for all seafarers (broadly defined). It might be considered preferable therefore to place the thrust of such a provision on access to benefits to cover periods of unemployment (like other workers).

Comment 12 (on Title 3, Regulations and Code, Parts A and B)

1. *Title 3* has been named "Accommodation, welfare facilities, food and catering". The title initially envisaged by the Office was called "working and living" conditions and dealt also with medical care and occupational health protection matters. In the Subgroup it was recommended that only the matters listed above be included in Title 3 and that the other matters be transferred to Title 4. These shipboard matters constitute a significant part of the matters addressed in the certificate of compliance and document of compliance system described in Title 5 and the related inspections and monitoring. These provisions are among the most detailed and technical in the Convention and contain numerous requirements for specific entitlements for accommodation and facilities that are related to the particular seafarer's duties and positions or specified vessel size (at times under an old tonnage measurement system). They are drawn from ILO Convention No. 92 (1949) and Convention No. 133 (1970). As much as possible of these detailed provisions have been replaced by a general obligation in Part A (see point 2 of comment 9 above), with their actual text being transferred to Code B. This is without prejudice, however, to a future review of their continued relevance and of whether they should be in an annex. The Office has however kept some of the technical details in Code A as minimum standards, where

they appeared to relate to health and safety and decent conditions. Although the provision in the existing Conventions are directed to seafarers who are members of the ship's crew, the Office proposes that the minimum standards should apply to all seafarers in general with any special entitlements being retained for those with specified duties.

2. *Regulation 3.1* deals with shipboard accommodation and welfare facilities. It should be noted that seafarers working on passenger ships are subject to differing standards for their accommodation minima. The very detailed requirements for size of rooms, heating, air conditioning, so many of which may be tied to ships of a particular period, have been placed in Code B. The regular inspection and record-keeping requirements would form part of a ship's ongoing continual compliance system.

3. *Regulation 3.2* deals with food quality and catering standards. The qualifications for ship's cook have been transferred to training and qualifications.

Comment 13 (on Title 4, Regulations and Code, Parts A and B)

1. *Title 4* deals with both on-board and on-shore matters. It addresses access to and financial responsibility for medical care (broadly defined), health protection, welfare on shore and social security.

2. *Regulation 4.1* covers seafarers' entitlement to access adequate medical care on board ship and ashore. The provisions in Standard A4.1 elaborate upon these entitlements including those relating to hospital facilities on board, on-board medical personnel and the contents of medicine chests and other medical assistance matters.

3. *Regulation 4.2* deals with financial liability for the consequences of the illness, injury or death of the seafarer (both the costs of care and payment of wages) as well as for "other misfortunes".

4. With respect to illness and injury, during consultations it was recommended that a provision concerning insurance for death and disability be added. The question of the nature of disability coverage (long or short term) is raised by the square brackets in Standard A4.2 (paragraph 1(b)).

5. A reference to "other misfortunes" (for which there may a better term) has been introduced in order to provide a place for the existing standard providing for an indemnity in the case of shipwreck. A broader term is however necessary to allow the possible future development of the Convention through the simplified amendment procedure to cover similar events, such as acts of piracy or terrorism.

6. *Regulation 4.3* deals with occupational health and safety and accident prevention. It primarily focuses on ensuring that employees have the appropriate equipment and protection to perform their duties safely and are trained as to how to do so. It also includes requirements for reporting of accidents. This again is part of a system for monitoring ongoing compliance and conditions on board ship.

7. *Regulation 4.4* addresses seafarer access to on-shore welfare facilities. It is part of a ratifying Member's duty to cooperate and provide on-shore relief for seafarers, within the limits, of course, of port state requirements relating to seafarer identification and security matters. This regulation also contains a provision (in square brackets) that was recommended during the consultation process. It is drawn from ILO Recommendation No. 173 and relates to the right to due process and an obligation to notify the flag State concerned when seafarers are detained in a foreign port.

8. *Regulation 4.5* deals with social security, a question which has not yet been discussed in the High-level Group. It is clear from discussions in the Subgroup, that the Convention will have to take account of major difficulties encountered, including significant problems for some governments. Because of the complexity of the subject and the paucity of ratifications of the relevant Conventions, a thorough discussion will first be needed on the extent to which, and the ways in which, such protection could be provided for at the present time and in the foreseeable future. If it were considered feasible and realistic for the Convention to make provision for the establishment of a complete system of social security protection (necessarily at some distance away in the future), the Convention would have to set the full realization of the right to social security as the basic principle – as is proposed in the first draft. The provisions proposed for Part A of the Code elaborate only on general principles at this point. If the principle of full protection were not set out in the Regulations, albeit as an objective, it would not be possible to use the simplified amendment procedure to strengthen the protection when circumstances so permitted.

Comment 14 (on Title 5, Regulations and Code, Parts A and B)

1. *Title 5* deals with compliance and enforcement and is linked to the obligations of ratifying Members under Article V. It encompasses both traditional enforcement practices through inspection and sanctions and more contemporary practices aimed at ensuring continual compliance between inspections. As noted in comment 8 (point 5) on the simplified amendment procedures for the Code, the question remains unresolved as to whether Part A of the Code for Title 5 can be amended on the same basis as in Titles 1 to 4 or whether they can only be amended in the same way as the Articles and Regulations (express ratification). The applicable provision is in square brackets at the start of the Regulations for Title 5.

2. The High-level Group has generally endorsed the adoption of some form of certificate-based system combined with other measures. The provisions in the draft of Title 5 draws on the text of the existing ILO Conventions: the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), the Labour Inspection (Seafarers) Convention, 1996 (No. 178); and the Labour Inspection (Seafarers) Recommendation, 1996 (No. 185); and provisions suggested by the Office in a report prepared for the second meeting of the High-level Tripartite Working Group⁹ and adjusted in the light of the High-level Group's comments. There have also been new elements added to strengthen and clarify the ongoing compliance system, which is also based on recommendations in a joint submission from the representatives of the Shipowner and Seafarer, which were generally approved by the Subgroup in February 2003. In addition, the system proposed in Title 5 draws upon aspects of the well accepted certificate-based system of the IMO that is found in Conventions such as MARPOL and SOLAS including the International Safety Management (ISM) Code, but adapts these approaches to the ILO context and concerns. The system adopted in the Convention could be closely coordinated with related certifications, particularly those required under IMO conventions, so that there could perhaps be a single certificate covering all related aspects in the country concerned. Such a feature was considered essential by some Government representatives in the High-level Group.

⁹ ILO: *Considerations for provisions on inspection and control in a consolidated maritime labour Convention*, High-level Tripartite Working Group on Maritime Labour Standards (second meeting), Geneva, 2002, doc. TWGMLS/2002/1.

3. *Title 5* is divided into three main Regulations: Regulation 5.1 on flag State responsibilities; Regulation 5.2 on port state responsibilities and Regulation 5.3 on labour supplying responsibilities. A State may have concurrent responsibility for enforcement activities in all three roles or it may only operate in one or two roles. There are standards in this first draft that pertain to each of these roles.

4. *Regulation 5.1* deals with a ratifying Member's responsibilities for matters on board ships that fly its flag. The flag State would be the focal point for shipboard-related compliance and enforcement activities, as required by Article 94 of the 1982 United Nations Convention on the Law of the Sea. This requirement is set out in the first paragraph of Regulation 5.1.1 on general principles, followed by a requirement that the flag State regularly inspect ships that fly its flag and ensure that ships are either not registered or not allowed to sail without a certificate and document of compliance. Ratifying Members would also undertake (paragraphs 3 and 4 of Regulation 5.1.1) to develop a system for the assessment of the administration of their activities under the Convention as flag States, and to include the resulting information in their periodic reports to the ILO.

5. *Regulation 5.1.2*, complemented by Standard A5.1.2 and Guideline B5.1.2, sets out the details of the proposed certification system, which can be summarized as follows:

- (a) each ship would be required to carry a certificate of compliance issued on the basis of a satisfactory inspection by the flag State to verify that the seafarers' conditions of employment and living arrangements comply with the standards of the Convention, as adopted in national laws and regulations (a preliminary list of matters that are the minimum for certification is set out in Code A, Appendix A-I). The certificate would be valid for three years, subject to inspections for ongoing compliance or to investigate complaints of non-compliance or in the case of changes, in registry or structural changes to the ship, for example, that affect seafarers' employment and living conditions;
- (b) each ship would also be required to carry a document of compliance on the lines of a model format suggested in Appendix B-III or in any other appropriate form determined by each flag State in accordance with its practice.

6. In view of the widely differing opinions that have been expressed in the High-level Group on the methods of ensuring compliance, it is intended that ratifying Members should be allowed a wide discretion as to such methods, subject to two basic conditions: they must establish adequate systems for on-going compliance, and their verification must cover not only the adequacy of the systems themselves, but also whether or not the standards of the Convention are actually being complied with. Furthermore, all documents of compliance used in the flag State, while not identical, would need to conform to a single model. Guidance for such a model is suggested in Guideline B5.1.2 (in addition to Appendix B-III). It is made clear in the Convention (Article II, paragraph 1(c)) that Members would be free to use any name that they liked for the "document of compliance"; the High-level Group may however prefer some other term for use in the Convention so as to avoid confusion with the document used in the IMO framework.

7. The document of compliance could be understood as comprising two parts. One part, developed by the competent authority, would set out the relevant national requirements a ship has to meet to be in compliance with the standards of the Convention and would refer to the relevant legislation. It would also contain ship or category-specific requirements that might affect seafarers' conditions of employment and living arrangements. Any substantial equivalencies adopted on the basis of Article VI of the Convention (see comment 5, paragraph 2 above) would be noted on this document (see

Regulation 5.1.2, paragraph 2). The second part of the document would set out policies and procedures developed by the shipowner and approved by the competent authority for assuring ongoing compliance on the ship between certifications. As is the case with the ISM Code, the ship would be subject to verification inspections to ensure that the policies and procedures are functioning properly.

8. The certificate of compliance and the document of compliance together would constitute prima facie evidence that the ship was in compliance with the standards of the Convention as they pertained to the matters certified. Officials in ports inspecting seafarers' conditions of employment and living arrangements would be entitled to review the documentation but, unless there were grounds for a detailed inspection, they would not investigate further.

9. At the High-level Group's second meeting, concern was expressed that inspections should be limited to matters that could actually be inspected, and a list was drawn up of the general areas concerned. They are listed on a preliminary basis only, in Appendix A-I of this draft. The draft draws a distinction between principle and practice: in that the standards in the Convention extend beyond the matters in the minimum list that must be inspected for certification; however, the fact that certain aspects would not be certified would not place them outside the scope of the enforcement provisions, as the existing procedures for flag state inspection upon complaint would cover any standard in the Convention.

10. *Standard 5.1.3* tentatively maintains (paragraph 2) the maximum interval of three years between regular inspections as required by Convention No. 178. Some Government representatives have pointed out that their countries do not have the resources to carry out inspections of that frequency. If this maximum were increased, consideration might be given to appropriate interim procedures for ensuring compliance, perhaps on the lines of appropriate procedures adopted in the IMO framework.

11. *Regulation 5.1.4* introduces a requirement that ships have on-board complaint procedures and that complaints and the responses to them are documented. This is an aspect of helping to assure on-going compliance on board ship. The approach is based on a joint submission made by the Shipowners and Seafarers, which was in general approved by the Subgroup in February 2003. The object of these procedures would be the establishment of effective procedures for the resolution of complaints at the level of the ship or the shipowner. Paragraph 2 of that Regulation would require Members to ensure that there is no "victimization" of a seafarer for making a complaint. Consideration should be given to finding a term better than "victimization", which could be understood as implying a series of activities or a pattern of behaviour under which a seafarer is made a victim. The term is intended however to cover any act adverse to the seafarer which is taken solely on account of the fact that a complaint was lodged.

12. *Regulation 5.2* addresses port state responsibilities with respect to the inspection of ships in port and the development of on-shore procedures for handling seafarer complaints. The term "authorized officers" was adopted to recognize that a range of personnel may be involved in an inspection.

13. These provisions originate from Article 4 of the Merchant Shipping (Minimum Standards) Convention (No. 147), the port state control provision. They embody the following four important developments:

- (a) *Reliance on the ship's documentation regarding compliance.* As is the case with the procedure adopted in the equivalent provisions of IMO Conventions, the action of the port state officers would be limited to verifying the ship's document of compliance

and the certificate of compliance. A further inspection would be carried out only in three cases: (i) where the documents were not produced or, if produced, did not contain the requisite information or were otherwise invalid; (ii) “where there are clear grounds for believing that the shipboard conditions of employment and shipboard living arrangements do not conform to the standards of this Convention”; and (iii) where a complaint is lodged by an interested person.

- (b) *Scope of the inspection.* If a detailed inspection is carried out, its scope would be limited to the general areas identified as subject to inspection in Code A, Appendix A–II (preliminary list). An inspection on a complaint would be limited to the subject matter of the complaint.
- (c) *Non-ratifying Members.* In accordance with the principle of “no more favourable treatment”, reflected in paragraph 7 of Article II of the first draft, the provisions on port state control would apply to the ships flying the flag of Members that had not ratified the consolidated Convention. An inspection would be carried out if the certification and documentation required by the Convention were not produced. This means that it would always have to be carried out in the case of the ships of a non-ratifying Member. As is the case at present (under Article 4 of the Convention), the inspection would relate to conformity with “the standards of this Convention”. This would presumably cover any substantial equivalents identified by ratifying Members in the document of compliance (see point 7 of comment 14 above). Whether or not the ships of non-ratifying Members should have the benefit of the flexibility of substantial equivalence is at present left to the discretion of ratifying Members.
- (d) *Action in the case of deficiencies.* Under Article 4, paragraph 1, of Convention No. 147, if deficiencies are found with respect to compliance, the port State may report the matter to the government of the flag State, with a copy of the notification being sent to the Director-General of the ILO. This procedure is expanded in the draft (paragraph 3 of Standard A5.2.1) along the lines set out in the Office’s report to the High-level Group: first, a procedure is set out for reporting to the flag State, giving the latter a proper opportunity to express its position and to take any necessary action; second, an indication is given of the action that the ILO Director-General would be expected to take if the flag State response to the problem was inadequate: namely, action “to ensure that a record is kept of such information and that it is brought to the attention of parties which might be interested in availing themselves of relevant recourse procedures” (such as representations or complaints under article 24 or 26 of the ILO Constitution).
- (e) *Extension of detainable defects.* Under Article 4 of Convention No. 147, a ship may be detained in the case of clear hazards to safety or health. This draft adds two more situations (explained in the report referred to above)¹⁰ in which detention of the ship would appear justified. One such situation would be the likelihood of “serious material hardship” to the seafarers concerned. Guidance would be given on this term in Guideline B5.2.1 of the Code (paragraph 2); a typical situation of this kind might result from the non-payment of wages. A Government representative has pointed out that the non-payment of wages has been considered as justifying detention on a ground mentioned in Convention No. 147, namely, a clear hazard to the safety of the ship. Similarly, a situation causing serious material hardship might also constitute a health hazard justifying detention. However, the existence of a ground of detention specifically based on serious material hardship might strengthen the legal basis for the

¹⁰ *ibid.*, para. 47.

port State's decisions in this respect. The second possible ground for detention would be repeated serious violations of the Convention on the part of the same ship. Guidance as to what may constitute a "serious violation" and what may constitute "several recent occasions" is also found in paragraph 2 of Guideline B5.2.1 referred to.

14. *Regulation 5.3* deals with the labour-supplying responsibilities of a State. In the discussions of the High-level Group emphasis has been given to the important role, in the area of enforcement, of the labour-supplying States, and efforts have been made to identify the respective responsibilities of flag States, port States and labour-supplying States. While it is easy to identify the major labour-supplying countries for seafarers, it would be difficult – and in fact wrong – to define that term for the purposes of a legal text. If the term were defined, some countries might fall outside the definition although, just as most if not all countries are called upon to act in the capacity of both flag and port States (if they are not landlocked), they may also act as suppliers of labour, albeit on a small scale, in the sense that their citizens may serve on ships registered outside their territory. The related responsibilities should therefore also apply to them. To avoid the misconception of a limited category of "labour-supplying State", it is proposed that the Convention simply refer to "labour-supplying responsibilities".

15. Another question that may need to be discussed relates to the situations in which labour-supplying responsibilities arise. A typical case is where recruitment and placement agencies are established or operated on the territory of the country concerned. In the High-level Group's discussions reference has also been made to "labour-supplying States" in the context of social security obligations that do not depend upon contracts of employment. Lastly, the contribution that can be made to the enforcement of decent conditions of work by States having jurisdiction over seafarers' employment agreements (irrespective of whether or not these are concluded through recruitment agencies) is also relevant in this connection, as explained below. In the light of all these considerations, Regulation 5.3 of this draft seeks to capture all responsibilities that States may have in maritime labour matters that arise independently of their roles as flag State or port State.

16. *Paragraphs 2 and 3 of Regulation 5.3* develop the obligations outlined in paragraph 6 of Article V of the Convention. Members are to ensure that the standards of the Convention applicable to the operation and practice of seafarer recruitment and placement services on its territory are effectively implemented in their laws and regulations and also enforced (paragraph 2). Members are also to ensure, through their national laws and regulations, that the standards relating to shipboard conditions of employment and living arrangements are adequately reflected in all seafarers' employment agreements concluded in their territory (paragraph 3). However, this latter requirement would be limited to legislative measures. Members would not be expected to verify the adequacy of all contracts that happen to be concluded on their territory. By having provisions in their national legislation that might, for example, render null and void contractual provisions conflicting with the standards of the Convention, Members could make a valuable contribution to ensuring a universal application of those standards, even in foreign countries – bearing in mind that a court hearing a case brought by a seafarer may (under the country's rules relating to conflict of laws) often apply the law of the country in which the employment agreement was concluded.

17. An important responsibility of countries in which recruitment and placement agencies are established is to ensure that such agencies are "made jointly and severally liable with shipowners, regardless of their domicile, for breach of the employment

agreement”.¹¹ This is indeed the practice of at least one major labour-supplying country. The principle was however questioned by a Government representative at the second meeting of the High-level Group. In order to avoid a possible obstacle to ratification, the concept of joint and several liability has been attenuated in Part B of the Code at Guideline B5.3. It is understood that this concept may not be easily applied in all legal systems.

¹¹ *ibid.*, Appendix I: *Consensual Statement of the Meeting of Experts on Working and Living Conditions of Seafarers on Board Ships in International Registers* (Geneva, 6-8 May, 2002), para. 10.