
INTERNATIONAL LABOUR ORGANIZATION
Sectoral Activities Programme

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

**Consolidated maritime labour Convention (Preliminary second draft)
Commentary**

Nantes, 2004



Contents

Commentary	1
General comment	1
Comments on the Preamble and Articles	2
Comment 1 (on the Preamble)	2
Comment 2 (on Article I).....	3
Comment 3 (on Article II).....	3
Comment 4 (on Articles III and IV).....	4
Comment 5 (on Article V)	5
Comment 6 (on Article VI).....	5
Comment 7 (on Article VII).....	6
Comment 8 (on Articles VIII to XII)	6
Comment 9 (on Article XIII)	7
Comment 10 (on Articles XIV to XV).....	8
Comments on the Regulations and the Code.....	9
Comment 11 (general remarks).....	9
Comment 12 (on Title 1).....	10
Comment 13 (on Title 2).....	12
Comment 14 (on Title 3).....	14
Comment 15 (on Title 4).....	15
Comment 16 (on Title 5).....	17
Annex: Legal Adviser’s opinion on the status of Part B of the Code	23

Commentary

General comment

1. The preliminary second draft for a Convention on maritime labour standards (2005), to which this Commentary relates, has been prepared as a resource document for the fourth meeting (January 2004) of the High-level Tripartite Working Group on Maritime Labour Standards. It reflects the progress that has been reached on the general structure and mechanics of the Convention and the general balance between its various parts as well as on the formulation of the basic principles and rights in the Articles and in the Regulations with the introductory statements of their purpose. The preliminary second draft is a revision of the first draft considered by the High-level Tripartite Working Group at its third meeting in July 2003. It draws upon comments made at the third meeting and written comments made by constituents¹ subsequent to that meeting, as well as upon the review by the Officers of the High-level Group, who met last September.
2. The comments have shown that substantial revision of certain sections of the Convention, and even their replacement by different provisions, is needed. This is why the present text is called a “preliminary second draft”. It seeks to identify certain areas of difficulty by placing wording inside square brackets and by reproducing some sections in italics to indicate that they may be the subject of proposals by constituents for substantial revision. The Officers propose that at its fourth meeting the High-level Group, rather than attempting to review the entire draft, should take up the suggestion made at its third meeting to make use of working parties. These would focus on specific areas of difficulty and in areas where little discussion has occurred in previous meetings because of time limitations. They would propose specific texts for approval. In addition to considering those texts, the Plenary would focus primarily on issues that would benefit from full discussion among constituents.
3. The Officers suggest that, at its fourth meeting, the High-level Group establish working parties for the following four areas:
 1. Social Protection (Title 4, Regulation 4.5 and relationship to Regulations 4.1 and 4.2 medical coverage and liability)
 2. The certification/inspection system (in Title 5)
 3. Accommodation (Title 3)
 4. Other areas of difficulty (Titles 1, 2 and parts of Titles 3 and 4 not addressed under the preceding headings).

¹ At the High-level Group’s last meeting it was agreed that constituents could submit comments to the Office on the first draft which would be taken into account in preparing the next draft. A preliminary draft and the comments would then be reviewed by the Officers in September and the text revised in light of that meeting for the High-level Group in January 2004. Comments were received from: the Shipowners’ and Seafarers’ representatives and the representatives of Algeria, Bahamas, Cuba, Denmark, France, Germany, Honduras, Japan, Republic of Korea, Liberia, Mexico, Netherlands, Norway, United Kingdom and the United States of America and the International Maritime Organization (IMO), and also from the International Christian Maritime Association and the International Maritime Health Association.

-
4. The representatives of Governments are urged to come to the High-level Group's fourth meeting in a position to discuss the difficulties that they may have from the point of view of achieving an unprecedented ILO objective: namely, the wide-scale ratification of a Maritime Labour Convention containing, in so far as possible, the substance of all up-to-date international labour Conventions, which have individually been the subject of varied and often relatively low levels of ratification. The previous discussions of the High-level Group and of its Sub-Group have shown that innovative solutions are required to achieve this objective. One such solution relates to the status of Part B of the Code in the Convention. The intention was that Part B should provide Members with considerable flexibility for the implementation of detailed obligations which may have constituted obstacles to the ratification of the corresponding Conventions. Concerns were however expressed on the subject at the High-level Group's third meeting. These concerns are addressed in the preliminary second draft, in particular through an "Explanatory Note" (suggested by the Officers – see below Comment 6, point 2). This Explanatory Note seems useful not only for providing a clear understanding of the concepts involved but also for serving as a basis for any necessary refinement of those concepts at the fourth meeting.
 5. In particular, it is hoped that the representatives will be able not only to draw attention to the difficulties that their Governments may have with particular provisions, but also to indicate how far their Governments might be prepared to go in the interest of participating in a common agreement and to suggest ways in which the provisions concerned might be made acceptable to their Governments. In this context, Part B of the Code might sometimes play a very useful role in allowing difficulties to be accommodated without compromising the substance of existing mandatory standards.
 6. In order to facilitate discussion in this respect, the preliminary second draft has been produced in a "vertical form" with the provisions concerning each principle or right grouped together. This should help participants to discuss the balance between:
 - (a) the Regulations, laying down the basic principles and rights and intended to set the parameters to be approved by national Parliaments in the ratification process;
 - (b) Part A of the Code, setting out the detailed obligations for the implementation of those principles and rights; and
 - (c) Part B of the Code providing non-mandatory guidance on the scope of those obligations and on their implementation in practice.
 7. The views of the High-level Group would be welcome on whether the final version of the Convention should be in this vertical form or should return to the "horizontal" arrangement, setting out all the Regulations first, followed by all the Standards in Part A followed by the Guidelines in Part B of the Code.

Comments on the Preamble and Articles

Comment 1 (on the Preamble)

A number of additional preambular statements have been proposed by the Seafarers.

Comment 2 (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. Paragraph 1 contains a reference to Article VI in order to make it clear that the reference to “complete effect” being given to the Convention is consistent with the use of “substantial equivalence” and does not imply any mandatory element in Part B of the Code (see Comment 6). Paragraph 2 of Article I in the first draft has been moved to Article II for legal drafting reasons. The addition of the word “enforcement” as a supplement to the obligation to cooperate in “effective implementation” in paragraph 3 was proposed at the third meeting and obtained support; however subsequent comments indicate that this term may not be acceptable to all Governments.

Comment 3 (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 third meeting of the High-level Group, some concerns were expressed about the terms used to describe the documents supporting the certification system. The concern primarily related to the need to avoid confusion with other maritime documentation systems. The terms “declaration of compliance” and “maritime labour certificate” are now proposed (paragraph 1(b) and (d)).
3. The “working definition” of Seafarer recommended by the Subgroup of the High-level Group has been retained in paragraph 1(f). It is the same definition as that adopted by the International Labour Conference in June 2003 in Convention No. 185 and is consistent with other maritime labour conventions. At the third meeting it was suggested that some national-level flexibility be inserted in the text. This is now reflected in paragraph 3. Where it is considered that certain substantive provisions of the Convention are not applicable to all “seafarers” as comprehensively defined, it is suggested that the necessary adjustment should be made by limiting the scope of application of the provisions concerned (to, for example, “seafarers responsible for the safe operation and navigation of the ship”) rather than by having a different definition of seafarer for those provisions.
4. The definition of “shipowner” in paragraph 1(i) is based on the definition in Convention No. 179. It may need to be revisited in the light of decisions taken on other provisions referring to the “shipowner”, such as Standard A2.1, paragraph 2(b). It is based on the principle of the shipowner’s responsibility with respect to all seafarers, without prejudice to the right of the shipowner to recover the costs involved from other employers responsible for particular seafarers. This is expressly stated in Standard A2.5 (paragraph 4) on repatriation. If the High-level Group agrees it might be the subject of a more general provision.
5. With respect to the scope of application of the Convention, paragraph 4(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. At the third meeting it was suggested that oil rigs and drilling platforms be

either totally excluded from the Convention or excluded only when the rig or platform is not under navigation. Both options are presented in Article II, paragraph 4(d).

6. 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 Seafarers' 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 which 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. The proposed changes in square brackets relate to proposals put forward by the Seafarers at the third meeting of the High-level Group. An opinion was provided to the third meeting by the Legal Adviser as to the difference in meaning between the terms "in consultation" and "after consultation".² There was also some concern expressed about the inclusion in Article II, paragraph 6, of a reference to Article IV, as that Article in its 5th paragraph appeared to make the whole Convention applicable; the reference in Article II however is not to Article IV as such but to the seafarers' employment rights referred to in that Article; these are covered only by paragraphs 1 to 4 of Article IV; a clarification has now been inserted to that effect. Paragraph 7 is a standard provision in ILO Conventions.

Comment 4 (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. Article III has been placed inside square brackets as a number of participants at the High-level Group's third meeting considered that its place was in the Preamble rather than in the body of the Convention. However, two of those fundamental rights (those mentioned under (a) and (c) of Article III) are expressly covered in the body of the most important of the existing ILO maritime Conventions, the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147): in addition to stating certain basic employment rights (reflected in the proposed Article IV), Convention No. 147 and its 1996 Protocol refer to three of the fundamental international labour Conventions (Nos 87, 98 and 138) 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". Article III of the draft seeks to reflect a similar very general obligation, covering the fundamental rights themselves, and not the provisions of the Conventions in which they are to be found. The reference in that Article to the ILO Declaration on Fundamental Principles and Rights at Work was included as the Declaration was agreed without dissent by the International Labour Conference in 1998. However, many feel that the Declaration, in view of its promotional nature, should not be referred to in binding legal provisions.
2. The preliminary second draft goes on – in Article IV – to require each ratifying Member to ensure decent conditions of work. In the light of comments made at the third meeting of the High-level Group, the phrase "working and living conditions" is used in paragraph 3. Paragraph 5 makes it clear that the "seafarers' employment rights", set out in paragraphs 1

² See TWGMLS/2003/10, para. 311.

to 4, are to be fully implemented not in the abstract but rather “in accordance with the requirements of the Regulations and the Code of this Convention”.

Comment 5 (on Article V)

Article V provides the legal foundation for the provisions on compliance and enforcement in Title 5 of the Convention. The obligations are implicit in such instruments as Convention No. 147 and the Labour Inspection (Seafarers) Convention, 1996 (No. 178). Paragraphs 2 and 6 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 or corrective actions 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, if these are established. This lays the foundation for the licensing and, if agreed, a certification system for recruitment and placement agencies. 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 6 (on Article VI)

1. Article VI introduces two important innovations as far as international labour Conventions are concerned. One relates to the structure of the new Convention. 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).
2. The other innovation in Article VI concerns “flexibility in implementation” in order to help to achieve the objective of wide-scale ratification without diluting the standards of the Convention, referred to in the general comment at the start of this Commentary (paragraph 4). Paragraph 2 of Article VI provides for an interaction within the Code of the Convention, under which Members are to give “due consideration” (previously “full consideration”) to implementing their responsibilities under Part A of the Code “in the manner provided for in [the non-mandatory] Part B of the Code”. This provision paved the way for the shift of many of the detailed requirements in existing Conventions from Part A to the guidelines in Part B of the Code. An important message received from the High-level Group at its third meeting was that the legal status of Part B was unclear. The Office (at the suggestion of the Officers) has sought to deal with this problem through an “Explanatory Note” following the Articles of the Convention. This Note (in paragraphs 9 to 11) reflects the opinion given by the ILO Legal Adviser on the subject to the High-level Group at its third meeting,³ indicates the general context of Part B and gives an example of Part B’s interaction with Part A. An explanation, rather than a legal text, does indeed seem to be the best approach. The intention would be to include this explanation in the Convention as adopted, while indicating that it should not be considered a part of the

³ This opinion is annexed to the present Commentary.

Convention. It would have a status similar to that of the Preamble, in assisting interpretation. It should also be useful for clarifying a number of matters (not only the status of Part B) for national Parliaments considering ratification of the Convention. In addition to the explanatory note, clarification is given (in headings throughout Part B – see point 3 of Comment 12) on another aspect referred to at the third meeting. This related to the provisions of Part B that are based on international labour Recommendations rather than international labour Conventions. Those provisions would now have exactly the same status as they have today as recommendations.

3. Paragraphs 3 and 4 set out the other 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(a)), 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. 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. 147,⁴ and cited with approval at the second 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. It should be noted that at the third meeting of the High-level Group it was proposed that the concept of substantial equivalence should not apply to Title 5. This is reflected in paragraph 2 of Title 5 of the present draft.

Comment 7 (on Article VII)

This is a proposal for a new provision made by the Seafarers’ representatives at the third meeting of the High-level Group as a way to respond to the situation where there may be no representative organization of shipowners or seafarers in a jurisdiction to consult with (as required by a number of provisions). The wording has been slightly modified by the Office to achieve legal precision. The proposal was initially presented in conjunction with the discussion of the Article II exemptions for the coasting trade (see Comment 3, point 6); however the provision appeared to engage the broader obligation to carry out tripartite consultation, that is found throughout the Convention and has consequently been taken into account as a separate Article.

Comment 8 (on Articles VIII to XII)

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.

⁴ ILO: *Labour Standards on Merchant Ships*, International Labour Conference, 77th Session, Geneva, 1990, paras. 65-79.

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 VIII still needs 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 one 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 V); 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. It has also been recommended that consideration be given to including in the entry-into-force requirement an element relating to the number of seafarers from the ratifying Members.
3. Article X deals with the situation with respect to the Conventions which will be revised by the new Convention. It was Article IX in the first draft of the Convention and is the subject of a paper, prepared at the request of the High-level Group at its third meeting, entitled: "Considerations concerning Article IX of the first draft for a consolidated Convention".

Comment 9 (on Article XIII)

1. Article XIII 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 10 below). It would consist of representatives of Governments which had ratified the new Convention and of Shipowners' and Seafarers' 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 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. Under the present draft, such Members would not have the right to vote on amendments to be adopted by the Committee. They would have the right to propose amendments and would take part in the process for the approval of such amendments in the International Labour Conference on the same basis as the Members that had ratified the Convention. Paragraph 4 provides for the Governments on the Committee to have twice the voting power of the Shipowners' and Seafarers' representatives on the Committee. This 2-1-1 configuration would mean that, in the (probably unlikely) event of a formal vote being needed in the Committee, the

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.

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: a vote would not be carried if it does not have the support of at least half the voting power of each of the three groups. The operation of this requirement could be illustrated by the following example of a Committee consisting of 100 members, namely 50 Government, 25 Shipowner and 25 Seafarer representatives: if all the Seafarers and Shipowners were in favour of a proposed amendment, also supported by 17 Governments, the proposal would not be carried even though the 67 (25+25+17) out of 100 votes would achieve the required two-thirds majority (under Article XV, paragraph 4(b)) since less than half the 50 Governments would have voted in favour.

Comment 10 (on Articles XIV 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 XIV 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. In a comment following the third meeting of the High-level Group, the question was raised as to whether it would not be more appropriate to simply adopt the tacit amendment procedures used by the International Maritime Organization (IMO) as a whole rather than “reinvent the wheel”. In fact, the wheel has not been reinvented as Article XV on the simplified amendment procedure is indeed based on the IMO provisions. The procedure has however been adapted to the very different ILO context and special features, just as wheels have to be adapted to meet the design and other requirements of different vehicles.
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. Members subsequently ratifying the Convention would be bound by all amendments adopted so far unless provided otherwise in any amendment (Article XIV, paragraph 9). 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 4). Members which had already ratified the Convention would receive only the specific amendment for consideration (paragraph 3). 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 5. These requirements might be the same as those set for the initial entry into force of the Convention itself (under Article VIII) or they might be set at a lesser amount (this is the case with the requirements for the

⁶ *ibid.*

entry into force of the Protocol to Convention No. 147, for example, as compared with the entry-into-force requirements for that Convention itself). A further requirement was suggested at the third meeting of the High-level Group: the ratifications just referred to would have to include those of at least half the Members that had previously ratified the Convention. This point has not so far been discussed.

3. 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. Discussion at the third meeting of the High-level Group in July primarily focused on the process of making proposed amendments (paragraph 2) by groups and Members and clarification of the process with respect to application of the amendments to a Member that may have initially disagreed with an amendment (paragraph 11)

Comments on the Regulations and the Code

Comment 11 (general remarks)

1. The Regulations and the Code begin with the “Explanatory Note” referred to above in point 4 of the general comment at the start of this Commentary. This Note is intended to distil the conclusions reached so far concerning the approach and structure of the new Convention and the interrelationship between the Regulations and the Code and between Part A and Part B of the Code, with special reference to the status of Part B. It is recommended to participants in the High-level Group who have not attended its previous meetings or those of its Sub-Group in order for them to understand the essence of the new Convention. If the High-level Group agrees that the Convention could usefully include an informal interpretative explanation of this kind (not forming part of its provisions), guidance and suggestions would be welcome to ensure that it fulfils its twofold objective: namely to correctly summarize the conclusions reached so far and to do so with the maximum of simplicity and clarity. Suggestions from any participants who have not previously been involved in the discussions could be particularly useful in order to ensure that it is fully understandable to members of Parliaments, for example, who might be looking at the Convention for the first time.
2. With respect to the interrelationship between Part A and Part B, there has been progress in finding the appropriate balance between the two parts. At the same time, there may be specific provisions that constituents feel are better placed in either Part A or Part B. It is recommended that Government representatives pay particular attention to this balance as well as to other drafting aspects which could promote the ratifiability of the Convention by their countries. It is hoped, though the proposed working parties (see point 3 of the general comment), to provide an opportunity for detailed discussion of the parts of the Convention that could give rise to difficulties.
3. One of the concerns raised in the third meeting of the High-level Group was that every effort be made to avoid inconsistency between the draft Convention and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 as amended (STCW) and Code. The Office was asked to obtain the views of the International Maritime Organization on the provisions in the draft text that may raise problems. The IMO responded to the Office request and the current provisions reflect the advice provided by IMO to the Office.

-
4. It will be recalled that the underlying approach in the Convention has been to provide minimum standards for decent work for all workers on board. Accordingly, 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, although some specific additional requirements and exemptions have been made for seafarers falling with the STCW regime (for example personnel engaged in watchkeeping).
 5. During the consultation process resulting in this preliminary second draft the Office received comments from the Shipowners and Seafarers recommending that some of the more technical parts of the Convention, particularly in Part B of the Code and some provisions in Part A of the Code, 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 provisions in the draft Convention text could be moved to annexes. An example of such a part might be the extensive provisions relating to accommodation or the provisions regarding 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 was moved in the first draft to Appendix B-I. Comments following the third meeting suggest that it may be more useful if it was updated and reproduced in the form of a booklet. Similarly in Guideline B5.1.3, paragraph 7, there is reference to Appendix B5-II containing "criteria for inspection". It may be that these are more appropriately placed in a document similar to an existing ILO booklet providing guidance on inspections. Where sections of Part B are, for the purposes of convenience, published in a separate booklet, wording could be used in the Convention to ensure that they retain their status as provisions of Part B.

Comment 12 (on Title 1)

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 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. It is proposed to retain the age of 16 as the minimum age, although some Governments recommend a lower minimum age and the Seafarers' representatives go the other way by questioning whether 16 is still appropriate given the provisions of Convention No. 182 (and Recommendation No.190) on the Worst Forms of Child Labour, 1999, which sets the basic minimum age at 18 for such worst forms. If employment as a seafarer necessarily involves hazardous work, it might well come within the category of a worst form of child labour. Whether or not it does is a debatable question, but it is not one that has only arisen since Convention No. 182. Already in 1973, the minimum age of 18 for hazardous work had been established by the Minimum Age Convention (No. 138) in its Article 3. Nevertheless, the Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180), set the age of 16 as the minimum for work on a ship. The provision concerned – Article 12 – is placed under the heading "Part III Manning of ships". It is thus not limited to the context of "Seafarers' hours of work and hours of rest", which is the subject of Part II of the Convention. For these reasons, Regulation 1.1 of the preliminary second draft sets the initial minimum age at 16, which could be changed later in Part A of the Code to provide for a higher age. In fact, a detail of this kind should not normally be included in the Regulations. Inclusion has

exceptionally been proposed in Regulation 1.1, in view of the importance that might be given to this detail by national Parliaments considering ratification. In its comments received after the third meeting of the High-level Group, the ISF suggested that the following exception should be added to paragraph 2 of this Regulation and to paragraph 1 of Standard A1.1, “except in the case of those following a programme of structured on-board training when the minimum age shall be 15 years”, to take account of countries in which the school leaving age is 15. With respect to paragraph 4 of Standard A1.1, the Seafarers’ representatives have suggested that the requirement of consultation with the social partners on what is hazardous could be deleted and a provision inserted into Guideline B1.1 requiring the competent authority to take into account the relevant guidelines promulgated by competent international organizations.

3. *Regulation 1.2* deals with medical certificates. Standard A1.2 adds an explicit recognition of medical certification requirements under the STCW Convention.
4. Guideline B1.2 is the first example of subheadings that are used throughout the guidelines in Part B of the Code. It consists of two sections: B1.2.1, setting out the basic content requirements for medical certificates, is headed, “Implementation of Standard A1.2”. This heading identifies it as a provision referred to in paragraphs 9 and 10 of the Explanatory Note. Section B1.2.2, concerning the international guidelines for medical fitness examinations, is headed, “Additional guidance”, indicating that it would have the status of a recommendation in existing ILO instruments (see paragraph 11 of the Explanatory Note).
5. *Regulation 1.3* deals with training and qualifications. The Office had envisaged using the terminology of certificates, but in the Subgroup 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 as drafted would explicitly recognize other training requirements such as those under the STCW Convention. Paragraph 1 of Standard A1.3 proposes a 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 Convention and Code be either adopted or referenced. The preliminary second draft reflects the advice of the International Maritime Organization (IMO) on the appropriate wording to ensure that the provisions in the draft Convention are not in conflict with the STCW. A new provision, paragraph 4 of Standard A1.3, is proposed regarding initial and on-board training to ensure that personnel have the opportunity to keep their knowledge and skills up to date (lifelong learning). Comments suggest that there may concern as to who should be responsible for this and also whether the provision, if included, should be confined to domiciled seafarers. It is understood that the question of certification for positions such as able seafarer 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 seafarers and ships cooks. Advice from IMO and comments from the Shipowners after the third meeting indicate that the question of transfer to IMO may require further discussion.
6. It had initially been envisaged that there would be a Regulation regarding vocational training. However, the present 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. However, as noted above, until there is a decision on the issue, the concept has been retained in paragraph 5, Standard A1.3 and Guideline B1.3.3. The more detailed provisions on national planning for vocational training for crew members have been retained as an Appendix to Part B of the Code but may perhaps, instead, be considered for publication as a separate booklet or other

educational material to assist Members. In that case, the related Standard and Guideline may need to be reconsidered.

7. *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 Convention No. 179 and the associated Recommendation. The first draft has been modified in response to comments in the third meeting and subsequent comments that there was too much duplication in Parts A and B of the Code for this Regulation. In addition several Governments indicated difficulty in implementing the text of the first draft. The preliminary second draft has been simplified to meet concerns expressed about this issue and also about the need to ensure that the distinction between public and private services be clarified. At the third meeting the Seafarers proposed that a certification system be developed for recruitment and placement agencies and that these certificates be subject to inspection. The possible development of a certificate system is provided for in square brackets in the preliminary second draft and in the inspection lists in Appendices A5-I and A5-II.
8. *Regulation 1.5*, dealing with seafarers' identity documents, reflects the views of the third meeting. It appeared that most constituents favoured retention of some reference to the new Convention (No. 185) but did not favour including the text of the Convention in this consolidated Convention. Comments after the third meeting reinforce this view; however a final decision has not yet been taken.

Comment 13 (on Title 2)

1. *Title 2* deals with the terms and conditions of employment including matters such as: the context for signing the agreement; the basic minimum terms of employment such as wages, annual leave, repatriation and the requirement that ships have a sufficient and qualified personnel on board to provide a safe work environment.
2. *Regulation 2.1* deals with the conditions under which a seafarer signs a seafarers' employment agreement. As much as possible it seeks to ensure that 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 consistency with the minimum standards in the Convention 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. Comments after the third meeting raised the situation of self-employed personnel. This is now covered by the requirements in Standard A2.1, paragraph 1(a). That Standard also requires (paragraph 2) that Member adopt laws and regulations for the essential terms that must be in each agreement.
3. Paragraph 3 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. Whether there should be a requirement to that effect is a question that is left open (by means of the square brackets). Paragraph 4 (in square brackets) reflects a proposal made by the Seafarers' representatives at the third meeting with respect to the definition of seafarers' employment agreement in Article II, paragraph 1(g). For reasons of drafting, it is presented in this different form.

-
4. 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(d)).
 5. Paragraph 3 of Standard A2.1 provides a clearer statement of the legal implications of a provision previously proposed in Regulation 5.3 of the first draft. In its revised form it expressly seeks to provide an appropriate remedy where a seafarers’ employment agreement does not conform to the standards of the Convention: the agreement would be construed as if it fully provided for the right or benefit that had been omitted in the agreement and any restrictive clauses would be considered null and void. The enforcement of this provision – which was a matter of concern to some members of the High-level group at its third meeting – would be left to the national courts with jurisdiction to consider disputes related to the agreement concerned. At the third meeting, the Seafarers’ representatives considered that such a provision would be better placed in this Title 2. In order not to prejudge this question, the same provision appears inside square brackets here and as paragraph 3 of Regulation 5.3.
 6. *Regulation 2.2* deals with wages. The text as drafted was reviewed by the High-level Group at the third meeting. Some additional provisions were suggested in comments following the third meeting regarding timely payment of wages, accounting for wages and provision for the transmission and cost of transmission of wages, including applicable exchange rates (Standard A2.2, paragraph 5). Standard A2.2 contains mandatory requirements that are not based on any current international labour Convention but are believed to be uncontroversial. The other provisions have been placed in Part B of the Code as “Additional guidance” (see paragraph 11 of the Explanatory Note) as they are based on an international labour Recommendation (No. 187 on Seafarers’ Wages, Hours of Work and the Manning of Ships of 1996).
 7. In connection with Guideline B2.2.2, it was noted in a comment that a maximum of 48 hours per week had been recommended for the purpose of calculating overtime, whereas Convention No. 47 of 1935 had approved the principle of a forty-hour week. The undertaking in that Convention was, however, to apply this principle to classes of employment to be prescribed in separate Conventions to be adopted later and 48 hours continued to be established as the generally applicable maximum in subsequent instruments (Convention No. 57 of 1936, which did not come into force, and Recommendation No. 187 just referred to).
 8. In another comment, it was suggested that some provision limiting or prohibiting deductions for monetary fines be included. Possible wording is proposed inside square brackets (Guideline B2.2.2, paragraph 4(j)).
 9. *Regulation 2.3* deals with hours or work or rest. Annual leave, which was also covered by the same Regulation in the first draft, is now dealt with separately in Regulation 2.4. The need to explicitly refer to seafarer fatigue was suggested in the Subgroup and supported in the High-level Group in its third meeting. This has been retained (paragraph 4). Later comments suggested a need to also expressly provide for some exemptions for specific positions. It was felt, however, that the new Convention should closely follow the provisions of the Seafarers’ Hours of Work and the Manning of Ships Convention, 1996 (No. 180), whose adoption had been the subject of extensive debate and delicate compromises.
 10. *Regulation 2.4* deals with annual leave entitlements and also suggests that the principle of shore leave be included. Comments have shown that some of the provisions, particularly the calculation of the entitlement on the basis of 30 calendar days a year (Standard A2.4, paragraph 2), could give rise to problems for certain countries. It was noted that an

agreement to accept pay in lieu of leave, expressly permitted under the first draft, was prohibited by a European Union directive. Such agreement is still possible under the present draft (paragraph 3 of Standard A2.4), but is not expressly provided for. A comment from the ISF indicated that the requirement for payment in advance of leave (now in paragraph 3 of Guideline B2.4 – inside square brackets) was not the best option.

11. *Regulation 2.5* 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 was proposed in a comment following the third meeting. This provision is in square brackets and should be regarded as a proposal pending the outcome of the Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers that will meet before the fourth meeting of the High-level Group.
12. In an effort to accommodate concerns by some constituents about the level of prescriptive detail in the first draft many of the details previously found in Part A have been transferred to Part B. Standard A2.5, paragraph 7, reflects a concern expressed by a Government member in the third High-level meeting and supported by the Seafarers in their comments following the third meeting. The words “In particular” have been added by the Office in order to make it clear that there is no intention to restrict the scope of the preceding, more general, paragraph.
13. *Regulation 2.6* on seafarers’ compensation for the ship’s loss or foundering has been moved from Title 4 in response to the advice of the High-level Group at its third meeting.
14. *Regulation 2.7* on safe manning adopts the term “manning” rather than “crewing” in response to comments made after the third meeting.
15. *Regulation 2.8* 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 work force and many no longer have a national register for seafarers. The Shipowners representatives suggested that the provision be considered as a part of social 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). However several options which may address concerns about having a policy for one sector only and promote inclusion of seafarers in broader full employment policies are suggested.

Comment 14 (on Title 3)

1. *Title 3* has been renamed “Accommodation, recreational facilities, food and catering” In order to avoid confusion with welfare matters in Title 4. These shipboard matters constitute a significant part of the issues addressed in the maritime labour certificate and declaration of compliance described in Title 5 and the related inspections and monitoring.
2. The provisions under *Regulation 3.1*, dealing with on board accommodation and recreational facilities, are among the most detailed and technical in the Convention and contain numerous requirements for specific entitlements that are related to the particular duties and positions of seafarers. In the first draft they were 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, with their actual text being transferred to Code B. The preliminary second draft is now in italics. This is because the current text reflects, for the most part, a proposal made by the Seafarers. This proposal,

or a joint Shipowner/Seafarer proposal that may be agreed, would be discussed at the fourth meeting of the High-level Group, initially in a working party if the suggestion referred to above (see point 3.3 of the general comment at the start of this Commentary) is adopted. A further aspect that may need consideration is the question of the application of any structural changes (i.e., room size etc.) to ships in existence at the time of entry into force of the Convention itself or (see the proposed paragraph 2 of Regulation 3.1) of an amendment. Although the provisions 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.

3. *Regulation 3.2* deals with food quality and catering standards. The provisions in this Regulation have been modified slightly from the first draft (i.e., specifying drinking water and indicating that food must be palatable for personnel from diverse backgrounds) in line with suggestions made in comments following the third meeting.

Comment 15 (on Title 4)

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 protection.
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. A question remains as to whether the standard of care should be linked to that of workers on shore. It is noted that a model medical record document remains to be drafted for placement under the appendices to the Convention (see Guideline B4.1.2).
3. A comment from a Government indicated that the obligation to provide free dental care (considered to be covered by the term "medical care" – see Standard A4.1, paragraph 1) could give rise to problems in certain circumstances; the obligation to provide free medical care under Convention No. 164 has been made a little more flexible with the addition of the words "in principle" in paragraph 2 of Regulation 4.1 and the use in Standard A4.1 (paragraph 1(d)) of the phrase "to the extent consistent with the Member's national law and practice" instead of "in accordance with national law and practice" used in Convention No. 164 (Article 4(d)).
4. In the light of a comment made at the third meeting, paragraph 3 of Regulation 4.1 makes it clear that the obligation on coastal States is limited to allowing access to existing medical facilities on shore (there would be no obligation on such States to establish them).
5. *Regulation 4.2* deals with what in the first draft was termed "Shipowners' liability in the case of sickness or injury of seafarers or other misfortunes". The term "Shipowners' liability" is used in the present draft on the suggestion of the ISF. This concise "term of art" perhaps reinforces the need to answer a question raised in a Government comment regarding what is comprised in the term. Since the "liability" concerned (covering both the costs of care and the payment of wages) is not related to any kind of fault on the part of the shipowner, the Office has suggested the addition of a second paragraph to Regulation 4.2 which would make it clear that the provisions are not intended to affect liability under the general civil law for negligence or fault.

-
6. The Government also asked whether the provisions were intended to cover pregnancy: as the Convention is worded at present, pregnancy would be covered under Regulation 4.1 (and the corresponding provisions of the Code), but not normally under Regulation 4.2.
 7. During consultations it was recommended that a provision regarding the provision of insurance for death and disability be added. At the third meeting of the High-level Group there was a difference of opinion between the Shipowner and Seafarer representatives as to whether these matters should be dealt with in this Convention and, if so, how they should relate to the discussions currently under way in the Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation and regarding Death, Personal Injury and Abandonment of Seafarers.
 8. *Regulation 4.3* deals with occupational health and safety protection 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 on-going compliance and conditions on board ship. There appears to be general support from the Seafarers and some Governments for the idea of encouraging more risk evaluation and management (a concept which, according to a comment, should be clarified) and encouraging the collection and use of statistical information (Standard A4.3 paragraphs 3 and 5) in this area. A comment following the third meeting proposed that the term illnesses or occupational diseases as well as accidents be included in the Code, in particular in Part B.
 9. *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. The main concern of many Governments related to ensuring that the wording of the provisions refers to an obligation to promote the development of shore-based welfare facilities without importing any financial obligations to provide or establish these facilities. A proposed provision regarding due process for detained seafarers and access to consulate and similar services has been transferred to Guideline B4.4.6 to respond to concerns expressed in the third meeting about the appropriateness of its placement in the first draft.
 10. *Regulation 4.5* and the associated Code provisions, on "social protection" (a term that seemed to be preferred in the High-level Group, as "social security" had come to be identified with systems operated by Governments) are italicized to indicate their preliminary character. The current draft reflects the advice of the Office's social protection experts. It takes account (*Regulation 4.5, paragraph 2*) of the progressive achievement of the objective of full social security, provided for in the International Covenant on Economic, Social and Cultural Rights, as well as of a proposal put forward by the Government of the United Kingdom at the third meeting. This proposal is annexed to the report of that meeting.⁷ It was not the subject of debate as there was insufficient time for members to consider it. The reaction of many participants was to welcome it as a helpful move towards a possible solution in the most difficult area to be dealt with in the new Convention. The proposal was also the subject of concern for some Governments, which feared that it could lead to a shift of responsibility to shipowners and flag States, to the detriment of seafarers.
 11. The current draft for *Regulation 4.5* and the Code is intended simply as a basis for discussion or for further proposals. At the third meeting, it was recommended that the

⁷ TWGMLS/2003/10, Annex 2.

provisions be dealt with through a working party (see point 3.1 of the general comment at the start of this Commentary), which would have the benefit of relevant information and expert advice.

Comment 16 (on Title 5)

1. *Title 5* deals with compliance and enforcement and is linked to the obligations of ratifying Members under Article V. 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 preliminary second draft that pertain to each of these roles. Title 5 encompasses both traditional enforcement practices through inspection and corrective actions and more contemporary practices aimed at ensuring continual compliance between inspections.
2. The question remains unresolved as to whether Part A of the Code for Title 5 could be amended on the same basis as in Titles 1 to 4 or whether it could only be amended in the same way as the Articles and Regulations (express ratification). The applicable provision, paragraph 3, is in square brackets in the introduction to the Regulations for Title 5. The preceding paragraph, also in square brackets, would preclude the use of substantial equivalence (under Article VI, paragraphs 3 and 4) for the implementation of Part A of the Code under Title 5. This provision reflects views expressed at the third meeting, especially by the Shipowners' representatives. In a subsequent comment the ISF stated that it was most important that control and enforcement procedures were implemented strictly in accordance with the agreed provisions.
3. It will be recalled that the High-level Group has generally endorsed the adoption of a certificate-based system for maritime labour standards if combined with other measures. The provisions in Title 5 draw 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 Group⁸ and adjusted in the light of the High-level Group's comments. In addition, the system proposed in Title 5 draws upon aspects of the well accepted certificate-based system of the International Maritime Organization, which is found in IMO conventions, 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 maritime certifications, particularly those required under IMO conventions. Such an approach was considered essential by some Government representatives in the High-level Group.
4. The approach to Title 5 in the first draft was generally supported by the High-level Group at the third meeting. However, comments at the meeting and following it indicated that the text needed simplification, reduction in duplication between the Regulations and the Standards and clarification as to the operation of the certification system. The preliminary second draft retains the same basic structure and text, but seeks to remedy the defects

⁸ 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.

noted at the third meeting. There is clearly a need, however, for the High-level Group to examine the proposed certification and inspection provisions in much greater detail. For this reason, it is proposed that a working party be devoted to this subject at the fourth meeting (see point 3.2 of the general comment at the start of this Commentary).

5. *Regulation 5.1* deals with a ratifying Member's responsibilities for working and living conditions for seafarers on board ships that fly its flag. Under the general principles in Regulation 5.1.1, 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. The obligation to adopt an effective system for inspection and certification is laid down and includes the obligation to report to the ILO on the system and methods for assessing its effectiveness (Regulation 5.1.1, paragraphs 2 and 4).
6. *Regulation 5.1.2*, complemented by Standard A5.1.2 and Guideline B5.1.2, sets out the details of the proposed maritime labour standards certification system, which can be summarized as follows:
 - (a) Each ship would be required to carry a maritime labour certificate on the basis of a satisfactory inspection by the flag State to verify that the seafarers' working and living conditions on board ships that fly its flag are in compliance with the standards of the Convention, as adopted in national laws and regulations (including any substantial equivalence), and a declaration of compliance.
 - (b) A list of matters to be inspected provides the parameters of the minimum working and living conditions to be inspected and certified as satisfactory (Appendix A5-I). This list is one of the elements of the draft that will need to be carefully reviewed at the fourth meeting; square brackets are used to indicate items that have been proposed but not discussed or are the subject of reservations (the same applies to the list in Appendix A5-II for port state control – see below, point 10(c)). The period of validity for the certificate is not yet agreed (Standard A5.1.2, paragraph 7). Three years was initially proposed however some Members have proposed five years. Irrespective of the period of validity, the ship would still be subject to inspections to verify ongoing compliance and 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' working and living conditions;
 - (c) A maritime labour certificate would only be issued if the ship passes inspection and has an approved declaration of compliance (Regulation 5.1.2, paragraph 3). At the third meeting, there was a suggestion that it should be possible to issue a certificate on a provisional basis in appropriate cases.
 - (d) The declaration of compliance is presented as having two main components (Standard A5.1.2, paragraph 4). A "national" component, 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. Any substantial equivalents adopted on the basis of Article VI of the Convention (see Comment 6, point 3, above) would be noted on this document (see Standard A5.1.2, paragraph 4(a)). The other component of the declaration would set out ship-specific components as well as the measures adopted by the shipowner and approved by the competent authority for assuring ongoing compliance on the ship between certifications. An explanation as to what is meant by ship-specific components is given in Guideline B5.1.2, paragraph 2. The ship would be subject to verification inspections by the flag State to ensure that the compliance measures proposed by the shipowner are functioning properly.

-
- (e) The present draft permits considerable flexibility with respect to the form of the maritime labour certificate and declaration of compliance (Guideline 5.1.2, paragraph 5). Consideration should however be given to possibly requiring greater uniformity in Member countries to assist the work of port state inspectors.
- (f) The maritime labour certificate and the declaration of compliance together would constitute prima facie evidence that the ship was in compliance with the standards of the Convention as they pertain to the matters certified (Regulation 5.1.1, paragraph 3). Officials in ports inspecting seafarers' working and living conditions would be entitled to review the documentation but, unless there were grounds for a detailed inspection, they would not investigate further (Regulation 5.2.1, paragraph 2).
7. *Standard 5.1.3* tentatively maintains (paragraph 4) 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 and have proposed a five-year validity period. 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.
8. *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. 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 this Regulation requires that Members ensure that there is no "victimization" of a seafarer for making a complaint. A definition of "victimization" is proposed in paragraph 3 of Standard A5.1.4.
9. *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. These provisions originate from Article 4 of the Merchant Shipping (Minimum Standards) Convention (No. 147), the port state control provision.
10. *Regulation 5.2.1* deals with inspections in port. It embodies the following features:
- (a) Members would be required to have an effective port state inspection and monitoring system (Regulation 5.2.1, paragraph 4); however, as is the case at present under Convention No. 147, they would not be under any obligation to inspect any particular ship ("may be the subject of inspection" – Regulation 5.2.1, paragraph 1).
- (b) Where a valid maritime labour certificate and declaration of compliance is produced, an inspection could only be carried out in the cases set out under (b) and (c) of paragraph 1 of Standard A5.2.1. In accordance with the principle of "no more favourable treatment", reflected in paragraph 7 of Article V of the preliminary second draft, the provisions on port state control would apply to the ships flying the flag of Members that had not ratified the consolidated Convention. Such ships would not be able to produce the certification and documentation required by the Convention. They would thus always be liable to inspection under paragraph 1(a) of Standard A5.2.1.
- (c) The inspection would "in principle" cover the areas listed in Appendix A5-II (Standard A5.2.1, paragraph 2). It would relate to conformity with "the standards of this Convention" (Regulation 5.2.1, paragraph 1). This would presumably cover any substantial equivalents identified by ratifying Members in the declaration of

compliance (see point 6(a) 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) 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 (paragraphs 4 and 5 of Standard A5.2.1): 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). Concern has been expressed concerning the burden for port States if they had to go through such procedures every time a deficiency was found. It is suggested that the necessary discretion should be given through the addition of the words “as appropriate” at the end of paragraph 4 of Standard A5.2.1. In this connection, it would seem to be in the interest of all ratifying Members that a record be kept of ships in serious or persistent violation.
- (e) There would however be an obligation on the port State, in the case of certain specified kinds of deficiencies, to detain the ship until the deficiencies are remedied. At present, under Article 4 of Convention No. 147, the port State may detain a ship to the extent necessary to rectify any conditions on board which are “clearly hazardous to safety or health”. Standard A5.2.1, paragraph 6, under (b) and (c) proposes two other circumstances warranting detention: material hardship to seafarers and repeated serious violations – concepts which are explained further in Guideline B5.2.1, paragraph 2. Paragraph 6 of Standard A5.2.1 has been placed inside square brackets in view of concern that has been expressed by both Seafarers and Governments (for differing reasons) about the extended basis of detention provided for in this paragraph.

11. *Regulation 5.2.2* deals with on-shore seafarer complaint handling procedures. It was recognized in the first draft that port state officers should take into account the desirability that adequate complaint procedures existing on board the ship concerned should have been explored by the complainant (Standard A5.2.2, paragraph 2(a)). However, a Government indicated, in its comments following the third meeting of the High-level Group, that an on-shore complaint procedure would be unacceptable in any event as its national law specifically prohibits disputes from being handled by foreign authorities. The Convention would however have to take account not only of countries with fair and efficient dispute handling procedures, but also of countries which may not have adequate procedures or may not be able to deal with a case expeditiously. At the same time, as a principle of “international comity”, judicial or similar bodies decline to hear cases where there is a more appropriate body with jurisdiction over the kind of dispute concerned. In view of Article 94 of the United Nations Convention on the Law of the Sea, cited in the preamble to the consolidated Convention, the more appropriate judicial or administrative bodies would be those of the flag State. For this reason, it is proposed in paragraph 2(b) of Standard A5.2.2 that the port state officers should also take account of the desirability that complaints are dealt with by the competent administrative or judicial authorities of the flag State where procedures are available there for an expeditious and fair resolution.

12. *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 of

labour-supplying States in the area of enforcement, 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, that term could not be defined for the purposes of a legal text. Indeed, 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”, the Convention would simply refer to “labour-supplying responsibilities”.

- 13.** Another question that may need to be discussed relates to the situations in which labour-supplying responsibilities arise. A typical situation is where recruitment and placement agencies are established or operated on the territory of the country concerned. This is dealt with in paragraph 1 of Regulation 5.3. 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. A legislative responsibility relating to seafarers’ employment agreements concluded on a Member’s territory was also contained in Regulation 5.3 in the first draft. At the third meeting, the Seafarers’ representatives felt that a provision of this kind could more appropriately be placed in Title 2. It is now provisionally to be found, inside square brackets, in two alternative places: as paragraph 3 of Regulation 5.3 and as paragraph 3 of Standard A2.1. The rationale of this proposed provision is explained in point 5 of Comment 13 above).
- 14.** Paragraph 4 of Regulation 5.3 would require Members to establish an effective inspection and monitoring system for enforcing their labour-supply responsibilities under the Convention. The Seafarers have proposed that there should be a certification system in place for recruitment and placement agencies which would form part of the ship inspection/certification system.
- 15.** 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”.⁹ This is indeed the practice of at least one major labour-supplying State. 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.

⁹ *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.

Annex

Legal Adviser's opinion on the status of Part B of the Code (see Comment 6, point 2)

Coexistence of mandatory and non-mandatory provisions in a Convention

Questions were addressed to the Legal Adviser by the government representatives of the Netherlands and Denmark, as well as of Cyprus and Norway, as to the various consequences flowing from the co-existence in the draft consolidated Convention of binding and non-binding provisions for ratifying Members.

The High-level Tripartite Working Group on Maritime Labour Standards is, in accordance with its mandate, working on a consolidated Convention as a new type of instrument compared with those adopted up to now. The consolidation of maritime instruments in force is aimed at placing all substantive elements in a single instrument in an approach radically different to that employed up to now, where Conventions contain detailed technical provisions, often accompanied by recommendations. From this perspective, conclusions cannot be drawn from the traditional formal arrangement based on the distinction between a Convention – where the provisions are binding – and a Recommendation – where they are not.

The future instrument is a Convention open to ratification by States Members providing explicitly for the coexistence of binding and non-binding provisions (draft Article VI, paragraph 1). The provisions of Part A of the code would be binding, those of Part B not. Some international labour Conventions set out, alongside binding provisions, others that are of a different nature.¹ The novelty introduced in the future instrument essentially resides in the great number of non-binding provisions in the instrument. It should equally be noted that other organizations such as the IMO have adopted conventions containing the two types of provisions without any apparent legal problems in their application.

Members ratifying the Convention would have to conform to the obligations set out in the Articles, the regulations and part A of the code. Their only obligation under part B of the code would be to examine in good faith to what extent they would give effect to such provisions in order to implement the Articles, regulations and Part A of the code. Members would be free to adopt measures different from those in Part B of the code so long as the obligations set out elsewhere in the instrument were respected. Any State Member which decided to implement the measures and procedures set out in Part B of the code would be presumed to have properly implemented the corresponding provisions of the binding parts of the instrument. A Member which chose to employ other measures and procedures would, if necessary particularly where the Member's application of the Convention was questioned in the supervisory machinery, have to provide justification that the measures taken by it did indeed enable it to properly implement the binding provisions concerned.

2 July 2003.

Loic Picard,
Legal Adviser.

¹ See, for example, the Occupational Health Services Convention, 1985, Article 9, paragraph 1: "... Occupational health services should be multidisciplinary".