INTERNATIONAL LABOUR ORGANIZATION

PTMC/04/2

Consolidated maritime labour Convention

Commentary to the recommended draft

Preparatory Technical Maritime Conference

Geneva, 13-24 September 2004

INTERNATIONAL LABOUR OFFICE GENEVA

ISBN 92-2-115812-8

First published 2004

Formatted by TTE: Ref. PTMC-2004-04-0181-01
Printed by the International Labour Office, Geneva, Switzerland

Contents

Appendices

Commentary

General comments

1. The recommended draft for a Convention on maritime labour standards, to which this Commentary relates, has been under development since 2001. Its origin could be said to have started with the resolution concerning the review of relevant ILO maritime instruments. This resolution was unanimously adopted by the Joint Maritime Commission (JMC) in January 2001 [1] and presented to the Governing Body of the International Labour Office at its 280th Session in March of that year. The resolution is known as the "Geneva Accord" between the Shipowner and Seafarer representatives, who make up the JMC under a Government chairperson and with the participation of an Employers' and a Workers' representative from the Governing Body. It noted that the shipping industry had been described as "the world's first genuinely global industry" which "requires an international regulatory response of an appropriate kind – global standards applicable to the entire industry", and called for "the development of an instrument which brings together into a consolidated text as much of the existing body of ILO instruments as it proves possible to achieve" as a matter of priority "in order to improve the relevance of those standards to the needs of all the stakeholders of the maritime sector". This instrument should "comprise a number of parts concerning the key principles of such labour standards as may be determined, together with annexes which incorporate detailed requirements for each of the parts. The instrument should also provide for an amendment procedure which would ensure that the annexes might be revised through an accelerated amendment procedure". It was recommended that the Governing Body establish a "high-level tripartite working group on maritime labour standards", with a subgroup, to assist in the development of this instrument. The Governing Body was urged to convene a preparatory meeting in 2004 for a first discussion of the proposed instrument, and a maritime session of the International Labour Conference in 2005 to adopt the instrument.

2. At its session in March 2001, the Governing Body accepted the JMC resolution and established the High-level Tripartite Working Group on Maritime Labour Standards, which held its first meeting in December 2001. At that meeting, the Government representatives expressed full support [2] for the eight "preferred solutions" [3] that had been put forward by the Shipowner and Seafarer representatives in the JMC. It should be noted that the latter did not call into question the legal status or substance of existing maritime labour instruments, but rather called for greater consistency and clarity, more rapid adaptability and general applicability. The concerns of the Shipowners and Seafarers were essentially to bring the system of protection contained in existing standards closer to the workers concerned, in a form that was consistent with this rapidly developing, globalized sector, and to improve the applicability of the system so that shipowners and governments

[1] JMC/29/2001/14, Appendix 2.

[2] See para. 48 of the report of the first meeting in document TWGMLS/2001/10.

[3] Contained in para. 3.23 of document TWGMLS/2001/1.

interested in providing decent conditions of work did not have to bear an unequal burden in ensuring such protection. [4]

3. The recommended draft for a Convention on maritime labour standards has remained true to the principles established in 2001 in all respects: substantive content, structure and approach.

(a) With respect to *substantive content*, the draft does indeed bring together into a consolidated text as much of the existing body of ILO instruments as it has so far proved possible to achieve. While full account has been taken of the conclusions, relevant to the maritime labour Conventions, of a Governing Body Working Party on Policy regarding the Revision of Standards, modifications of existing standards have essentially been restricted to updating matters of detail that were not considered to give rise to controversy or resolving inconsistencies as between the Conventions concerned. In the recommended draft, the source of each provision that is based on an existing Convention or Recommendation is shown, inside (round) brackets, in the text. These references are for the purposes of information only at this stage: they will not appear in the final text of the Convention.

(b) The *structure* has remained as originally envisaged, apart from changes in terminology with respect to "Regulations", and "Part A" and "Part B" of "the Code", and the Articles of the draft Convention establish a simplified amendment procedure applying to the provisions of the Code.

(c) On the general *approach*, as will be seen below, considerable thought has been given to improving the relevance of existing maritime labour standards, from the viewpoint of ensuring their general applicability, which implies two aims: first, that the consolidated Convention is ratifiable on a wide scale by the maritime Members of the ILO and, second, that its provisions will be properly enforced. For these purposes, as summarized by the Chairperson of the High-level Group at its first meeting, the instrument should be *inflexible with respect to rights* and *flexible with respect to implementation* and the principal consideration should be the *achievement and maintenance of a level playing field*. [5]

4. In order to achieve the aims established at the start of the exercise, the recommended draft Convention on maritime labour standards has had to embody a number of innovative solutions, which have from time to time prompted questions from Government representatives familiar with the ILO's traditional Conventions. Many of these novel features for the ILO in fact rely on recognized and accepted approaches in other Conventions in the maritime sector – namely, those of the International Maritime Organization (IMO). This is the case with the general structure of the Convention, its simplified amendment procedure and the system of certification of ships for compliance with the requirements of the Convention. The IMO solutions have not however been imported en bloc in view of the very different constitutional requirements, procedures and philosophy of the ILO (particularly, those inherent in tripartism). In order to understand the reason why a particular innovation has been considered necessary, it is often useful to see the feature in the context of the problem that it is designed to resolve. This is particularly true of the relationship between the mandatory Part A and the non-mandatory Part B of the Code, which will be explained later in this Commentary (see comment 6). A question

[4] See para. 3.1 of document TWGMLS/2001/1. The specific concerns are set out in paras. 3.3 to 3.22 of that document.

[5] See section I of the appendix to the report of the first meeting (op. cit., in footnote 2, above).

asked in this respect is: Why can the new Convention not follow the approach that is usually (but not always) [6] followed in ILO instruments of placing the mandatory provisions in an international labour Convention and non-mandatory provisions in an international labour Recommendation supplementing the Convention? The answer is related to the basic challenge of making the new Convention generally ratifiable. There are over 60 maritime labour Conventions and Recommendations currently in force, dating back as far as 1920, which provide international standards for almost every aspect of employment on ships. This body of standards represents a considerable achievement for the protection of the workers concerned and for the industry as a whole. However, despite the apparently significant interest of Members in these issues suggested by the large number of instruments, the level of ratification for many of the Conventions is very low. [7] One of the reasons that has been identified for the lack of success of particular Conventions in this respect is the high level of detail, contained in one or two mandatory provisions, that creates an obstacle to ratification for certain countries even though the system of protection in the areas covered may be at least as strong in the countries concerned as that required under the Convention. The relationship between Part A and Part B of the Code, and the special treatment given to Part B, is in fact a long-discussed and carefully balanced application of the maxim referred to earlier of flexibility with respect to implementation, and inflexibility with respect to rights, thus helping to find a solution to what would otherwise appear as an insoluble problem.

5. The recommended draft is the result of a highly intensive and extensive consultation process leading up to this preparatory technical conference. Four week-long meetings of the High-level Group to review previous drafts of this text have taken place since 2001. [8] These meetings have generated considerable interest from Members, with the fourth meeting in January 2004 involving 126 participants, including 45 Government delegations. In addition, two week-long meetings of an almost equally large Subgroup of the High-level Group met during this period to discuss text and proposals. This consultation process was complemented by specific opportunities for Governments and the Shipowner and Seafarer representatives to make written submissions on the various drafts, which were considered by the Office, under the guidance of the Officers of the High-level Group. This recommended draft Convention reflects the conclusions that have been reached throughout this consultation process taking into account the mandate of consolidation of existing Conventions and the overall objectives to be achieved in developing a new maritime labour instrument.

6. In light of the extensive consultation process involved in developing the current text, the High-level Tripartite Working Group, at its fourth meeting in January 2004, recommended that the Preparatory Technical Maritime Conference should proceed by focusing its attention initially on matters that remain as yet unresolved as they are in need of more discussion or are controversial, rather than revisiting points that have been the subject of

[6] The recent Seafarers' Identity Documents Convention (Revised), 2003 (No. 185), is the most notable example of the inclusion (in Annex III) of non-mandatory "recommended procedures and practices".

[7] See Appendix I to this Commentary for a list of proposed revised Conventions and the related record of ratification.

[8] First meeting: *Final report*, High-level Tripartite Working Group on Maritime Labour Standards, TWGMLS/2001/10 (Geneva: 2001); second meeting: *Final report*, High-level Tripartite Working Group on Maritime Labour Standards, TWGMLS/2002/13 (Geneva: 2002); third meeting: *Final report*, High-level Tripartite Working Group on Maritime Labour Standards, TWGMLS/2003/10 (Geneva: 2003); fourth meeting: *Final report*, High-level Tripartite Working Group on Maritime Labour Standards TWGMLS/2004/ (Nantes, 2004).

extended tripartite discussion and agreement.[9] The matters identified as needing further discussion by this Conference are indicated by brackets and underlining. In order to assist in review and discussion, the Officers of the High-level Group recommended that two kinds of brackets and associated indications be adopted to distinguish between points considered controversial and matters that simply need discussion and a decision. Square brackets and solid underlining, i.e. [xxxxx], in the recommended draft are used to indicate controversial matters. Curved or soft brackets with broken underlining, i.e., {xxxx} are used to indicate proposals that have not yet been discussed (which may or may not be controversial).

7. The representatives of Governments are urged to come to the Preparatory Conference in a position to discuss the issues in brackets and to note areas where they feel there may be significant difficulty in 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.

8. In particular, it is hoped that the representatives will be able not only to draw attention to areas where their Governments may have significant difficulties 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 respect it is important to note that at the High-level Group's fourth meeting, Governments indicated acceptance of the fact that a new Convention could entail adjustments to existing legislation: to require that the status quo be maintained at the national level in every country would in fact defeat the purpose of the new Convention.

9. As already indicated, one of the innovative solutions required to achieve the objectives of this instrument relates to the structure of the Convention. In accordance with the guidance provided to the Office, the recommended draft Convention has different parts which together would make up the Convention. The proposed Convention would comprise three different but related parts, the Articles, the Regulations and the Code.

- The Articles and Regulations set out the core rights and principles and the basic obligations of Members ratifying the Convention. The Articles and Regulations can only be changed by the General Conference in the framework of article 19 of the Constitution of the International Labour Organization (see Article XIV of the Convention).

- The Code contains the details for the implementation of the Regulations. It comprises Part A (mandatory Standards) and Part B (non-mandatory Guidelines). The Code can be amended through the simplified procedure set out in Article XV of the Convention, subject to one exception (see paragraph 3 of Title 5 of the Convention). Since the Code relates to detailed implementation, amendments to it must remain within the general scope of the Articles and Regulations.

[9] See the resolution adopted at its fourth meeting, which is appended to the report, op. cit., footnote 8, above.

10. The Regulations and the Code are organized into general areas under five Titles:

Title 1: Minimum requirements for seafarers to work on a ship

Title 2: Conditions of employment

Title 3: Accommodation, recreational facilities, food and catering

Title 4: Health protection, medical care, welfare and social security protection

Title 5: Compliance and enforcement

11. These Titles are presented in what may be called a "vertical" format, to facilitate easier discussion and review. Each Title contains groups of provisions relating to a particular principle or right (or enforcement measure in Title 5), with connected numbering. The first group in Title 1, for example, consists of Regulation 1.1, followed by Standard A1.1 (taken from Part A of the Code) and then by Guideline B1.1 (taken from Part B of the Code). Thus the reviewer can immediately see the overall scope of the particular Regulation and obligation. Constituents may wish to consider whether this vertical approach or the more traditional "horizontal" approach (that is, all Regulations placed together, followed by all provisions of Part A and then all provisions of Part B of the Code grouped together) should be used for the draft of the Convention to be presented to the International Labour Conference.

12. The Convention's structure is intended to help achieve three underlying purposes:

(a) to lay down (in its Articles and Regulations) a firm set of principles and rights;

(b) to allow (through the Code) a considerable degree of flexibility in the way Members implement those principles and rights; and

(c) to ensure (through Title 5) that the principles and rights are properly complied with and enforced.

13. There are two main areas for flexibility in implementation: one is the possibility for a Member – where necessary (see Article VI, paragraph 3) – to give effect to the detailed requirements of Part A of the Code through substantial equivalence (as defined in Article VI, paragraph 4).

14. The second area of flexibility in implementation is provided by formulating the mandatory requirements of many provisions in Part A in a more general way, thus leaving a wider scope for discretion as to the precise action to be provided for at the national level. In such cases, guidance on implementation is given in the non-mandatory Part B of the Code. In this way, ratifying Members would be able to ascertain the kind of action that might be expected of them under the corresponding general obligation in Part A (as well as action that would not necessarily be required).

15. Although ratifying Members would not be bound by the guidance provided in Part B they would be required – under paragraph 2 of Article VI – to give due consideration to implementing their responsibilities under Part A of the Code in the manner provided for in Part B. If, having duly considered the relevant Guidelines, they decide to provide for different arrangements to meet the Standard which affords at least the same kind of protection as the measures suggested in the Guidelines, they are left free to do so. However, by following the guidance, a Member can be sure without further consideration that the arrangements it has provided for are adequate to implement the responsibilities concerned under Part A. The same will be true of the bodies responsible for reviewing

implementation of international labour Conventions, particularly those responsible for dealing with the reports submitted by ratifying Members under article 22 of the ILO Constitution.

16. In legal terms, therefore, there is a mandatory obligation to give "due consideration" to the non-mandatory guidance contained in Part B of the Code. The obligation is provided for in Article VI of the Convention, which is considered in more detail in comment 6 below. But what are the precise implications for Members that ratify the Convention with respect to the treatment to be given to Part B of the Code? This question has been raised by some constituents and was resolved in the following understandings, which were formally adopted by the High-level Group at its meeting at Nantes this year:

> *Question:* Is Part B mandatory?
>
> *Answer:* No.
>
> *Question:* Can Part B be ignored by ratifying Members?
>
> *Answer:* No.
>
> *Question:* Is implementation of Part B verified by port state inspectors?
>
> *Answer:* No.
>
> *Question:* Does the ratifying Member have to follow the guidance in Part B?
>
> *Answer:* No, but if it does not follow the guidance it may – vis-à-vis the competent bodies of the International Labour Organization – need to justify the way in which it has implemented the corresponding mandatory provisions of the consolidated Convention.
>
> These understandings would need to be clearly reflected in the Convention itself or in related documentation.

17. In the recommended draft, the above understandings are reflected partly in the Explanatory note to the Convention (see comment 14 below) and partly in the body of the Convention (see Regulation 5.2.1, paragraph 3). They could also be specifically drawn to the attention of the International Labour Conference with a view to their approval as part of the *travaux préparatoires*.

Comments on the Preamble and Articles

Comment 1 (on the Preamble)

Preambles to Conventions are not binding on the parties, but they are an authoritative expression of the parties' intentions. Thus, the proposed Preamble indicates a clear intention that the new consolidated Convention should, inter alia, embody the fundamental principles to be found, in particular, in the ILO's "fundamental Conventions" (2nd preambular paragraph), within the general legal framework of the basic universal Convention in the maritime sector: the United Nations Convention on the Law of the Sea (UNCLOS), 1982 (seventh paragraph). Particular reference is made (eighth paragraph) to Article 94 of that Convention, which begins by establishing that:

> Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. … In particular every State shall: … assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.

The clause at the end of the eighth paragraph of the Preamble, "and that Article 217 establishes the enforcement obligations", has been placed inside { } brackets for discussion since the relevance of Article 217 of the United Nations Law of the Sea Convention has

been questioned as it relates to flag state obligations for the prevention, reduction and control of pollution of the marine environment from vessels, rather than to social matters.

Comment 2 (on Article I)

1. The first Article, on general obligations, begins (*paragraph 1*): "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.

2. *Paragraph 2* refers "to the effective implementation and enforcement" of the Convention. A Government representative has expressed concern about the inclusion of the words "and enforcement" as being inherent in the phrase "effective implementation".

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 words "unless provided otherwise" in *paragraph 1*, allow the general definitions to be the subject of specific variations for the purpose of particular provisions of the Regulations or the Code. However, as far as the term "seafarer" is concerned, the general definition in subparagraph (f) could be retained throughout the Convention with any necessary tailoring to specific categories of seafarers (see the last sentence of point 3 below) being made by restricting the scope of the particular provisions. This is permitted by *paragraph 2* of Article II.

2. *Subparagraph (e)* of paragraph 1 proposes a new definition (as compared with previous drafts of the Convention) relating to the "requirements of this Convention". The earlier drafts had often referred in the Convention text to the "standards of this Convention" and questions had been asked in the High-level Group as to what exactly was meant by that phrase. In this recommended draft, the term "standards" has been replaced throughout the text by "requirements", in order to avoid confusion with the "Standards" in Part A of the Code. The definition that has been added here also makes it clear that this term only refers to the mandatory provisions of the Convention – namely those in the Articles, Regulations and Part A of the Code – which, however, also include Article VI requiring Members to give "due consideration" to implementing their responsibilities in the manner provided for in Part B of the Code (see point 15 of the general comment above).

3. The definition of a "seafarer" (in *subparagraph (f)*) was the subject of extended discussion throughout the development of the draft Convention text. Although the current definition or variations on it are found in many international labour Conventions [10] such as Nos. 164, 166, 178 and 179 [11] and, more recently, No. 185, there is now a greater awareness of the

[10] Convention No. 147 does not address the matter. See also a paper prepared by the Office for the second meeting of the High-level Tripartite Working Group on Maritime Labour Standards, *Definitions and scope of application provisions in existing ILO maritime instruments and related texts*, document TWGMLS/2002/4 (Geneva, 2002).

[11] Some Conventions 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 "any person defined as such" under national law or collective agreements – Article 2(d) of Convention No. 180). Convention No. 178 also provides for consultation with the social partners when there is

broad range of people who are employed at sea and carry out jobs not traditionally understood to be part of the seafaring workforce or thought to be covered by the maritime labour Conventions. 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 international standards. It is hoped that the concerns about ensuring decent work for all workers on board ship can be met by paragraph 1(f), read with paragraph 3 (see below), which allows for some national flexibility, and combined with specific references tailored to particular issues in the more technical parts of the Convention where the context requires it.

4. The definition of "shipowner" in *subparagraph (j)* of paragraph 1 is based on the definition in the Recruitment and Placement of Seafarers Convention, 1996 (No. 179). It is similar to a definition of a "company" adopted by the International Maritime Organization in the international safety management (ISM) provisions of the International Convention for the Safety of Life at Sea, 1974 (SOLAS) as amended. The definition reflects the principle that shipowners are the responsible employers under the Convention with respect to all seafarers on board their ships, without prejudice to the right of the shipowner to recover the costs involved from others who may also have responsibility for the employment of a particular seafarer. This is expressly stated in Standard A2.5 (paragraph 4) on repatriation.

5. With respect to the scope of application of the Convention, as noted above in connection with the inclusive definition of seafarer, *paragraph 3* would provide governments with the ability to exclude some categories of people from the Convention where their inclusion as "seafarers" may be wholly inappropriate. Such a determination would be subject to tripartite consultation on the particular category to be excluded.

6. *Paragraph 4(a)* of Article II is in square [ ] brackets as it may need special attention: the determination of a tonnage limit for application of the Convention, if any is adopted, is an important issue. It should be noted that any decision on this matter must take into account the fact that proposals for limiting the application of the Convention to particular categories of ships are also presented in Title 3, which contains the requirements for seafarers' on-board accommodation. Many of these requirements affect hull design and other structural design aspects of existing ships. At present in Title 3 there has also been no decision as to whether the limitation should be based on tonnage, currently proposed as "[ships of less than 3,000 gross tons]" or "[smaller ships]", however there is agreement that not all of the Title 3 requirements should apply to every ship. Title 3 also proposes further scope-related provisions (Regulation 3.1, paragraphs 3 and 4) regarding the application of the requirements to existing ships when the Convention comes into effect for the Member. In addition it is proposed that some requirements are not applicable to a specified category of ships (passenger ships). Consequently any decision on this matter should include a consideration of the full range of requirements under the draft Convention. It is noted that many Conventions, such as the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), and the Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180), do not have tonnage limitations; however

doubt as to whether someone is a seafarer (see the proposed para. 3 of this Article in the recommended draft).

other Conventions, such as Conventions Nos. 92, 71 and 133, do contain some limitations based on tonnage. A working party at the third meeting of the High-level Group recommended, in accordance with contemporary practice in other maritime Conventions, that the term gross tonnage should be used and that the Convention should only reference tonnage as defined in Article II, paragraph 1(c). [12]

7. *Paragraph 4(b)* excludes fishing vessels (and fishers) from this Convention. This exclusion reflects the view of the Governing Body of the International Labour Office [13] that, although many of the existing maritime labour Conventions specifically encourage Members to apply them to vessels and personnel engaged in commercial fishing, the new maritime labour Convention should not try to also address the very diverse needs and concerns of the fisheries sector. Rather a new Convention and recommendation consolidating the existing international labour standards on fishing is currently under consideration by the International Labour Conference, which would provide protection specifically tailored to meet the needs of the fishing sector. The latter would not, of course, preclude Members from giving their fishers the benefit of any additional protection.

8. The High-level Group did not reach an agreement as to whether oil rigs and drilling platforms should be either totally excluded from the Convention or excluded only when the rig or platform is not under navigation. Both options are presented in square [ ] brackets in Article II, *paragraph 4(d)*.

9. Another important question relates to domestic, coastal and near coastal services. At 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* of Article II 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 text of paragraph 6 is in square [ ] brackets to reflect the differing views.

10. Within the text of paragraph 6 there are also square [ ] brackets around provisions relating to consultation. This relates to proposals put forward by the Seafarers at the third meeting of the High-level Group. An opinion was provided to that meeting by the Legal Adviser as to the difference in meaning between the terms “in consultation” and “after consultation”. [14]

11. There was also some concern expressed about the inclusion in Article II, paragraph 6, of a reference to Article IV, as that 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 and social 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. In other

[12] op. cit., footnote 8, appendix to the *Final report*.

[13] At its 283rd Session (March 2002), the Governing Body decided to place on the agenda of the 92nd Session (June 2004) of the International Labour Conference an item concerning a comprehensive standard (a Convention supplemented by a Recommendation) on work in the fishing sector.

[14] See TWGMLS/2003/10, para. 311.

words, a Member making such exclusions would have to provide protection under its national law for the fundamental rights mentioned in the first four paragraphs, but would not have to apply the detailed "requirements of this Convention", referred to in paragraph 5 of Article IV, to the seafarers concerned.

12. *Paragraph 7* is a standard provision in international labour Conventions.

Comment 4 (on Articles III and IV)

1. These two Articles set out fundamental rights and principles and seafarers' employment and social rights pursuant to the Decent Work Agenda. Two alternative versions (placed inside square [ ] brackets) have been provided for Article III. The first alternative reproduces the original version contained in previous drafts of the Convention. With respect to that version, a number of participants at the High-level Group 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 Conventions, the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147): in addition to stating certain basic employment and social 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". The intention of both versions of Article III is 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 in the original version as the Declaration was agreed without dissent by the International Labour Conference in 1998. With the second version of Article III, the reference would be transferred to the Preamble, as many feel that the Declaration, in view of its promotional nature, should not be referred to in binding legal provisions.

2. The second alternative version results from consultations held by the Office, at the suggestion of the High-level Group at Nantes, with Governments particularly interested in Article III as well as with the Shipowner and Seafarer representatives. As this version seeks to take account of the widely differing views of the various parties consulted, the end result has not been approved by any of the parties and it is not known how far the individual elements in it are acceptable to them as a compromise. However, all the interested parties indicated (with a reservation expressed by one Government concerning paragraph 2) that the second alternative for Article III provided a good basis for the discussions at the Preparatory Technical Maritime Conference to achieve a generally acceptable compromise. At that Conference, participants will be asked to decide which of the two alternatives should be adopted as the basis of discussion.

3. The purpose of *paragraph 1* of the second alternative of Article III would be to achieve recognition of the underlying importance of the fundamental rights while clarifying that they would not form part of the actual "commitments" made by ratifying Members under the Convention; failures to observe them in the context of those requirements would be considered as frustrating the meaningful implementation of the Convention and could be the subject of comment in the framework, for example, of the ILO supervisory procedures.

4. *Paragraph 2* of the second alternative to some extent follows the approach of Article 2(a) of Convention No. 147, referred to in point 1 above, by requiring Members that had not ratified the fundamental Conventions to ensure that the provisions of their laws and

regulations are "substantially equivalent" to those of the Conventions. Paragraph 2 would however apply to all eight of the fundamental Conventions (listed at the beginning of the Preamble to the recommended draft), rather than only to the three mentioned in Convention No. 147. Moreover, the introduction (through substantial equivalents) of the provisions of other Conventions – while understandable in the sense that respect for the fundamental principles and rights which are the subject of those fundamental Conventions has been recognized as an essential condition for the effective exercise of labour rights in general – was strongly criticized by one interested Government consulted, which feared that it would partially change the nature of the Consolidated Convention.

5. *Article IV* requires each ratifying Member to ensure decent conditions of work. *Paragraph 5* makes it clear that the "seafarers' employment and social rights", set out in *paragraphs 1* to *4*, are to be fully implemented, not in the abstract but, rather, "in accordance with the requirements of this Convention" – i.e., in accordance with the relevant provisions of the Articles, Regulations and Part A of the Code (see above, comment 3, point 2).

Comment 5 (on Article V)

1. 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).

2. *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.

3. *Paragraph 4* provides a foundation for port state inspections to help ensure compliance with the Convention requirements regarding working and living conditions on board ship.

4. *Paragraph 5*, relates essentially to the complementary responsibilities of Members from which the world's seafaring workforce are drawn. It requires Members to exercise "effective jurisdiction and control" over seafarer recruitment and placement services, if these are established in its territory. This lays the foundation for the licensing and, if agreed, a certification system for private recruitment and placement services that is proposed in Title 1 of the Convention (see comment 18 below).

5. *Paragraph 6* simply sets out a requirement that the Member is expected to enforce it laws with sufficient sanctions or other corrective actions to discourage violations, even if the violations occur outside its territory, as they often would in the case of international shipping. For example, if a ship flying the flag of a Member violates a requirement and the violation occurs outside the Member's territory, the Member would still be expected to take action with respect to the ship and/or shipowner. The latter idea is in square [ ] brackets as there was some uncertainty on the part of Government representatives as to the nature of this responsibility. 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. Some felt that perhaps this paragraph should be confined to flag state responsibility. However there may be instances where, for example, there may be a violation of law by a seafarer and recruitment placement services which takes place outside the territory of the Member in which the service is located. The principle of territoriality that exists in some countries for application of national laws may allow violations to go unaddressed.

6. *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, discussed above in the general comments at the start of this Commentary, from points 9 to 17. *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 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 at the end of point 3(c) of the general comments above.

2. *Paragraph 2* provides for an interaction within the Code of the Convention, under which Members are to give "due consideration" to implementing their responsibilities under Part A of the Code "in the manner provided for in Part B of the Code". This provision paved the way for the shift of many of the detailed requirements in existing Conventions from the Standards in Part A to the Guidelines in Part B of the Code. In order to assist Members, an "Explanatory note" following the Articles of the Convention has been included in the text of the Convention (see comment 14 below). This note (in paragraphs 9 and 10) reflects the opinion given by the ILO Legal Adviser on the subject to the High-level Group at its third meeting,[15] 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.

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 the Convention's requirements, *paragraph 3* relates to the concept of "substantial equivalence", a possibility already provided for in the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147). There appeared also to be a need to 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* is submitted in two alternatives inside square [ ] brackets. It proposes a general definition of substantial equivalence, which, in the first alternative wording, 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,[16] and referred to with approval by 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 is proposed

[15] The opinion is annexed to the report of the third meeting, op. cit., footnote 8, above.

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

that the concept of substantial equivalence should not apply to Title 5 (see below, point 6 of comment 35).

4. The second alternative for paragraph 4 of Article VI resulted from the consultations referred to in comment 4 above and was considered by the interested parties consulted to offer a better basis of discussion. It differs from the first alternative in two main respects: in the first place, each ratifying Member is required to "satisfy itself" that its legislation or other implementing measure is substantially equivalent to the requirements of Part A of the Code. This wording has been criticized by one Government consulted as introducing an element of subjectivity which could prejudice a "level playing field" and create problems for port state control, due to the need for clear obligations or an international system which can set clear standards. The wording "satisfy itself" is used in Convention No. 147 and, while it gives a certain discretion to the legislators of the flag State, the basic rule of good faith under the law of treaties would require such a discretion to be exercised reasonably. The other main difference with the first alternative is that the definition of "substantial equivalence" in subparagraphs (a) and (b) is a little less strict than that based on the Committee of Experts' analysis of the relevant provisions of Convention No. 147 (see point 3 above). At the same time it is a little more complex than the explanation given by the ILO Legal Adviser at the time of the adoption of Convention No. 147, which essentially referred to the achievement of the general object or purpose of the Conventions concerned. The substance of the Legal Adviser's opinion was reflected in an understanding contained in the instrument of ratification of that Convention by one Member.

5. It will be noted that the definition in paragraph 4 of Article VI would apply only "for the purpose of paragraph 3" (i.e. only as far as the provisions of Part A of the Code were concerned) and only "in the context of this Convention"; it is therefore not intended to affect the meaning that might be given to the term "substantially equivalent" in other ILO Conventions (Nos. 147 and 185). One Government consulted considered that this should be expressly stated in the paragraph.

Comment 7 (on Article VII)

This is a proposal made by the Seafarer 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 proposal was initially presented in conjunction with the discussion of the Article II exemptions for the coasting trade (see comment 3, point 9); 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. The square [ ] brackets around the Article indicate that no agreement was reached with respect to inclusion of this provision in the Convention.

Comment 8 (on Article VIII)

1. The "final clauses" in Articles VIII to XII and Article XVI are based on the standard provisions of international labour Conventions, with particular reference to Convention No. 147. Unlike 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 VIII, still needs to be discussed. Two suggestions are made in { } brackets in the current draft Convention for the purposes of discussion only. The formula of ten 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 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.

3. There has also been a suggestion that consideration be given to including in the entry-into-force requirement an element relating to the number of seafarers from the ratifying Members. It is also important to note that the current text proposes a 12-month period before ratification becomes effective for a Member ratifying after the Convention has come into force. This may be relevant to the issue of adjustments within the domestic systems and to ship construction. Members should also be aware that any decision on the issue of ratification levels must take into account the considerations outlined in comment 10 below concerning Article X.

Comment 9 (on Article IX)

This standard provision regarding the denunciation process is used in all ILO Conventions. The effect of this long-standing practice is to establish the same period during which denunciation is possible for each ratifying Member, regardless of when the Convention entered into force for the Member.

Comment 10 (on Article X)

1. *Article X*, in { } brackets, lists the Conventions which will be revised by the new Convention. The current ratification record of the Conventions listed in Article X is set out in Appendix I to this Commentary. A detailed discussion of the process of revision of Conventions upon the coming into force of this Convention was the subject of a paper *Considerations concerning Article IX of the first draft for a consolidated Convention* [17] provided to the High-level Group at it fourth meeting. There it was pointed out that, until the consolidated Convention is ratified by all of the States that have ratified the existing maritime labour Conventions, it will necessarily have to coexist to varying degrees (depending on their ratification levels) with the obligations under the present international maritime labour Conventions.

2. This raises some questions and options for Members to consider. One issue relates to the individual Members' obligations under existing maritime labour Conventions when they ratify the new Convention: should ratification of the new Convention result in an automatic denunciation of the Conventions revised by the new Convention? The second issue is the broader policy question of whether all the Conventions revised by the new Convention should be closed to further ratification upon the adoption of the new Convention. If the Convention were closed in this way, Members that were currently party to a Convention revised by it would remain bound until they ratified the new Convention or denounced the present Convention, but no other Members could ratify the revised Conventions. They

[17] *Effect on revised Conventions*, document TWGMLS/2004/3. Article IX referred to in this paper is now Article X of this draft.

would have to choose between joining the new Convention or remaining outside the current systems of protection.

3. Under international treaty law, there is no easy way of eliminating existing multilateral Conventions,[18] or replacing them by a new one, unless those Conventions themselves provide a means of doing this. International labour Conventions adopted from 1930 onwards[19] do in fact contain an Article that makes it possible for a future "revising Convention" to eliminate most of the effects of the Conventions they are revising (but not the Conventions themselves). This Article typically reads as follows:[20]

> *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 of [the article permitting denunciation after certain intervals], 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.*
>
> *2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.*

4. Subparagraphs (a) and (b) of paragraph 1 of this Article thus offer two options providing solutions for the coexistence problems mentioned above, which will apply "unless the new Convention otherwise provides". Subparagraph (a) avoids the problem of a ratifying Member being bound by similar obligations under different Conventions: once the new obligations enter into force, the old obligations will disappear. Subparagraph (b) blocks the old Convention to further ratifications: once the new Convention comes into force, the old Convention will be limited to the Members that have already ratified it (until they denounce it).

5. If the new consolidated Convention does not "otherwise provide" with respect to subparagraph (a) mentioned above, upon its entry into force any Member that has already ratified it or subsequently ratifies it will be deemed to have denounced any Convention adopted after 1930 which it has ratified and which is identified in the new Convention in Article X as having been revised. The Office can see only one disadvantage of this, which seems to be outweighed by the advantage of avoiding duplicating (and sometimes possibly conflicting) obligations for ratifying Members. The disadvantage is that the ratifying Member would no longer be a party to the old Conventions: it would therefore not be able to benefit from provisions in those Conventions that establish obligations in favour of

[18] When an amendment to the ILO Constitution that was adopted in 1996 enters into force, the International Labour Conference will have the power to abrogate obsolete international labour Conventions in certain circumstances.

[19] The first post-1930 maritime labour Conventions were the Officers' Competency Certificates Convention, 1936, (No. 53), the Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55), and the Minimum Age (Sea) Convention (Revised), 1936 (No. 58), all of which came into force in 1939. The proposals discussed here do not of course assist in the elimination of maritime labour Conventions adopted before 1930. These would need to be expressly denounced by Members that were still party in accordance with their respective provisions relating to denunciation. However, most if not all of the provisions of those Conventions would become obsolete having regard to the principles on the application of successive treaties relating to the same subject-matter, as reflected in Article 30 of the Vienna Convention on the Law of Treaties, 1969.

[20] Convention No. 180, Article 23.

Members that have ratified the same Convention. However, there seem to be only two Conventions that do establish obligations in favour of other ratifying Members: namely, Nos. 108 and 185 dealing with seafarers' identity documents and it is likely that these will be outside the revision process. A Member that ceases to be a Party to a revised Convention would, in addition, be unable to lodge a complaint, under article 26 of the ILO Constitution, about another Party's non-observance of that Convention. However, the Member would still be able to initiate the article 26 procedure through the ILO Governing Body. [21]

6. The answer to the second question of whether the existing Convention should be closed to further ratification may be dependent upon the decision relating to Article VIII on the number of ratifications and other requirements specified for the entry into force of the new Convention. In this matter the overall objective of ensuring universal coverage and coherence in the system of maritime labour standards, in order to secure the seafarers' right to decent work, must be kept in mind. If the entry into force of the new Convention requires the ratification of a significant number of maritime nations then immediate closure of existing Conventions, (as per subparagraph (b) in the example above) would be easily justified. This might encourage the remaining maritime countries in the ILO to ratify the new Convention by preventing subsequent ratification of the revised Conventions after the new Convention has come into force. However, if a relatively low level of ratification is required for entry into force of the new Convention, then there may be a risk that a Member that is unable to take on the full range of commitments under the new Convention would also be precluded from making any international commitments in the areas revised by the new Convention. In the paper referred to above, the Office has made suggestions for a "phased" or graduated approach to the issue under which some revised Conventions would be closed immediately whilst the closure of others, for example, Convention No. 147, would be delayed. However, for the purposes of discussion, the proposed Article X does not provide for any exception to the normal effect of entry into force. As already indicated, if nothing is stated to the contrary, ratification of the new Convention will, when it takes effect for the Member concerned, result in the Member's ipso jure (automatic) denunciation of the Conventions listed in that Article that were adopted after 1930 and have been ratified by the Member. In addition, as soon as the new Convention first enters into effect, all Conventions listed in Article X that were adopted after 1930 would be closed to further ratification, in order to secure as rapidly as possible transition to a single universally accepted set of international standards and obligations, with an improved "relevance … to the needs of all the stakeholders of the maritime sector" (see point 1 of the general comments above).

7. There is no need for Article X to deal with existing maritime labour recommendations. These can simply be withdrawn by the International Labour Conference (as can the listed Conventions that have not yet entered into force) under the Standing Orders of the Conference and without any need for a change in the ILO Constitution. The process of withdrawing outdated recommendations (identified by the Governing Body Working Party referred to in point 3(a) of the general comments above) is in fact under way.

Comment 11 (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

[21] Under para. 4 of Article 26.

amendment procedure[22] for the Code (see comment 13 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). 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 Shipowner and Seafarer 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 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 two-thirds majority (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 12 (on Article XIV)

1. Articles XIV and XV address the procedures for amendment of the new Convention, dealt with in a report prepared for the second meeting of the High-level Group.[23] 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.

2. The Article 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

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

[23] ibid.

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 *(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 could only 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 that 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 entry into force of the Protocol to Convention No. 147, for example, as compared with the entry-into-force requirements for that Convention itself). The Office has inserted proposed figures in { } brackets for the purpose of discussion only.

Comment 13 (on Article XV)

1. 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 in the High-level Group on the concept itself and on the main elements of the amendment procedure proposed. A similar approach to more rapid amendment of the technical parts of a Convention was recently adopted by the International Labour Conference for the Seafarers' Identity Documents Convention (Revised), 2003 (No. 185) (Article 8).

2. This simplified amendment procedure is similar to that provided for in Conventions adopted in the framework of the International Maritime Organization (IMO), such as the International Convention for the Safety of Life at Sea, 1974 as amended (SOLAS). The procedure has, however, been adapted to the special features of the International Labour Organization, in particular its tripartite structure and the pre-eminent role, given by the Constitution to the Organization as a whole, through the International Labour Conference, with respect to the adoption and revision of Conventions; in particular, the revision of a Convention is a matter for the Organization as a whole rather than only for the Members that have ratified it.

3. *Paragraph 1* of Article XV maintains the constitutional right of the Governing Body to place an item on the Conference's agenda for the amendment of provisions of the Code under the traditional procedures reflected in Article XIV. It also takes account of the fact that the Convention may expressly provide that certain provisions of the Code could only be amended through the Article XIV procedure. A proposal to that effect has been made with respect to Part A of the Code in Title 5 (see below, point 7 of comment 35).

4. A flow chart illustrating the six main steps in the simplified amendment procedure, as set out in points 5 to 10 below, is provided in Appendix II to this Commentary.

5. *Step 1:* A proposal for an amendment is submitted to the Director-General of the Office for an amendment *(paragraph 2)*; it may be made by the Shipowners' or Seafarers' group on the special tripartite committee (see comment 11 above) or by any Member of the

Organization; in this case, it must have the support of one of the groups or must include among the Governments submitting or supporting the proposal, a certain number (placed inside { } brackets) of Governments that have ratified the Convention.

6. *Step 2:* The Director-General of the Office then checks that the proposal has been validly made and circulates it to all ILO Members, with any comments or suggestions deemed appropriate *(paragraph 3)*, inviting the Members to submit their own observations or suggestions.

7. *Step 3:* After a period which is normally six months, the proposal and a summary of observations or suggestions received is transmitted, in accordance with *paragraph 4*, to the special tripartite committee for consideration with a view to adoption (subject to the approval of the International Labour Conference). The presence of at least half the ratifying Members *(subparagraph (a))* and a two-thirds majority in favour *(subparagraph (b))* are required for the adoption of an amendment. As already stated (see comment 11, point 2), all Members of the Organization can participate in the discussions, but only the committee members (i.e., the ratifying Members in the case of Governments) can vote, and the voting rules ensure that none of the tripartite groups can be outvoted *(subparagraph (c))*.

8. *Step 4:* The main difference as compared with the IMO procedures can be seen in the next step, required by *paragraph 5*, namely the submission of an adopted amendment to the International Labour Conference for approval, so that the Organization as a whole can verify the legality of the amendment and its consistency with the general policy of the Organization. This procedure should be very short as the Conference would only have the task of approving the amendment (by a two-thirds majority) or otherwise. It could not reformulate the amendment. If its approval was not obtained, the amendment would be referred back to the special tripartite committee.

9. *Step 5:* The rest of the procedure – submission of approved amendments for consideration – is very similar to the IMO procedures. The amendments are notified only to Members that have ratified the Convention, which are given a period to react (normally two years); other ILO Members receive a copy *(paragraph 6)*. The amendment is deemed to have been accepted unless a certain number of Members, representing a certain percentage of world gross tonnage (the two figures have been placed inside { } brackets) express their disagreement before the end of the period just mentioned *(paragraph 7)*.

10. *Step 6:* An amendment enters into force six months after the date of its deemed acceptance for all Members except those that have, within the prescribed period, expressed their disagreement *(paragraph 8)* or have given notice that they will only be bound by their express acceptance *(paragraph 8(a))*. A Member may also, before the amendment enters into force, delay its entry into effect for it by a period normally not exceeding one year *(paragraphs 8(b) and 10)*.

11. The consolidated Convention would respect the principle (now followed in the ILO with regard to revisions, and also in the 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. If they decide to ratify the Convention, they must accept the text as amended *(paragraph 12)*.

12. 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 13* 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)*).

Comments on the Regulations and the Code

Comment 14 (Explanatory note)

1. The Regulations and the Code begin with the "Explanatory note" referred to above in the general comments at the start of this Commentary. This note is intended to distil the agreements reached by the High-level Tripartite Working Group concerning the approach and structure of the new Convention and the interrelationship between the Articles, Regulations and the Code and between Part A and Part B of the Code. The note would be included with the Convention to be adopted, but would indicate (in its *paragraph 1*) that it should not be considered a part of the 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 (such as the treatment to be given to Part B of the Code) for national parliaments considering ratification of the Convention.

2. *Paragraph 4* of the note contains text in square [ ] brackets. This is simply a consequential indicator: the text will either have the square brackets removed or the text will be removed depending on the decisions made with respect to the third introductory paragraph to Title 5.

Comment 15 (on Title 1, Regulation 1.1)

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 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 had proposed a lower minimum age and the Seafarer representatives had gone the other way and questioned 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 forms of labour. 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), sets the age of 16 as the minimum for work in its Part III on the manning of ships. For these reasons, Regulation 1.1 of the proposed Convention 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.

Comment 16 (on Regulation 1.2)

1. *Regulation 1.2* deals with medical examinations and certificates.

2. *Standard A1.2* explicitly recognizes medical certification requirements under the International Convention on Standards of Training, Certification and Watchkeeping, 1978, as amended ("the STCW Convention"). *Paragraph 6* is in { } brackets to discuss its placement in Part A rather than Part B of the Code. *Paragraph 6(b)*, also in { } brackets, proposes using the term "medical condition" to capture a broader range of conditions, such as obesity, that are now understood to be matters falling within health and safety concerns. The word "disease" was used in the Medical Examination (Seafarers) Convention, 1946 (No. 73), which was adopted in 1946. However, the ILO/WHO Guidelines of 1997,[24] providing international guidance (taking into account ILO, IMO and WHO standards) to medical practitioners administering the examinations, uses the broader term "medical condition" (Annex C).

3. In *paragraph 7*, subparagraphs (a) and (b) contain { } brackets to reflect the fact that there was no final decision reached on the period of validity for medical and vision-related certificates. It is proposed that the period of validity be two years for persons above the age of 18, and one year for young seafarers, as currently provided in Convention No. 73 and the Medical Examination of Young Persons (Sea) Convention, 1921 (No. 16). It has been suggested that since colour vision is permanent there may be no need to require examinations every six years. However, it appears colour vision defects can be acquired through ageing and eye disease some retesting would seem appropriate. Convention No. 73 provides for six years.

4. *Paragraph 8* is in square [ ] brackets to reflect a difference of opinion as to whether it is acceptable for a seafarer to work on board a ship without having undergone a medical examination and obtained a medical certificate. The situation with respect to certificates that expire when the seafarer is at sea is dealt with separately in *paragraph 9*.

Comment 17 (on Regulation 1.3)

1. *Regulation 1.3* deals with training and qualifications of seafarers. The Regulation, as presently drafted, would explicitly recognize other applicable training requirements such as those under the STCW Convention, as amended (see paragraph 3).

2. Seafarers holding positions on board ship that require training or qualifications not covered by the STCW Convention would have to be trained or qualified in accordance with national requirements, if any, for the position. For example, a person hired as a nurse or doctor on a ship would be expected to meet any national standards for those positions. However, the competent authority of a Member would not be responsible for the training or evaluation of the person for that position, but simply for requiring shipowners to ensure that personnel meet relevant national standards. This concept, as set out in *paragraph 2* of the Regulation, is in square [ ] brackets to reflect the concerns of some Governments as to whether this was an appropriate requirement.

3. *Standard A1.3* proposes a requirement (in *paragraph 1*) that would ensure, for example, that all seafarers have basic personal safety training for work on board ship. This is already a requirement under the STCW Convention. During consultations it was recommended

[24] ILO/WHO: *Guidelines for Conducting Pre-sea and Periodic Medical Fitness Examinations for Seafarers, 1997.* See also, ILO/WHO/D.2/1997.

that the terminology already developed under the STCW Convention and Code be either adopted or referenced. The recommended draft reflects the advice of IMO on the appropriate wording to ensure that its provisions are not in conflict with the STCW.

4. *Paragraphs 4* to *8* of the Standard are in { } brackets because of ongoing discussions within the International Maritime Organization (IMO) in connection with the STCW Convention and the possible transfer of training requirements for able seafarers to the IMO framework. It had initially been envisaged that there would be a Regulation regarding vocational training. 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. However the concept has been retained in *paragraphs 8* and *9* of the Standard and in *Guideline B1.3*. The two paragraphs are in square [ ] brackets because of a difference of opinion regarding the need to have these provisions in the Convention and concerns as to who should have responsibility for ensuring vocational and on-board training.

5. During the consultation process, the Office also received comments from the Shipowner and Seafarer representatives recommending that some of the more detailed provisions in Conventions or recommendations 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. One example of such a Recommendation might be Recommendation No. 137 regarding Vocational Training (Seafarers). Such a text could perhaps be added to the Convention in the future as an appendix or as a booklet. Guideline B1.3 would then be amended to refer to the new text.

Comment 18 (on Regulation 1.4)

1. *Regulation 1.4* deals with recruitment and placement services and requires ratifying Members to regulate such services (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 the Recruitment and Placement of Seafarers Convention, 1996 (No. 179) and the associated Recommendation. The recommended draft has been formulated to meet concerns of some Governments about the need to ensure that a distinction should be made between public and private services. Square [ ] brackets are found in this Regulation and throughout the Code in relation to the word “certificate” and associated provisions. The Seafarer representatives have proposed that, in addition to licensing or other regulation, a certification system should be developed for private recruitment and placement agencies and that these certificates should be subject to flag state inspection and certification and port state inspection. The development of a certificate system is a matter on which there was no agreement at the High-level Group. If it is decided that there should be a certificate system, provisions to support such a requirement are found in square [ ] brackets in the draft Convention and in the lists in Appendices A5-I and A5-III of matters to be inspected. In addition if such a system is adopted some consideration will need to be given to the nature of the associated documentation and to what extent detailed information about the recruitment and placement service and its certificate should be included in the maritime labour Convention documentation system described in Title 5 (see below, comment 36 and comment 39).

2. *Paragraph 4* of *Standard A1.4* also has square [ ] brackets around the words “personal travel document”. This relates to a difference in views as to whether a seafarers’ identity document is a document that a seafarer should have to pay for.

Comment 19 (on Regulation 1.5)

Regulation 1.5, dealing with seafarers' identity documents, reflects the views of the High-level Group. It appeared that most constituents favoured retention of some reference to the Seafarers' Identity Documents Convention (Revised), 2003 (No. 185), but without embodying the substance of that instrument in the consolidated Convention. However, no clear decision was reached on the matter and the text remains in { } brackets for discussion. This position is also reflected in the { } bracketed provisions regarding seafarers' identity documents found in the lists in Appendices A5-1 and A5-III of matters to be inspected and verified by the flag State for certification and subject to port state control.

Comment 20 (on Title 2, Regulation 2.1)

1. *Title 2* deals with the terms and conditions of employment including matters such as: the context for signing the employment 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 and secure 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 they are signed under conditions that allow the employees' informed consent 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.

3. 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. Thus, *Standard A2.1*, in *paragraph 1*, places an obligation on Members to regulate diverse aspects of agreements for seafarers on ships that fly their flag. The situation of self-employed personnel is also covered *(paragraph 1(a))*.This is a matter that was originally raised by some Governments which felt it was important to ensure full coverage and avoid creating an incentive to contract out of the Convention's requirements. However, one Government representative has expressed concern about problems in regulating the situation of self-employed personnel.

4. Since the agreement may be a matter for inspection in port, an English translation would be required (see *paragraph 2*) except for ships only making domestic voyages.

5. *Paragraph 4* of the Standard requires Members to adopt laws and regulations that provide for some basic matters to be dealt with in seafarers' employment agreements covered by their national law.

6. One important matter is of course the question of termination: *paragraph 4(g)* includes the provisions of the Seamen's Articles of Agreement Convention, 1926 (No. 22) with respect to the principles governing a termination procedure for the seafarers' employment agreements. This provision has to be read with *paragraphs 5* and *6* of the Standard, whose text is still under discussion and is in { } brackets. These paragraphs would require that Members adopt a minimum notice period for both the seafarer and the shipowner to terminate their employment agreements. The specific period to be adopted under paragraph 6 is controversial and is indicated as such by square [ ] brackets but, whatever period is chosen, it would need to be consistent with the approach outlined in paragraph 5. The period is a minimum only. The parties can obviously give a longer period of notice if they so wish. However, paragraph 6 would also establish the maximum length of notice of termination that seafarers could be required to give. Under that paragraph, situations that

justify immediate termination or discharge under national law or a collective bargaining agreement, without the requisite notice, are also recognized.

7. *Paragraph 4(h)* of the Standard requires that the seafarers' social security protection entitlements be listed with respect to the benefits for which the shipowner is responsible, and also indicate the relevant national social security protection system that applies and which may be part of the seafarers' overall employment entitlements (for example, through contributory systems). The latter requirement is in square [ ] brackets pending the outcome of discussions on Regulation 4.5 on social security and the impact it will have on the question of whether seafarers' employment agreements should, at a minimum, identify the relevant system of longer-term coverage for the individual seafarer.

8. *Paragraph 4(j)* (based on paragraph 3 of Regulation 2.1) makes it clear that a seafarers' employment agreement could incorporate by reference the provisions of relevant collective bargaining agreements covering the matters dealt with by the Convention. This would not require that each employment agreement reproduce the entire text of the relevant collective bargaining agreement but, rather, that the seafarer's agreement would simply contain a reference identifying the relevant collective bargaining agreement governing the terms of the employment relationship.

Comment 21 (on Regulation 2.2)

1. *Regulation 2.2* deals with wages. *Standard A2.2* contains several mandatory requirements relating to payment methods that are not based on any current international labour Convention but are believed to be uncontroversial.

2. *Paragraph 6*, inside { } brackets as it is a new provision in the Standard, notes that some countries may regulate seafarers' wages in national laws while others may not. The purpose is to make it clear that *Guideline 2.2*, in Part B of the Code, is addressed only to countries that choose to regulate seafarers' wages by law as the Standard in Part A does not contain a requirement to regulate wages. The Guideline covers methods of calculation of wages and overtime and other matters. Its text is drawn from an international labour Recommendation (No. 187 on seafarers' wages, hours of work and the manning of ships of 1996).

Comment 22 (on Regulation 2.3)

1. *Regulation 2.3* deals with hours of work or rest. *Paragraphs 10* and *11* of *Standard A2.3* provide the ability to respond to specific situations at a national level and to emergency events. However, some Governments feel that they need to specifically exclude masters and/or chief engineers from the hours of work and rest requirements. Others feel that the issue is already provided for in the current text and that it is not appropriate to make exceptions, especially in light of growing concerns about the impact of fatigue on safety. The Seafarer representatives have expressed significant concern about the idea of excluding any seafarers from the hours of work and rest provisions and believe that it is contrary to understandings reached with respect to the Seafarers' Hours of Work and the Manning of Ships Convention (No. 180). The Shipowner representatives have indicated support for the concerns of the Governments that wish to have such an exclusion. The High-level Group has on a number of occasions stressed that the new Convention should closely follow the provisions of Convention No. 180, whose adoption had been the subject of extensive debate and delicate compromises.

2. The recommended draft includes – inside square [ ] brackets – the two alternative proposals with respect to exclusions from the Regulation that were made by Government

representatives at the High-level Group's last meeting. One is in *paragraph 3* of *Regulation 2.3*; the other is in *paragraph 12* of *Standard A2.3*.

Comment 23 (on Regulation 2.4)

1. *Regulation 2.4* deals with annual leave entitlements and also suggests (*paragraph 2*) that the principle of shore leave be included as an important requirement for seafarers' health and well-being.

2. In order to meet the difficulties some Governments were encountering with the 30 calendar days a year, provided for in the Seafarers' Annual Leave with Pay Convention, 1976 (No. 146 in Article 3, paragraph 3), the recommended draft Convention takes the monthly equivalent of the annual 30 days as the basis. Thus, *paragraph 2* of *Standard A2.4* provides for calculation on the basis of a minimum of 2.5 calendar days per month of employment. It is understood that this may be a viable solution for those Governments that were having difficulty with the 30 days.

Comment 24 (on Regulation 2.5)

1. *Regulation 2.5* deals with repatriation. 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. In an effort to meet concerns that the level of prescriptive detail in the existing Repatriation of Seafarers Convention (Revised), 1987 (No. 166), was providing difficulties for Governments, many of the details regarding repatriation have been placed in Part B of the Code (Guideline B2.5) to provide guidance in implementation at a national level. A concern was raised by some Governments regarding possible confusion about repatriation rights relative to immigration status. It is understood that choice of location for repatriation does not grant seafarers any new or additional rights in relation to immigration status. These are matters dealt with by immigration and other national laws, and outside the scope of the consolidated Convention. [25]

2. The posting of some form of financial security is proposed in *paragraph 2* of the Regulation. This provision is in { } brackets however, as discussion is still under way within the framework of the Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers. [26]

3. *Paragraphs 3* and *5(c)* of *Standard A2.5* make it clear, that except for the limited circumstances outlined in paragraph 3, seafarers are not responsible for the costs of repatriation.

[25] In fact, Guideline B2.5.2, paragraph 2(a)(iii), indicates a need, in cases of proposed repatriation to a port other than that of the seafarer's country, or the country of engagement, to ensure that the seafarer has the necessary permission from the relevant competent authority.

[26] *Report of the Fifth Session of the Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers* (London, 12-14 January 2004). Document GB.289/STM/8/2. It appears that discussion, consultation and research are still under way in the framework of this Joint Working Group.

4. Under *paragraph 4* of the Standard, although shipowners are responsible for repatriation expenses for all seafarers on their ships, their right to recover costs from others that may have contractual responsibility to them for these costs is recognized.

5. Provision is made in *paragraphs 5* and *6* for recoupment of repatriation costs by Members that may end up repatriating seafarers: recoupment can be sought from the shipowner concerned or from the relevant flag State.

Comment 25 (on Regulation 2.6)

1. *Regulation 2.6* provides for compensation for seafarers in the event of a ship's loss or foundering. *Standard A2.6* reflects the requirements for indemnification against unemployment arising from the loss or foundering presently found in the Unemployment Indemnity (Shipwreck) Convention, 1920 (No. 8).

2. *Paragraph 2*, in { } brackets, is proposed to make it clear that the unemployment indemnity is not the only remedy to which the seafarer may be entitled under national law for losses or injuries resulting from shipwreck.

Comment 26 (on Regulation 2.7)

Regulation 2.7 and the related Code provisions on manning levels reflect the concerns of some constituents that the concept of manning should encompass more than navigational safety: it should also reflect contemporary concerns with seafarer fatigue and with on-board security matters. The text is in { } brackets to allow for discussion as to whether the proposed text sufficiently addresses these concerns.

Comment 27 (on Regulation 2.8)

Regulation 2.8 on continuity of employment has been placed inside square [ ] brackets because many, if not most, Governments and the Shipowner representatives have expressed the view that it is no longer appropriate to require such a policy with respect to one sector of the workforce. In addition many Governments no longer have a national register for seafarers. However, the Seafarers representatives feel that it is important that the Convention contain a provision dealing with this issue. In light of suggestions made in the High-level Group meetings, several options are suggested. These may address concerns about having such a policy for one sector only and may serve to promote inclusion of seafarers in broader full employment policies by focusing on regularity of employment and on career development for seafarers.

Comment 28 (on Title 3, Regulation 3.1)

1. *Title 3* is called "Accommodation, recreational facilities, food and catering" in order to avoid confusion with the social welfare protection matters in Title 4. These shipboard matters will be a significant aspect of the issues addressed in the maritime labour certificate and declaration of labour compliance described in Title 5 and the related inspections and monitoring (see below, comment 36 and comment 39).

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 including in some instances specific entitlements that are related to the particular duties and positions of seafarers. They are primarily drawn from

the Accommodation of Crews Convention (Revised), 1949 (No. 92) and the Accommodation of Crews (Supplementary Provisions) Convention, 1970 (No. 133) and the related Recommendations Nos. 140 and 141, but have been updated to reflect the advice of the Shipowner and Seafarer representatives regarding contemporary standards and needs in the sector. In some cases, agreement has not yet been reached on specific requirements, such as room sizes, and these provisions remain in square [ ] brackets. Subsequent to the Fourth High-level Meeting, representatives of the Shipowners and Seafarers, on the advice of the Officers, met to resolve some areas of disagreement and bring forth recommendations to advance the text for the Conference. The Chair of the Nantes working group on Title 3 was present for these meetings to assist with continuity in light of the discussion at Nantes. As much as possible given constraints of timing, the recommendations arising from this meeting have been incorporated in the current draft. However some matters could not be included. They are indicated below at points 8, 10, 11, 12 and have been marked by { } brackets in the recommended draft text.

3. It has also been proposed that this Title, which primarily impacts on ship design and construction, be subject to transitional clauses, such as those now proposed in *paragraphs 2* and *3* of the Regulation, to deal with ships on a national register that may not meet these requirements or requirements developed in future amendments. These provisions must be understood within the framework of the Articles dealing with the determination of when the Convention will come into force for a Member. Paragraphs 3 and 4 of Article VIII currently provide that the Convention is in effect for ratifying Members 12 months after coming into force and, for Members ratifying the Convention after it comes into force, 12 months after the date the Member's ratification is registered. Article XIV provides for similar 12-month periods in accordance with the amendment to the Convention made under that procedure. Article XV provides for six-month periods, or longer in the cases referred to in paragraph 8 of that Article.

4. *Paragraph 3* of Regulation 3.1 is in { } brackets for discussion. It establishes the scope of the transition clause: it would cover any new provision "relating to the provision of seafarer accommodation".

5. In addition, in some cases, it has been proposed that specific requirements would not apply to some ships, described as "ships of less than 3,000 gross tons". While it seems agreed that it should be possible to provide for exemptions from some requirements (after consultation), the size of the ship is not yet agreed and the text is in { } brackets to facilitate discussion on this issue. These provisions and this possible limitation must be considered in light of any decision that is made with respect to having a general tonnage limit for the Convention under the scope provisions in Article II, paragraph 4(a) (see comment 3, point 6).

6. As much as possible, the technical details have been placed in guidelines in Part B of the Code in order to provide some flexibility. Their placement in the Code (whether in Part A or Part B) will also allow for more rapid updating to meet changes in technology and ship design.

7. There was a difference of opinion as to the need for *paragraph 4* of *Standard A3.1*, which is in square [ ] brackets. It simply lists the main subjects for attention. Some felt it would be useful to inspectors as it serves to highlight all the key areas of concerns which are then covered by the subsequent more specific text. Others felt it was unnecessary text. The items listed in paragraph 4 are not themselves controversial; however, *subparagraph (c)* dealing with noise and vibration is bracketed { } for discussion as to the inclusion of vibration (not currently addressed in detail in existing texts) and as to the placement of these provisions. In previous drafts of this Convention, noise had been placed in Title 3 as it was seen as relating to ship and equipment design standards. Vibration concerns would raise similar considerations. Inclusion in Title 3 would also allow for operation of the

transitional provisions (see point 3 above) to the extent they relate to preventing noise and vibration through hull and equipment design. However, the Shipowner and Seafarer representatives have agreed that the issue is better considered as an aspect of the standards applying to occupational health protection and would be better dealt with under Title 4, Regulation 4.3, which also required updating. Accordingly the provisions on noise have been moved to Regulation 4.3 and associated Code provisions. Some inspection obligations and cross references have however also been placed in Title 3 (see *Standard A3.1, paragraph 3(a), paragraph 4(c)* and *paragraph 5(t)*) pending a decision on the best place for this issue and subject to more detailed consideration of the content and approach to occupational safety and health adopted under Regulation 4.3 (see comment 32 below). It may be important in any event to retain a reference in Title 3 to noise and other ambient factors in that they can negatively affect both the living and workplace on board ship.

8. With respect to *paragraph 5 of Standard A3.1*, it was recommended that the reference in *subparagraph (e)* to "fresh-air" air conditioning (now inside square [ ] brackets) should be deleted and that the subjects of the radio room and centralized machinery control room should be dealt with in Title 4, rather than Title 3. Concerning *subparagraph (h)*, it was recommended that there be an ability to exempt ships from requirements in some cases. However the specific categories for exemptions requires further discussion with some suggested categories presented in { } brackets. In addition it has been recommended by the Shipowner and Seafarer representatives that the criteria for exemptions may need strengthening and may need established parameters in addition to consultation. More stringent requirements beyond consultation could be included on a clause-by-clause basis or could be dealt with as a single clause, such as the provision currently proposed in { } brackets by the office in paragraph 9. The text relating to consultation is also in { } brackets to allow for discussion of this question.

9. There is a difference of opinion between the Shipowners and Seafarers concerning the question of separate mess rooms. This is reflected by the square [ ] brackets in the last sentence of *subparagraph (p)* of paragraph 5 of the Standard and in the related Guideline (*B3.1.7*). The Seafarers consider that separate mess rooms should exist as a rule unless there has been an agreement to the contrary made by the parties.

10. With respect to the requirements for sleeping rooms, it was recommended that any of the provisions in the relevant guideline – under *B3.1.5* – should be moved from Part B of the Code, to Standard A3.1 in Part A: namely, B3.1.5, paragraphs 4, 5, 8, 9 (except for the last sentence), 17, 18 and 20. These are in { } brackets to facilitate discussion regarding this shift.

11. Similarly, under *B3.1.7*, relating to sanitary accommodation, it was recommended that paragraphs 1 to 4 and 6 be moved from Part B of the Code to Standard A3.1 in Part A. These are in { } brackets to facilitate discussion regarding this shift.

12. In the section on recreational facilities – *B3.1.10* – it is recommended that *paragraphs 5* to *7* be transferred from Title 3 to Title 4. These provisions are in { } brackets to facilitate discussion of this matter and their placement if they are moved to Title 4.

Comment 29 (on Regulation 3.2)

Regulation 3.2 deals with food quality, drinking water and catering standards. The provisions relating to the training of ships' cooks are in square [ ] brackets pending a decision as to the content of Title 1, under Regulation 1.3, on training and qualifications and whether the provisions on the qualifications of ships' cooks are better placed under food and catering or along with the training requirements for able seafarers. It has also been noted that the qualifications for ships' cooks and catering personnel, which are based

on Conventions of 1946, (Certification of Ships' Cooks Convention (No. 69) and Food and Catering (Ships' Crews) Convention (No. 68)) may well need to be updated.

Comment 30 (on Title 4, Regulation 4.1)

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

3. A comment from a Government indicated that the obligation to provide essential dental care (considered to be covered by the term "medical care" – see *paragraph 1* of the Standard) could give rise to problems in certain circumstances; the obligation to provide free medical care under the Health Protection and Medical Care (Seafarers) Convention, 1987 (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 response to a comment made in the High-level Group, *paragraph 3* of *Regulation 4.1* makes it clear that the obligation on coastal States is limited to allowing access to existing medical facilities onshore (there would be no obligation on such States to establish them).

5. In *paragraph 4* of *Standard A4.1*, *subparagraphs (a)* and *(c)* contain text in { } brackets for discussion. This relates, in part, to matters arising under Title 3 and the proposed provision of individual sleeping rooms and the impact of this requirement on the need to also provide separate hospital accommodation. There is also a concern about updating the text to reflect modern conditions and manning levels. For example, some constituents have questioned whether it is appropriate to base a determination as to provision of on-board hospital accommodation or a requirement for a medical doctor on parameters such as 15 or 100 seafarers, the levels currently set out in Convention No. 164 (1987), Articles 8 and 11 (in combination with tonnage provisions of 500 gross tonnage (Article 11) and 1,600 gross tonnage (Article 9 for medical training that is required where less than 100 seafarers are on board and trips are less than three days). The possibility of more access to rapid emergency transport to airlift ill personnel to shore has also been noted.

6. The text of *paragraph 4(d)* of the Standard represents a reconciliation of the text of Convention No. 164, Article 9, on medical training requirements with the language of the STCW Code to the International Convention on Standards of Training, Certification and Watchkeeping, 1978, as amended relating to various levels of medical training for seafarers.

7. A Government representative has voiced a strong concern with respect to the financial impact on the coastal State of the costs of ship-to-shore communication under *paragraph 4(e)*.

8. In the Guidelines, the first four paragraphs under *B4.1.1* are in { } brackets for discussion as to whether they should be moved to the Standards in Part A of the Code and also whether they may be better placed in Title 3 since they also relate to hull design and the layout of accommodation.

9. *Paragraph 5* is in { } brackets for discussion as to whether the provisions are best placed in Part A or in Part B of the Code.

10. *Paragraph 9* contains a reference to Regulation 4.3. It is in { } brackets for discussion pending a decision on the proposed occupational safety and health management system referred to in Regulation 4.3 (see comment 32).

Comment 31 (on Regulation 4.2)

1. *Regulation 4.2* deals with "Shipowners' liability" for economic consequences of sickness and injury experienced by seafarers during their engagement. These provisions are intended to address shorter-term social security protection coverage, currently found in the Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55) and the Social Security (Seafarers) Convention (Revised), 1987 (No. 165). They would complement the longer-term social security protection that would, in principle, be dealt with in Regulation 4.5. 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, *paragraph 2* is presented inside { } brackets for discussion. This would make it clear that the provisions are not intended to affect liability under the general civil/private law for negligence or fault.

2. In *Standard A4.2, paragraph 1, subparagraphs (a)* and *(b)* are in square [ ] brackets pending the outcome of discussions within the framework of the Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation and regarding Death, Personal Injury and Abandonment of Seafarers.[27]

3. *Paragraph 4* dealing with payment of wages has text in square [ ] brackets to reflect a difference of opinion as to the relevant minimum period of coverage. Convention No. 165 (Articles 14 and 15) provides for a minimum of 12 weeks of coverage for wages and Convention No. 55 (Article 5) provides for a minimum of 16 weeks. A provision has also been suggested but not agreed regarding the question of whether such payments can be conditional on a minimum period of employment.

Comment 32 (on Regulation 4.3)

1. *Regulation 4.3* deals with occupational health and safety protection and accident prevention. It draws upon the text of the Prevention of Accidents (Seafarers) Convention, 1970 (No. 134) and the related Recommendation (No. 142), which focus 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. There appears to be general support from the Seafarer representatives and some Governments for the idea of encouraging more risk evaluation and management and encouraging the collection and use of statistical information. Much of the text of Regulation 4.3 and associated Code provisions are bracketed { } for discussion. This reflects the recommendation of the Officers that the text should now be modernized to include human element matters (such as fatigue, drug and alcohol abuse) and other concerns such as exposure to chemicals and other workplace risks. It was also recommended that the provisions dealing with noise and vibration should be moved to this Regulation and dealt with as matters of health protection rather than under Title 3. Advice

[27] op cit., footnote 26.

has been sought and is reflected in the proposed text (in { } brackets for discussion) from the relevant ILO occupational safety and health experts as to both the content and approach in these provisions. It was suggested that on-board occupational safety and health should take into account and adopt the general approach proposed in the Guidelines on Occupational Safety and Health Management Systems (ILO-OSH, 2001). In addition it was suggested that the text of Regulation 4.3 and the Code provisions should be informed by the concepts and standards referred to in other ILO instruments and the other standards to which they refer.[28] The draft text seeks to incorporate these ideas (for example, requiring ships to have occupational safety and health management systems) within the framework of the existing maritime Conventions dealing with occupational health and accident prevention that would be revised by Regulation 4.3.

2. The detailed text dealing with exposure to noise on board ship and a proposal for a text on vibration that was moved from Title 3 (see comment 28, point 7) is now found in *Guideline B4.3* at *B4.3.2*. *Paragraph 4* dealing with noise levels also has text within that is in square [ ] brackets. The brackets reflect a difference of opinion among constituents as to whether the Convention should contain the table of maximum noise levels drawn from the guidance of the International Maritime Organization (IMO) on the matter (Resolution A 468 XII, adopted in 1981) or whether the Convention should more generally refer to IMO (and other relevant) guidance on the matter in order to foresee and reference future amendments to the IMO document, without having to also update this text. A text in { } brackets has also been proposed – as *B4.3.3* – for shipboard vibration drawing on the more general provisions for vibration found in the ILO 2001 code of practice on ambient factors in the workplace. It may be useful to consider whether noise and vibration should be dealt with in detail in this Convention (and not other ambient factors) or whether they, along with other applicable risk factors for the maritime sector, would be better dealt with in a new appendix which would cross reference and update standards and practices as they are developed within ILO or IMO and other technical standard-setting organizations.

Comment 33 (on Regulation 4.4)

1. *Regulation 4.4* addresses seafarers' access to onshore welfare facilities. It is part of a ratifying Member's duty to cooperate and provide onshore relief for seafarers, within the limits, of course, of port state requirements relating to seafarer identification and security matters.

2. 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. In *Guideline B4.4, paragraph 1* of *B4.4.4* is in square [ ] brackets to reflect differing views on this matter.

[28] In particular, the Recommendation concerning the list of occupational diseases and the recording and notification of occupational accidents and diseases, 2002 (ILO, R.194); *Safety in the use of chemicals at work: An ILO code of practice*, 2003; Globally Harmonized System for the Classification and Labelling of Chemicals (GHS) (United Nations Economic Commission for Europe: 2003); *Ambient factors in the workplace: An ILO code of practice*, 2001; Drug and Alcohol Abuse Prevention Programmes in the Maritime Industry (A Manual for Planners (Revised)) (ILO/UNDCP, 2001); *Management of alcohol and drug-related issues in the workplace: An ILO code of practice*, 1996; *Recording and notification of occupational accidents and diseases: An ILO code of practice*, 1996; *HIV/AIDS and the world of work: An ILO code of practice*, 2001; Protection of workers' personal data, 1997.

Comment 34 (on Regulation 4.5)

1. *Regulation 4.5*, and the associated Code provisions, on "social security protection" address social security protection provided through national security systems, are presented only as headings with a purpose statement. Although there was agreement in the High-level Group as to the importance of including social security protection (now dealt with by, inter alia, the Social Security (Seafarers) Convention (Revised), 1987 (No. 165)) in this new Convention, there was no agreement reached with respect to precise content. This inclusion is consistent with the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), which refers to "appropriate social security measures" (Article 2(a)(ii)) although it leaves the determination of the particulars of coverage to the national law of the flag State.

2. In general there seemed to be some agreement with the idea that it is intended to complement rather than duplicate the social security protection that is provided through shipowners' liability, primarily under Regulation 4.2, for shorter-term protection. The content of Regulation 4.5 and associated Code provisions has been a matter of extensive debate. The debate in the High-level Group has related to developing an acceptable text to address the very complex problem of seafarers working on foreign-flag ships, who may not be eligible for protection under the social security system of the flag State and whose country of residence or nationality may also not provide social security protection. The overall concern is to avoid the situation where, because of reasons relating to either national laws that do not extend coverage to non-residents or to non-nationals or the lack of any system in the country of residence or nationality, seafarers are left without any protection at all for themselves or their dependants. This gap in coverage for some seafarers raises concerns about equality and decent work [29] and also undermines one of the objectives of this Convention – that is, seeking to ensure that seafarers' employment conditions present, as much as possible, a "level playing field". An additional broader problem in this area relates to the differing range of coverage between national social security systems, where they do exist. These were issues that Convention No. 165 sought to address: however, to date it has only two ratifications. A number of options have been proposed and explored by the constituents during the course of the discussions in the High-level Group. The tentative provisions included under Regulation 4.5 and the related Standard and Guideline were prepared by the Office at a late stage following further consultations – see the Addendum at the end of this Commentary.

Comment 35 (on Title 5)

1. *Title 5* deals with compliance and enforcement and is linked to the obligations of ratifying Members under Article V. The Title is divided into three main Regulations: Regulation 5.1 on flag state responsibilities; Regulation 5.2 on port state responsibilities and Regulation 5.3, dealing with the responsibilities of countries that supply seafarers to work on board ships.

2. The broad lines of this key component of the consolidated Convention [30] were in fact substantially agreed in the High-level Group before the Convention's substantive

[29] The significance of social security as a basic human right was affirmed by the International Labour Conference at its 89th Session in 2001: see *Social security: A new consensus* (Geneva, ILO, 2001).

[30] These lines, though considerably refined in later discussions, can be seen in the Office's paper TWGMLS/2002/1: *Considerations for provisions on inspection and control in a consolidated*

provisions, in Titles 1 to 4, were even discussed. In the view of the Seafarer representatives, which was generally shared, it would have been useless to have continued with the exercise of consolidation in the absence of consensus on the question of compliance and enforcement (and also on the simplified amendment procedure).

3. For traditional enforcement practices in the maritime sector through flag and port state inspections and corrective actions, the provisions in Title 5 draw on the text of the existing ILO standards in the area of compliance and enforcement: 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). For more contemporary practices, aimed at ensuring continual compliance between inspections, the system proposed in Title 5 embodies aspects of the well-accepted certificate-based system of the International Maritime Organization, which has been developed in significant maritime Conventions such as the International Convention for the Safety of Life at Sea, 1974 (SOLAS) as amended and in the International Convention for the Prevention of Pollution from Ships, 73/78 (MARPOL 73/78) and its various annexes. However, the IMO system, as it has evolved to include ongoing compliance and system management and human resource management matters, has been adapted in the proposed Convention to meet the ILO context and the special concerns raised by international labour standards. The certification system proposed in Title 5 for the consolidated Convention could and should be closely coordinated with the related maritime certifications, particularly those required under IMO Conventions. Such an "integrated" approach was considered essential by some Government representatives in the High-level Group.

4. Most of the new features in Title 5 are in fact developments of measures provided for in existing international labour Conventions, in particular the addition of a system of certification to the inspection system, an extension of the grounds under Convention No. 147 for detention of ships in port state control and procedures for the handling of seafarers' complaints or disputes. The real novelty of the Convention in this area resides in its approach to compliance and enforcement. Several international labour Conventions on substantive-law matters have included provisions relevant to the enforcement of the Convention concerned; however, those provisions appear as ancillary to the substantive rights and obligations provided for. Title 5 consists of a detailed set of provisions on principles and rights, at the same level of importance as the other Titles, relating to substantive rights, and inseparable from those Titles in keeping with its character of a sine qua non.

5. The ILO's greatest strength in the context of the implementation of international labour Conventions is undoubtedly its supervisory system, carrying the necessary institutional guarantees and authority and an important tripartite component.[31] With the consolidated

maritime labour Convention, presented to the High-level Group at its second meeting, and in the related discussions at the meeting. See the report, op. cit., footnote 8, para. 35 et seq.

[31] As delegates familiar with ILO procedures will well know, under article 22 of the ILO Constitution, all Members submit reports to the International Labour Office on the measures they have taken to give effect to the Conventions that they have ratified. These reports are first transmitted to a committee of eminent experts, established in 1927, which carefully reviews progress in the Member's implementation of the Convention concerned on the basis not just of the reports themselves, but also of all relevant information, including observations from employers' and workers' organizations. In the case of problems, the Committee frequently establishes contact with the government concerned. The report of the Committee of Experts is transmitted to the annual session of the International Labour Conference, at which it is discussed at length by a special tripartite Committee on the Application of Conventions and Recommendations. The supervisory system is reinforced by ad hoc representation or complaints procedures, under articles 24 and 26 of the Constitution, and in the area of freedom of association.

Convention, there would be a continuity of "compliance awareness" at every stage from the national systems of protection up to the international system. It would start with the individual seafarers, who – under the Convention – would have to be properly informed of their rights and of the remedies available in case of alleged non-compliance; it would continue with the Shipowners, who would be required to develop and carry out plans for ensuring that the laws, regulations or other measures to implement the Convention are actually being complied with. The masters of the ships concerned would then be responsible not only for carrying out the plans, but also for keeping proper records to evidence implementation of the requirements of the Convention. In addition to the traditional functions of inspection of ships, the flag State would have to control the shipowners' plans and ensure that they were actually in place and being implemented. They would also have to carry out periodic quality assessments of the effectiveness of their national systems of compliance, and their reports to the ILO under article 22 of the Constitution would need to provide information on their inspection and certification systems, including on their methods of quality assessment. This general system in the flag State would be complemented by procedures to be followed in countries that are also or even primarily the source of the world's supply of seafarers, which would also be reporting under article 22 of the ILO Constitution, and the mechanisms of port state control would help to reduce any failings on the part of flag States.

6. In the *introductory paragraphs* to Title 5, *paragraph 2* 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. It would thus remove part of the flexibility that is given to ratifying Members in their implementation of the Titles on substantive rights. The working party established to consider Title 5 at the High-level Group's fourth meeting took the view that there should be greater uniformity among Members in the area of enforcement.

7. 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.

Comment 36 (on Regulation 5.1)

1. *Regulation 5.1* deals with a ratifying Member's responsibilities under this Convention with respect to seafarers on board ships that fly its flag.

2. *Regulation 5.1.1* articulates the general principles relevant to the flag State: it 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, mentioned in the Preamble (see comment 1 above). This is clearly stated in *paragraph 1*, which clarifies that the flag State's obligations for ships that fly its flag are not limited to "working and living conditions" but include all matters dealt with by the Convention. This distinguishes between the matters subject to the certification system and the broader range of issues covered by the Convention. This formulation of flag state obligations is a proposal by the Office and is in { } brackets for discussion.

3. The obligation to adopt an effective system for inspection and certification is also laid down in this Regulation and includes the obligation to report to the ILO on the system and methods for assessing its effectiveness (*paragraphs 2* and *4*).

4. *Paragraph 3* is bracketed { } for discussion. It reflects the provisions found in Convention No. 178, Article 2(3), permitting governments to authorize public institutions and other organizations to carry out labour inspections on their behalf. It expands upon this and also

refers, in { } brackets, to delegation to other ratifying Members. This delegation to recognized organizations, such as ship classification societies, of the tasks related to ship survey inspections and even possibly issuance of required maritime certificates is also found in IMO Conventions such as SOLAS and MARPOL. In addition to provisions in these Conventions recognizing the practice and requiring that governments report any such authorizations to the IMO for circulation to other States Party to the relevant Convention, the IMO has also developed a framework, found in IMO Resolutions A.739(18) and A.789(19). These resolutions set the minimum requirements for these organizations, called "recognized organizations", and other matters that governments should consider in making such a delegation. Paragraph 3 makes it clear (in line with the cited provision of Convention No. 178) that the flag State still retains full responsibility for the inspection and certification of working and living conditions on board ships that fly its flag.

5. The principle in paragraph 3 relating to delegation to recognized organizations just referred to is developed into concrete requirements in *Regulation 5.1.2* and the related provisions of the Code. The provisions of the recommended draft that relate to the use of recognized organizations or to delegation to other Members were proposed by a Government expert at the fourth meeting of the High-level Group and have not yet been the subject of a full discussion. They have, for this reason, been placed inside { } brackets. The question of delegation of flag state inspection and certification to other ratifying Members has not yet been the subject of in-depth discussion and the provisions are not fully developed on this idea. Although this possibility is recognized under IMO Conventions, one of the issues that may distinguish the situation under this draft Convention lies in the fact that certification is with respect to stated national standards (Part III of the declaration of labour compliance, see point 7 below) implementing the Convention. This may provide some difficulty for another Member.

6. *Standard A 5.1.2, paragraph 1(a)* contains square [ ] brackets around the words "and social security protection". This relates to the question, and a difference of opinion, as to whether social security protection would be a matter for flag state certification and port state control.

7. *Regulation 5.1.3* and the related Code provisions set 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:

(i) a *maritime labour certificate*, confirming that the working and living conditions on the ship have been inspected and meet the requirements of the flag State's national law implementing the Convention and that measures adopted by the shipowner to ensure ongoing compliance are satisfactory; together with

(ii) a *declaration of labour compliance*, which would state what those requirements are and how they are to be complied with (*paragraphs 1* and *2* of the Regulation).

The inspection and certification have to relate to the requirements of national law as it is there that the mandatory detailed standards for implementing the Convention will necessarily be found; in the interest of achieving the flexibility for wide-scale ratification (see points 14 to 16 of the general comments at the beginning of this Commentary), many of the details pertaining to implementation of the standards in the Convention are in the form of non-mandatory guidelines in Part B of the Code.

(b) Once issued or approved, a copy of the relevant documentation would be kept on record or registered by the competent authority in accordance with *paragraph 4* of the Regulation. The words "and register" are in square [ ] brackets because some

governments report that they do not keep the records of certificates or other documentation issued under their authority for other maritime Conventions. These are kept by the relevant recognized organization.

(c) The maritime labour certificate and the declaration of labour compliance are to follow the model format set out in Appendix A5-II *(Regulation 5.1.3, paragraph 3* and *Standard A5.1.3, paragraph 9)*. While the wording of the national certificates of each Member is determined by this model, this will be the case only to a varying degree with the national declarations of labour compliance as much of the wording will depend upon the terms of each Member's national requirements implementing the Convention. These declarations are to consist of three parts *(Standard A5.1.3, paragraph 10)*: Part I is a summary "checklist" – a one-page sheet of the various items to be inspected and verified. Part II (the "national" component) would set out the relevant national requirements a ship has to meet in order to be in compliance with the standards of the Convention and would refer to the relevant legislation, including any special requirements for ships of specified categories, e.g., those carrying dangerous goods. 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. Both these parts would be drawn up by the competent authority (defined in Article II.1(a)), a task that could not be delegated to a recognized organization. Part III of the declaration would be drawn up by each shipowner and must be approved by the competent authority or (in square [ ] brackets) a recognized organization. This part would describe the measures adopted by the shipowner for ensuring ongoing compliance on board the ship between inspections and/or certifications. In order to assist governments, an example of the kinds of provision that might be found in a declaration is provided as guidance in Appendix B5-I.

(d) *Paragraph 1 of Standard A5.1.3* – through Appendix A5-I – sets the list of matters to be inspected and verified for flag state certification purposes and thus provides the parameters of the minimum working and living conditions to be inspected and certified as satisfactory. This list is one of the elements of the draft that will need to be carefully reviewed as several items on the current list are controversial (the same applies to the list in Appendix A5-III for port state control – see below, comment 37, point 2(f)).

(e) Paragraph 1 also sets the period of validity of the certificate at a maximum of five years, subject *(paragraph 2)* to at least one intermediate inspection, on the same scale as the initial inspection, to verify continuing compliance.

(f) In the limited circumstances set out in *paragraph 5* of Standard A5.1.3, an interim certificate could be granted with a validity of a few months *(paragraph 6)*. The grant would be subject to a limited verification, including inspection for compliance with the accommodation requirements of Title 3 of the Convention *(paragraph 7)*. A full inspection would have to be carried out at the end of the period of validity and no further interim certificate could be granted *(paragraph 8)*. Some aspects of the proposed provisions are controversial as indicated by the square [ ] brackets.

(g) The Standard ends by setting out the circumstances in which a certificate ceases to be valid *(paragraphs 15* and *16)* and by providing *(paragraph 17)* that the certificate is to be withdrawn if there is evidence of non-compliance by the ship with the requirements of the Convention which remains uncorrected. Evidence of non-compliance might result from one of the various inspections that the flag State is required to have carried out irrespective of the period of validity (see point 8 below) or from an inspection by a port State.

Standard A5.1.3 setting out the system described above has been placed inside { } brackets for discussion as most of its provisions were proposed by Government experts at the High-level Group's fourth meeting. The substance of the text appears to be generally acceptable (apart from the aspects inside square [ ] brackets), but the provisions could not be discussed in detail at the meeting.

8. *Regulation 5.1.4* requires flag States to have an effective and coordinated system of regular inspections. It should be noted that inspections are required by the Convention also in specified circumstances not related to the validity of a certificate. In particular, Standard A3.1 on accommodation requires inspections under Regulation 5.1.4 to be carried out when a ship is registered or re-registered or the seafarer accommodation on a ship has been substantially altered, and *paragraph 5* of *Standard A5.1.4* requires an investigation in the case of a complaint or evidence of a deficiency or other non conformity with the requirements of the Convention.

9. *Paragraph 7(c)* of *Standard A5.1.4* is in square [ ] brackets to reflect a difference of opinion as to the inspection and remedies. The Seafarer representatives propose an alternative formulation to deal also with cases of a serious breach of seafarers' rights. The Seafarers also propose using the term "non-compliance" rather than "deficiency" to describe incidents warranting detention in port. "Deficiency" is a term that appears to be commonly used in maritime inspection practices.

10. *Paragraph 14* of the Standard is based on Article 6, paragraph 2, of Convention No. 178 in connection with flag state inspections and its substance is also to be found in Conventions of the International Maritime Organization. It has been placed in square [ ] brackets to reflect doubts expressed by a number of Government representatives at the fourth meeting of the High-level Group as to whether such a provision was necessary in the context of the flag State. The Shipowner representatives, on the other hand, considered that the provision was so important as to justify its transfer from Part A of the Code to the Regulation itself.

11. *Paragraph 15* requires Members to provide for adequate penalties and other corrective measures, inter alia, for violation of "the requirements of this Convention". It is based on Article 7, paragraph 1, of Convention No. 178, which requires penalties for violations of "the legal provisions enforceable by inspectors". A Government representative has pointed out that the consolidated Convention would provide less protection than Convention No. 178, in that it would not itself place an obligation on Members to impose penalties for the violation of any national laws which provided greater protection than that required by the Convention. The fundamental purpose of Title 5 is however to ensure the implementation of the principles and rights in the Convention itself (which was not the case with Convention No. 178) as well as to provide for a level playing field among Members. In this sense the Convention provides minimum standards, subject however to article 19, paragraph 8, of the ILO Constitution, which provides that "in no case shall the adoption of any Convention … by the Conference, or the ratification of any Convention by a Member, be deemed to affect any award, law, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention …".

12. In *Guideline B5.1.4, paragraph 10* has been placed within { } brackets, but not because its actual content needs discussion. The question raised was whether its content was not important enough to justify the transfer of this provision to the Standard in Part A of the Code.

13. *Regulation 5.1.5* 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 ongoing compliance on board ship. The approach is generally based on a joint submission made by the Shipowners and Seafarers to the third meeting of the High-level

Group. The object would be the establishment of effective procedures for the resolution of complaints at the level of the ship or the shipowner. The text in the Regulation opens with two alternatives (in square [ ] brackets) to reflect differences in concepts and formulation on which it has so far not been possible to reach agreement. The first alternative consists only of *paragraph 1* relating to complaints. The other alternative consists of *paragraph 1* relating to complaints and *paragraph 2* relating to the resolution of disputes.

14. *Paragraph 2* or *3* (in the case of the second alternative) requires Members to ensure that there is no "victimization" of a seafarer for making a complaint. A definition of "victimization" is proposed in *paragraph 3* of *Standard A5.1.5*.

15. *Regulation 5.1.6* is taken from Convention No. 147. It addresses flag state responsibilities to inquire into serious marine casualties involving injury or loss of life on ships that fly its flag. A question has been raised as to whether this duplicates requirements within IMO. Advice is being sought as to that matter, however, unless there is a conflict with any the IMO provisions, there would be no difficulty in having a complementary requirement that focuses on ILO concerns and proposes public disclosure of findings.

Comment 37 (on Regulation 5.2)

1. *Regulation 5.2* addresses port state responsibilities with respect to the inspection of ships in port and the development of onshore procedures for handling seafarers' complaints. The term "authorized officers" was adopted to recognize that a range of personnel may be involved in an inspection and to ensure consistency with other maritime instruments that pertain to port state control. The provisions in Regulation 5.2 originate in part from Article 4 of the Merchant Shipping (Minimum Standards) Convention (No. 147), the port state control provision, and practices in the implementation of other maritime Conventions.

2. *Regulation 5.2.1* deals with inspections in port. It embodies the following features:

(a) Port state control activity is not obligatory. This is reflected in both Article V, paragraph 4, of the Convention and in the use of the word "may" ("… may be the subject of inspection") in *paragraph 1*. Members that do carry out port state inspections would be required to have an effective inspection and monitoring system *(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.

(b) *Paragraph 2* of the Regulation requires port States to accept a valid maritime labour certificate and declaration of labour compliance as "prima facie evidence" of compliance with the requirements of the Convention. This term, also used in Regulation 5.1.1, paragraph 4, is a legal term that has been defined as "evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive".[32] Essentially this captures the legal nature of the initial port state control action under other maritime Conventions and is a central feature in the balance struck in the certification system between differing interests, including the supremacy of flag state jurisdiction over matters on ships that fly its flag. The consequence of this is explained in paragraph 2: the inspection must be limited to a review of the maritime labour certificate and the declaration of labour compliance,

[32] In *The Oxford companion to law*, by David M. Walker, Clarendon Press, Oxford, 1980.

"except in the circumstances specified in the Code".[33] Those circumstances are specified in *subparagraphs (a), (b)* and *(c)* of *paragraph 1* of *Standard A5.2.1*. One of the circumstances (subparagraph (b)) is where there are clear grounds for believing that the working and living conditions on the ship do not conform to the requirements of the Convention; such grounds may, for example, be apparent to the port state control officer from the documentation produced or from his or her professional observations when boarding the ship.[34]

(c) Another circumstance specified in *Standard A5.2.1, paragraph 1*, would be the absence of the required documentation (*subparagraph (a)*). In accordance with the principle of "no more favourable treatment", reflected in paragraph 7 of Article V (see comment 5, point 6 above), 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.

(d) Under *paragraph 1* of the Standard, a more detailed inspection would be obligatory where the deficiency noted could constitute a clear hazard to the safety, health or security or (a suggestion of the Shipowner and Seafarer representatives placed between { } brackets) a clear obstacle to the application of the principles or rights provided for in the Convention.

(e) Consistent with the understanding and agreement reached in the High-level Group regarding the treatment to be given to Part B of the Code (see paragraphs 15 and 16 of the general comments at the beginning of this Commentary), port state inspection would relate to the Articles and Regulations and Part A of the Code *(Regulation 5.2.1, paragraph 3)*.

(f) The detailed inspection under *paragraph 2* of *Standard A5.2.1*, regarding matters under paragraphs 1(a) and (b) would "in principle" cover the areas listed in Appendix A5-III and would be based on compliance with the requirements of this Convention including any substantial equivalents identified by ratifying Members in the declaration of labour compliance (see comment 36, point 7(c) 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.

(g) *Paragraph 3* of the Standard addresses the inspection carried out as a result of a complaint under paragraph 1(c). It is in square [ ] brackets as the precise scope of inspection pursuant to a complaint is controversial.

(h) Under Article 4, paragraph 1, of Convention No. 147, if deficiencies are found with respect to conformity with the Convention, 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 Convention *(paragraph 4* of *Standard A5.2.1)*: first, a procedure is set out for reporting to the flag

[33] Similarly SOLAS, Chapter 1, Regulation 19, para. 1, provides that: "Every ship when in a port of another Contracting Government is subject to control by officers duly authorized by such Government in so far as the control is directed towards verifying that certificates … are valid." Paragraph 2 provides that "Such certificates, if valid, shall be accepted unless there are clear grounds…".

[34] See also: IMO Resolution A.787(19) Procedures for port state control, in particular sections 2.2, 3.1.1. and 3.2.

State, giving the latter a proper opportunity to express its position and to take any necessary action (two alternative formulations of this point are put forward in *paragraph 4(b)*) and for providing information to the next port of call and to the appropriate seafarers' and shipowners' organizations; second, under *paragraph 5*, an indication is given of the action that the ILO Director-General would be expected to take if the flag State's 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. 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. A suggestion has also been made that information on deficiencies found and corrective measures should be available to persons interested.

(i) *Paragraph 6* of the Standard would place an obligation on the port State if during an inspection (voluntarily carried out – see point (a) above) certain specified kinds of deficiencies come to the inspector's attention: the ship must not be permitted to sail 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". This is specified in *subparagraph (a)* of paragraph 6 under consideration: *subparagraphs (b)* and *(c)* propose 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 the Standard 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. The Shipowner and Seafarer representatives propose deletion of the provisions relating to the repair yard. An alternative formulation regarding the release of the ship is proposed by the Seafarer representatives in the last part of paragraph 6.

(j) *Paragraph 7* is in { } brackets for discussion, in part because aspects of the particulars of the guidance provided in *Guideline B5.2.1, paragraph 2* are controversial (or mention controversial provisions) as shown by the square [ ] brackets in that paragraph. It may be preferable not to place this guidance in the Convention. It may be considered more useful to develop more detailed materials to guide port and flag State inspectors in line with other port state inspection materials.

3. *Regulation 5.2.2* deals with onshore handling procedures for complaints by seafarers. The entire text of the Regulation and the related Code provisions are in { } brackets for discussion. The first question for consideration is essentially this: is it appropriate for a seafarer to resort to external recourse procedures without first attempting to have the matter resolved on board ship? The answer "No" is suggested in *paragraph 2(a)* of *Standard A5.2.2*, and this principle (which is in line with the general legal rule that local remedies must first be exhausted) is probably generally acceptable.

4. The second question for consideration is controversial: should it be possible for the seafarer to resort to any external recourse procedures other than those of the flag State? The answer contained in *paragraph 2(b)* of the Standard, which amounts to a "Yes, but", has been placed inside square [ ] brackets, as has the related provision in *Guideline B5.2.2*, namely *paragraph 4*. The strongest position for the answer "No" has been taken by one Government which has stated that an onshore complaint procedure would be unacceptable: 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. As a principle of "international comity", judicial or similar bodies usually 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 (see comment 1 above), the more appropriate judicial or administrative bodies would normally 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.

Comment 38 (on Regulation 5.3)

1. *Regulation 5.3* deals with what are described as the "labour-supplying responsibilities" of a State. A Government representative has expressed concern that the term "labour-supplying" appears to depreciate the value of the workers involved and has suggested the term "manpower supply" or other appropriate term instead. For the time being, the term "labour-supplying" has been retained for want of a better term and because it is more generally understood and accepted as the appropriate term in ILO practice. There is also some debate about whether the Convention should deal with this third category of "labour-supplying" responsibility at all.

2. In the discussions of the High-level Group emphasis has been given to the important role of labour-supplying countries in the area of enforcement for matters such as recruitment and placement agencies and employment agreements and social security protection. While it is easy to identify the major countries that supply 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". It should be noted that the Seafarers have expressed some concern about the concept of States other than flag States having recognized responsibilities for seafarers' conditions of work. In their view this may be contrary, rather than complementary, to Article 94 of the United Nations Law of the Sea Convention (see comment 1 above). The opening words of the Regulation ("Without prejudice to …") seek to address this concern by recognizing the primacy of flag state responsibility.

3. 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 the Regulation.

4. In the High-level Group's discussions, reference has also been made to "labour-supplying responsibilities" 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 is also contained in *paragraph 3* of the Regulation, which is in square [ ] brackets. Paragraph 3 provides a clearer statement of the legal implications: it expressly seeks to provide an appropriate remedy where a seafarers' employment agreement does not conform to the requirements 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.

5. 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. For example, 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. This may also be an example of the kind of issue that would be covered under this Regulation.

Comment 39 (on the appendices)

1. The appendices to Title 5 of the Convention relate to the certification system. Appendix A5-I (see comment 36, point 7(d)) and A5-III (see comment 37, point 2(f)) contain the list, as agreed so far, of items to be inspected and verified by the flag and port State for purposes of the certification system. Items in square [ ] brackets are not agreed. The two lists are the same as they relate to the content of the checklist and the list of items to be certified in the documents. It must be remembered that the list relating to the flag State does not however comprise its entire obligations vis-à-vis seafarers on ships that fly its flag: it is only the list of items that must be inspected for certification and port state control purposes (see comment 36, points 1 and 2).

2. It has been suggested that other information could usefully be included on the face of the documentation, such as the details of IMOs' ISM Code or the items listed in the on-board Continuous Synopsis Record required under Regulation 5 of SOLAS Chapter X-1. To the extent that these items are not already indicated in the model in Appendix 5-II, then it is important to consider carefully the relationship between the extra requirements for the content of documentation and the substance of the Convention. For example, requiring details of other on-board IMO certificates in order to issue a maritime labour certificate, aside from duplication, may implicitly impose conditions on ratification of this Convention. Similarly some items of a ship's history may not be possible for a flag State to certify. It is reasonable that the ship be required in the context of the IMO security-related provisions to carry such information on board in the record and have it available for inspection. Whether it should also be indicated and mandatory for the purposes of maritime labour certificate or declaration of labour compliance raises different issues.

3. The current draft maritime labour certificate and declaration of labour compliance does however seek to incorporate as many of these ideas as possible in the draft model in Appendix A5-II and the sample national documentation found in the guidelines at Appendix B5-I. Appendix B5-I provides guidance through an example of some possible provisions that may be adopted by a competent authority and shipowner in completing the documentation under this Convention (see comment 36, point 7(c)).

Appendix I

Lists of ratifications of maritime labour Conventions

Conventions	No. of ratifications (as at 1 May 2004)
Minimum Age (Sea) Convention, 1920 (No. 7)	53
Unemployment Indemnity (Shipwreck) Convention, 1920 (No. 8)	59
Placing of Seamen Convention, 1920 (No. 9)	40
Medical Examination of Young Persons (Sea) Convention, 1921 (No. 16)	81
Seamen's Articles of Agreement Convention, 1926 (No. 22)	58
Repatriation of Seamen Convention, 1926 (No. 23)	45
Officers' Competency Certificates Convention, 1936 (No. 53)	35
Holidays with Pay (Sea) Convention, 1936 (No. 54)	6
Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55)	16
Sickness Insurance (Sea) Convention, 1936 (No. 56)	19
Hours of Work and Manning (Sea) Convention, 1936 (No. 57)	4
Minimum Age (Sea) Convention (Revised), 1936 (No. 58)	51
Food and Catering (Ships' Crews) Convention, 1946 (No. 68)	24
Certification of Ships' Cooks Convention, 1946 (No. 69)	36
Social Security (Seafarers) Convention, 1946 (No. 70)	7
Seafarers' Pensions Convention, 1946 (No. 71)	13
Paid Vacations (Seafarers) Convention, 1946 (No. 72)	5
Medical Examination (Seafarers) Convention, 1946 (No. 73)	43
Certification of Able Seamen Convention, 1946 (No. 74)	28
Accommodation of Crews Convention, 1946 (No. 75)	5
Wages, Hours of Work and Manning (Sea) Convention, 1946 (No. 76)	1
Paid Vacations (Seafarers) Convention (Revised), 1949 (No. 91)	24
Accommodation of Crews Convention (Revised), 1949 (No. 92)	43
Wages, Hours of Work and Manning (Sea) Convention (Revised), 1949 (No. 93)	6
Seafarers' Identity Documents Convention, 1958 (No. 108)	62
Wages, Hours of Work and Manning (Sea) Convention (Revised), 1958 (No. 109)	16
Accommodation of Crews (Supplementary Provisions) Convention, 1970 (No. 133)	27
Prevention of Accidents (Seafarers) Convention, 1970 (No. 134)	27
Continuity of Employment (Seafarers) Convention, 1976 (No. 145)	17
Seafarers' Annual Leave with Pay Convention, 1976 (No. 146)	14
Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)	46
Protocol of 1996 to the Merchant Shipping (Minimum Standards) Convention, 1976	11
Seafarers' Welfare Convention, 1987 (No. 163)	14
Health Protection and Medical Care (Seafarers) Convention, 1987 (No. 164)	12
Social Security (Seafarers) Convention (Revised), 1987 (No. 165)	2
Repatriation of Seafarers Convention (Revised), 1987 (No. 166)	10
Labour Inspection (Seafarers) Convention, 1996 (No. 178)	9
Recruitment and Placement of Seafarers Convention, 1996 (No. 179)	9
Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180)	16
Seafarers' Identity Documents Convention (Revised), 2003 (No. 185)	1

Chart of ratifications of maritime Conventions
(as at 1 May 2004)

( ) denounced

Member States (177)	Total	Ratifications of maritime Conventions
Afghanistan	–	–
Albania	3	16, (58), 178
Algeria	12	56, (58), 68, 69, 70, 71, (72), 73, 74, 91, 92, 108
Angola	8	(7), 68, 69, 73, 74, 91, 92, 108
Antigua and Barbuda	1	108
Argentina	11	(7), 8, 9, 16, 22, 23, 53, 58, 68, 71, 73
Armenia	–	–
Australia	15	7, 8, 9, 16, 22, 57, 58, 69, 73, 76, 92, 93, 109, 133, 166
Austria	–	–
Azerbaijan	9	16, 23, 69, 73, 92, 108, 133, 134, 147
Bahamas	3	(7), 22, 147
Bahrain	–	–
Bangladesh	2	16, 22
Barbados	5	(7), 22, 74, 108, 147
Belarus	3	16, (58), 108
Belgium	21	(7), 8, 9, 16, 22, 23, 53, (54), 55, 56, (57), (58), 68, 69, 73, 74, 91, 92, 147, P147, 180
Belize	6	(7), 8, 16, 22, 58, 108
Benin	–	–
Bolivia	–	–
Bosnia and Herzegovina	13	8, 9, 16, 22, 23, 53, 56, 59, 73, 74, 91, 92, 109
Botswana	–	–
Brazil	18	(7), 16, 22, 53, (58), (91), 92, 93, 108, 109, 133, 134, 145, 146, 147, 163, 164, 166
Bulgaria	25	(7), 8, (9), 16, 22, 23, 53, (54), 55, 56, (57), (58), 68, 69, 71, 72, 73, 75, 108, 146, 147, 163, 166, 179, 180
Burkina Faso	–	–
Burundi	–	–
Cambodia	–	–
Cameroon	4	9, 16, 108, 146
Canada	11	7, 8, 16, 22, 58, 68, 69, 73, 74, 108, 147
Cape Verde	–	–
Central African Republic	–	–
Chad	–	–
Chile	5	(7), 8, 9, 16, 22
China	4	(7), 16, 22, 23
Colombia	6	(7), 8, 9, 16, 22, 23
Comoros	–	–
Congo	–	–

Member States (177)	Total	Ratifications of maritime Conventions
Costa Rica	6	8, 16, 92, 134, 145, 147
Côte d'Ivoire	1	133
Croatia	15	8, 9, 16, 22, 23, 32, 53, 56, 69, 73, 74, 91, 92, 109, 147
Cuba	14	(7), 8, 9, 16, 22, 23, 53, (58), (72), 91, 92, 93, 108, 145
Cyprus	5	16, 23, (58), 92, 147
Czech Republic	3	108, 163, 164
Democratic Republic of the Congo	–	–
Denmark	15	(7), 8, 9, 16, 53, (58), 73, 92, 108, 133, 134, 147, P147, 163, 180
Djibouti	13	9, 16, 22, 23, 53, 55, 56, 58, 69, 71, 73, 91, 108
Dominica	5	8, 16, 22, 108, 147
Dominican Republic	1	(7)
Ecuador	–	–
Egypt	15	9, 22, 23, 53, 55, 56, 68, 69, 71, 73, 74, 92, 134, 145, 147
El Salvador	–	–
Equatorial Guinea	2	68, 92
Eritrea	–	–
Estonia	9	7, 8, 9, 16, 22, 23, 53, 92, 108
Ethiopia	–	–
Fiji	3	8, (58), 108
Finland	23	(7), 8, (9), 16, 22, 53, (72), 73, (75), (91), 92, 108, 133, 134, 145, 146, 147, P147, 163, 164, 178, 179, 180
France	35	8, 9, 16, 22, 23, 53, (54), 55, 56, (58), 68, 69, 70, 71, (72), 73, 74, (75), (91), 92, 108, 109, 133, 134, 145, 146, 147, P147, 163, 164, 166, 178, 179, 180, 185
Gabon	–	–
Gambia	–	–
Georgia	–	–
Germany	14	(7), 8, 9, 16, 22, 23, 53, 56, 73, 92, 133, 134, 147, 164
Ghana	9	8, 16, 22, 23, 58, 69, 74, 92, 108
Greece	18	(7), 8, 9, 16, 23, 55, (58), 68, 69, 71, 73, 92, 108, 133, 134, 147, P147, 180
Grenada	5	(7), 8, 16, (58), 108
Guatemala	4	16, 58, 108, 109
Guinea	3	16, 133, 134
Guinea-Bissau	8	7, 68, 69, 73, 74, 91, 92, 108
Guyana	3	(7), 108, 166
Haiti	–	–
Honduras	1	108
Hungary	7	(7), 16, 145, 163, 164, 165, 166
Iceland	4	(58), 91, 108, 147
India	3	16, 22, 147
Indonesia	1	69

Member States (177)	Total	Ratifications of maritime Conventions
Iran, Islamic Republic of	1	108
Iraq	12	8, 16, 22, 23, (58), 92, 93, 108, 109, 145, 146, 147
Ireland	17	(7), 8, 16, 22, 23, 53, 68, 69, 73, 74, 92, 108, 147, P147, 178, 179, 180
Israel	7	9, 53, 91, 92, 133, 134, 147
Italy	24	(7), 8, 9, 16, 22, 23, 53, 55, (58), 68, 69, 71, 73, 74, (91), 92, 108, 109, 133, 134, 145, 146, 147, 164
Jamaica	4	(7), 8, 16, (58)
Japan	10	(7), 8, 9, 16, 22, (58), 69, 73, 134, 147
Jordan	1	147
Kazakhstan	–	–
Kenya	4	16, (58), 134, 146
Kiribati	–	–
Korea, Republic of	2	53, 73
Kuwait	–	–
Kyrgyzstan	9	16, 23, 69, 73, 92, 108, 133, 134, 147
Lao People's Democratic Republic	–	–
Latvia	6	7, 8, 9, 16, 108, 147
Lebanon	9	8, 9, 58, 71, 73, 74, 109, 133, 147
Lesotho	–	–
Liberia	9	22, 23, 53, 55, 58, 92, 108, 133, 147
Libyan Arab Jamahiriya	1	53
Lithuania	2	73, 108
Luxembourg	17	(7), 8, 9, 16, 22, 23, 53, 55, 56, 68, 69, 73, 74, 92, 108, 147, 166
Madagascar	–	–
Malawi	–	–
Malaysia	2	(7), 16
Mali	–	–
Malta	11	(7), 8, 16, 22, 53, 73, 74, 108, 147, P147, 180
Mauritania	5	22, 23, 53, 58, 91
Mauritius	6	(7), 8, 16, (58), 74, 108
Mexico	17	(7), 8, 9, 16, 22, (23), 53, 54, 55, 56, 58, 108, 109, 134, 163, 164, 166
Moldova, Republic of	1	108
Mongolia	–	–
Morocco	9	22, 55, 108, 145, 146, 147, 178, 179,180
Mozambique	–	–
Myanmar	2	16, 22
Namibia	–	–
Nepal	–	–

Member States (177)	Total	Ratifications of maritime Conventions
Netherlands	21	(7), 8, 9, 16, 22, 23, (58), 68, 69, 70, 71, 73, 74, (91), 92, 133, 145, 146, 147, P147, 180
New Zealand	14	8, 9, 16, 22, 23, 53, 58, 68, 69, 74, 92, 133, 134, 145
Nicaragua	7	(7), 8, 9, 16, 22, 23, 146
Niger	–	–
Nigeria	7	8, (9), 16, (58), 133, 134, 179
Norway	26	(7), 8, (9), 16, 22, 53, 56, (58), 68, 69, 71, 73, (75), 91, 92, 108, (109), 133, 134, 145, 147, 163, 164, 178, 179, 180
Oman	–	–
Pakistan	2	16, 22
Panama	16	8, 9, 16, 22, 23, 53, 55, 56, (58), 68, 69, 71, 73, 74, 92, 108
Papua New Guinea	3	(7), 8, 22
Paraguay	–	–
Peru	13	8, 9, 22, 23, 53, 55, 56, 58, 68, 69, 70, 71, 73
Philippines	6	23, 53, (93), 98, 138, 179
Poland	19	(7), 8, 9, 16, 22, 23, 68, 69, (70), 73, 74, 91, 92, 108, 133, 134, 145, 147, 178
Portugal	15	(7), 8, 22, 23, 68, 69, 73, 74, (91), 92, 108, 109, 145, 146, 147
Qatar	–	–
Romania	15	(7), 8, 9, 16, 22, 68, 92, 108, 133, 134, 147, P147, 163, 166, 180
Russian Federation	11	16, 23, (58), 69, 73, 92, 108, 133, 134, 147, 179
Rwanda	–	–
Saint Kitts and Nevis	–	–
Saint Lucia	4	7, 8, 16, 108
Saint Vincent and the Grenadines	4	7, 16, 108, 180
San Marino	–	–
Sao Tome and Principe	–	–
Saudi Arabia	–	–
Senegal	–	–
Serbia and Montenegro	13	8, 9, 16, 22, 23, 53, 56, 69, 73, 74, 91, 92, 109
Seychelles	5	(7), 8, 16, (58), 108
Sierra Leone	5	7, 8, 16, 22, 58
Singapore	4	7, 8, 16, 22
Slovakia	2	163, 164
Slovenia	13	8, 9, 16, 22, 23, 53, 56, 69, 73, 74, 91, 92, 108
Solomon Islands	3	8, 16, 108
Somalia	3	16, 22, 23
South Africa	–	–
Spain	28	(7), 8, 9, 16, 22, 23, 53, 55, (56), (58), 68, 69, (70), 73, 74, (91), 92, 108, (109), 134, 145, 146, 147, 163, 164, 165, 166, 180
Sri Lanka	5	(7), 8, 16, 58, 108
Sudan	–	–

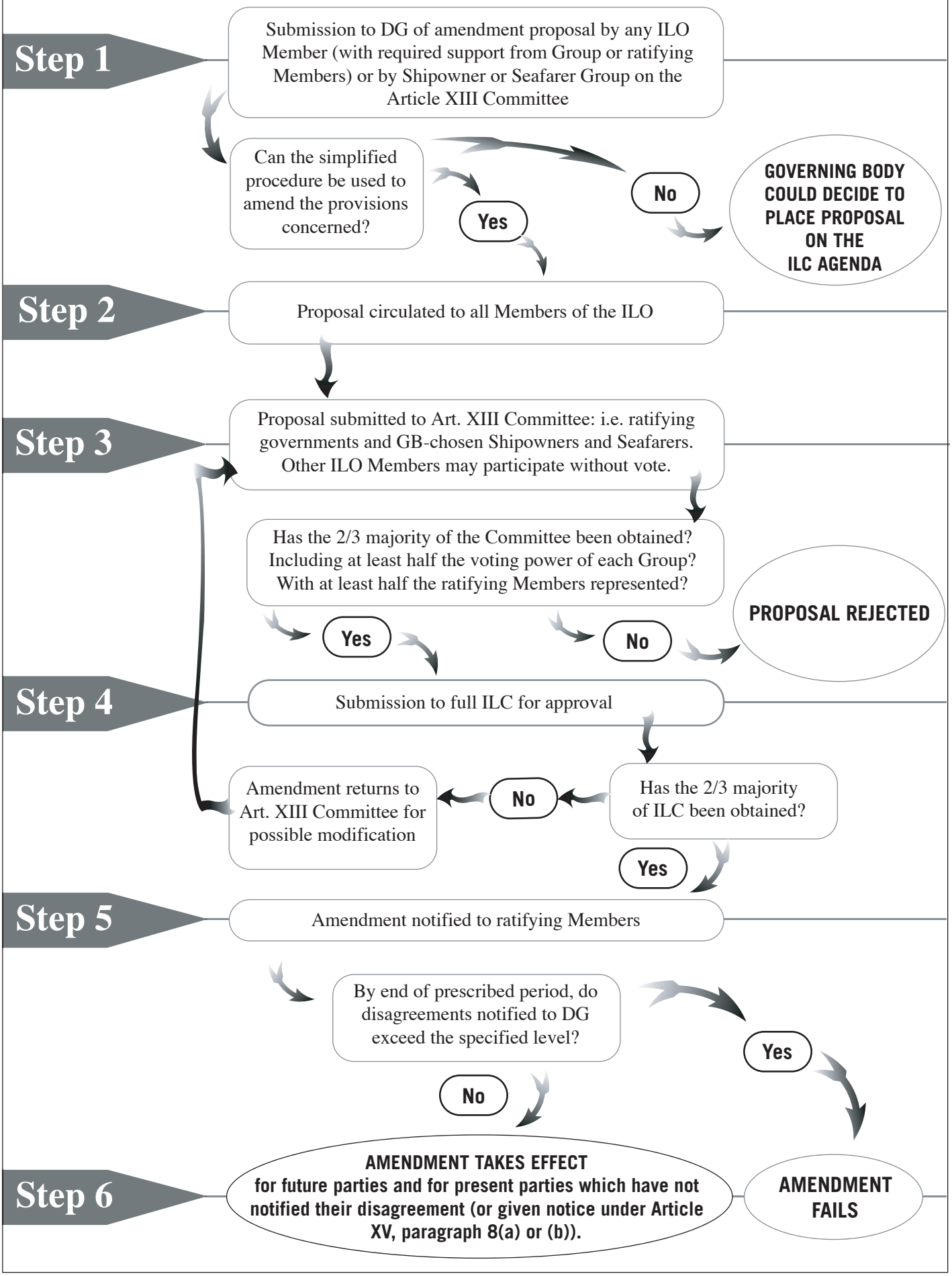
Member States (177)	Total	Ratifications of maritime Conventions
Suriname	–	–
Swaziland	–	–
Sweden	19	(7), 8, 9, 16, (58), 73, (75), 92, 108, 133, 134, 145, 146, 147, P147, 163, 164, 178, 180
Switzerland	5	8, 16, 23, (58), 163
Syrian Arab Republic	1	53
Tajikistan	9	16, 23, 69, 73, 92, 108, 133, 134, 147
Tanzania, United Republic of	5	(7), 16, 58, 108, 134
Thailand	–	–
The former Yugoslav Republic of Macedonia	14	8, 9, 16, 22, 23, 53, 56, 59, 69, 73, 74, 91, 92, 109
Timor-Leste, Democratic Republic of	–	–
Togo	–	–
Trinidad and Tobago	2	16, 147
Tunisia	13	8, 16, 22, 23, 55, (58), 73, 92, 108, 126, 133, 138, 147
Turkey	1	(58)
Turkmenistan	–	–
Uganda	–	–
Ukraine	10	16, 23, 32, (58), 69, 73, 92, 108, 133, 147
United Arab Emirates	–	–
United Kingdom	17	(7), 8, 16, 22, 23, 56, 68, 69, 70, 74, 92, 108, 133, 147, P147, 178, 180
United States	7	53, 54, 55, 57, 58, 74, 147
Uruguay	13	(7), 8, 9, 16, 22, 23, 54, (58), 73, 93, 108, 133, 134
Uzbekistan	–	–
Vanuatu	–	–
Venezuela	2	(7), 22
Viet Nam	–	–
Yemen	2	16, 58
Zambia	–	–
Zimbabwe	–	–

Declarations of application of maritime labour Conventions to non-metropolitan territories
(as at 22 April 2004)

( ) denounced

Member States	Non-metropolitan territories	Conventions applicable (with or without modifications)	
		Total	
Australia	Norfolk Islands	–	–
Denmark	Faeroe Islands	6	7, 8, 9, 16, 53, 92
	Greenland	2	7, 16
France	French Guiana	25	8, 9, 16, 22, 23, 53, (54), 55, 56, 58, 68, 69, 70, 71, (72), 73, 74, (91), 92, 108, 109, 133, 145, 146, 147
	French Polynesia	17	9, 16, 22, 23, 53, 55, 56, 58, 69, 71, 73, (91), 98, 108, 145, 146, 147
	French Southern and Antarctic Territories	17	8, 9, 16, 22, 23, 53, 58, 68, 69, 73, 74, 92, 108, 133, 134, 146, 147
	Guadeloupe	25	8, 9, 16, 22, 23, 53, (54), 55, 56, 58, 68, 69, 70, 71, (72), 73, 74, (91), 92, 108, 109, 133, 145, 146, 147
	Martinique	25	8, 9, 16, 22, 23, 53, (54), 55, 56, 58, 68, 69, 70, 71, (72), 73, 74, (91), 92, 108, 109, 133, 145, 146, 147
	New Caledonia	16	9, 16, 22, 23, 53, 55, 56, 58, 69, 71, 73, (91), 108, 145, 146, 147
	Réunion	25	8, 9, 16, 22, 23, 53, (54), 55, 56, 58, 68, 69, 70, 71, (72), 73, 74, (91), 92, 108, 109, 133, 145, 146, 147
	St. Pierre and Miquelon	16	9, 16, 22, 23, 53, 55, 56, 58, 69, 71, 73, (91), 108, 145, 146, 147
Netherlands	Aruba	10	8, 9, 22, 23, (58), 69, 74, 145, 146, 147
	Netherlands Antilles	7	8, 9, 22, 23, 58, 69, 74
New Zealand	Tokelau	–	–
United Kingdom	Anguilla	6	7, 8, 22, 23, 58, 108
	Bermuda	8	7, 16, 22, 23, 58, 108, 133, 147
	British Virgin Islands	5	7, 8, 23, 58, 108
	Falkland Islands (Malvinas)	5	7, 8, 22, 23, 58
	Gibraltar	9	7, 8, 16, 22, 23, 58, 108, 133, 147
	Guernsey	8	7, 8, 16, 22, 56, 69, 74, 108
	Isle of Man	14	7, 8, 16, 22, 23, 56, 68, 69, 70, 74, 92, 108, 133, 147
	Jersey	8	7, 8, 16, 22, 56, 69, 74, 108
	Montserrat	5	7, 8, 16, 58, 108
	St. Helena	5	7, 8, 16, 58, 108
United States	American Samoa	6	53, 54, 55, 57, 58, 147
	Guam	7	53, 54, 55, 57, 58, 74, 147
	Northern Mariana Islands	1	147
	Puerto Rico	7	53, 54, 55, 57, 58, 74, 147
	United States Virgin Islands	7	53, 54, 55, 57, 58, 74, 147

APPENDIX II: Simplified amendment procedure under Article XV



Addendum to the Commentary on the recommended draft of the maritime labour Convention concerning Regulation 4.5: Social security

1. This addendum, concerning *Regulation 4.5*, "Social security", of the recommended draft of the maritime labour Convention, should be read in the light of comment 34 of the Commentary on the recommended draft (document [reference]). It will be recalled that agreement for specific provisions on the subject could not be reached at the last meeting in Nantes of the High-level Tripartite Working Group on Maritime Labour Standards. At the suggestion of the Officers of the High-level Group, the Office consulted experts from Governments and Shipowner and Seafarer representatives in April this year and has inserted, in the recommended draft, provisions which have achieved a high measure of tripartite agreement.

2. The provisions are under the proposed *heading* "Social security", recommended by the experts, who pointed out that the term "social protection" was normally used in a much wider sense. It is recommended that the term social security rather than social security protection be used to describe the protection offered under Regulation 4.5. It should be noted at the same time that some of the other provisions in Title 4 of the Convention are also considered as relating to aspects of social security by some Governments. The terms used in the Convention would not of course affect the terminology used in ratifying countries.

3. The proposed Regulation clarifies that the obligations of ratifying Members relate to the matters or branches identified in the Code with respect to seafarers and their dependants that are subject to their social security legislation. It also reminds Members of the overriding obligation under the ILO Constitution that the adoption and the ratification of international labour Conventions do not affect other provisions ensuring more favourable conditions for workers *(paragraph 1)*. *Paragraph 2* would look forward to the progressive achievement of comprehensive social security protection for seafarers (and, to the extent provided for in national laws, their dependants), who would *(paragraph 3)* in any event be entitled to protection not less favourable than shoreworkers.

4. Despite the history of some difficulty with respect to this topic a high degree of agreement was achieved among the experts consulted. This was largely due to the fact that they started their work by adopting a matrix indicating the branches of protection to be covered and identifying the entities that should be responsible for providing the various aspects of coverage. The branches, identified in *Standard A4.5, paragraph 1*, are the nine branches that form the subject of the Social Security (Minimum Standards) Convention, 1952 (No. 102), in so far as they complement the shorter term protection offered by shipowners that is already provided for under Regulations 4.1 and 4.2 of the maritime labour Convention (as well as other provisions of the Convention, such as those relating to the seafarers' employment agreement, repatriation and the shipwreck indemnity). Thus, the Title 4 protection would begin with the short-term protection, which is provided by shipowners and regulated by flag States, relating to medical care and sick pay. The protection would continue where applicable into the medium term in accordance with provisions such as paragraph 3 of Standard A4.2 on sick pay. This basic protection would include responsibility for occupational illness and injury in the short term, and also in the long term in the sense that the shipowner is to obtain insurance for death or long-term disability in accordance with paragraph 1(b) of Standard A4.2. Although this latter paragraph has been placed inside square [ ] brackets as its precise terms are controversial, its general substance was considered an essential part of the protection to be provided under the Convention.

5. At the time of ratification, Members would be required to provide protection in at least three of the branches *(paragraph 2)*. This is drawn from the requirements of Convention No. 102 and should not be an onerous requirement, particularly as *paragraph 1* of *Guideline B4.5* recommends that those branches should be medical care, sickness benefit and employment injury benefit, already provided for by shipowners to the extent indicated above.

6. *Paragraph 3* of *Standard A4.5* refers to the obligation of the State in which the seafarer is ordinarily resident to take steps to provide "complementary protection" (to that already to be provided by shipowners) in the branches selected . While it must be at least equivalent to the protection enjoyed by shoreworkers in the country concerned, it may be provided through various mechanisms such as international agreements or contribution-based systems. In the latter case, the flag State should be responsible for ensuring that the contributions are paid *(paragraph 7* of *Guideline B4.5)*.

7. *Paragraph 4* of the Standard refers to the obligations of the flag State with respect to ensuring matters under Regulations 4.1 and 4.2 and also to the responsibilities inherent in its general obligations under international law, which would include in particular the obligation to exercise jurisdiction and control in social matters (see comment 1 of the Commentary on the recommended draft). The Seafarer experts at the meeting referred to in point 1 above considered that this paragraph did not adequately cover the responsibilities of the flag State with respect to social security. One Government expert also considered that the paragraph could be developed. This paragraph in the Standard is complemented by *paragraph 5* of *Guideline B4.5*, which was proposed by the Seafarer experts but did not obtain agreement. The proposed Guideline recommends that each flag State "should seek to take steps … according to its national circumstances and as far as practicable" to ensure that all seafarers serving on its ships are able to benefit from the same branches of social security protection as seafarers resident and insured on its territory.

8. *Paragraph 5* of the Standard addresses the important question of how Members' longer term (not 4.1, 4.2) social security obligations towards seafarers are to be implemented in the absence of protection from the entities normally responsible for providing it. For example, the State in which the seafarer is ordinarily resident may not have ratified the Convention or it may not be able to provide protection in the branch concerned. This is a serious gap in the social security protection coverage for seafarers and can undermine the idea of a level playing field. In such cases, the country of residence and/or the flag State, as the case may be, must "give consideration" to the various ways in which comparable benefits will be provided in accordance with national law and practice. Methods for providing comparable benefits are suggested in *paragraph 2* of *Guideline B4.5*. This provision means that Members should seriously consider ways of providing benefits that are comparable to those that are missing and to strive to provide such benefits to the extent that this is feasible and in accordance with their national law and practice.

9. Considerable flexibility is also given to the means by which Members will implement their social security obligations, in general. In particular, *paragraph 6* of the Standard would allow them to take account of collective bargaining agreements and even private schemes. To the extent that their obligations are satisfied by appropriate agreements or schemes, there would be no requirement for legislation or other state measures.

10. *Paragraph 7* of the Standard deals with the question (covered by Convention No. 102, for example) of the "seamless" maintenance of social security rights of seafarers, who will often serve under many shipowners and under many different flags in the course of their career.

11. *Paragraph 8* of the Standard, on fair and effective dispute settlement procedures, is complemented by *paragraph 3* and *4* of *Guideline B4.5*, which emphasize that the

procedures developed by each Member (with respect to the social security protection for which it is responsible) should be able to deal with all disputes concerning the coverage concerned, irrespective of the mechanism for providing the coverage (private or public).

12. *Paragraphs 9 and 10* of the Standard are usual provisions for international labour Conventions.

13. The question of conflict of laws is dealt with in *paragraph 3* of *Guideline B4.5*, which requires Members whose legislation may apply, to cooperate in determining which legislation should apply, with the more favourable type and level of protection as well as seafarer preference accorded a primary role in the choice of law.

14. *Paragraph 6* of *Guideline B4.5* addresses the treatment of the social security aspects in the seafarers' employment agreement. It would therefore need to be coordinated with the provisions of Title 2 of the recommended draft Convention, in connection with paragraph 4(h) of Standard A2.1, which relates to the same subject (see comment 20, point 7, and the relevant provision in square [ ] brackets). Paragraph 6 represents the greatest consensus that could be reached on an initial proposal by the Seafarer experts, which the Shipowner experts considered to be administratively burdensome.