International Chamber of Shipping
Shaping the Future of Shipping

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H.E. Mansukh L. Mandaviya
Minister of State
Ministry of Ports, Shipping and Waterways
Parivahan Bhavan 1, Parliament Street
New Delhi, India

22 December 2020

Dear Minister,

PUBLIC CONSULTATION: INDIA MINISTRY OF PORTS, SHIPPING AND WATERWAYS PROPOSED NEW 'MERCHANT SHIPPING BILL (2020)', TO REPLACE THE 'MERCHANT SHIPPING ACT (1958)'

1 Introduction

The International Chamber of Shipping (ICS), is the global trade association for shipowners, representing over 80% of the world merchant fleet, with a membership comprising national shipowners associations from 38 countries.

On 18 November, the Ministry of Ports, Shipping and Waterways began a consultation on the draft 'Merchant Shipping Bill (2020)', which we understand is intended to replace the Merchant Shipping Act (1958).

We also understand that this initiative is complementary to the overarching vision of Prime Minister Shri Narendra Modi's government to modernise India's national regulations, on the basis of contemporary international law and best practice.

2 Industry support for forward-looking initiative

ICS fully supports the primary aim of the proposed new Merchant Shipping Bill to promote the growth of the Indian shipping industry, taking into account the best practices adopted by other advanced nations (e.g. U.S., Japan, UK, Singapore and Australia), as noted in the official consultation press release.

The global shipping industry functions within a comprehensive regulatory framework, under the auspices of the International Maritime Organization (IMO), the

International Labour Organization (ILO), and other international organisations. We therefore noted with appreciation that the Ministry has taken steps to ensure that all IMO Conventions and Protocols, to which India is a party, will be adopted in the new regulation.

3 Request for extension of consultation period

Given the magnitude and the potential implications of the 160-page Bill, ICS respectfully suggests that the length of the consultation period – from 26 November to 24 December 2020 – is too short. Additional time is needed for all stakeholders affected by the new regulation, to assess and determine the real-world impacts resulting from this complex new regulatory measure.

We therefore hope that the Ministry of Ports, Shipping and Waterways will grant an extension with sufficient time to review and assess the national policies underlying this new Bill and the Bill's potential effects. We suggest that an extension of 30 days to the comment period would be a reasonable timeframe for interested parties to submit thorough and carefully considered comments.

4 Comments on aspects of the public consultation

The above notwithstanding, ICS appreciates the steps that the government has taken to enhance transparency in governance through the ongoing public consultation. In this respect, we provide formal comments concerning some aspects of the new Merchant Shipping Bill, in the sections that follow.

ICS understands that the local organisation representing the interests of liner shipping companies in India, the Container Shipping Lines Association ("CSLA"), will be providing the Ministry with its members' positions on the Bill. ICS fully supports the position submitted by CSLA and provides these comments from the global shipping industry perspective.

We sincerely hope that the Ministry will give our inputs and suggestions (intended to be constructive) their due consideration.

4.1 PART V - SEAFARERS

India has ratified the MLC, 2006, as amended (MLC, 2006). As a Flag, Coastal and Labour Supply state, India will be mindful of the importance of fully respecting its obligations with regard to abandoned seafarers as set out in that Convention. We highlight below some areas where the provisions in the provisions in the draft Bill on repatriation of abandoned seafarers and the associated costs are not aligned with the international convention, MLC, 2006, creating scope for uncertainty for abandoned seafarers.

4.1.1 Section 89, Page 46: 'Relief and maintenance of abandoned seafarers'

Sub-section (1) of Section 89

The current text in Sub-section (1) of Section 89 stipulates that *"the Indian consular officer at or near the place where a seafarer is abandoned shall, on application being made to him by the abandoned seafarer, provide in accordance with the rules made under this Act for the return of that seafarer to a proper return port, and also for the seafarer's necessary clothing and maintenance until his arrival at such port"*.

However, MLC, 2006 states that provision must be made for *"the essential needs of the seafarer including such items as: adequate food, clothing where necessary, accommodation, drinking water supplies, essential fuel for survival on board the ship, necessary medical care and any other reasonable costs or charges from the act or omission constituting the abandonment* ***until the seafarer's arrival at home"*** (see MLC (2006), 'Standard A2.5.2 – Financial security', paragraph 9.

Moreover, MLC (2006), 'Standard A2.5.2 – Financial security', Paragraph 10 also states that: *"The cost of repatriation shall cover travel by appropriate and expeditious means, normally by air, and include provision for food and accommodation of the seafarer from the time of leaving the ship until arrival at the* ***seafarer's home****, necessary medical care, passage and transport of personal effects and any other reasonable costs or charges arising from the abandonment"*.

Therefore, for proper alignment with the provisions of the MLC, Sub-section (1) of Section 89 of the Bill should reflect the principle of "***arrival at home***", not at port. This amendment should be applied throughout the Bill (for example, also in sub-section (2) of Article 89, and in all other places where the expression "proper return port" or "port" is used in relation to the repatriation of abandoned seafarers).

Sub-section (4) of Section 89

Regarding Sub-section (4) of Section 89 of the Bill: *"All excepted expenses incurred by or on behalf of the Central Government in accordance with the provisions of this Act shall constitute a debt due to the Central Government for which the seafarer in respect of whom they were incurred and the owner or the agent of the ship to which that seafarer belonged at the time of his discharge or other event which resulted in his becoming an abandoned seafarer shall be jointly and severally liable, and the owner or agent shall be entitled to recover from the seafarer any amount paid by him to the Central Government in settlement or part settlement of such debt, and may apply to the satisfaction of his claim so much as may be necessary of any wages due to the seafarer"*.

ICS suggests that the text in this Sub-section requires clarification. It is important that unless the situation is a clear excepted expense as per the MLC 2006, there should

be no obligation on an abandoned seafarer to have to ultimately reimburse the Indian Government for costs of their repatriation.

Sub-section (5) of Section 89

Sub-section (5) of Section 89 of the Bill states: "*All excepted expenses incurred in accordance with the provisions of this Act in respect of any abandoned seafarer by the owner or agent of the ship to which he belonged at the time of his discharge or other event which resulted in his becoming an abandoned seafarer shall constitute a debt due to the owner or agent for which the seafarer shall be liable, and the owner or agent may apply to the satisfaction of his claim so much as may be entitled to recover from the seafarer any repatriation expenses other than excepted expenses."*

ICS would suggest that Sub-section (5) should reflect the wording of the MLC 2006, i.e., Regulation 2.5 (Repatriation), Standard A2.5 (Repatriation), Paragraph 3: *"Each Member shall prohibit shipowners from requiring that seafarers make an advance payment towards the cost of repatriation at the beginning of their employment, and also from recovering the cost of repatriation from the seafarers' wages or other entitlements except where the seafarer has been found, in accordance with national laws or regulations or other measures or applicable collective bargaining agreements, to be in serious default of the seafarer's employment obligations"*.

Sub-section (7) of Section 89

With regard to Sub-section (7) (a) of Section 89 of the Bill: *"**'excepted expenses'** means repatriation expenses incurred in cases where the cause of the seafarer being left behind is desertion or absence without leave or imprisonment for misconduct or discharge from his vessel on the grounds of misconduct"*.

ICS would suggest that Sub-section (7) (a) – like Sub-section (5) – should reflect the wording of the MLC (2006), i.e. Regulation 2.5 (Repatriation), Standard A2.5 (Repatriation), Paragraph 3: *"Each Member shall prohibit shipowners from requiring that seafarers make an advance payment towards the cost of repatriation at the beginning of their employment, and also from recovering the cost of repatriation from the seafarers' wages or other entitlements except where the seafarer has been found, in accordance with national laws or regulations or other measures or applicable collective bargaining agreements, to be in serious default of the seafarer's employment obligations"*.

As regards Sub-section (7) (b) of Section 89 of the Bill: *"**'Repatriation expenses'** means expenses incurred in returning an abandoned seafarer to a proper return port and in providing him with necessary clothing and maintenance until his arrival at such a **port**, and includes in the case of a shipwrecked seafarer the repayment of expenses incurred in conveying him to a port after shipwreck and maintaining him while being so conveyed"*.

For the same reasons provided in our comments corresponding to Sub-section (1) of Section 89, ICS suggests that the reference to ***"port"*** in this current Sub-section (7) (b) should be replaced by ***"home"***, to ensure consistency with the MLC (2006).

Please note that our comments pertaining to references to "port" and "home" in this Section 89 of the Bill, are applicable also to Section 90 'Replacement crew on board abandoned vessels'.

4.1.2 Section 90, Page 47: 'Replacement Crew On Board Abandoned Vessels'

This provision contemplates powers to be given to the government to arrange replacement crew to relieve crew that has been repatriated and for the costs of such replacement crew to be the liability of the shipowner or agent of the ship. ICS notes that this is a liability that is not included in the MLC, 2006 or in any other international regulation/convention and it is difficult to see how these powers could be made effective with regard to a foreign owned vessel which the shipowner has abandoned, usually because of insolvency. In this regard we agree and align with the comments and further information on MLC Regulation 2.5, Standard 2.5.2 in the submission of the International Group of P&I Clubs dated 22 December 2020.

4.1.3 Section 115, Page 59: 'Reporting incidents'

Regarding Sub-section (3) of Section 315 of the Bill, which states: *"If the vessel referred to in sub-section (1) or sub-section (2) is abandoned, or a report from such vessel is incomplete, the Central Government shall fix the responsibility on the master of the vessel."*

ICS suggests that this provision should be amended to clarify that the master of the vessel does not have to remain onboard if, for example, the vessel is deemed to be unseaworthy and ensure that if relief is required this is coordinated by the port state who will take responsibility for the payment and safety of replacement crew for the duration of their stay on board, in accordance with the MLC, 2006 (Standard A2.5.5 paragraph 8).

4.1.4 Section 318, Page 155-156: 'Abandoned Vessels'

Sub-section (2) of Section 318

In relation to Sub-section (2) of Section 318 of the Bill, which states: *"The Central Government **may** prescribe the form and procedure for issuance of notice to the flag state of the vessel or consulate of the country of domicile of the registered owner for the purposes of sub-section (1)(a) of this Section".*

ICS suggests that the reference to ***"may"*** in this current Sub-section (2) should be replaced by ***"shall"***. This would ensure proper alignment with the provisions of the MLC, 2006 (see MLC (2006), Appendix 5.2, DMLC Requirement, points 15 and 16).

4.1.5 Section 319, Page 156: 'Power of the Central Government in respect of abandoned vessels'

Sub-section (2) of Section 319

As regards Sub-section (2) of Section 319 of the Bill, which states: *"The Central Government **may**, give such directions, in writing, as it deems appropriate…"*.

For the same reasons provided in our comments corresponding to Sub-section (2) of Section 318 – see above – ICS suggests that the reference to ***"may"*** in this current Sub-section (2) of Section 319 should be replaced by ***"shall"***, i.e. to ensure consistency with the MLC, 2006.

4.1.6 Section 139, Page 70: 'Power of the Central Government to give directions to certain vessels or persons to render certain service'

Sub-section (1) of Section 139

Based on our understanding of this Sub-section, the Central Government *"may direct the owner of any Indian vessel, tug, barge or any other equipment […]"*, to provide services or assistance in the event of *"an incident in which the cargo or harmful substances […] is escaping or likely to escape from a vessel and may cause or threaten to cause pollution […]"*.

Clarification is needed on what *"owner of any Indian vessel, tug, barge or any other equipment"* means. Does it mean "registered owner of an Indian vessel" (as referred to in Section 320) or does it mean 'any owner of a vessel, tug, barge or any other equipment registered in India'.

There appear to be two different terminologies used, i.e. "owner of any Indian vessel" and "registered owner of an Indian vessel". Providing a definition (or clarification) on the meaning of these terminologies would better identify the intended scope of application of this Sub-section, in the context of Sub-section (1) of Section 138. Clarifying what "any other equipment" means is also vital for better understanding of the provision.

Sub-section (2) of Section 139

Sub-section (2) appears to constitute undue interference by the Government in commercial activities, insofar as – in the context of Sub-section (1) of Section 139 referred to above – it appears to confer on the Central Government the authority to ("where tariff rates of freight are not fixed or where there is any dispute about reasonable rate of charter hire") unilaterally set rates for charter hire and freight charges, for services provided in the event of "an incident in which the cargo or

harmful substances […] is escaping or likely to escape from a vessel and may cause or threaten to cause pollution […]".

Such a major change in national policy would amount to inappropriate interference by the Central Government into commercial activities between shipping companies and their customers (government customers or otherwise). Government intervention into commercial activities threaten to damage freedom of contract in international shipping activities serving India's international trade.

We therefore appeal to the Government to remove this provision prior to the Bill's formal adoption, noting that it would also run counter to the overarching vision of Prime Minister Modi's government to modernise India's national laws, on the basis of contemporary international law and best practice.

Like many other sectors, the shipping industry continues to be severely impacted by the Covid-19 pandemic. To navigate through these very difficult times, we urge the government to support continuity and efficiency in the international maritime supply chain. If implemented, this provision would do the opposite, potentially harming international shipping services to and from India, with knock on effects on India's international trade.

Sub-section (3) of Section 139

This Sub-section of the Bill would give the Director General the authority to *"requisition the services of any officer of the Central Government or other officers or any police officer to assist for the purposes of this Part and it shall be the duty of every such officer to comply with such requisition"*.

ICS is very concerned that this potential mechanism for enforcement of the provisions in Sub-sections (1) and (2) of Section 139 would be highly inappropriate, especially in light of our comments in Sub-section (2), regarding inappropriate Government interference into commercial activities (see above).

4.2 PART IX - MARITIME LIBILITY AND COMPENSATION

Chapter 2 - Limitation of Liability for Maritime Claims

4.2.1 Section 167, Page 84: 'Limit for Passenger Claims'

The draft Bill implements the LLMC 1996, as amended (the LLMC). This contains specific provisions on the limits of liability for passenger claims, namely, SDR 175,000 per capita multiplied by the number of passengers the ship is licensed to carry. Section 167 provides that the limit of liability for passenger claims shall be such amount as "*may be prescribed*". For the avoidance of doubt, clarification is requested in this Bill that this refers to the amount prescribed in the LLMC, and not some other amount.

4.2.2 Section 173, Pages 86-87: Compulsory Insurance or other Financial Security for Maritime Claims Subject to Limitation

It appears from the provisions in the draft bill on this section, that the government of India is seeking to ensure that all ships maintain insurance for claims subject to limitation under the LLMC, as amended. This is not a requirement of the LLMC but ICS notes that the IMO Guidelines on Shipowners' Responsibilities in respect of Maritime Claims (IMO Resolution A.898(21)) recommends that shipowners should ensure that effective liability insurance is in place for the type of claims described in the LLMC up to the limits of the Convention and that they should ensure that their ships have on board a certificate issued by the insurer in respect of these claims. These recommendations have been made mandatory in some countries in their domestic laws and in the European Union through the EU Council's Insurance Directive of 2009 (Directive 2009/20/EC on the Insurance of Shipowners for Maritime Claims).The Directive also requires all ships exceeding 300 GT to maintain insurance equal to the relevant maximum amount for the limitation of liability laid down in the LLMC and for this to be evidenced by a certificate of Entry issued by the insurer.

The draft Bill is silent on whether evidence of the insurance will be required and what form this should take. If this aspect is under contemplation, in the interests of uniformity ICS requests that India adopts the model recommended in the IMO Guidelines referenced above, namely, that the evidence should comprise the Insurance Certificate of Entry.

4.3 PART X - MARINE INCIDENTS, NAIROBI CONVENTION ON THE REMOVAL OF WRECKS, AND EMERGENCY RESPONSE

Chapter 3 - Civil Liability for Pollution Damage

ICS notes and agrees with the comments made by the International Group of P&I Clubs in their submission dated 22 December on this chapter, and which are set again below for ease of reference.

Subsection (5(f)) of Section 178: the word "may" in the penultimate line should be "would";

Section 181: the word "only" needs to be inserted in the penultimate line so that it reads "may only be brought in the…";

Sub-section (1) of Section 182: the word "may" in the first line should be "shall be entitled to" so that it reads "The owner shall be entitled to limit…";

Sub-section (2) of Section 182: the word "may" in the last line should be "would";

Section 183: An insurer's letter of undertaking should also be specifically referenced as acceptable for the constitution of a limitation fund in 183 (2).

4.4 PART XII – WRECK AND SALVAGE

Chapter 1 - Wreck

4.4.1 Section 237, Page 114: 'Application of this Chapter to Wrecks'

This section purports to apply the WRC into all of its territory, "*including the coastal waters of India*". ICS is fully supportive of the application of the WRC into the territorial sea in the interests of international uniformity and to ensure that the benefits of the convention are made available as widely as possible (such as the shipowners' strict liability, compulsory insurance by shipowners for this liability and the right of direct action against the insurer). While it is perfectly legitimate for India to decide to apply the international WRC into its territorial sea through domestic legislation through section 237, ICS would recommend in the interests of transparency, particularly for the international shipping sector, that this is confirmed also through the mechanism of the "opt in" provision in Article 3, paragraph 2 of the Convention. This is easily achieved by notifying the IMO at any time.

In addition to the above, ICS notes that the draft Bill is inconsistent with, or has measures in addition to the WRC. A small number of these inconsistencies are highlighted below but this list is not exhaustive:

Section 239: this is an additional clause which is not present in the WRC;

Sub-section (2) of Section 240: There are no details of the extent of information that needs to be provided for determination of hazard, as included in WRC Article 5(2);

Sub-section (1) of Section 241: Two additional sub-points, (d) and (p) are included in determining if a wreck constitutes a hazard, in addition to the provisions under WRC Article 6; and

Section 242**:** The section does not implement WRC Article 7, which imposes an obligation on the Affected State to warn mariners and States concerned of the nature and location of wreck as a matter of urgency. Further if a wreck poses a hazard, the requirement to ensure all practical steps are taken to establish precise location of the wreck is excluded. Further, unlike WRC Article 8, the onus of marking of wrecks is transferred from the Affected State to the owner/operator of the vessel.

These inconsistencies/additional measures create uncertainty for all stakeholders. ICS therefore strongly urges India, that in implementing the WRC, it should fully respect the purpose and objective of the international Convention while giving effect to the rights, duties and obligations on the parties that are defined in the Convention, including States, shipowners, insurers and salvors.

4.5 PART XV - MISCELLANEOUS

4.5.1 Section 323, Page 158: 'Regulation of freight charges'

If adopted in its current form, Section 323 of the Bill would essentially amount to a requirement for shipping companies to either:

1. Provide numerous types of critical services without compensation; or

2. Build compensation for those services into the all-inclusive freight charged to all customers, even if some customers do not receive such services.

Sub-section (1) of Section 323

Subsection (1) of Section 323 stipulates that *"Every serviceprovider (sic) or agent, in respect of any Indian ship or other ship operating in coastal waters, in relation to import, export or domestic transportation, shall specify the all-inclusive freight in the bill of lading or any other transport document"*.

While the Bill does not specify the "all-inclusive freight" charges/ services that must be included in the bill of lading "or any other transport document", it is understood that they may include costs that cannot all reasonably be known or foreseen at the outset when the bill of lading contract is issued, such as charges by agents, port handling and storage charges. The bill of lading (for both port to port shipments and those issued in the liner trade), typically specifies only the cost of the maritime transportation. The bill of lading serves three functions: (1) a receipt for the shipment of goods, (2) evidence of the contract of carriage between the carrier and the cargo interest, and (3) a document of title to the goods being transported. Any other charges that might be incurred, such as empty container fees or container detention and demurrage fees, are set out in documents and tariffs separate from the bill of lading, but which are incorporated by reference into the bill of lading and are available to all parties. They are therefore fully transparent.

Those charges and fees constitute ancillary charges which continue to exist and have existed worldwide for many years. They are separate from basic freight charges and are affected by different factors to freight rates, allowing shipping companies to recover various costs associated with the transportation and handling of cargo. They are also intended to be based on cost recovery only, as a means of increasing transparency for customers on charges related to these services.

Charges falling into this category include, for example:

1. Maintenance and repair charges where the container has been damaged while in the custody of the shipper;

2. Container cleaning charges arising from the container being returned with debris or cargo residue inside;

3. Charges for late payment of freight; and

4. Detention and demurrage charges that are incurred if the cargo interest does not collect the cargo from a marine terminal on time or return the carrier's equipment within the allowable free time.

If the Bill is enacted as drafted, these charges, which are legitimate everywhere in the world, could not be collected as they would not be reflected in the bill of lading (since they arise after issuance of the bill of lading).
Moreover, it is unclear whether Section 323's reference to "other transport documents" is intended to include services and corresponding charges related to the movement of containerised cargo, which are typically set separately either by a contract document outside of the bill of lading or through public tariffs or circulars published by shipping companies listing these rates. If that is the case, the Ministry should clarify this by expressly listing them in the Bill, to avoid any undue confusion among contracting parties about which "transport documents" are covered, as these additional services and costs are in conformance with international practices and cannot be listed on the bill of lading.

A prohibition on the shipowner, agent, or any other service provider recovering such charges if they are not specified in the bill of lading, would amount, therefore, to undue legislative interference into commercial relationships and practices between shipping companies and their customers. This provision of the Bill, in undermining parties' freedom of contract in this way, is contrary to long-standing legal, regulatory, contractual and commercial norms both internationally and in India.

For example, if enacted as drafted, the Bill would prohibit shipping companies from billing customers for 'detention and demurrage' charges, which are part of the commercial contracts between shipping companies and their customers worldwide and critical to keeping supply chains flowing. This would be counter to the Government's stated aim of promoting trade growth and improving efficiency in India's ports. It is vital to ensure that cargo keeps flowing by implementing (rather than limiting or prohibiting) measures that incentivise cargo interests to promptly retrieve their cargo containers from the ports, unload those goods from the containers, and return the empty containers to the shipping companies. The Bill could lead to a slowdown in the movement of goods and containers, contribute to port congestion, and reduce the reliable flow of commerce into and out of India.

By assessing surcharges separately from base freight rates, shipping company customers have better transparency and understanding of their total costs. The decision to collect surcharges, and the quantum of any such surcharges, are also decided individually by each shipping company, based on various factors, including its commercial situation and assessment of its costs. In addition, the application of a surcharge is subject to negotiations in private commercial arrangements between

shipping companies and their customers. Surcharges therefore vary between different shipping companies, since each company has different costs.

Sub-section (2) of Section 323

Sub-section (2) stipulates that *"No service provider or agent shall levy any freight charges other than the all-inclusive freight specified in the bill of lading or other transport document"*.

For the same reasons as those provided under Sub-section (1) of Section 323, we appeal to the Government to remove this provision prior to the Bill's formal adoption. It constitutes inappropriate and unwarranted legislative interference into commercial relationships and practices between shipping companies and their customers; undermines parties' freedom of contract, contrary to international norms; diminishes commercial certainty, hindering the ability of shipping companies to make investments in India with confidence; and would also undermine India's positive and ambitious efforts towards becoming a fully developed maritime economy.

Moreover, as previously explained, many charges cannot be included in an "all-inclusive freight" on the bill of lading or otherwise in a "transport document," because it is unknown at the time the bill of lading is created and/or when the contract between the parties is negotiated whether the services associated with those charges will in fact be provided. Many charges not shown on the bill of lading are for services that must be provided if the cargo interest's expectations for the handling and delivery of the cargo are to be met, but these are services beyond the basic ocean transportation for which charges are shown on the bill of lading.

Sub-section (3) of Section 323

Sub-section (3) stipulates that *"The Central Government may prescribe the terms and conditions for issuance of the Bill of Lading or any other transport document"*. For the same reasons as those provided under Sub-sections (1) and (2) of Section 323, we appeal to the Government to remove this provision prior to the Bill's formal adoption.

Section 323 would exclude many legitimate services, and corresponding charges, that are essential for the smooth functioning of the international ocean transportation system, negatively impacting India's international trade and economy. Commercial arrangements in shipping are intricate and complex. The universal approach by governments is therefore to allow the parties to those commercial arrangements among themselves.

The global shipping industry has a longstanding history of operating in India, and substantial investments have been made toward resources to ensure that the industry continues to provide the key services which are vital to the Indian economy. Diminishing commercial certainty would hinder the ability of shipping companies to continue to make those investments with confidence. It would also undermine India's

positive and ambitious efforts towards becoming a fully developed maritime economy.

We therefore appeal to the Government to remove this provision prior to the Bill's formal adoption, noting that it would run counter to the overarching vision of Prime Minister Modi's government to modernise India's national regulations, on the basis of contemporary international law and best practice.

As has been previously reiterated, ICS appreciates the steps that the government has taken to enhance transparency in governance through the ongoing public consultation. We sincerely hope that the Ministry will give our inputs and suggestions (intended to be constructive) their due consideration.

Yours sincerely,

Simon Bennett
Deputy Secretary General