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88th session
Agenda item 3

LEG 88/3/3
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REVIEW OF THE CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION, 1988, AND ITS PROTOCOL OF 1988 RELATING TO THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF FIXED PLATFORMS LOCATED ON THE CONTINENTAL SHELF (SUA CONVENTION AND PROTOCOL)

Comments on draft article 8bis

Submitted by the International Chamber of Shipping (ICS), the International Shipping Federation (ISF) and the International Confederation of Free Trade Unions (ICFTU)

SUMMARY

Executive summary: This submission comments on document LEG 88/3 and the proposed boarding provisions (draft article 8bis) in particular.

Action to be taken: Paragraph 24

Related documents: LEG 88/3; LEG 88/3/4

1 This document is submitted as a comment on document LEG 88/3 and on draft article 8bis in particular.

Proposed boarding provisions

2 The shipping industry considers that it is crucial that the authority of the flag State be maintained and that any boarding is expressly authorised by the flag State, either on an individual ship by ship basis or through the conclusion of a bilateral agreement. We also believe that there should be clear grounds for any boarding, that it is in accordance with applicable international law and that adequate safeguards should be built into the Convention.

3 The prior notification of the ship and the ability of the ship to verify that any boarding is authorised are fundamental to ensuring that the rights of seafarers, shipowners and cargo owners are protected.

4 The boarding of a merchant ship at sea is an extreme measure, which will inevitably put the master and crew under considerable pressure. The master will be faced with the potentially conflicting interests of the boarding party, his/her responsibility to his/her owner, and the safety of his/her ship and crew. The rise in incidences of piracy and armed robbery at sea also mean that ships and their crews are increasingly vulnerable to criminals seeking to board. This may result in the master taking evasive action against legitimate boarding parties that are perceived to be a

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threat. Accordingly, the master will need clear advice from the flag State and the ship operator as to what should be done in the circumstances and sufficient time must be allowed to obtain that advice. The proposed tacit authorisation would only exacerbate this stressful situation. It is important to bear in mind the fact that seafarers live and work onboard a ship and are entitled to the protection and due process that we all take for granted. Nor should it be overlooked that seafarers will be implementing the ISPS requirements and will be expected to only permit authorised entry to the ship.

5 In article 8*bis*(1), we prefer “against the safety of maritime navigation” rather than “covered by this Convention” because it is consistent with the title and purpose of the SUA Convention and the remit of IMO. We also prefer “international law” rather than “the international law of the sea” because it reflects the requirement that States must ensure that any measures taken comply with all their obligations under international law, in particular international human rights law.

6 In article 8*bis* (2), we prefer “clear grounds to believe” and “flying its flag”. This terminology is consistent with UNCLOS. In addition, the phrase “flying its flag” is used elsewhere in the existing SUA Convention (see article 6(1)(a) and article 9) and we are not aware that it has given rise to any problems of interpretation.

7 In article 8*bis*(3), we would suggest the deletion of the two paragraphs in square brackets (second and third paragraphs from the end).

8 The first of these paragraphs appears to be illogical. We do not understand why, if the first Party is unable to confirm nationality, it may nevertheless indicate that it does not object to boarding.

9 The second of these paragraphs proposes tacit authorisation for boarding if the first Party does not respond to a request to confirm nationality within four hours of acknowledgement of receipt of the request. As stated above (in paragraph 2), we do not believe that this is an appropriate means of resolving a highly stressful and potentially dangerous situation. The proposed text gives rise to many practical difficulties, for example there is the problem of different time zones; and how to inform the master that receipt of the request has been acknowledged. In addition, it should be borne in mind that the paragraph is suggested as an exception to article 8*bis*(4) situations (see opening words of article 8*bis*(3)) and it would seem to be inappropriate to undermine a State’s decision not to authorise boarding on ratification of the Convention by allowing tacit authorisation if the State does not reply in time to a request to board.

10 In the opening paragraph of article 8*bis*(3) (and elsewhere), we question the appropriateness of the reference to “the ship” and the “ship’s cargo”. We are not sure whether the ship itself or the cargo could commit any of the proposed offences and would be grateful for clarification of what is intended by the use of these terms.

11 Our preference would be to delete article 8*bis*(4) for the reasons explained in paragraph 12 above. Nevertheless, if Governments decide to include the provision, we suggest that it should be made clear that the first Party may include conditions as part of its notification, including a condition that only law enforcement/authorised officials of certain States Parties may board.

12 In article 8*bis*(6), we prefer “the safeguards provisions of this article and applicable international law”.

13 In article 8bis(7), we prefer “the minimum necessary” rather than “that which is reasonably necessary” because we believe it will afford better protection for seafarers.

14 In article 8bis(8), we would suggest the insertion of an additional safeguard as a new (a):

(a) Notwithstanding the provisions contained in article 8bis (10), (11) and (12), the ship shall be advised prior to any boarding and the master shall be afforded sufficient time to verify that the boarding is duly authorized by the flag State;

The following sub-paragraphs should be renumbered accordingly.

15 In article 8 bis (8)(a)(ii), we would suggest the retention of the text in square brackets i.e. “including passengers and stowaways”.

16 Article 8 bis (8)(a)(iii): it should be borne in mind that the boarding of a ship at sea is a potentially dangerous operation, both for the boarding party and the ship, and that in the case of ships carrying certain cargoes (e.g. flammable substances) the very act of boarding can create its own hazards to the ship and crew. We therefore propose that this provision should be reworded as follows:

Take due account of the physical characteristics of the ship and its cargo and the safety and security of the crew and ensure that any measures taken do not exceed what is reasonably required to implement the provisions of this Article.

17 In Article 8bis(8)(a)(vi), we would agree with replacing the words “are being” with the words “may be” (see footnote 70 of annex 1 of document LEG 88/3).

18 As a consequential amendment we would suggest that article 8 bis(8)(a)(vii) is reworded as follows:

ensure that the master of a ship is at all times afforded the opportunity to contact the ship’s owner or flag State.

19 Article 8bis (8)(b): as presently drafted this provision provides little protection for ship operators against delays or damage to ship and cargo because the expressions used are unclear and capable of different interpretations. In the first line “reasonable” and “unduly” is a duplication and we therefore propose that “reasonable” is replaced with “all”. In the second line, the use of the term “vessel” is unclear because it is not defined, and it is also not clear whether a vessel/ship can commit an act or what persons the term is intended to embrace. In the fourth line, it is not clear which national law is meant by the reference to “national law”. In addition, the reference to national law would allow States to restrict liability for damage or loss in their national laws. The introduction of a special liability in an international convention should not be made subject to national law. It should be seen as an incentive to proceed with utmost care. We therefore propose that the paragraph should be reworded as follows:

All efforts shall be taken to avoid a ship or its cargo being unduly detained, delayed or damaged and to avoid the loss of crew earnings and/or the loss of or damage to crew effects. States Parties shall be liable for damage or loss attributable to them arising from measures taken pursuant to this article when:

(i) the grounds for such measures prove to be unfounded; or

(ii) *such measures are unlawful or exceed that reasonably required to implement the provisions of this article.*

20 Article 8*bis*(10): we prefer the alternative “are encouraged to” as this leaves it to the discretion of States as to whether to develop standard operating procedures.

21 Article 8*bis*(12): for the sake of clarity we prefer “article” rather than “Convention, as amended” since the requirement would seem to relate solely to article 8*bis*.

22 In order to assist the Committee, we have submitted a clean copy of article 8*bis* in our separate submission, document LEG 88/3/4.

23 The organizations concerned have further comments on other sections of the text and will raise these at the appropriate time during the course of the discussions.

Action requested of the Legal Committee

24 The Committee is invited to take into account the views of the sponsoring organizations when discussing the revision of the SUA Convention.
