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Agenda item 4

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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 FIXED PLATFORMS LOCATED ON THE CONTINENTAL SHELF (SUA CONVENTION AND PROTOCOL)

Comments on draft article 8bis (8)(b)

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 89/4/1 and article 8bis (8)(b) on the issue of compensation

Action to be taken: Paragraph 13

Related document: LEG 89/4/1

1 This document is submitted as a comment on document LEG 89/4/1 and on draft article 8bis(8)(b) on the issue of compensation in particular.

Proposed compensation provisions

Background

2 The issue of compensation for damage and loss caused by States in the implementation of the provisions of article 8bis was first raised in document LEG 85/4, which included the first draft of the proposed SUA Protocol. The text proposed was based on Article 110.3 of UNCLOS 1982 and Article 22.3 of the Convention on the High Seas 1958.

3 Further amendments to the text have been based on Regulation 9.3.5.1 of Chapter XI-2 of SOLAS 1974 (as amended); Article 21.18 of the Agreement for the Implementation of the Provisions of UNCLOS 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995; and Article 9.2 of the UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, 2000, Supplementing the UN Convention Against Trans-national Organized Crime.

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4 However, there are other international conventions which include compensation provisions that should be taken into consideration when drafting a suitable compensation provision for inclusion in the proposed SUA protocol. An example is the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969, (The 1969 Intervention Convention).

General Comments

5 It is clear that the international community has long recognized the risk of damage and/or loss being sustained as a result of boarding, detention and/or delay of a ship. A compensation provision that adequately protects shipowners and seafarers is particularly important in the proposed SUA Protocol. This is because of the broad spectrum of offences that have been proposed, including the transportation of dual-use equipment, materials and software that could potentially result in a large number of ships being boarded and detained.

6 Shipowners must be compensated for loss or damage to the ship and/or cargo and delay; and seafarers for personal injury, loss of life, damage to their property and loss of wages. Ensuring access to compensation for injured parties is crucial to protect their rights.

7 It is well established that States are vicariously liable for the actions of their law enforcement officials and have to compensate individuals and corporate entities if those officials cause injury and/or damage or loss as a result of an intervention that proves unfounded, or if an unreasonable level of force was used during the course of the intervention. Those law-enforcement officials are also subject to disciplinary measures and/or prosecution should they be found to have violated human rights. These principles would apply to any action that may be taken pursuant to article *8bis*.

8 As presently drafted, the provision for compensation in article *8bis*(8)(b) does not provide assurances to persons concerned that States parties will act with due care and that compensation will in fact be available to them if loss or damage is sustained following the intervening State(s) failure to abide by the provisions of article *8bis*.

9 The current text uses expressions that are unclear and capable of different interpretations. The first sentence restricts damage and loss to that directly linked with the detention or delay of the ship. Whereas article *8bis* includes measures that may be taken by the intervening State, such as boarding and searching, which could result in damage to property and personal injury and loss of life. Therefore, the text should include compensation for all damages and losses sustained from measures taken pursuant to article *8bis*.

10 The inclusion of a compensation provision in the proposed SUA Protocol must allow recourse for injured parties in practice. To this end, private individuals must be able to bring claims against States for any loss or damage caused by measures taken under article *8bis* and appropriate text may need to be included in the protocol to this effect.

11 We also agree with those delegations that have pointed out that ships cannot commit acts, and that the draft text should accordingly be reworded as proposed in document LEG 89/4/1.

Article 8bis (8)(b)

12 Taking into account the above comments, we propose that the last sub-paragraph of article 8bis (8)(b) be reworded as follows:

“When the grounds for measures taken pursuant to this Article prove to be unfounded or are unlawful or exceed that reasonably required to implement the provisions of this Article in light of available information, States Parties shall be liable to compensate claimants for any damage or loss caused by the measures taken.”

Action requested of the Legal Committee

13 The Legal Committee is invited to take into account the views of the shipping industry when discussing the revision of the SUA Convention.
