

**BALANCING MARITIME SECURITY AND FREEDOM OF
NAVIGATION ON THE HIGH SEAS:
A STUDY OF THE MULTILATERAL NEGOTIATION PROCESS IN
ACTION**

CHRISTOPHER YOUNG*

I. ABSTRACT

In light of concern about the use of ships in terrorist activities, the International Maritime Organization has undertaken a review of the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 to ensure that it provides an appropriate legal framework to counter such a use. This paper examines the process by which special provisions authorizing the boarding of a ship on the high seas by a State other than the flag State, when there are grounds for believing the ship may be involved in a terrorist activity, have been negotiated to respect the jurisdictional claims of the flag State as well as the legitimate interests of innocent ship owners and seafarers. Using a single article from a new treaty-in-progress as an example, this paper provides a detailed, inside look at modern, multilateral negotiation in action.

II. BACKGROUND

The International Maritime Organization (IMO) is a specialised agency of the United Nations.¹ It was established by the Convention on the International Maritime Organization which was adopted by a UN Conference in 1948. The Convention came into force in 1958.² The IMO currently has 165 member States (as at 23 May 2005). Article 1 of the IMO Convention expresses the purposes of the Organization, among which is the following: 'To provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade, and to encourage and facilitate the general adoption of the highest

* Senior Legal Officer and Head of the International Maritime Law and Technical Co-operation Section, Sub-Division for Legal Affairs, Legal Affairs and External Relations Division, International Maritime Organization in London. The views expressed in this article are the author's, and they do not necessarily reflect those of the International Maritime Organization.

¹ The UN 'family' is made up of a large number of organs including the International Court of Justice, the General Assembly, the Security Council, the Economic and Social Council, a wide number of Programmes and Funds (e.g., the United Nations Conference on Trade and Development (UNCTAD), the United Nations Environment Programme (UNEP), the United Nations Development Programme (UNDP), the United Nations Children's Fund (UNICEF), and the Office of the United Nations High Commissioner for Refugees (UNHCR)), as well as a number of specialized agencies (e.g., the International Labour Organization (ILO), the Food and Agriculture Organization (FAO), the World Health Organization (WHO), the International Civil Aviation Organization (ICAO), the World Bank, the International Monetary Fund (IMF), and the IMO), and related organizations (e.g., the International Atomic Energy Agency (IAEA) and the World Trade Organization (WTO)). Though they have their own governing bodies and budgets, these organs are linked to the UN system by means of special agreements and they report their activities to the General Assembly.

² The original name of the Organization was the Inter-Governmental Maritime Consultative Organization (IMCO), but the name was changed to IMO in 1982.

practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships; and to deal with administrative and legal matters.'

In recent years, and even more insistently since the events of September 11, 2001, the General Assembly and the Security Council have adopted resolutions calling for international cooperation to combat terrorism in all its forms.³

At its first meeting following the atrocities of September 11, in November 2001, the Assembly of the IMO adopted resolution A.924(22)⁴ which, among other things, expressed 'great concern for the security of passengers and crews on board ships including small craft both at anchor and underway in the context of incidents involving terrorism and other unlawful acts against ships, and the associated risks to people on shore or populations in port areas as well as to ports, offshore terminals and the marine environment' and requested the Legal Committee of the Organization to undertake, on a high priority basis, a review to ascertain whether there was a need to update the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA 1988) and, in the light of such a review, to take prompt action as appropriate.⁵

Immediately prior to this session of the Assembly, at its regular eighty-third session in October 2001, the IMO Legal Committee had already given consideration to a request made by the Secretary-General of the IMO in his opening speech that priority be given to the question of a review of SUA 1988. The Secretary-General at the time, William O'Neil, had stated that 'it was important to ensure that criminals who had perpetrated acts of violence at sea be properly brought to trial and punished.' The Committee gave its unanimous support to the request made by the Secretary-General and decided to include the review of the SUA treaties as a priority in its work programme.⁶

The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation was originally adopted by the International Conference on the Suppression of Unlawful Acts against the Safety of Maritime Navigation held in Rome in 1988.⁷ This

³ For example, SC Res 1368, UN SCOR (Res & Dec), 56th sess, 4370th mtg, UN Doc S/RES/1368 (2001); SC Res 1373, UN SCOR (Res & Dec), 56th sess, 4385th mtg, UN Doc S/RES/1373 (2001); SC Res 1540, UN SCOR (Res & Dec), 59th sess, 4956th mtg, UN Doc S/RES/1540 (2004); and GA Res 58/187, UN GAOR, 58th sess, 77th plen mtg, UN Doc A/RES/58/187 (2003); GA Res 59/24, UN GAOR, 59th sess, 56th plen mtg, UN Doc A/RES/59/24 (2004); and GA Res 59/46, UN GAOR, 59th sess, 65th plen mtg, UN Doc A/RES/59/46 (2004).

⁴ The IMO Assembly meets every two years. Resolutions adopted by the Assembly are identified by the letter A preceding the resolution number, which is followed by the number of the Assembly session in which it was adopted. Thus: A.924(22) was adopted by the Assembly at its twenty-second session in November 2001, and was numbered sequentially from the first resolution adopted by the first Assembly in 1959 (A.1(I)).

⁵ As a matter of background, this IMO Assembly resolution made reference, in its preambular paragraphs, to UN General Assembly resolution 56/1 (GA Res 56/1, UN GAOR, 56th sess, 1st plen mtg, UN Doc A/RES/56/1 (2001)) and UN Security Council Resolutions 1368 and 1373 (SC Res 1368, UN SCOR (Res & Dec), 56th sess, 4370th mtg, UN Doc S/RES/1368 (2001); SC Res 1373, UN SCOR (Res & Dec), 56th sess, 4385th mtg, UN Doc S/RES/1373 (2001)).

⁶ The IMO Legal Committee is a standing body of the Organization established under the IMO Convention. It normally meets twice a year, once in the autumn and once in spring. Documents submitted to, or generated by, this Committee are identified by the symbol LEG in the document name. This paragraph reflects the outcome of the discussion at the 83rd session which can be found in the report of that session (document LEG 83/14, paragraphs 175-179).

⁷ In addition to the SUA Convention, the Conference adopted the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf. The present paper does not address that protocol because it does not raise the issue of boarding of ships on the high seas.

conference was convened following the hijacking of the cruise ship *Achille Lauro* in October 1985,⁸ and the Convention obligates States Parties either to prosecute or extradite individuals found in their territories who are suspected of committing any of the unlawful acts described in the Convention.⁹

III. CONSIDERATION BY THE LEGAL COMMITTEE¹⁰

A. Eighty-fourth session (April 2002)

The IMO Legal Committee began its consideration of possible amendments to SUA 1988 at its eighty-fourth session. The primary focus of the initial proposals was on the need to expand the scope of offences covered by the Convention. For example, the United States, in document LEG 84/6/1, suggested there was a need to add language to the Convention that explicitly 'creates an offence of intentionally and unlawfully releasing harmful substances (such as biological agents, chemicals, or radiological materials) that have the capacity to cause death or serious bodily injury to the ship's crew or passengers' although they might not endanger the safe navigation of the ship. The United States also proposed that the list of offences should be expanded specifically (a) 'to prohibit knowingly and unlawfully providing international maritime transportation to persons who are known or suspected to have committed acts prohibited by the SUA Convention or other terrorism conventions'; (b) 'to prohibit knowingly and unlawfully providing international maritime transportation for supplies and other cargo that support acts prohibited by the SUA Convention or other terrorism conventions'; (c) to address the issue of 'transportation [or transport] of items related to weapons of mass destruction and their means of delivery in violation of applicable international non-proliferation agreements'; and (d) 'to criminalize using the ship or its cargo as a weapon'.¹¹ The United States recommended that the Committee should establish

⁸ On 7 October 1985, the Italian cruise ship *Achille Lauro* was seized in the Mediterranean by four hijackers. During the incident an American passenger, Leon Klinghoffer, was killed. With regard to the risks of maritime terrorism, it may be noted that the strikes against the USS Cole in October 2000 and the French oil tanker Limburg in October 2002, both off the Yemen coast, are considered to have been terrorist events.

⁹ SUA 1988 was modelled on the Montreal Hijacking Convention (*Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973)). SUA 1988 (*Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 10 March 1988, 1678 UNTS 221, (entered into force 1 March 1992)) makes it an offence for a person unlawfully and intentionally to seize or exercise control over a ship by force, threat, or intimidation; to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship; to place a destructive device or substance aboard a ship; and other acts against the safety of ships.

¹⁰ This paper is largely based on an examination of, and selective quotation from, the records from the Legal Committee sessions between April 2002 and April 2005. It is not an analysis of the issues involved or of the effectiveness of negotiating tactics, but a straight-forward record of how discussions developed. The Legal Committee records effectively serve as the travaux préparatoire (or legislative history) for the article under discussion. It should be noted that Legal Committee reports, by a long-standing decision by the Committee, do not include the name of the country making the intervention. It is a summary record rather than a transcript.

¹¹ Two other documents were submitted to the 84th session of the Legal Committee under this agenda item, LEG 84/6 (by the IMO Secretariat) and LEG 84/6/2 (by Turkey). The Secretariat generally suggested (at [14]) 'revision and expansion of the offences in article 3 to ensure that a wider range of unlawful acts are covered by the Convention in the light of the experience of 11 September', but did not offer detailed recommendations. Turkey suggested (at Annex [3]) a list of crimes which

an intersessional correspondence group to advise the review process, and offered to lead such a group.

The Committee supported the establishment of a formal Correspondence Group under the leadership of the United States.¹² The Committee also decided that the terms of reference¹³ of the Group should be broad, but sufficiently focused to enable it to carry out a thorough consideration of the scope of amendments.¹⁴ The Committee adopted terms of reference for the group and requested that it report to the Committee's eighty-fifth session.

B. Eighty-fifth session (October 2002)

At the Committee's eighty-fifth session, the delegation of the United States, as lead country for the intersessional Correspondence Group, introduced document LEG 85/4 which contained, among other things, a draft protocol to the SUA Convention. The draft was described as a work in progress. The United States representative said comments would be welcome as the Correspondence Group continued its work.¹⁵

It is beyond the scope of this paper to discuss the full range of proposals contained in the first draft protocol prepared by the Correspondence Group (or other papers submitted on issues raised by the review of SUA 1988).¹⁶ For present purposes, it should be understood that the range of proposed new offences was broad and encompassed crimes committed with a terrorist motive, the transport of materials that could be used in production or distribution of a weapon of mass destruction, as well as the transport of persons who were suspected of committing or abetting such offences. The remainder of this paper focuses on the boarding at sea provisions.

In introducing the draft protocol developed by the Correspondence Group, the United States noted that 'the proposed amendments would add a new article to the Convention that would set out procedures to be used in connection with the boarding of a ship of one State Party by officials of another State Party.'¹⁷

would be covered by the Convention if they were committed with a terrorist motive (i.e., 'deliberately conducted, threatened to be conducted, aided or harboured or solicited by the use of ships for the purposes of intimidation, harming or changing political, economic and social structure of States, inflicting material and moral damage to States, their institutions, their people and International Organizations, and distributing propaganda to serve these aims.')

¹² LEG 84/14, [68]. A Correspondence Group allows for interactive, informal consultations and negotiations to take place within a certain amount of coordination and structure to maintain in-depth progress during the intersessional period; the group has no fixed membership and takes no decisions. The leader of the Correspondence Group is expected to promote progress, insure the prompt exchange of proposals and comments, consolidate the results, and prepare a report for the Committee which includes a fair and balanced indication of all points of view expressed by members of the Group.

¹³ The Correspondence Group was instructed, *inter alia*, to 'review the 1988 SUA Convention and the 1988 SUA Protocol and ... propose necessary amendments for the two instruments in order to facilitate, strengthen and expand international co-operation and co-ordination as a means of combating unlawful acts, including terrorist acts.' (Annex 2, [2])

¹⁴ Report of the Legal Committee on the Work of its Eighty-Fourth Session, LEG 84/14, [70], (7 May 2002).

¹⁵ Report of the Legal Committee on the Work of its Eighty-Fifth Session, LEG 85/11, [64] (5 November 2002).

¹⁶ Other submissions included LEG 85/4/1 which expressed concern about possible overlap with other international conventions (Japan, *Comments on draft amendments to the SUA Convention and SUA Protocol*, LEG 85/4/1 (23 September 2002)).

¹⁷ United States, *Draft amendments to the SUA Convention and SUA Protocol*, LEG 85/4, [10] (17 August 2002).

In order to put this proposal in context, the United States provided the following analysis and background:¹⁸

The SUA Convention does not presently contain any such provision, in part because at the time it was negotiated there were no internationally agreed procedures. Such procedures have evolved over the past 14 years, first in article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, and more recently in articles 7 to 9 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, as well as the recently concluded Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area.

The proposed article 8 *bis* is derived from these recent instruments. It would establish two methods by which the flag State could authorize another Party to board a suspect vessel claiming its nationality located seaward of any State's territorial sea: either advance authorization when the enumerated conditions are met, or a procedure for granting authorization on an as-requested basis, including authorization when no reply is given within four hours. This default limits the opportunity for the suspect vessel to escape while minimizing the time the vessel may be prevented from proceeding toward its next port. This provision also enables the requesting State to use its limited naval resources most effectively.

The draft text includes provisions regarding notice to the flag State of the results of the boarding and the instructions for disposition of the vessel, cargo and crew, as well as rules for the conduct of boardings, including safeguards to be followed during the boarding.

The draft text includes a requirement that each Party ensure that its officials and those of other Parties acting on its behalf have the requisite authority under that Party's law. This provision is designed to remove a potential defence that a boarding was not authorized by the domestic law of the flag State.

The actual draft article (proposed to be inserted in SUA 1988 as article 8*bis*) is reproduced at the end of this paper as Annex 1.

During the Committee's discussion,¹⁹ most delegations 'expressed their concern at this article in view of the fact that it involved considerations not only of a legal but also of a political kind.' Reference was made to the potential lack of compatibility between the proposed boarding procedures and the principles of freedom of navigation and flag State jurisdiction.²⁰ Doubts were also expressed as to 'the compelling need of such an article, and

¹⁸ LEG 85/4, [11-14].

¹⁹ *Report of the Legal Committee on the Work of its Eighty-Fifth Session*, LEG 85/11, [89-93] (5 November 2002).

²⁰ The principles of flag State jurisdiction over ships on the high seas are reflected in the UN Convention on the Law of the Sea (*United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, art 230(1), 1833 UNTS 3 (entered into force 16 November 1994) ('UNCLOS')), particularly in para 1 of art 92, Status of ships, which reads as follows: 'Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.' One specific exception in UNCLOS pertains to acts of piracy. With regard to boarding at

the potential for abuse in its practical application.' Concern was also expressed regarding 'the safety of crews who might be exposed to hijacking by individuals posing as members of the armed forces of a State.' It was suggested that 'additional safeguards' might have to be included to ensure that boarding procedures were not misused.

In one drafting proposal, it was suggested that the expression used in draft paragraph 1(c) to justify a request for authorization to board (i.e., that the ship is '*reasonably suspected of being involved in, or reasonably believed to be the target of*') 'lacked objectivity for triggering the criminal law' and it was suggested that it would be preferable to use the expression '*having reasonable grounds to believe that ...*'

Doubts were also expressed on whether boarding provisions in other treaties could be adapted for use in the SUA context.

The observer delegation of the International Conference of Free Trade Unions (ICFTU), supported by some delegations, 'referred to the need to protect the ship's crew and indicated its opinion that the safeguards provided in paragraph 5 were not adequate.' It was imperative, the observer said, that IMO 'developed further provisions elsewhere to protect the human rights and interests of seafarers who are recognized as a vulnerable group in need of special protection. The need to do so was particularly compelling in view of the fact that the proposal under consideration by the Committee involves boarding and the use of force in accordance with the laws of the boarding State.'

The Committee recognized that this was just a preliminary exchange of views and that most delegations had not had time to consult the appropriate experts at home. Consequently, it was decided to continue work in the Correspondence Group. It was emphasized that the objective must be to develop a draft instrument which would attract wide ratification.²¹

sea, art 110, Rights of visit, provides in part as follows: 'Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that: (a) the ship is engaged in piracy; (b) the ship is engaged in the slave trade; (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109; (d) the ship is without nationality; or (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship. 2. In the cases provided for in para 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration. 3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.' Of course, in the case of UNCLOS, it is unwise to rely solely on selective quotation, since that Convention lays out a complex and balanced system of rights and responsibilities, and each provision must be interpreted in light of other related provisions.

²¹ LEG 85/11, [100-103]. One aim of the IMO is to develop instruments which are truly international in character—i.e., which are likely to be adopted by an international conference and then ratified/accepted by a large number of States.

C. Eighty-sixth session (April/early May 2003)

At its eighty-sixth session, the Committee continued its review of SUA 1988.²² The delegation of the United States introduced documents LEG 86/5 and LEG 86/5/Corr.1²³ which contained a new draft of the proposed protocol to SUA 1988. The delegation made reference to several changes in the draft which 'took into account the most important concerns of the Group's participants, which involved either changing the texts, or inserting square brackets'.²⁴ In this regard, mention was made of a number of matters, including the ship-boarding provisions. The text of the revised article *8bis* is reproduced in Annex 2 to this article.

During the discussion a number of delegations supported in principle an article on boarding of foreign ships. 'Nevertheless, a number of areas were identified where further work would be needed to clarify the objectives, the procedures and safeguards and to ensure that the boarding provisions were not subject to abuse and should not discriminate in form or in fact against foreign ships.' It was noted that the new provisions on boarding 'should conform with the principles of the United Nations Convention on the Law of the Sea (UNCLOS) and should take into account existing precedents'.²⁵ It was also noted that any new provisions on boarding of foreign ships must 'respect the jurisdiction of the flag State over its ships on the high seas.' In this regard, 'a number of delegations said that boarding should take place only when the flag State had given explicit authorization'.²⁶

On the other hand some delegations recognized that 'there may be cases where boarding may need to take place without explicit authorization, but these cases might be covered under the provisions of international law other than the SUA Convention. It was noted that a right to board a ship without authorization from the flag State might leave ships vulnerable to boarding for illegal purposes, for example, by pirates'.²⁷

With regard to specific paragraphs in draft article *8bis*, the following comments were made, as follows:

1. Paragraph 1 on Co-operation Between States²⁸

Some delegations took the view that this provision could be placed in the preamble to the draft Protocol, while others favoured retaining such a provision in draft article *8bis* in order to establish explicitly international co-operation between States as a treaty obligation governing, in particular, flag State authorization.

²² *Report of the Legal Committee on the Work of its Eighty-Sixth Session*, LEG 86/15, [40-93] (2 May 2003). A summary of the discussion on draft article *8bis* on shipboarding can be found in paragraphs 55 to 83.

²³ LEG/86/5/Corr.1 contained a correction of an error in LEG 86/5.

²⁴ Square brackets [...] are used in IMO documents to indicate that the text enclosed in the brackets is still the subject of discussion due to a lack of consensus regarding the substance and/or the drafting of the provision. **Bold-face** text and ~~strike-outs~~ are used to show changes made to a previous version of the same text.

²⁵ LEG 86/15, [56].

²⁶ LEG 86/15, [57].

²⁷ LEG 86/15, [58-59]: A number of delegations noted that their comments would be of a preliminary nature until the offence provisions were settled because of the close link between the offence provisions and the boarding provisions.

²⁸ LEG 86/15, [60].

2. Paragraph 2 on Grounds for Requesting Assistance²⁹

It was noted that a request would be made to the flag State based on 'reasonable grounds' but there was no obligation on the requesting State to provide those grounds to the flag State. A number of delegations expressed a preference for replacing the phrase 'a ship claiming its nationality' with the phrase 'flying its flag' or 'entitled to fly its flag.'

3. Paragraph 3 on Flag State Authorization³⁰

It was noted that the phrase 'reasonable grounds to believe' might be improved by referring to 'reasonable grounds to suspect,' although 'some delegations failed to understand what difference this might make.'

It was suggested that the request for confirmation of nationality should be mandatory ('shall') where a State wishes to board a ship, rather than permissive ('may'). It was also suggested that the list of actions which could be authorized by the flag State under this paragraph should be 'restrictive rather than indicative.'

Concerning situations where the requested State was unable to confirm that the ship concerned is entitled to fly its flag, some delegations questioned the logic of a provision which gave a State authority to authorize boarding of a ship when it could *not* confirm that ship's registration. 'However, it was also noted that this provision may be necessary to prevent rogue vessels from intentionally evading, through use of a false flag, the confirmation of nationality; and this should also ultimately enhance the ability of the flag State to exercise its authority over its own flag vessels.'

With regard to having a time limit for responding to a request for confirmation of nationality of a ship, it was noted that a four-hour time limit was currently used in a regional agreement. Some delegations, however, said a four-hour time limit 'may be impracticable in a global convention and did not have sufficient basis in international law.' Others expressed a preference for wording which required an 'immediate' response rather than a specific time limit. Some delegations said they could not support a presumption that boarding could take place in the absence of a response from the flag State. Concern was expressed that a short time limit 'might be abused to create unwarranted boarding opportunities.' It was noted that removing the time limit altogether 'could lead to uncertainty on how to proceed in situations where the requesting State failed to respond to a request.'

4. Paragraph 4 on General Advance Authorizations to Another Party³¹

It was noted that this was an optional provision which left the flag State with full discretion over whether to grant such an authorization or not.

²⁹ LEG 86/15, [61-63].

³⁰ LEG 86/15, [64-68].

³¹ LEG 86/15, [69].

5. Paragraph 5 on Authorization to Detain³²

It was suggested that the phrase 'disposition instructions' should be clarified.

6. Paragraph 8 on Conditional Boarding Authorizations³³

It was suggested that the current drafting was 'vague' and would require clarification.

7. Paragraph 9 on Use of Force³⁴

It was noted that 'principles of international law' rather than the 'laws and policies of the State conducting the boarding' must apply to the use of force. Some delegations said they 'did not consider a reference to self-defence to be appropriate in this paragraph. Other delegations said 'the right of self-defence of those on board the ship should be addressed in the article.' It was also observed that 'the right of self-defence pertaining to States under international law was different from that applicable to individuals under, principally, domestic law.'

8. Paragraph 10 on Safeguards³⁵

Several delegations expressed support in principle for having a provision on 'safeguards' in the draft article on boarding, but identified 'a number of areas where the text might benefit by further clarification.'

Some delegations supported in principle a safeguard of 'compensation' for the ship 'when the grounds used to justify the boarding prove to be unfounded.' It was suggested that 'not only the ship, but individuals such as the ship-owner and persons on board the ship who suffer loss or injury as a result of the boarding should be entitled to compensation in such cases.' It was also noted that the current wording left it 'unclear as to which State, the flag State or the requesting/boarding State, should pay the compensation.' It was suggested that article 232 of UNCLOS might provide a 'model' for a provision on compensation.³⁶

9. Paragraph 11 on Other Types of Boarding³⁷

It was noted that this paragraph might not contain an exhaustive list of other boarding situations. It was suggested that there might be a need 'to distinguish clearly between boardings conducted for law enforcement purposes and boardings conducted to assist the ship or perform salvage operations.'

³² LEG 86/15, [70].

³³ LEG 86/15, [71].

³⁴ LEG 86/15, [72-73].

³⁵ LEG 86/15, [74-75].

³⁶ UNCLOS Article 232 (on 'Liability of States arising from enforcement measures') reads as follows: 'States shall be liable for damage or loss attributable to them arising from measures taken pursuant to section 6 when such measures are unlawful or exceed those reasonably required in the light of available information. States shall provide for recourse in their courts for actions in respect of such damage or loss.'

³⁷ LEG 86/15, [76].

10. Paragraph 15 on Nationality of the Ship³⁸

It was suggested that the current wording should be more closely modelled on article 91 of UNCLOS.³⁹ It was noted that it might be useful to retain some 'flexibility for identifying the nationality of the ship.' However, the view was also expressed that SUA was not the appropriate instrument to develop 'new provisions on the nationality of ships.'

11. Paragraph 17 on Ships without Nationality⁴⁰

It was suggested that this paragraph may need to be 'expanded to address the risk of seizure without adequate grounds.'

12. Possible additional provisions⁴¹

It was suggested that a clear reference to 'the human rights of seafarers' should be included in the draft article on boarding, along with a provision recognizing that 'seafarers have the right to take reasonable steps to protect themselves when not given proper notice of the boarding.'

It was further suggested that an additional safeguard may be needed regarding 'the consequences of the use of force on a ship carrying hazardous substances.'

The Committee decided that work on revision of SUA 1988 should be continued intersessionally through correspondence with the United States continuing to act as co-ordinator of the Correspondence Group.⁴²

D. Eighty-seventh session (October 2003)

At its eighty-seventh session, the IMO Legal Committee continued its review of SUA 1988.⁴³ The delegation of the United States, introduced document LEG 87/5/1⁴⁴ which contained a new revised draft of the proposed protocol, including a new draft for article 8*bis* on ship boardings, which is reproduced in Annex 3 to this paper. There was considerable debate about this draft article. Following are the highlights of the discussion.

³⁸ LEG 86/15, [77].

³⁹ UNCLOS article 91 (on 'Nationality of ships') reads as follows: '1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship. 2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.'

⁴⁰ LEG 86/15, [78].

⁴¹ LEG 86/15, [79- 82].

⁴² LEG 86/15, [93].

⁴³ The summary of the discussion of SUA can be found in *Report of the Legal Committee on the Work of its Eighty-Seventh Session*, LEG 87/17, [88-142] (23 October 2003).

⁴⁴ United States, *Draft Amendments to the SUA Convention and Protocol*, LEG 87/5/1 (8 August 2003).

The Committee recognized that substantial revisions had been made to the text on the basis of intersessional consultations. However, while there still seemed to be general acceptance in the Committee on the need to include provisions concerning boarding in the draft protocol, it was clear that the present draft text would require further 'substantial modification'. It was also generally accepted that 'the principle of flag State jurisdiction must be respected to the utmost extent, recognizing that a boarding by another State on the high seas could only take place in exceptional circumstances.' Some delegations emphasized that boarding should take place 'only with the consent of the flag State.'⁴⁵

The Committee considered a number of specific points raised by the draft text.

1. Paragraph 2 (Requesting assistance)⁴⁶

A number of delegations expressed the view that the phrase 'a ship flying its flag' was preferable to the phrase 'a ship claiming its nationality' and should be used uniformly throughout, noting that this phrase 'would be consistent with terminology used in UNCLOS (e.g., Article 94).'⁴⁷

One delegation proposed that the phrase 'has reasonable grounds to suspect' (that a ship, a ship's cargo, or a person on board the ship is or has been involved in the commission of an offence) should be replaced by the phrase 'has clear grounds for believing.'

2. Paragraph 3 (Authorizing a boarding)⁴⁸

Regarding authorization of boarding by a State Party who is unable to confirm nationality of the ship, the view was expressed that this provision 'would not be appropriate because it would be a major incursion on flag State jurisdiction over the ship, and it was not clear how a State which could not confirm that the ship was entitled to fly its flag had the authority to authorize boarding by another State.'

Concerning a possible time limit for responding to a request for confirmation of nationality of a ship, the view was expressed that, 'while there may be a need for a time limit, the principle of allowing 'silent consent' was inconsistent with the right of a flag State to exercise jurisdiction' and in any case a 4-hour time limit was impracticable.

3. Paragraph 6 (Subjecting the authorization to conditions)⁴⁹

It was proposed that the phrase 'No additional measures would be taken' should be replaced by the words 'No additional measures *may* be taken' to indicate the mandatory nature of this provision on conditions which may be imposed by the flag State when authorizing a boarding.

⁴⁵ LEG 87/17, [111-114].

⁴⁶ LEG 87/17, [115-116].

⁴⁷ UNCLOS Article 94 concerns duties of the flag State. Paragraph 1 is representative of the use of the terminology 'ships flying its flag' and reads as follows: '1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.'

⁴⁸ LEG 87/17, [117-118].

⁴⁹ LEG 87/17, [119].

4. Paragraph 7 (Use of force)⁵⁰

It was proposed that the words 'assumed by the requesting Party' as used in the chapeau to this paragraph to refer to the obligations under international law should be deleted on the ground that the boarding should be conducted in accordance with all obligations under international law, not only those *assumed* by a Party.

With regard to the use of force provision in paragraph 7(a), one delegation queried 'whether the term *boarding officials* should be understood to include those on the mother ship who were overseeing the boarding.'

A number of delegations expressed the view that the words 'in strict accordance with applicable laws and policies of that Party' should be deleted 'since the use of force should be accordance with *international law* and in any case the reference to *policies* in this context was inappropriate.'

The view was expressed that wording which required the use of force to be 'the minimum reasonably necessary under the circumstances' was 'unclear, cumbersome and inconsistent with other international instruments on the use of force.'

With regard to the right of self-defence in paragraph 7(b), several delegations expressed the view that 'this wording did not distinguish clearly between the right of self-defence claimed by a State under international law (as reflected in Article 51 of the Charter of the United Nations), and the right of self-defence claimed by law enforcement officials under domestic law.' It was also suggested that 'there may be no need for this provision in the draft protocol because it reflected existing international law.'

5. Paragraph 9 (Safeguards)⁵¹

With regard to paragraph 9(a), one delegation suggested that the safety and humane treatment of the crew, as well as passengers and stowaways, should be included as a consideration in the safeguard provisions. In this regard, the observer organization of ICFTU noted that it had put forward a proposed new wording of paragraph 9(a)(v) in its document LEG 87/5/2.⁵²

With regard to paragraph 9(b) on compensation for situations where the grounds for taking measures prove to be unfounded, the view was expressed that the phrase 'consistent with their national laws' should be deleted 'since the determination of compensation should not be limited by the law of the State which is liable for the damage or loss. One delegation expressed the view that, 'while it may be necessary to pursue the claim in the courts of that State, it was improbable that compensation would ever be provided. This delegation said that the burden of proof that the grounds were well founded for boarding the ship should be on the State conducting the boarding.'

⁵⁰ LEG 87/17, [120 -125].

⁵¹ LEG 87/17, [126 -129].

⁵² The ICFTU proposal for paragraph 9(a)(v) of Article 8*bis* read as follows: 'ensure that persons on board are afforded the protections provided for in international law, especially human rights law, that they are not subject to unreasonable force and that their basic human dignity is preserved. They shall also be entitled to compensation for any infringement of this provision and for any damage to their property.' International Confederation of Free Trade Unions (ICFTU), *Review of the Convention of the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988, and its Protocol of 1988 Related to Fixed Platforms Located on the Continental Shelf (SUA Convention and Protocol)*, LEG 87/5/2 [15] (11 September 2003).

6. Paragraph 13 (law enforcement or other authorized officials)⁵³

Clarification was requested as to whether the law enforcement measures taken under article 8*bis* would be limited to those outside the territorial sea.

7. Paragraph 16 (Ships without nationality)⁵⁴

One delegation said this paragraph 'restated customary international law regarding ships without nationality' and could be deleted. However, if it was to be retained, 'then the last sentence, which was unclear, should be revised or deleted.'

8. Other observations⁵⁵

As a general comment on article 8*bis*, one delegation queried what action the master, crew and shipowner should take to avoid prosecution if weapons of mass destruction were discovered on a ship while at sea.

The observer organization of ICFTU expressed the view that article 8*bis* 'should provide for prior notification to the crew before a boarding took place in order to allow the crew to distinguish between a legitimate and an illegitimate boarding'. In the view of this delegation, 'such a notification was essential to ensure that crews (a) were not vulnerable to criminals seeking to board the ship and (b) did not inadvertently take evasive action against legitimate boarding parties which they perceived to be a threat.'

The observer organization of the International Chamber of Shipping (ICS) expressed the view that the draft article 'raised many practical questions including (a) the shiphandling skills of those involved in manoeuvring to accommodate a boarding on the high seas; (b) the process by which the ship owner and master are informed that a request has been made to the flag State and are advised of what reply the flag State has given; (c) the responsibility for costs resulting from delay of the ship during its voyage and from inspecting cargo on board, which might require gaining access to containers; (d) determining who would be entitled to bring a claim when a safeguard was not respected, and in what jurisdiction such a claim could be brought; and (e) who was responsible for damage to cargo or injury to persons on board when the grounds for the boarding are well founded.'

E. Eighty-eighth session (April 2004)

At its eighty-eighth session, the IMO Legal Committee continued its consideration of possible amendments to SUA 1988.⁵⁶ The delegation of the United States, introduced document LEG 88/3 which contained a newly revised text of the draft protocol. In so doing it explained the changes and improvements made to the draft protocol based on the Committee's deliberations and subsequent contributions received from members of the Group, with particular reference to, *inter alia*, the revised safeguards in article 8*bis*. The text

⁵³ LEG 87/17, [132].

⁵⁴ LEG 87/17, [133].

⁵⁵ LEG 87/17, [134-136].

⁵⁶ A summary of the discussion can be found in *Report of the Legal Committee on the Work of its Eighty-Eighth Session*, LEG 88/13, [29-83].

of this article as it was presented to the Legal Committee in April 2004 is reproduced in Annex 4 of this paper.⁵⁷

In the general discussion, most delegations that spoke expressed their support in broad terms for the 'strengthening' of the SUA Convention 'because of the threat posed by international terrorism.' Nevertheless, several delegations 'referred to the need to ensure that the expanded SUA protocol would not jeopardize the principle of freedom of navigation and the right of innocent passage which are guaranteed by the 1982 United Nations Convention on the Law of the Sea (UNCLOS) as well as by basic principles of international maritime law.'⁵⁸

In the opinion of some delegations 'there was a need to carefully consider the linkage between the proposed new offences and the boarding provisions. Not all offences should necessarily trigger a request for boarding a foreign ship.' The view was also expressed that 'boarding should proceed only with the express consent of the flag State and that the rights of the seafarers should be preserved.' The point was also made that 'compensation should be clearly provided for any damage or injury caused by unjustified boarding.'⁵⁹

The Committee recognized that while there seemed to be general acceptance of the need to include provisions concerning boarding in the draft protocol, 'it was clear that the present draft text, although an improvement over the previous text, still required further modification.' It was also recognized that 'inclusion of boarding provisions constituted a significant departure from the fundamental principles of freedom of navigation on the high seas and exclusive jurisdiction of flag States over their vessels. It was accepted that the principle of flag State jurisdiction must be respected to the utmost extent, recognizing that a boarding by another State on the high seas could only take place in exceptional circumstances. Any exception must be precise, unambiguous and internationally accepted.'⁶⁰

Some delegations were of the view that boarding should not be allowed for *all* offences in article 3*bis* but 'should be limited to the more serious ones.'⁶¹

Some delegations emphasized that 'boarding should take place only with the prior consent of the flag State and that sufficient time should be allowed for the master to verify the legitimacy of the boarding with the flag State and the owner.' Moreover there should be clear grounds for boarding and *prima facie* evidence of an offence 'should be provided by the boarding State to the flag State' when permission for boarding is sought.⁶²

It was suggested that the boarding provisions in article 106 of UNCLOS⁶³ might provide 'a model' for boarding and 'assist in preventing errors in implementation.' However, one delegation was of the view that this article of UNCLOS 'applied only for crimes such as piracy and slavery and was therefore not an appropriate model.' It was

⁵⁷ A number of documents were submitted to the 88th session of the Legal Committee with comments on the boarding article, including Mexico, *Comments and proposals*, LEG 88/3/1 (19 March 2004), and documents LEG 88/3/2, 3/3 and 3/4 submitted jointly by the International Chamber of Shipping (ICS), the International Shipping Federation (ISF) and the ICFTU.

⁵⁸ LEG 88/13, [34-35].

⁵⁹ LEG 88/13, [36].

⁶⁰ LEG 88/13, [65-66].

⁶¹ LEG 88/13, [67].

⁶² LEG 88/13, [68].

⁶³ UNCLOS article 106 reads as follows: 'Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.'

further suggested that boarding was a consequence of the right of visit in article 110 of UNCLOS⁶⁴ and, as such, 'required clear and reliable information.'⁶⁵

One delegation expressed the view that 'the issue of primary, or preferential, jurisdiction with respect to criminal proceedings needed to be studied further.'⁶⁶

1. Paragraph 3 (Cases where State is unable to confirm ship's nationality, and time limits)

With reference to the text in square brackets in paragraph 3 concerning the case where a State is unable to confirm the nationality of a ship, a number of delegations said that 'such a provision would be legally doubtful and should be deleted.' And with regard to the text in square brackets concerning a time limit for responding to a request for confirmation of nationality of a ship, the view was expressed that the 4-hour time limit was 'unacceptable and impracticable.' Furthermore the notion of 'tacit acceptance' was not acceptable because 'it was inconsistent with the right of a flag State to exercise jurisdiction'.

2. Paragraph 4 (General authorization)

If a State was unable to confirm or refute the nationality of the ship, according to one delegation, 'it was in no position to consent to boarding.' Some delegations expressed the view that, 'if there is to be a provision on tacit acceptance, then they would prefer an *opt-in* clause rather than the *opt-out* clause as currently in paragraph 4'.⁶⁷

3. Paragraph 8 (Safeguards)

With regard to the safeguards, several delegations were of the view that the provisions on compensation for an unjustified boarding needed to be strengthened. Some delegations were also of the view that the current compensation provisions provided little protection for the ship's operator against delays or damage to the ship or cargo occasioned by the boarding 'because the terminology used was unclear and capable of differing interpretations.' Additionally, some delegations were of the view that 'the reference to national law created uncertainties since national law might not allow compensation for unjustified boardings,' and others were of the opinion that it was 'inappropriate' to refer to national law in an international convention.⁶⁸

One delegation noted that several international conventions on maritime law 'included provisions relating to compensation for wrongful detention of a ship by a State Party,' but these provisions 'had not been effective in assuring payment of compensation.' Consequently, the 'onus of proof that the detention was justified should be on the boarding State' and this provision should be included in the protocol.⁶⁹

⁶⁴ See LEG 85/4, Annex, art 8bis(5). Excerpts from UNCLOS art 110 on the Right of Visit can be found above n 21.

⁶⁵ LEG 88/13, [69].

⁶⁶ LEG 88/13, [70].

⁶⁷ LEG 88/13, [72-73]. The opt-in/opt-out approach would depend on what a State was required to declare at the time of ratifying/accepting the new Protocol. See below n 77.

⁶⁸ LEG 88/13, [74-76].

⁶⁹ LEG 88/13, [77].

The Legal Committee agreed that a Working Group on SUA should meet intersessionally in July 2004 to consider and advance suitable amendments for the consideration of the Committee at its eighty-ninth session.⁷⁰

F. Intersessional Working Group on SUA—First meeting

The first Intersessional Working Group on the revision of the SUA Convention was held at IMO Headquarters from 12 to 16 July 2004 and one of the primary areas of discussion was the draft article containing the boarding provisions (*8bis*).⁷¹ The main points made during the meeting are the following.

Several delegations noted the need, given the danger of boarding at sea, for consideration of 'whether appropriate measures could be more safely taken in port'. Other delegations, however, were concerned that this was 'beyond the scope of SUA and objected to its inclusion in the text.'⁷²

The Group 'agreed that the principle to be articulated in the text was that of express flag State authorization for a boarding'. The only exception to this principle would be 'in cases where a State Party has expressed its explicit consent at the time of deposit of a ratification instrument to an alternative arrangement when its ship is suspected of being involved in an offence under SUA. In such cases it could grant consent to board its ship on expiration of a time limit after it has acknowledged receipt of an authorization request from another State Party, or could grant other States Parties advance consent to board its ships.'⁷³ The Working Group prepared a text reflecting this opt-in concept in principle.⁷⁴

1. Paragraph 3 (Response to request for authorization to board)

It was suggested that, on account of the difficulties involved in boarding operations at sea, 'the alternative of diverting the ship to a port' should be considered among the options mentioned in paragraph 3(b). Some delegations noted that 'the diversion of the ship to a port could involve the jurisdiction of the port State, thus adding a third jurisdiction within the complex framework of interaction between the flag State and the State requesting the boarding. In the view of these delegations, the scope of operation of boarding provisions should thus be restricted to the high seas.'⁷⁵

The Group 'agreed, in principle,' to include in the text the two *opt in* provisions, and to divide them into two subparagraphs.⁷⁶ The Group 'remained divided on the issue of

⁷⁰ LEG 88/13, [81-83]. An Intersessional Working Group is a formal meeting of delegations, but there is no interpretation (the meeting and documents are in English). A report along the lines of those prepared for Legal Committee meetings is prepared by the Secretariat.

⁷¹ The Report of the Working Group meeting was issued as the Annex to document LEG 89/4. Discussion of the boarding provisions is summarized in paragraphs 66 to 103. It is difficult to describe this discussion in detail, because the Working Group discussed a number of working papers which were prepared during the meeting.

⁷² LEG 89/4, Annex, [69].

⁷³ LEG 89/4, Annex, [70-71].

⁷⁴ See LEG/SUA/WG.1/WP.4.

⁷⁵ LEG 89/4, Annex, [74].

⁷⁶ The 'opt-in' principle would allow a State, at the time of ratification, to express its agreement to a process which would presumptively authorize a boarding if it did not respond to a request for such authorization within a specific time limit. If it did *not* 'opt-in' then it would retain the right to authorize

whether to include a specific time limit' for responding after acknowledging receipt of the request to confirm nationality. Some delegations suggested that the time limit be 'left to the discretion of the State Party' at the time of its notification of its acceptance of the *opt in* provision, while others proposed other time limits.⁷⁷

2. Paragraph 7 (Use of force)

There was general agreement that 'the principle of proportionality' should apply to the use of force under this article, and a number of alternative texts were offered. An informal drafting group proposed two alternative texts for consideration by the Correspondence Group, which were worded as follows:⁷⁸

Any use of force pursuant to this Article [i.e., when necessary to ensure the safety of the State Party's officials and other persons, or when the State Party's officials are obstructed in the execution of the authorized actions] shall not [Alternative A: exceed that which is necessary and reasonable in the circumstances] OR [Alternative B: exceed the minimum degree of force which is necessary and reasonable in the circumstances].⁷⁹

3. Paragraph 8 (safeguards)

Regarding the safeguards provisions, one delegation proposed the inclusion of a sentence permitting States Parties to limit communication between the master and the ship's owner if they have reasonable grounds for believing that such communication would obstruct investigations into a relevant offence. While some delegations preferred the original text, most delegations 'agreed in principle to give further consideration to this proposal.' An observer delegation pointed out 'the need for the master to obtain prior verification of the legitimacy of the boarding from the flag State and shipowner in light of the dangers involved and the threat of piracy.' There was some support for this view.⁸⁰

boardings of ships flying its flag *only* on an express-authorization basis. Following is the text which was under discussion: 'if, on or after it deposits its instrument of ratification, acceptance, approval or accession, a State Party has notified the Secretary General that, with respect to ships flying its flag or displaying its mark of registry, the requesting Party either: (i) shall be deemed to be granted authorization to board and search the ship, its cargo and persons on board, and to question the persons on board in order to locate and examine documentation of its nationality and determine if an offence under Article 3, Article 3*bis* or Article 3*ter* has been, or is about to be, committed, if there is no response from the first Party within four hours of acknowledgement of receipt of a request to confirm nationality; or (ii) is authorized to board and search a ship, its cargo and persons on board, and to question the persons on board in order to determine if an offence under Article 3, Article 3*bis* or Article 3*ter* has been or is about to be, committed. The notifications made pursuant to this paragraph can be withdrawn at any time.

⁷⁷ LEG 89/4, Annex, [77-78].

⁷⁸ LEG 89/4, Annex, [94].

⁷⁹ Proposal regarding Article 8*bis* paragraph 7, LEG/SUA/WG.1/WP.9 (15 July 2004).

⁸⁰ LEG 89/4, Annex, [95(viii)].

4. Paragraph 8(b) (Liability and compensation for loss/damage from unfounded boardings)

One delegation proposed a new provision 'on liability for damage and losses resulting from an unfounded or unlawful boarding, providing for a direct right of action for private entities and individuals against States.' This provision, it said, 'would address the need for balance between enhanced maritime security and the right of those who are harmed by an illicit boarding or detention.' Many delegations pointed out the importance of compensation in cases of unfounded boarding.⁸¹

The view was expressed that 'liability and compensation was a complex area that could not be addressed in a single paragraph.' It was also noted that, among the issues which would need careful consideration, were 'the possible need for dispute settlement provisions with access to arbitration or an international tribunal, clarification of the applicable national law and jurisdictions available to the claimant and a means of ensuring the execution or enforcement of court judgements.'⁸²

The Group briefly discussed other claims proposals. One delegation proposed the inclusion of claims language based on paragraph 3 of UNCLOS, Article 110.⁸³ The Group agreed that because there was insufficient time to consider this proposal, that it be reconsidered by the Correspondence Group.⁸⁴

G. Eighty-ninth session of the Committee (October 2004)

The eighty-ninth session of the IMO Legal Committee met in October 2004 and continued its discussion of amendments to SUA 1988.⁸⁵ The Committee was informed of the outcome of the Intersessional Working Group and used, as its basic text, the draft protocol attached as the annex to document LEG 89/4/1. The text of draft article 8*bis* on boardings, as it was presented to the 89th session of the Committee is reproduced in Annex 5 to this paper.

The Committee agreed to begin its discussion with article 8*bis* on the boarding provisions.

1. Paragraph 1(b) (Boarding in port)

The Committee considered the text in square brackets in paragraph 1(b) which would 'allow States Parties to take into account the dangers and difficulties of boarding at sea and give consideration to whether appropriate measures could be more safely taken in port.'⁸⁶ Delegations were 'divided' in their responses although there was 'a slight majority in favour of retention of the text.' The differences of opinion were summarized in the report of the meeting as follows:

⁸¹ LEG 89/4, Annex, [96].

⁸² LEG 89/4, Annex, [97].

⁸³ 'If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.'

⁸⁴ LEG 89/4, Annex, [98].

⁸⁵ A summary of the discussion can be found in *Report of the Legal Committee on the Work of its Eighty-Ninth Session*, LEG 89/16, [33-116].

⁸⁶ LEG 89/16, [37].

Those delegations against retention cited a variety of reasons including:

- Deviation of a ship from the high seas to a port for the purpose of boarding and searching operations belonged within the purview of IMO safety instruments and was not an issue to be decided under SUA.
- Additional complications would arise in the case of the port State being different from the requesting State and the consequent involvement of three jurisdictions, namely, that of the port State, the requesting State and the flag State.
- In cases of transport of nuclear weapons the proposed text would compromise a State's adherence to other treaties, which prohibited the bringing of these weapons to port.
- The inclusion of such provisions would necessarily lead to a further complication, namely, the need to address the question of claims for costs entailed as a result of the deviation of the ship to port.

Other delegations favoured the inclusion of the text in square brackets for a number of reasons including:

- This was not a jurisdictional provision but a practical one which would offer a suitable alternative in cases such as the boarding of ships for searching of containers which would be very difficult to undertake on the high seas without endangering the safety of the ship and the persons and goods on board.
- Safety is a paramount consideration underlying many IMO instruments and it is appropriate therefore that SUA takes the safety element into account.
- The proposal, if retained, could be expanded beyond the reference to ports to include coastal areas as potential sites for conducting appropriate measures.
- The jurisdictional implications could be avoided by deleting at the end of the proposal the reference to appropriate measures and ending the provision after the word 'cargo'.

It was further suggested that the proposal, if retained, might be moved to the safeguards provision in paragraph 8 of the draft protocol.

The Committee decided to request the Working Group to further study this question and to report back to it with a solution.⁸⁷

2. Paragraph 3 (Time limits)

A proposal that a time limit be established in which a State would be 'required to acknowledge the receipt of a request from another State Party as to whether the ship claiming its nationality was entitled to do so' was supported by some delegations; however,

⁸⁷ LEG 89/16, [40-44].

a majority of delegations opposed the proposal and the Committee decided 'not to accept the proposal to insert specific time limits in this provision.'⁸⁸

3. Paragraph 6 (Jurisdiction)

The Committee discussed in detail the text in square brackets in paragraph 6, which 'provides that where a boarding occurs pursuant to article 8*bis*, the flag State shall have the primary right to exercise jurisdiction over the ship except where the flag State waives its primary right to exercise jurisdiction.' A clear majority of the delegations that spoke supported the inclusion of such a provision.⁸⁹

It was noted that the inclusion of an explicit provision on the exercise of jurisdiction was important 'because, in a boarding conducted pursuant to this article, there may be a number of States having concurrent jurisdiction over the offences in question. For instance, due to the operation of article 6 of the existing SUA Convention, in addition to the flag State, the State—or States—of which the alleged perpetrator is a national would have jurisdiction, as could the State(s) of which the victim is a national. In such a situation, it is necessary to regulate the question of which of the States involved should have the primary right to exercise its jurisdiction where there is a boarding at sea.'⁹⁰

The point was made, however, 'that a waiver of the flag State's right to exercise jurisdiction could have far-reaching consequences, particularly with respect to the rights and protection of the master and crew and for this reason, mere consent to boarding should not be construed as consent to waiver.' In this connection, the observer delegation of the ICFTU reminded the Committee of 'the duty of flag States to protect seafarers on vessels flying their flag.'⁹¹

It was also noted that 'a flag State could only waive the exercise of its jurisdiction in favour of a State having a basis under article 6 of the SUA for exercising jurisdiction.'⁹²

The Committee asked the Working Group to consider this provision further in the light of the above comments.⁹³

4. Paragraph 7 (Use of force)

Regarding the provisions on the use of force during a boarding, the Committee considered the two alternative proposals developed at the Intersessional Working Group.⁹⁴ A number of delegations said that 'neither of the two options provided for the concept of proportionality which should be expressly included in the text.' Other delegations, however, were of the view that the concept of proportionality was 'encompassed within the phrase *necessary and reasonable* and that an express reference would be superfluous.' It was also noted that the term 'proportional' was 'relative and would need to be linked with another term, such as risk

⁸⁸ LEG 89/16, [46-49].

⁸⁹ LEG 89/16, [54].

⁹⁰ LEG 89/16, [55].

⁹¹ LEG 89/16, [57].

⁹² LEG 89/16, [58].

⁹³ LEG 89/16, [60].

⁹⁴ 'Any use of force pursuant to this Article shall not exceed [that which is necessary and reasonable] OR [the minimum degree of force which is necessary and reasonable] in the circumstances.'

of injury or damage.' The Committee agreed to retain the wording in the second set of brackets and adopted the paragraph as amended to read as follows: 'Any use of force pursuant to this Article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.'⁹⁵

5. Paragraph 8(a) (Right of master to communicate)

The Committee then considered a number of proposals concerning 'the right of the master to communicate with the flag State and/or the ship owner' in paragraph 8(a)(viii).

Some delegations supported the proposal of ICS, ISF and ICFTU⁹⁶ to add the following new paragraph: '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'. Some delegations noted that this provision would be consistent with the maritime security provisions of SOLAS and the International Ship and Port Facility Security Code (ISPS Code) 'which require Contracting Governments to have a point of contact when ships are in need of assistance, and for ships to be able to deny access except by authorized persons.'

The Committee referred the paragraph back to the Working Group for further examination.⁹⁷

6. Paragraph 8(b) (Liability and compensation for damage/loss from unfounded boarding)

The Committee then turned its attention to the compensation provisions in paragraph 8(b). In this connection, 'while all delegations that spoke agreed on the need for the Protocol to address the issue of compensation for unjustified boarding, several delegations were of the view that the existing text was not satisfactory and needed to be modified.'⁹⁸

The Committee examined three new submissions relating to this paragraph,⁹⁹ including a proposal to add 'the concepts of joint and several liability' (to be shared by the flag State or the intervening State), 'arbitration and the right of direct action against flag and boarding States.' However, this proposal found little support on the basis, primarily, that 'it was too detailed and would be difficult to implement.'¹⁰⁰

The view was expressed that this proposal, if adopted, 'would amount to an unprecedented and unnecessary expansion of international law' and that 'several States were constitutionally prohibited from agreeing to such a detailed claims structure.' The view was also put that, pursuant to paragraph 8bis (5), a flag State 'may subject its authorization to board under paragraphs 3 or 4 to conditions, and if a particular flag State wishes to impose conditions relating to claims such as arbitration or private right of action, it could do so under this paragraph.'¹⁰¹

⁹⁵ LEG 89/16, [62-64].

⁹⁶ ICS, ISF & ICFTU, *Comments on draft article 8bis*, LEG 89/4/9, [7].

⁹⁷ LEG 89/16, [66-70].

⁹⁸ LEG 89/16, [71].

⁹⁹ Mexico, *Draft article 8bis paragraph 8(b)*, LEG 89/4/2 (17 September 2004); ICS, ISF & ICFTU, *Comments on article 8bis 8(b)*, LEG 89/4/10 (24 September 2004); Germany, LEG/WP.4 (25 October 2004).

¹⁰⁰ LEG 89/16, [73-74].

¹⁰¹ LEG 89/16, [74].

Some delegations noted that UNCLOS and several other international conventions on maritime law 'already included provisions relating to compensation for wrongful detention of a ship by a State Party.' They suggested, therefore, that 'rather than looking for new solutions, a suitable claims regime might be found in other conventions and that further study could be done on those conventions.'¹⁰²

The Committee agreed to send the paragraph to the Working Group for further consideration.¹⁰³

7. Planning for Conference

With regard to organizing its work, the Committee recalled that the Assembly, at its twenty-third session (November 2003), had approved, on a planning basis, the convening of a diplomatic conference in 2005, and that it was generally understood by the Legal Committee that this conference was intended for the revision of the 1988 SUA Treaties. Because the draft protocol required further work in order to be ready for such a conference, the Committee decided to hold a second intersessional meeting of the Working Group in February 2005, to have a two-week Legal Committee meeting from 18 to 29 April 2005, on the understanding that the first week would be completely devoted to the finalization of the revision of the SUA treaties, and to hold a diplomatic conference on the revision of the SUA treaties from 10 to 14 October 2005.¹⁰⁴

H. Intersessional Working Group on SUA—Second session

The second session of the Intersessional Working Group was held at IMO Headquarters from 31 January to 4 February 2005. The report of the session (document LEG/SUA/WG.2/4) was provided to the Legal Committee in the Annex to document LEG 90/4. Among the most significant matters relating to the boarding provisions as discussed by that Working Group were the following:

1. Request for boarding (paragraph 1(a))

The Group considered a proposal¹⁰⁵ that 'the request for boarding must be made or confirmed in writing, as appropriate.' Although some delegations supported this proposal, the majority of the Group did not accept it and reaffirmed its preference for the existing text.¹⁰⁶

¹⁰² LEG 89/16, [75]. See also above n 18.

¹⁰³ LEG 89/16, [78].

¹⁰⁴ LEG 89/16, [219-220].

¹⁰⁵ Cyprus, *Proposal to amend draft article 8bis 1(a)*, LEG/SUA/WG.2/WP.6 (2 February 2005).

¹⁰⁶ *Report of the Working Group*, LEG/SUA/WG.2/4, [55-56] (9 February 2005).

2. Failure to respond to request for authorization to board (paragraph 3(d))

The Working Group considered a proposal¹⁰⁷ requiring a requesting State 'to consider warning other Parties if a requested State does not comply with its obligation to respond to a request.' Several delegations stated that the proposal 'was not needed, since the requesting State had a right to warn other Parties which could be implemented without any specific authorization.' Other delegations supported the proposal 'because it would serve the useful purpose of reinforcing through consequences the obligation to respond.' By a narrow majority, the Group decided to incorporate the proposal as follows:¹⁰⁸

(d) If a requested State, which has not made a declaration in accordance with the subparagraphs 3(e) or (f) of this Article, does not comply with its obligation under paragraph 1 of this Article to respond to either of the two requests of the requesting Party, pursuant to sub-paragraphs 3(a) and 3(b) of this article, the requesting Party shall consider the need to warn other States Parties concerned.

One delegation formally 'objected' to the incorporation of this new text into the draft convention 'since it had been adopted by a bare majority only.'¹⁰⁹

3. Liability and compensation for claims relating to unfounded boardings (paragraph 8(b))

The Working Group agreed to delete the square brackets around the words 'States Parties' and to add a sentence, so that the paragraph would read:¹¹⁰

Provided that authorization to board by a flag State shall not *per se* give rise to its liability, States Parties shall be liable for any 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, provided that the ship has not committed any act justifying the measures taken: or
- (ii) such measures are unlawful or exceed that reasonably required in light of available information to implement the provisions of this article.

State Parties shall provide effective recourse in respect of such damage.

Some delegations maintained the view that 'State Parties' should be replaced by 'Boarding or Requesting Parties'.¹¹¹

An observer suggested that the reference to 'damage or loss' was 'too narrow and should be extended to cover violation of rights, as provided for under articles 2.3(a) and 9.5 of the International Covenant on Civil and Political Rights.' A delegation supported

¹⁰⁷ France, *New Article 8bis 3(d)*, LEG/SUA/WG.2/WP.1/Rev.2 (2 February 2005).

¹⁰⁸ LEG/SUA/WG.2/4, [58-59].

¹⁰⁹ LEG/SUA/WG.2/4, [60].

¹¹⁰ LEG/SUA/WG.2/4, [65].

¹¹¹ LEG/SUA/WG.2/4, [66].

inclusion of terms such as 'harm' and 'delay,' and the Working Group agreed to include the term 'harm' in the text of article 8*bis* paragraph 8(b) (to read, in other words: '...States Parties shall be liable for any damage, *harm* or loss attributable to them arising from measures taken pursuant to this article...').¹¹²

I. *Ninetieth session of the Committee (April 2005)*

The ninetieth session of the IMO Legal Committee took place in April 2005. The report of the intersessional working group was presented to the Committee in the annex to document LEG 90/4. The text of the draft protocol reflecting the outcome of the discussions in the working group were presented in the form of a revised draft protocol in the annex to document LEG 90/4/1.¹¹³

The Committee decided to use the draft protocol contained in the annex to document LEG 90/4/1 as the basic text for its deliberations.¹¹⁴ It also decided to address, firstly, outstanding issues related to new offences and boarding provisions.¹¹⁵ (The text of article 8*bis* which was used at the Committee's 90th session was quite similar to the text in Annex 6 in the present article, except that the first paragraph (as seen in Annex 5), was divided into three paragraphs, resulting in new numbering.)

1. Paragraph 1 (of draft article 8*bis*) (paragraphs 1 to 3 in Annex 6)—Content of request for authorization to board suspect ship

The delegation of India stated that it was important for a request for boarding to be 'based on persuasive information' and suggested that this should be reflected in paragraph 1(a). Several delegations stated that India's concern was already covered in article 8*bis*, paragraph 5. The Committee did not agree with this proposal and approved the text of paragraph 1(a), unchanged.¹¹⁶

2. Paragraph 2 (paragraph 4 in Annex 6)—Request for assistance

The Committee approved the text of paragraph 2, unchanged.¹¹⁷

¹¹² LEG/SUA/WG.2/4, [68-69].

¹¹³ A 'consolidated' version of the SUA Convention as it *would* be revised by the draft protocol was also available to the Committee in the annex to document LEG 90/4/2.

¹¹⁴ A summary of the discussion can be found in *Report of the Legal Committee on the Work of its Ninetieth Session*, LEG 90/15, [29-214] (9 May 2005). Two documents were submitted to this session of the Legal Committee with comments on the boarding article; India, *Comments and proposals*, LEG 90/4/5 (17 March 2005); and China, *Comments and proposals*, LEG 90/4/6 (18 March 2005).

¹¹⁵ LEG 90/15, [32].

¹¹⁶ LEG 90/15, [66-68] As a matter of drafting, the Committee agreed that the *chapeau* and subparagraphs (a) and (b) should be redrafted as three separate paragraphs, namely, paragraphs 1, 2 and 3.

¹¹⁷ LEG 90/15, [72].

3. Paragraph 3 (paragraph 5 in Annex 6)—Request for authorization to board and actions by Requested State

One delegation expressed concern about 'possible ambiguity' in this provision regarding the rights of the requesting State 'in cases where the ship was navigating in territorial waters and the requesting State was different from the flag and the coastal State.' It was explained that the boarding provisions only applied to ships located 'seaward of any State's territorial sea'. Accordingly, the Committee approved the text of paragraph 3 subparagraphs (a), (b) and (c) unchanged.¹¹⁸

The Committee 'extensively discussed' retention of subparagraph (d) which would require a requesting State to consider warning other Parties if a requested State does not comply with its obligation to respond to any of the requests referred to in article 8*bis*.¹¹⁹

Delegations favouring the text 'reaffirmed the need for it on grounds that it would serve an important purpose, namely, to clarify the consequences of not responding to a requesting State in a high risk situation where the requesting State had reasonable grounds to suspect that the ship or a person on board were involved in the commission of a terrorist offence.' They expressed the view that this provision would fill an existing gap without interfering with the rights of the flag State.¹²⁰

Other delegations opposed the retention of this provision, on the grounds that there was 'no need to explicitly refer to an existing right held by all States.' It would add 'no value' to the rights of a requesting State and might be considered to be 'intimidating and counter-productive to the aims of the Protocol.'¹²¹

An 'indicative vote' showed that the Committee was evenly divided on whether to include the provision (25 for deletion, 25 against deletion, with 12 abstentions). The Committee decided to retain the text in square brackets.¹²² It was suggested that 'interested delegations' might explore improvements to the text in preparation for the Diplomatic Conference.¹²³

The Committee also approved the inclusion of subparagraphs (e) and (f), unchanged.¹²⁴

4. Paragraph 4 (paragraph 6 in Annex 6)—Results of boarding

The Committee approved the text of paragraph 4, unchanged.¹²⁵

¹¹⁸ LEG 90/15, [73-76].

¹¹⁹ LEG 90/15, [77].

¹²⁰ LEG 90/15, [79].

¹²¹ LEG 90/15, [80].

¹²² This is the single issue on the boarding provisions which was explicitly left open for decision by the Diplomatic Conference.

¹²³ LEG 90/15, [81-82]. An 'indicative vote' in the Legal Committee is not a formal vote. It is simply a means for the Chairman to get a sense from the Committee on whether there is a strong preference for one view or another to enable him or her to structure the discussion.

¹²⁴ LEG 90/15, [83].

¹²⁵ LEG 90/15, [84].

5. Paragraph 5 (paragraph 7 in Annex 6)—Subjecting authorization to conditions

The Committee did not agree to a proposal to include text referring to 'cases where additional measures had been expressly authorized by a relevant bilateral or multilateral agreement to which both the flag State and the requesting State are Parties.' The view was expressed that this was 'already implicit in the original text.' The Committee approved the text of paragraph 5, unchanged.¹²⁶

6. Paragraph 6 (paragraph 8 in Annex 6)—Jurisdiction

One delegation proposed the inclusion of the term 'expressly' where a flag State may consent to the exercise of jurisdiction by another State. Several delegations opposed this inclusion. They noted that the addition was 'unnecessary and such consent was subject to the constitution and laws of the flag State.' The view was also expressed that paragraph 5 of article 8*bis* 'allowed a flag State to place any conditions it wished, including express consent,' on a boarding State. The Committee approved the text of paragraph 6, unchanged.¹²⁷

7. Paragraph 7 (paragraph 9 in Annex 6)—Use of force

The Committee did not accept a proposal to include in this paragraph 'explicit references to the right of self-defence, the principle of proportionality and prior authorization of the flag State as features of the use of force,' and approved the text of paragraph 7, unchanged.¹²⁸

8. Paragraph 8 (paragraph 10 in Annex 6)—Safeguards

8(a), subparagraphs (i) to (ix)—Right of master to communicate with ship owner, etc. One delegation sought clarification that the words at the end of subparagraph (a)(viii) 'at the earliest opportunity' would 'not unduly limit the right of the master to contact the ship owner and the flag State at all times.' The Committee 'was assured that the master has every right to contact the flag State at all times.' Accordingly, the Committee approved paragraph 8(a) unchanged.¹²⁹

Sub-paragraph 8(b) (paragraph 10(b) in Annex 6)—Liability and compensation. A proposal was made to revise the words of subparagraph (b)(i) to read as follows: '... provided that the ship has not committed an act reasonably justifying the measures taken'. The purpose of this proposal 'was to emphasize that measures must be reasonable or would be subject to compensation.' It was noted that the current wording 'was based on UNCLOS article 110 and was the result of a compromise after full debate and represented a delicate balance of interests' and the Committee did not accept the proposal.¹³⁰

¹²⁶ LEG 90/15, [85-86].

¹²⁷ LEG 90/15, [87-88].

¹²⁸ LEG 90/15, [89].

¹²⁹ LEG 90/15, [91].

¹³⁰ LEG 90/15, [92-93].

The delegation of China proposed adding the word 'delay' after the words 'damage, harm or loss' in the *chapeau*. Several delegations noted that delay was encompassed by the term 'loss'. One delegation indicated that, for its domestic purposes, it would interpret the term 'harm' as being limited to physical harm. An observer delegation expressed the view that the term 'harm' should be 'understood more broadly to include harm to seafarers who may be affected by an illegal or unfounded boarding or subsequent detention.' The Committee decided not to include the word 'delay', as the delay would be interpreted to be covered by 'loss' or 'damage'.¹³¹ The Committee adopted paragraph 8(b), with the addition of the words 'harm or loss' at the end of the second sentence.¹³²

9. Paragraphs 9 to 13 (paragraphs 11 to 15 in Annex 6)

The Committee approved these paragraphs, unchanged.¹³³ The text of draft article 8*bis* on the boarding provisions, as it emerged from the 90th session of the Legal Committee for submission to the Diplomatic Conference in October 2005, can be found in Annex 6 to this paper.

IV. DIPLOMATIC CONFERENCE

On 4 May 2005, the IMO formally announced (by an invitation sent to IMO Member States and States Parties to the SUA Convention) that a diplomatic conference was being convened from 10 to 14 October 2005 for the purpose of revising the SUA Convention and Protocol. Technically, it was to be a conference of States Parties to those instruments. States which were not Party were invited to send 'observers'.¹³⁴

One week is short for an international conference, given the formalities that must be followed to achieve a success. For example, the plenary must elect officers and establish its committees (including a Committee of the Whole to undertake the technical work of the Conference, a Drafting Committee to finalized the agreed texts for adoption by the Conference, and a Credentials Committee to review the documents by which each delegation is empowered officially to represent its government during the Conference). But the assumption is that preparatory work of the Legal Committee has delivered a text which is complete except for a handful of outstanding major policy issues (such as the number of States which will be required to ratify the new instrument to bring it into force).¹³⁵

With respect to the boarding provisions, only one policy issue was explicitly left open (i.e., retained in square brackets) for a decision by the Conference (i.e., subparagraph 5(d) of draft article 8*bis*¹³⁶). However, a Diplomatic Conference is a meeting of sovereign States

¹³¹ LEG 90/15, [94-95].

¹³² LEG 90/15, [99].

¹³³ LEG 90/15, [100].

¹³⁴ Observers may participate in the work of the Conference but are not permitted to vote.

¹³⁵ Documents prepared in advance for the Conference include LEG/CONF.15/1 (Provisional Agenda); LEG/CONF.15/2 (Provisional Rules of Procedure); LEG/CONF.15/3 (The text of the draft SUA Protocol as prepared by the IMO Legal Committee); LEG/CONF.15/4 (the draft text for a parallel protocol to revise the 1988 Fixed Platform Protocol); and LEG/CONF.15/5 (a provisional timetable for the meetings of Plenary and various Committees during the Conference). The Entry-into-force requirement of the original 1988 SUA Convention was 15 States.

¹³⁶ '[If a requested State, which has not made a declaration in accordance with the subparagraphs 5(e) or 5(f) of this article, does not comply with its obligation under paragraphs 1 and 2 to this article to respond to either of the requests pursuant to the subparagraphs 5(a) and 5(b) of the present article, the

which are entitled to raise any issue at their discretion, whether it has been previously discussed and agreed or not. It remained to be seen whether any new issues relating to the new boarding provisions might be raised in the Conference in October 2005.

A. Outcome of the Conference

In the event 74 States Parties to the 1988 SUA Convention¹³⁷ were represented by accredited delegations at the Conference, and 24 States which were not party to the Convention were registered as observers. As a result of the Conference, two new instruments were adopted: the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, and the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf. These Protocols will be open for signature at the headquarters of the IMO in London from 14 February 2006 to 13 February 2007, and thereafter remain open for accession.¹³⁸

With particular regard to the article on boarding ships at sea (draft article 8*bis*), the Record of Decisions for the Committee of the Whole¹³⁹ (LEG/CONF.15/CW/RD/2)¹⁴⁰ includes the following decisions for the afternoon of 10 October 2005:

- Article 8 of the draft protocol, paragraph 2: new article 8*bis* [in the Convention]
8. The Committee did not approve a proposal contained in document LEG/CONF.15/9, paragraph 5, to amend paragraph 9 of article 8*bis*.
 9. The Committee decided to delete the text in square brackets in paragraph 5(d).
 10. The Committee approved article 8 for consideration by the Drafting Committee.

requesting Party shall consider the need to warn other States Parties concerned.]’ See the text at paragraph 5(d) in Annex 6.

¹³⁷ At the time of the Conference, 127 States had ratified or otherwise expressed their consent to be bound by the Convention (though, for the five newest States Parties, it would not come into force until after the Conference).

¹³⁸ The primary records of the Conference can be found in the following documents: Basic texts prepared by the IMO Legal Committee and submitted to the Conference (LEG/CONF.15/3 and LEG/CONF.15/4); Submissions by countries and organizations containing comments and proposals for revising the basic text (LEG/CONF.15/6 to 16); Records of Decisions of the Plenary (LEG/CONF.15/RD/1 and RD/2); Records of Decisions of the Committee of the Whole (LEG/CONF.15/CW/RD/1 to RD/5); Report of the Credentials Committee (LEG/CONF.15/17); Texts of the Convention referred by the Committee of the Whole to the Drafting Committee (LEG/CONF.15/CW/2, CW/2/Add.1, CW/2/Add.2 and CW/3); Report of the Committee of the Whole (LEG/CONF.15/CW/4); Final texts referred to the Plenary by the Drafting Committee, including the text of the Final Act (LEG/CONF.15/DC/1 to DC 3); Report of the Drafting Committee (LEG/CONF.15/DC/4).

¹³⁹ The Chairman of the Committee of the Whole was Mr Alfred H.E. Popp, QC, Senior General Counsel, Admiralty and Maritime Law, Department of Justice (Canada). The Committee of the Whole is established by a Conference to conduct the substantive work. All representatives attending the Conference are able to attend the Committee of the Whole. One key difference is that decisions can be taken by the Committee of the Whole by simple majority, while substantive decisions by the Plenary of the Conference are subject to approval by two-thirds under the rules of procedure.

¹⁴⁰ The Record of Decisions does not include any summary of positions taken by individual delegations or of the weight of support by which the decisions were taken. A Summary Record, prepared by précis writers, would be a more in depth record, but the budget for this Conference did not provide for such a service.

The proposal referred to in paragraph 8 above was submitted by Cuba in document LEG/CONF.15/9. Cuba proposed a substantial revision of paragraph 9¹⁴¹ on the use of force. The proposal read as follows:

9. When carrying out the authorized actions under this article, the use of force shall be ~~avoided~~ **prohibited except in the following circumstances:**

(a) **In the exercise of the inherent right of legitimate defence under international law, including the United Nations Charter**, when necessary to ensure the safety of its officials and persons on board.

(b) **By express authorization of the flag State**, where officials are obstructed in the execution of the authorized actions.

Any use of force pursuant to this article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances, **in accordance with the principles of proportionality and necessity as laid down in international law.**

As reported in the Record of Decisions, this proposal was not sufficiently supported for the Committee to agree to the change. Among the views which were often expressed during the Conference to resist proposed changes (and not only in this case) were that (a) the revision was unnecessary; (b) it would not improve the existing text; or (c) the existing text had been carefully negotiated over many sessions of the IMO Legal Committee and represented complex compromises which might unravel if changes were made.

As also noted in the Record of Decisions for the Committee of the Whole, the only subparagraph in draft article 8bis which had been left in square brackets by the Legal Committee (i.e., 5(d) on giving a warning to other Parties in the event a Requested State does not fulfil its obligation to respond to requests for confirmation of registration or for authorization to board a ship flying its flag) was deleted from the text. Again, it was not supported strongly or widely enough to convince the Committee of the Whole to agree to retain it in the final text.

The Drafting Committee¹⁴² carefully examined the text as agreed by the Committee of the Whole (LEG/CONF.15/2) and made a number of changes of an editorial nature (including internal re-numbering where necessary).¹⁴³

On 14 October 2005, the Plenary of the Conference was reconvened for its final session.¹⁴⁴ The new instruments were formally adopted¹⁴⁵ and a ceremony was held for

¹⁴¹ See the text in Annex 6 to this article.

¹⁴² The following countries were represented on the Drafting Committee: Argentina, Australia, China, France, Morocco, Russian Federation, Spain, United Kingdom and United States. This ensured representation from the six official languages to be used in the authentic texts of the Protocols (Arabic, Chinese, English, French, Russian and Spanish). The Chairperson was Ms Renée Leon of Australia.

¹⁴³ For example, the opening words of the chapeau of paragraph 5 were revised as follows 'Whenever law enforcement or other authorized officials of a State Party ('the requesting Party') encounter a ship flying the flag or displaying marks of registry of ~~the first~~ **another State Party** ('the first Party') ...'. And the opening words of paragraph 5(d) were revised to read as follows: '~~On or after it~~ **Upon or after depositing deposits** its instrument of ratification, acceptance, approval or accession, a State Party may notify the Secretary-General that ...'.

¹⁴⁴ The President of the Conference was His Excellency Mr. Giancarlo Aragona, Ambassador (Italian Embassy, London).

signing the Final Act.¹⁴⁶ The objectives from this point forward are, first, to promote ratifications by a sufficient number of States (at least twelve) to bring it into force; second, to increase the number of States Parties to ensure its universality; and third, to implement its provisions in domestic law to ensure it is available as a legal framework should the need arise.

As the Secretary-General of IMO, Mr Efthimios E. Mitropoulos, said to the Conference in his closing remarks:

This Conference will go down in the annals of IMO History as possibly the one most politically charged. The Organization was presented with a major challenge, to which it responded admirably ...

The usual request for States to become Parties to any new IMO treaty is, in the case of the two Protocols adopted today, an urgent plea, the importance of which, beyond any doubt, is clearly understood by you all. We are running a race against time in our efforts to prevent and suppress unlawful acts against the safety of maritime navigation and to bring to justice the perpetrators of the unlawful acts covered by the 2005 SUA Protocols. Early entry into force of the Protocols is therefore of the essence. And while early deposits of instruments of ratification will send a strong message that the community is eager and willing to protect the industry against acts of terrorism, any delays in so doing will send a wrong signal to all those who, at this time, are profiting from the present legal vacuum which the Protocols aim to fill.

The final text of article 8*bis*, as adopted by the Conference is contained in Annex 7 to this article.¹⁴⁷

¹⁴⁵ As the result of statements made by three delegations (India, Pakistan and the Russian Federation), the adoption was not by full consensus. The statements involved reservations or interpretations pertaining to provisions in the Protocol other than those discussed in this article (such as concern over references to rights and responsibilities under the Non-Proliferation Treaties (NPT) and their possible application to States Parties which are not also party to NPT, in articles 2*bis* and 3*bis* (articles 3 and 4 of the Protocol); and concern over the 'dual use' provisions, in article 3*bis* (article 4 of the Protocol)).

¹⁴⁶ The following guidance was provided to the Conferences on the implications of signing the Final Act:

The Final Act may be signed by any or all members of a governmental delegation of a State Party to the SUA Treaties, at the discretion of the delegation itself. No commitment is involved in signing the Final Act and, therefore, only signatures are inscribed; no other statements or declarations are appropriate to this document.

Signature of the Final Act attests to the work and structure of the Conference and records the adoption of the text of the two Protocols by the Conference. However, the Final Act is not itself a treaty instrument and, therefore, signature of the Final Act does not constitute a legal commitment on the part of delegations with regard to either of the instruments adopted. Any such commitment will need to take place in accordance with the provisions of the Protocols and general principles of treaty law as well as the practices and legal arrangements followed by each national Government.

¹⁴⁷ A direct comparison of this text with the text originally put on the table at the 85th session of the IMO Legal Committee in October 2002 (Annex 1 to this article) reveals what was achieved in three years of negotiation on the boarding provisions.

ANNEX 1**PROPOSED NEW ARTICLE ON BOARDING AT SEA
AS PREPARED BY THE CORRESPONDENCE GROUP
AND SUBMITTED TO THE 85TH SESSION OF THE
LEGAL COMMITTEE
IN OCTOBER 2002**

(Extract from document, LEG 85/4, Annex 1,
without the explanatory footnotes from that Annex.)

ARTICLE 8bis

1. Except where a Party has notified the Secretary-General that it will apply the provisions of paragraph 2 of this Article, when law enforcement or other authorized officials of one Party ("the first Party") encounter a ship:

- (a) claiming the nationality of another Party,
- (b) located seaward of any State's territorial sea, and
- (c) reasonably suspected of being involved in, or reasonably believed to be the target of, acts described in Article 3,

such officials are authorized to board and search such ship, its cargo and persons on board, and to question the persons on board in order to determine whether a person or persons on board that ship are, or have engaged in, conduct described in Article 3.

2. A Party ('the first Party') may notify the Secretary-General that whenever law enforcement or other authorized officials of another Party ("the requesting Party") encounter a ship:

- (a) claiming the nationality of the first Party,
- (b) located seaward of any State's territorial sea, and
- (c) reasonably suspected of being involved in, or reasonably believed to be the target of, acts described in Article 3,

the requesting Party may request that the first Party confirm the claim of nationality and if such claim is confirmed, authorize the law enforcement or other authorized officials of the requesting Party to board and search the suspect ship, its cargo and persons on board, and to question the persons on board in order to determine if conduct described in Article 3 is taking or has taken place aboard that ship.

If the first Party is unable to confirm nationality, that Party may authorize the boarding and search by the law enforcement or other officials of the requesting Party, or refute the claim of nationality.

If there is no response from the first Party within four (4) hours of an oral request to confirm nationality, the requesting Party may board and search the suspect ship, its cargo and persons on board, and question the persons found on board in order to determine if conduct described in Article 3 is taking or has taken place aboard that ship.

The notification can be withdrawn at any time.

3. When evidence of conduct described in Article 3 is found as the result of any boarding conducted pursuant to this Article, the law enforcement or other authorized officials of the boarding Party may detain the ship, cargo and persons on board pending expeditious disposition instructions from the flag State Party. The boarding Party shall promptly inform the flag State Party of the results of a boarding and search conducted pursuant to this Article.

4. The boarding and search of a suspect ship in accordance with this Article is governed by the national laws of the boarding Party. The authorization to board, search and detain includes the authority to use force. All uses of force by a Party pursuant to this Article shall be in strict accordance with applicable laws and policies of that Party and shall in all cases be the minimum reasonably necessary under the circumstances. Nothing in this Convention, as amended, shall impair the exercise of the inherent right of self-defense by the Parties or their law enforcement or other officials.

5. Safeguards.

(a) Where a State Party takes measures against a vessel in accordance with this Article, it shall:

- (i) ensure the safety and humane treatment of the persons onboard;
- (ii) take due account of the need not to endanger the security of the vessel or its cargo; and
- (iii) take due account of the need not to prejudice the commercial or legal interests of the flag State or any other interested State.

(b) Where the grounds for measures taken pursuant to this article prove to be unfounded, the vessel shall be compensated for any loss or damage that may have been sustained, provided that the vessel has not committed any act justifying the measures taken.

(c) Any measure taken, adopted or implemented in accordance with this Convention shall take due account of the need not to interfere with or to affect:

- (i) the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or
- (ii) the authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel.

(d) Any measure taken at sea pursuant to this Convention shall be carried out only by warships or military aircraft, or by other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

6. Except as expressly provided herein, this Article does not apply to or limit boarding of ships, conducted by any Party in accordance with international law, seaward of any State's territorial sea, including boardings based upon, *inter alia*, the right of visit, the rendering of assistance to persons, ships and property in distress or peril, or an

authorization from the flag State to take law enforcement or other action.

7. The Parties are encouraged to develop standard operating procedures for joint operations pursuant to this Article and consult, as appropriate, with other Parties with a view to harmonizing such standard operating procedures for the conduct of operations.

8. In order to meet the objectives of this Article, each Party is encouraged to co-operate closely with the other Parties. Parties may conclude agreements or arrangements between them to facilitate law enforcement or other operations carried out in accordance with this Article.

9. Consistent with its legal system, each Party shall take appropriate measures to ensure that its law enforcement or other authorized officials, and law enforcement or other authorized officials of other Parties acting on its behalf, are empowered to exercise the authority of law enforcement or other authorized officials as prescribed in this Convention, as amended.

ANNEX 2**REVISED DRAFT ARTICLE ON BOARDING AT SEA
AS PREPARED BY THE CORRESPONDENCE GROUP AND
SUBMITTED TO THE 86TH SESSION OF THE LEGAL
COMMITTEE
IN APRIL/MAY 2003**

(Extract from document LEG 86/5, Annex 1,
without the explanatory footnotes from that Annex.)

ARTICLE 8bis

1. The Parties shall cooperate to the fullest extent possible to prevent and suppress unlawful acts against the safety of maritime navigation, in conformity with the international law of the sea.

2. A Party that has reasonable grounds to believe that a ship claiming its nationality, its cargo or a person on board the ship is, has been or is about to be involved in, or the target of, the commission of an offence under Article 3 of the Convention may request the assistance of other Parties in preventing or suppressing that offence. The Parties so requested shall respond expeditiously to the request and render such assistance within the means available to them.

3. Except where a Party ('the first Party') has notified the Secretary-General that it will apply the provisions of paragraph 4 of this Article, whenever law enforcement or other authorized officials of another Party ('the requesting Party') encounter a ship:

- (a) claiming the nationality of the first Party, located seaward of any State's territorial sea; and
- (b) the requesting Party has reasonable grounds to believe that the ship, its cargo or a person on board the ship is, has been or is about to be involved in, or the target of, the commission of an offence under Article 3 of the Convention,

the requesting Party may request that the first Party confirm the claim of nationality and if such claim is confirmed, authorize the law enforcement or other authorized officials of the requesting Party to take appropriate measures with regard to that ship. The flag State may authorize the requesting State, *inter alia*,

- (a) to board and search the suspect ship, its cargo and persons on board;
- (b) to question the persons on board in order to determine if conduct described in Article 3 is taking or has taken place aboard that ship; and
- (c) if evidence is found that the conduct described in Article 3 is, has been or is about to take place aboard the ship, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State.

[If the first Party is unable to confirm nationality, that Party may authorize or indicate that it does not object to the boarding and search by the law enforcement or

other officials of the requesting Party, or refute the claim of nationality.]

[If there is no response from the first Party within four (4) hours of a request to confirm nationality, the requesting Party may board and search the suspect ship, its cargo and persons on board, and question the persons found on board in order to locate and examine documentation of its nationality and determine if conduct described in Article 3 is, has been or is about to take place aboard that ship.]

4. At the time of becoming a Party to this Protocol, or at any time thereafter, a Party ('the first Party') may notify the Secretary-General that whenever law enforcement or other authorized officials of another Party ('the requesting Party') encounter a ship:
 - (a) claiming the nationality of the first Party,
 - (b) located seaward of any State's territorial sea, and
 - (c) the requesting Party has reasonable grounds to believe that the ship, its cargo, or a person on board the ship is, has been or is about to be involved in or the target of the commission of an offence under Article 3 of the Convention,

such officials are authorized to board and search such ship, its cargo and persons on board, and to question the persons on board in order to determine whether the ship or a person or persons on board that ship is, has been or is about to be involved in the commission of an offence under Article 3 of the Convention.

The notification can be withdrawn at any time.

5. When evidence of conduct described in Article 3 is found as the result of any boarding conducted pursuant to this Article, except as provided in paragraph 4 above, the flag State may authorize the law enforcement or other authorized officials of the requesting Party to detain the ship, cargo and persons on board pending receipt of expeditious disposition instructions from the first Party.
6. The requesting Party shall promptly inform the first Party of the results of a boarding and search conducted pursuant to this Article.
7. A Party shall respond expeditiously to a request from another Party to determine whether a ship claiming its nationality is entitled to do so and to a request for authorization made in accordance with paragraph 3 of this Article.
8. A flag State, consistent with the other provisions of this Convention, may subject its authorization to conditions to be agreed by it and the requesting State, including conditions relating to responsibility and the extent of effective measures to be taken. A Party shall take no additional measures without the express authorization of the flag State, except when necessary to relieve imminent danger to the lives of persons or those that derive from relevant bilateral or multilateral agreements.
9. The boarding and search of a suspect ship pursuant to this Article shall be conducted in accordance with the obligations assumed by the requesting Party under international law, including the safeguards provisions of this Article. The authorization to board, search and detain includes the authority to use force. All uses of force by a Party

pursuant to this Article shall be in strict accordance with applicable laws and policies of that Party and shall in all cases be the minimum reasonably necessary under the circumstances. Nothing in this Convention, as amended, shall impair the exercise of the inherent right of self-defense by the Parties or their law enforcement or other officials.

10. Safeguards:

- (a) Where a State Party takes measures against a ship in accordance with this Article, it shall:
- (i) take due account of the need not to endanger the safety of life at sea and the security of the ship and its cargo, or to prejudice the commercial or legal interests of the flag State or any other interested State; and
 - (ii) ensure, within available means, that any measure taken with regard to the ship is environmentally sound under the circumstances.
- (b) Where the grounds for measures taken pursuant to this Article prove to be unfounded, the ship shall be compensated for any loss or damage that may have been sustained, provided that the ship has not committed any act justifying the measures taken.
- (c) Any measure taken, adopted or implemented in accordance with this Convention shall take due account of the need not to interfere with or to affect:
- (i) the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or
 - (ii) the authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the ship.
- (d) Any measure taken at sea pursuant to this Article shall be carried out by law enforcement or other authorized officials from warships or military aircraft, or from other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect and, notwithstanding Articles 2 and 2*bis*, the provisions of this Article shall apply.
- (e) For the purposes of this Article 'law enforcement or other authorized officials' means uniformed or otherwise clearly identifiable members of law enforcement or other government authorities that are notified to the Secretary-General by the Party responsible for those authorities as being authorized to act pursuant to this Article.

11. This Article does not apply to or limit boarding of ships, conducted by any Party in accordance with international law, seaward of any State's territorial sea, including boardings based upon, *inter alia*, the right of visit, the rendering of assistance to persons, ships and property in distress or peril, or an authorization from the flag State to take law enforcement or other action.

12. The Parties are encouraged to develop standard operating procedures for joint

operations pursuant to this Article and consult, as appropriate, with other Parties with a view to harmonizing such standard operating procedures for the conduct of operations.

13. In order to meet the objectives of this Article, each Party is encouraged to cooperate closely with the other Parties. Parties may conclude agreements or arrangements between them to facilitate law enforcement operations carried out in accordance with this Article.

14. Consistent with its legal system, each Party shall take appropriate measures to ensure that its law enforcement or other authorized officials, and law enforcement or other authorized officials of other Parties acting on its behalf, are empowered to exercise the authority of law enforcement or other authorized officials as prescribed in this Convention, as amended.

15. For the purposes of the Convention, a claim of nationality may be evidenced, *inter alia*, by the flying of a flag, displaying marks or documentation of its registration, or a verbal claim from a responsible official on the ship.

At the time of becoming a Party to this Protocol, each Party shall designate the authority, or, where necessary, authorities to receive and respond to requests for assistance, for confirmation of nationality, and for authorization to take appropriate measures. Such designation shall be notified to the Secretary-General to all other Parties within one month of the designation.

A Party that has reasonable grounds to believe that a ship, its cargo or a person on board the ship is, has been, or is about to be involved in, or the target of, the commission of an offence under Article 3 of the Convention, and that the ship is without nationality, or may be assimilated to a ship without nationality, may board and search the ship. If evidence confirming the suspicion is found, that Party shall take appropriate measures in accordance with international law.

ANNEX 3**REVISED DRAFT ARTICLE ON BOARDING AT SEA
AS PREPARED BY THE CORRESPONDENCE GROUP AND
SUBMITTED TO THE 87TH SESSION OF THE LEGAL COMMITTEE
IN OCTOBER 2003**

(Extract from document LEG 87/5/1, Annex 1,
without the explanatory footnotes from that Annex.)

ARTICLE 8bis

1. The States Parties shall cooperate to the fullest extent possible to prevent and suppress unlawful acts against the safety of maritime navigation, in conformity with the international law of the sea.

2. A State Party that has reasonable grounds to suspect that a ship [claiming its nationality], the ship's cargo or a person on board the ship is, has been or is about to be involved in, or the target of, the commission of an offence under Article 3, Article 3 *bis* or Article 3*ter* may request the assistance of other States Parties in preventing or suppressing that offence. The States Parties so requested shall respond expeditiously to the request and render such assistance within the means available to them.

3. Except where a State Party ('the first Party') has notified the Secretary-General that it will apply the provisions of paragraph 4 of this Article, whenever law enforcement or other authorized officials of another State Party ('the requesting Party') encounter a ship:

- (a) [claiming the nationality] of the first Party, located seaward of any State's territorial sea, and
- (b) the requesting Party has reasonable grounds to suspect that the ship, the ship's cargo or a person on board the ship is, has been or is about to be involved in, or the target of, the commission of an offence under Article 3, Article 3*bis* or Article 3*ter*, and
- (c) the requesting Party desires to board, it shall request that the first Party confirm the claim of nationality and if such claim is confirmed, authorize the law enforcement or other authorized officials of the requesting Party to take appropriate measures with regard to that ship,

the flag State may authorize the requesting State's law enforcement or other authorized officials, *inter alia*, to board and search such ship, its cargo and persons on board, and to question the persons on board in order to determine whether the ship or a person or persons on board that ship is, has been or is about to be involved in the commission of an offence under Article 3, Article 3*bis* or Article 3*ter*.

A State Party shall respond expeditiously to a request from another State Party to determine whether a ship claiming its nationality is entitled to do so and to a request for authorization to take appropriate measures with regard to that ship.

[If the first Party is unable to confirm nationality, that Party may authorize or indicate that it does not object to the boarding and search by the law enforcement or other officials of the requesting Party, or refute the claim of nationality.]

[If there is no response from the first Party within four (4) hours of a request to confirm nationality, the requesting Party may board and search the suspect ship, its cargo and persons on board, and question the persons found on board in order to locate and examine documentation of its nationality and determine if conduct described in Article 3, Article 3bis or Article 3ter is, has been or is about to take place aboard that ship.]

4. On or after it deposits its instrument of ratification, acceptance, approval or accession, a State Party ('the first Party') may notify the Secretary-General that whenever law enforcement or other authorized officials of another State Party ('the requesting Party') encounter a ship:

- (a) [claiming the nationality] of the first Party, located seaward of any State's territorial sea, and
- (b) the requesting Party has reasonable grounds to suspect that the ship, the ship's cargo or a person on board the ship is, has been or is about to be involved in the commission of an offence under Article 3, Article 3bis or Article 3ter,

the requesting State's law enforcement or other authorized officials are authorized to board and search such ship, its cargo and persons on board, and to question the persons on board in order to determine whether the ship or a person or persons on board that ship is, has been or is about to be involved in the commission of an offence under Article 3, Article 3bis or Article 3ter.

The notification can be withdrawn at any time.

5. When evidence of conduct described in Article 3, Article 3bis or Article 3ter is found as the result of any boarding conducted pursuant to this Article, the flag State may authorize the law enforcement or other authorized officials of the requesting Party to detain the ship, cargo and persons on board pending receipt of expeditious disposition instructions from the first Party.

6. A flag State, consistent with the other provisions of this Convention, may subject its authorization to conditions to be agreed by it and the requesting State, including conditions relating to responsibility for and the extent of effective measures to be taken. No additional measures would be taken without the express authorization of the flag State, except when necessary to relieve imminent danger to the lives of persons or those that derive from relevant bilateral or multilateral agreements.

7. The boarding and search of a suspect ship pursuant to this Article shall be conducted in accordance with the obligations assumed by the requesting Party under international law, including the safeguards provisions of this Article. The authorization to board, search and detain includes the authority to use reasonable force.

- (a) Subject to the provisions of subparagraph (b) below, States Parties shall avoid the use of force except when and to the degree necessary to ensure the safety of the boarding officials and where the officials are obstructed in the execution of their duties. All uses of force by a State Party pursuant to this Article shall be in strict accordance with applicable laws and policies of that Party and shall in all cases be the minimum reasonably necessary under the circumstances.
- (b) Nothing in this Convention, as amended, shall impair the exercise of the inherent right of self-defense by the States Parties or their law enforcement or other authorized officials.
8. The requesting Party shall promptly inform the first Party of the results of a boarding and search conducted pursuant to this Article.
9. Safeguards:
- (a) Where a State Party takes measures against a ship in accordance with this Article, it shall:
- (i) take due account of the need not to endanger the safety of life at sea;
 - (ii) take due account of the security of the ship and its cargo;
 - (iii) not prejudice the commercial or legal interests of the flag State;
 - (iv) ensure, within available means, that any measure taken with regard to the ship is environmentally sound under the circumstances;
 - (v) if applicable, ensure that persons on board are afforded the protections of Article 10(2); and
 - (vi) ensure that the master of a vessel is, or has been, afforded the opportunity to contact the vessel's owner or flag State at the earliest opportunity.
- (b) **Reasonable efforts shall be taken to avoid a ship being unduly detained or delayed. Where the grounds for measures taken pursuant to this Article prove to be unfounded, States Parties shall be liable for damage or loss attributable to them, consistent with their national laws, arising from action taken pursuant to this Article when such action is unlawful or exceeds that reasonably required in light of available information to implement the provisions of this Article, provided that the vessel has not committed any act justifying the measures taken.**
- (c) **Any measure taken, adopted or implemented in accordance with this Convention shall take due account of the need not to interfere with or to affect:**
- (i) the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or
 - (ii) the authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the ship.
- (d) Any measure taken at sea pursuant to this Article shall be carried out by law enforcement or other authorized officials from warships or military aircraft, or from other ships or aircraft clearly marked and identifiable as being on government

service and authorized to that effect and, notwithstanding Articles 2 and *2bis*, the provisions of this Article shall apply.

- (e) [For the purposes of this Article 'law enforcement or other authorized officials' means uniformed or otherwise clearly identifiable members of law enforcement or other government authorities that are notified to the Secretary-General by the State Party responsible for those authorities as being authorized to act pursuant to this Article.]

[10. This Article does not apply to or limit boarding of ships, conducted by any State Party in accordance with international law, seaward of any State's territorial sea, including boardings based upon, *inter alia*, the right of visit, the rendering of assistance to persons, ships and property in distress or peril, or an authorization from the flag State to take law enforcement or other action.]

11. The States Parties are encouraged to develop standard operating procedures for joint operations pursuant to this Article and consult, as appropriate, with other States Parties with a view to harmonizing such standard operating procedures for the conduct of operations.

12. In order to meet the objectives of this Article, each State Party is encouraged to co-operate closely with the other States Parties. States Parties may conclude agreements or arrangements between them to facilitate law enforcement operations carried out in accordance with this Article.

13. Consistent with its legal system, each State Party shall take appropriate measures to ensure that its law enforcement or other authorized officials, and law enforcement or other authorized officials of other States Parties acting on its behalf, are empowered to exercise the authority of law enforcement or other authorized officials as prescribed in this Convention, as amended.

[14. For the purposes of this Convention, a claim of nationality may be evidenced, *inter alia*, by the flying of a flag, displaying marks or documentation of its registration, or a verbal claim from a responsible official on the ship.]

15. On or after it deposits its instrument of ratification, acceptance, approval or accession, each State Party shall designate the authority, or, where necessary, authorities to receive and respond to requests for assistance, for confirmation of nationality, and for authorization to take appropriate measures. Such designation shall be notified to the Secretary-General within one month, who shall inform all other States Parties within one month of the designation. Each State Party is responsible for providing prompt notice through the Secretary-General of any changes in the designation or contact information.

16. A State Party that has reasonable grounds to suspect that a ship, its cargo or a person on board the ship is, has been, or is about to be involved in, or the target of, the commission of an offence under Article 3, Article *3bis* or Article *3ter*, and that the ship is without nationality, or may be assimilated to a ship without nationality, may board and search the ship to verify the ship's lack of nationality. If evidence confirming either suspicion is found, that State Party shall take appropriate measures in accordance with international law.

ANNEX 4**REVISED DRAFT ARTICLE ON BOARDING AT SEA
AS PREPARED BY THE CORRESPONDENCE GROUP AND
SUBMITTED TO THE 88TH SESSION OF THE LEGAL
COMMITTEE
IN APRIL 2004**

**(Extract from document LEG 88/3, Annex 1,
without the explanatory footnotes from that Annex.)**

ARTICLE 8bis

1. The States Parties shall cooperate to the fullest extent possible to prevent and suppress unlawful acts [against the safety of maritime navigation] **OR** [covered by this Convention], in conformity with [the international law of the sea] **OR** [international law].

2. A State Party that has [reasonable grounds to suspect] **OR** [reasonable grounds to believe] **OR** [clear grounds to believe] that a ship [having its nationality] **OR** [flying its flag], the ship's cargo or a person on board the ship is, has been or is about to be involved in, the commission of an offence under Article 3, Article 3bis or Article 3ter may request the assistance of other States Parties in preventing or suppressing that offence. The States Parties so requested shall respond expeditiously to the request and render such assistance within the means available to them.

3. Except where paragraph 4 applies, whenever law enforcement or other authorized officials of another State Party ('the requesting Party') encounter a ship [claiming the nationality] **OR** [flying the flag] **OR** [claiming the right to fly the flag], of the first Party, located seaward of any State's territorial sea, and the requesting Party has [reasonable grounds to suspect] **OR** [reasonable grounds to believe] **OR** [clear grounds to believe] that the ship, the ship's cargo or a person on board the ship is, has been or is about to be involved in, the commission of an offence under Article 3, Article 3bis or Article 3ter, and the requesting Party desires to board,

- (a) it shall request that the first Party confirm the claim of nationality, and,
- (b) if nationality is confirmed, the requesting Party shall ask the first Party (hereinafter, the flag State) to authorize the requesting Party to take appropriate measures with regard to that ship.

Appropriate measures that may be authorized by the flag State include stopping, boarding and searching the ship, its cargo and persons on board, and questioning the persons on board in order to determine if an offence under Article 3, Article 3bis or Article 3ter has been, or is about to be, committed.

[If the first Party is unable to confirm nationality of the ship, it may indicate that it does not object to the boarding and search by the law enforcement or other officials of the requesting Party, or refute the claim of nationality.]

[If there is no response from the first Party within four (4) hours of acknowledgement of receipt of a request to confirm nationality, the requesting Party may board and search the ship, its cargo and persons on board, and question the persons found on board in order to locate and examine documentation of its nationality and determine if an offence under Article 3, Article 3*bis* or Article 3*ter* has been, or is about to be, committed, except where a State Party has notified the Secretary-General, on or after it deposits its instrument of ratification, acceptance, approval or accession, that ships [claiming the nationality] OR [flying the flag] OR [claiming the right to fly the flag] of that Party located seaward of any State's territorial sea may only be boarded upon express consent of that Party.]

A State Party shall respond expeditiously to a request from another State Party to determine whether a ship claiming its nationality is entitled to do so and to a request for authorization to take appropriate measures with regard to that ship.

4. On or after it deposits its instrument of ratification, acceptance, approval or accession, a State Party ('the first Party') may notify the Secretary-General that whenever law enforcement or other authorized officials of another State Party ('the requesting Party') encounter a ship [claiming the nationality] OR [flying the flag] OR [claiming the right to fly the flag] of the first Party, located seaward of any State's territorial sea, and the requesting Party has [reasonable grounds to suspect] OR [reasonable grounds to believe] OR [clear grounds to believe] that the ship, the ship's cargo or a person on board the ship is, has been or is about to be involved in, the commission of an offence under Article 3, Article 3*bis* or Article 3*ter*, and the requesting Party desires to board, the requesting Party is authorized to board and search such ship, its cargo and persons on board, and to question the persons on board in order to determine whether the ship or a person or persons on board that ship is, has been or is about to be involved in the commission of an offence under Article 3, Article 3*bis* or Article 3*ter*. The notification can be withdrawn at any time.

5. When evidence of conduct described in Article 3, Article 3*bis* or Article 3*ter* is found as the result of any boarding conducted pursuant to this Article, the flag State may authorize the requesting Party to detain the ship, cargo and persons on board pending receipt of disposition instructions from the flag State. The requesting Party shall promptly inform the flag State of the results of a boarding, search, and detention conducted pursuant to this Article. The requesting Party shall also promptly inform the flag State of the discovery of evidence of illegal conduct that is not subject to this Convention.

The flag state shall respond expeditiously to a request from the requesting party for disposition instructions.

6. A boarding and search pursuant to this Article shall be conducted in accordance with [the obligations assumed by the requesting Party under international law, including the safeguards provisions of this Article] OR [the safeguards provisions of this Article and applicable international law]. A flag State, consistent with the other provisions of this Convention, may subject its authorization to conditions to be agreed by it and the requesting State, including conditions relating to responsibility for and the extent of measures to be taken. No additional measures may be taken without the express authorization of the flag State, except when necessary to relieve imminent danger to the lives of persons or those that derive from relevant bilateral or multilateral agreements.

7. States Parties shall avoid the use of force except when necessary to ensure the safety of its officials and persons on board, and where the officials are obstructed in the execution of their duties. All uses of force by a State Party pursuant to this Article shall in all cases be [the minimum necessary] **OR** [that which is reasonably necessary] under the circumstances.

8. Safeguards:

(a) Where a State Party takes measures against a ship in accordance with this Article, it shall:

- (i) take due account of the need not to endanger the safety of life at sea;
- (ii) ensure that all persons, [including passengers and stowaways] on board are treated in a manner which preserves their basic human dignity, and in compliance with the applicable provisions of international law, including international law of human rights;
- (iii) take due account of the security of the ship and its cargo;
- (iv) take due account of the need not to prejudice the commercial or legal interests of the flag State;
- (v) ensure, within available means, that any measure taken with regard to the ship or its cargo is environmentally sound under the circumstances;
- (vi) ensure that persons on board against whom proceedings are being carried out in connection with any of the offences set forth in Article 3, Article 3*bis*, or Article 3*ter* are afforded the protections of Article 10(2), regardless of location; and
- (vii) ensure that the master of a vessel is, or has been, afforded the opportunity to contact the vessel's owner or flag State at the earliest opportunity.

(b) Reasonable efforts shall be taken to avoid a ship being unduly detained or delayed. Provided that the vessel has not committed any act justifying the measures taken, States Parties shall be liable for damage or loss attributable to them, in accordance with national law and in a manner consistent with international law, 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 in light of available information to implement the provisions of this Article.

(c) Where a State Party takes measures against a ship in accordance with this Convention, it shall take due account of the need not to interfere with or to affect:

- (i) the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or
- (ii) the authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the ship.

(d) Any measure taken pursuant to this Article shall be carried out by law enforcement or other authorized officials from warships or military aircraft, or from other ships

or aircraft clearly marked and identifiable as being on government service and authorized to that effect and, notwithstanding Articles 2 and 2bis, the provisions of this Article shall apply.

- (e) For the purposes of this Article "law enforcement or other authorized officials" means uniformed or otherwise clearly identifiable members of law enforcement or other government authorities that are notified to the Secretary-General by the State Party responsible for those authorities as being authorized to act pursuant to this Article.

[9. This Article does not apply to or limit boarding of ships, conducted by any State Party in accordance with international law, seaward of any State's territorial sea, including boardings based upon the right of visit, the rendering of assistance to persons, ships and property in distress or peril, or an authorization from the flag State to take law enforcement or other action.]

10. The States Parties [are encouraged to] **OR** [shall] develop standard operating procedures for joint operations pursuant to this Article and consult, as appropriate, with other States Parties with a view to harmonizing such standard operating procedures for the conduct of operations.

11. States Parties may conclude agreements or arrangements between them to facilitate law enforcement operations carried out in accordance with this Article.

12. Each State Party shall take appropriate measures to ensure that its law enforcement or other authorized officials, and law enforcement or other authorized officials of other States Parties acting on its behalf, are empowered to act pursuant to this [Convention, as amended] OR [Article].

[13. For the purposes of this Convention, a claim of nationality may be made, *inter alia*, by the flying of a flag or displaying marks of registration. In the absence of a flag or marks of registration, a responsible official on the ship shall be requested to state the nationality of the ship.]

14. On or after it deposits its instrument of ratification, acceptance, approval or accession, each State Party shall designate the authority, or, where necessary, authorities to receive and respond to requests for assistance, for confirmation of nationality, and for authorization to take appropriate measures. Such designation, including contact information, shall be notified to the Secretary-General within one month of becoming a Party, who shall inform all other States Parties within one month of the designation. Each State Party is responsible for providing prompt notice through the Secretary-General of any changes in the designation or contact information."

ANNEX 5

**REVISED DRAFT ARTICLE ON BOARDING AT SEA
AS PREPARED BY THE INTERSESSIONAL WORKING GROUP
AND SUBMITTED TO THE 89TH SESSION OF THE LEGAL
COMMITTEE
IN OCTOBER 2004**

(Extract from document LEG 89/4/1, Annex,
without the explanatory footnotes from that Annex.)

Article 8bis

1. The States Parties shall co-operate to the fullest extent possible to prevent and suppress unlawful acts covered by this Convention, in conformity with international law, and shall respond to requests pursuant to this Article as expeditiously as possible.

- (a) **Each request pursuant to this Article should, if possible, contain the name of the suspect ship, the registration number, the home port, the ports of origin and destination, and any other relevant information. If a request is conveyed orally, the requesting Party shall confirm the request in writing as soon as possible. The requested Party shall acknowledge its receipt of any written or oral request immediately.**
- (b) **[States Parties shall take into account the dangers and difficulties involved in boarding a ship at sea and searching its cargo, and give consideration to whether appropriate measures could be more safely taken in port.]**

2. A State Party that has reasonable grounds to suspect that an offence under Article 3, Article *3bis* or Article *3ter* is, has been or is about to be committed involving a ship flying its flag, may request the assistance of other States Parties in preventing or suppressing that offence. The States Parties so requested ~~may seek additional information~~ shall use their best endeavours to render such assistance within the means available to them.

3. Whenever law enforcement or other authorized officials of ~~a another~~ State Party ("the requesting Party") encounter a ship flying the flag or displaying marks of registry of the first Party ("the first Party"), located seaward of any State's territorial sea, and the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship is, has been or is about to be involved in, the commission of an offence under Article 3, Article *3bis* or Article *3ter*, and the requesting Party desires to board,

- (a) ~~if paragraph (b) does not apply, (i) it shall request,~~ **in accordance with paragraph 1,** that the first Party confirm the claim of nationality, and,
- (b) if nationality is confirmed, the requesting Party shall ask the first Party (hereinafter, "the flag State") **for authorization to board and to** ~~authorize the requesting Party to~~ take appropriate measures with regard to that ship, **which may include** stopping, boarding and searching the ship, its cargo and persons on board, and questioning the persons on board in order to determine if an offence under Article 3, Article *3bis* or Article *3ter* has been, or is about to be, committed; **and**

- (c) the flag State shall either:
- (i) authorize the requesting Party to board and to take appropriate measures set out in subparagraph (b) of this paragraph, subject to any conditions it may impose in accordance with paragraph 5; or
 - (ii) conduct the boarding and search with its own law enforcement or other officials; or
 - (iii) conduct the boarding and search together with the requesting Party, subject to any conditions it may impose in accordance with paragraph 5; or
 - (iv) decline to authorize a boarding and search.
- (d) On or after it deposits its instrument of ratification, acceptance, approval or accession, a State Party may notify the Secretary General that, with respect to ships flying its flag or displaying its mark of registry, the requesting Party is granted authorization to board and search the ship, its cargo and persons on board, and to question the persons on board in order to locate and examine documentation of its nationality and determine if an offence under Article 3, Article *3bis* or Article *3ter* has been, or is about to be, committed, if there is no response from the first Party within four hours of acknowledgement of receipt of a request to confirm nationality.
- (e) On or after it deposits its instrument of ratification, acceptance, approval or accession, a State Party may notify the Secretary General that, with respect to ships flying its flag or displaying its mark of registry, the requesting Party is authorized to board and search a ship, its cargo and persons on board, and to question the persons on board in order to determine if an offence under Article 3, Article *3bis* or Article *3ter* has been or is about to be, committed.

The notifications made pursuant to this paragraph can be withdrawn at any time.

4. When evidence of conduct described in Article 3, Article *3bis* or Article *3ter* is found as the result of any boarding conducted pursuant to this Article, the flag State may authorize the requesting Party to detain the ship, cargo and persons on board pending receipt of disposition instructions from the flag State. The requesting Party shall inform promptly the flag State of the results of a boarding, search, and detention conducted pursuant to this Article. The requesting Party shall also inform promptly the flag State of the discovery of evidence of illegal conduct that is not subject to this Convention.

5. A flag State, consistent with the other provisions of this Convention, may subject its authorization under paragraphs 3 or 4, including obtaining additional information from the requesting Party, and conditions relating to responsibility for and the extent of measures to be taken. No additional measures may be taken without the express authorization of the flag State, except when necessary to relieve imminent danger to the lives of persons or those that derive from relevant bilateral or multilateral agreements.

[6. For all boardings pursuant to this Article, the flag State shall have the primary right

to exercise jurisdiction over a detained vessel, cargo or other items and persons on board (including seizure, forfeiture, arrest and prosecution); provided, however, that the flag State may, subject to its Constitution and laws, waive its primary right to exercise jurisdiction and authorize the enforcement of another State's law against the vessel, cargo or other items and persons on board.]

7.* **When carrying out the authorized actions under this Article, States Parties shall avoid the use of force shall be avoided** except when necessary to ensure the safety of its **the State Party's** officials and persons on board, **or and** where the **State Party's** officials are obstructed in the execution of the authorized actions. ~~All uses of force by a State Party pursuant to this Article shall in all cases [the minimum necessary] OR [that which is reasonably necessary] under the circumstances.~~ **Any use of force pursuant to this Article shall not exceed [that which is necessary and reasonable] OR [the minimum degree of force which is necessary and reasonable] in the circumstances.**

8. Safeguards:

(a) Where a State Party takes measures against a ship in accordance with this Article, it shall:

- (i) take due account of the need not to endanger the safety of life at sea;
- (ii) ensure that all persons, ~~[including passengers and stowaways]~~ on board are treated in a manner which preserves their basic human dignity, and in compliance with the applicable provisions of international law, including international law of human rights;
- (iii) ensure that a boarding and search pursuant to this Article shall be conducted in accordance with [national law and] applicable international law;
- (iv) take due account of the **safety and** security of the ship and its cargo;
- (v) take due account of the need not to prejudice the commercial or legal interests of the flag State;
- (vi) ensure, within available means, that any measure taken with regard to the ship or its cargo is environmentally sound under the circumstances;
- (vii) ensure that persons on board against whom proceedings may be commenced in connection with any of the offences set forth in Article 3, Article 3*bis*, or Article 3*ter* are afforded the protections of Article 10(2), regardless of location; and
- (viii)** ensure that the master of a ship is, or has been, afforded the opportunity to contact the ship's owner or flag State at the earliest opportunity. **[However, a State Party may prevent or delay any communication with the owners of the ship if it has reasonable grounds for believing that such communications would obstruct the investigations into a relevant offence.]**

(b) Reasonable efforts shall be taken to avoid a ship being unduly detained or delayed. Provided that the ship has not committed any act justifying the measures taken, States Parties shall be liable for damage or loss attributable to

* This paragraph was corrected in document LEG 89/4/1/Corr.1.

them, in accordance with national law and in a manner consistent with international law, 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 in light of available information to implement the provisions of this Article.
- (c) Where a State Party takes measures against a ship in accordance with this Convention, it shall take due account of the need not to interfere with or to affect:
- (i) the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or
 - (ii) the authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the ship.
- (d) Any measure taken pursuant to this Article shall be carried out by law enforcement or other authorized officials from warships or military aircraft, or from other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect and, notwithstanding Articles 2 and *2bis*, the provisions of this Article shall apply.
- (e) For the purposes of this Article 'law enforcement or other authorized officials' means uniformed or otherwise clearly identifiable members of law enforcement or other government authorities that are notified to the Secretary-General by the State Party responsible for those authorities as being authorized to act pursuant to this Article.

[9. This Article does not apply to or limit boarding of ships, conducted by any State Party in accordance with international law, seaward of any State's territorial sea, including boardings based upon the right of visit, the rendering of assistance to persons, ships and property in distress or peril, or an authorization from the flag State to take law enforcement or other action.]

10. The States Parties [are encouraged to] OR [shall] develop standard operating procedures for joint operations pursuant to this Article and consult, as appropriate, with other States Parties with a view to harmonizing such standard operating procedures for the conduct of operations.

11. States Parties may conclude agreements or arrangements between them to facilitate law enforcement operations carried out in accordance with this Article.

12. Each State Party shall take appropriate measures to ensure that its law enforcement or other authorized officials, and law enforcement or other authorized officials of other States Parties acting on its behalf, are empowered to act pursuant to this [Convention, as amended] OR [Article].

13. On or after it deposits its instrument of ratification, acceptance, approval or accession, each State Party shall designate the authority, or, where necessary, authorities to receive and respond to requests for assistance, for confirmation of nationality, and for authorization to take appropriate measures. Such designation, including contact information, shall be notified to the Secretary-General within one month of becoming a

Party, who shall inform all other States Parties within one month of the designation. Each State Party is responsible for providing prompt notice through the Secretary-General of any changes in the designation or contact information.

ANNEX 6

**REVISED DRAFT ARTICLE ON BOARDING AT SEA
AS IT EMERGED FROM THE 90TH SESSION
OF THE LEGAL COMMITTEE
IN APRIL 2005
FOR SUBMISSION TO THE DIPLOMATIC CONFERENCE
IN OCTOBER 2005**

(Extract from document LEG 90/15, Annex 4)

Draft Article 8bis

1. States Parties shall co-operate to the fullest extent possible to prevent and suppress unlawful acts covered by this Convention, in conformity with international law, and shall respond to requests pursuant to this article as expeditiously as possible.
2. Each request pursuant to this article should, if possible, contain the name of the suspect ship, the IMO identification number, the port of registry, the ports of origin and destination, and any other relevant information. If a request is conveyed orally, the requesting Party shall confirm the request in writing as soon as possible. The requested Party shall acknowledge its receipt of any written or oral request immediately.
3. States Parties shall take into account the dangers and difficulties involved in boarding a ship at sea and searching its cargo, and give consideration to whether other appropriate measures agreed between the States concerned could be more safely taken in the next port of call or elsewhere.
4. A State Party that has reasonable grounds to suspect that an offence under articles 3, 3bis, 3ter or 3quater is, has been or is about to be committed involving a ship flying its flag, may request the assistance of other States Parties in preventing or suppressing that offence. The States Parties so requested shall use their best endeavours to render such assistance within the means available to them.
5. Whenever law enforcement or other authorized officials of a State Party ('the requesting Party') encounter a ship flying the flag or displaying marks of registry of the first Party ('the first Party'), located seaward of any State's territorial sea, and the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship is, has been or is about to be involved in, the commission of an offence under articles 3, 3bis, 3ter or 3quater, and the requesting Party desires to board,
 - (a) it shall request, in accordance with paragraphs 1 and 2, that the first Party confirm the claim of nationality, and,
 - (b) if nationality is confirmed, the requesting Party shall ask the first Party (hereinafter, 'the flag State') for authorization to board and to take appropriate measures with regard to that ship which may include stopping, boarding and searching the ship, its cargo and persons on board, and questioning the persons on board in order to determine if an offence under articles 3, 3bis, 3ter or 3quater has been, or is about to be, committed; and

- (c) the flag State shall either:
- (i) authorize the requesting Party to board and to take appropriate measures set out in subparagraph (b) of this paragraph, subject to any conditions it may impose in accordance with paragraph 7; or
 - (ii) conduct the boarding and search with its own law enforcement or other officials; or
 - (iii) conduct the boarding and search together with the requesting Party, subject to any conditions it may impose in accordance with paragraph 7; or
 - (iv) decline to authorize a boarding and search.

The requesting Party shall not board the ship or take measures set out in subparagraph (b) of this paragraph without the express authorization from the flag State.

- (d) **[If a requested State, which has not made a declaration in accordance with the subparagraphs 5(e) or 5(f) of this article, does not comply with its obligation under paragraphs 1 and 2 to this article to respond to either of the requests pursuant to the subparagraphs 5(a) and 5(b) of the present article, the requesting Party shall consider the need to warn other States Parties concerned.]**
- (e) On or after it deposits its instrument of ratification, acceptance, approval or accession, a State Party may notify the Secretary-General that, with respect to ships flying its flag or displaying its mark of registry, the requesting Party is granted authorization to board and search the ship, its cargo and persons on board, and to question the persons on board in order to locate and examine documentation of its nationality and determine if an offence under articles 3, *3bis*, *3ter* or *3quater* has been, or is about to be, committed, if there is no response from the first Party within four hours of acknowledgement of receipt of a request to confirm nationality.
- (f) On or after it deposits its instrument of ratification, acceptance, approval or accession, a State Party may notify the Secretary-General that, with respect to ships flying its flag or displaying its mark of registry, the requesting Party is authorized to board and search a ship, its cargo and persons on board, and to question the persons on board in order to determine if an offence under articles 3, *3bis*, *3ter* or *3quater* has been or is about to be, committed.

The notifications made pursuant to this paragraph can be withdrawn at any time.

6. When evidence of conduct described in articles 3, *3bis*, *3ter* or *3quater* is found as the result of any boarding conducted pursuant to this article, the flag State may authorize the requesting Party to detain the ship, cargo and persons on board pending receipt of disposition instructions from the flag State. The requesting Party shall inform promptly the flag State of the results of a boarding, search, and detention conducted pursuant to this article. The requesting Party shall also inform promptly the flag State of the discovery of evidence of illegal conduct that is not subject to this Convention.

7. A flag State, consistent with the other provisions of this Convention, may subject its authorization under paragraphs 5 or 6 to conditions, including obtaining additional information from the requesting Party, and conditions relating to responsibility for and the extent of measures to be taken. No additional measures may be taken without the express authorization of the flag State, except when necessary to relieve imminent danger to the lives of persons or those that derive from relevant bilateral or multilateral agreements.

8. For all boardings pursuant to this article, the flag State has the right to exercise jurisdiction over a detained ship, cargo or other items and persons on board (including seizure, forfeiture, arrest and prosecution); however, the flag State may, subject to its Constitution and laws, consent to the exercise of jurisdiction by another State having jurisdiction under article 6.

9. When carrying out the authorized actions under this article, the use of force shall be avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. Any use of force pursuant to this article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.

10. Safeguards:

(a) Where a State Party takes measures against a ship in accordance with this article, it shall:

- (i) take due account of the need not to endanger the safety of life at sea;
- (ii) ensure that all persons on board are treated in a manner which preserves their basic human dignity, and in compliance with the applicable provisions of international law, including international law of human rights;
- (iii) ensure that a boarding and search pursuant to this article shall be conducted in accordance with applicable international law;
- (iv) take due account of the safety and security of the ship and its cargo;
- (v) take due account of the need not to prejudice the commercial or legal interests of the flag State;
- (vi) ensure, within available means, that any measure taken with regard to the ship or its cargo is environmentally sound under the circumstances;
- (vii) ensure that persons on board against whom proceedings may be commenced in connection with any of the offences set forth in articles 3, 3*bis*, 3*ter* or 3*quater* are afforded the protections of article 10(2), regardless of location;
- (viii) ensure that the master of a ship is advised of its intention to board, and is, or has been, afforded the opportunity to contact the ship's owner and the flag State at the earliest opportunity; and
- (ix) take reasonable efforts to avoid a ship being unduly detained or delayed.

(b) Provided that authorization to board by a flag State shall not *per se* give rise to its liability, States Parties shall be liable for any damage, harm or loss attributable to them arising from measures taken pursuant to this article when:

- (i) the grounds for such measures prove to be unfounded, provided that the ship has not committed any act justifying the measures taken; or
- (ii) such measures are unlawful or exceed that reasonably required in light of available information to implement the provisions of this article.

States Parties shall provide effective recourse in respect of such damage, harm or loss.

- (c) Where a State Party takes measures against a ship in accordance with this Convention, it shall take due account of the need not to interfere with or to affect:
 - (i) the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or
 - (ii) the authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the ship.
- (d) Any measure taken pursuant to this article shall be carried out by law enforcement or other authorized officials from warships or military aircraft, or from other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect and, notwithstanding articles 2 and *2bis*, the provisions of this article shall apply.
- (e) For the purposes of this article "law enforcement or other authorized officials" means uniformed or otherwise clearly identifiable members of law enforcement or other government authorities duly authorized by their government. For the specific purpose of law enforcement under this Convention, law enforcement or other authorized officials shall provide appropriate government-issued identification documents for examination by the master of the ship upon boarding.

11. This article does not apply to or limit boarding of ships, conducted by any State Party in accordance with international law, seaward of any State's territorial sea, including boardings based upon the right of visit, the rendering of assistance to persons, ships and property in distress or peril, or an authorization from the flag State to take law enforcement or other action.

12. States Parties are encouraged to develop standard operating procedures for joint operations pursuant to this article and consult, as appropriate, with other States Parties with a view to harmonizing such standard operating procedures for the conduct of operations.

13. States Parties may conclude agreements or arrangements between them to facilitate law enforcement operations carried out in accordance with this article.

14. Each State Party shall take appropriate measures to ensure that its law enforcement or other authorized officials, and law enforcement or other authorized officials of other States Parties acting on its behalf, are empowered to act pursuant to this article.

15. On or after it deposits its instrument of ratification, acceptance, approval or accession, each State Party shall designate the authority, or, where necessary, authorities to receive and respond to requests for assistance, for confirmation of nationality, and for

authorization to take appropriate measures. Such designation, including contact information, shall be notified to the Secretary-General within one month of becoming a Party, who shall inform all other States Parties within one month of the designation. Each State Party is responsible for providing prompt notice through the Secretary-General of any changes in the designation or contact information.

ANNEX 7

**Text of article 8bis as adopted by the 2005 SUA Conference
(Extract from document LEG/CONF.15/DC/1)****Article 8bis**

1. States Parties shall co-operate to the fullest extent possible to prevent and suppress unlawful acts covered by this Convention, in conformity with international law, and shall respond to requests pursuant to this article as expeditiously as possible.

2. Each request pursuant to this article should, if possible, contain the name of the suspect ship, the IMO ship identification number, the port of registry, the ports of origin and destination, and any other relevant information. If a request is conveyed orally, the requesting Party shall confirm the request in writing as soon as possible. The requested Party shall acknowledge its receipt of any written or oral request immediately.

3. States Parties shall take into account the dangers and difficulties involved in boarding a ship at sea and searching its cargo, and give consideration to whether other appropriate measures agreed between the States concerned could be more safely taken in the next port of call or elsewhere.

4. A State Party that has reasonable grounds to suspect that an offence set forth in article 3, *3bis*, *3ter* or *3quater* has been, is being or is about to be committed involving a ship flying its flag, may request the assistance of other States Parties in preventing or suppressing that offence. The States Parties so requested shall use their best endeavours to render such assistance within the means available to them.

5. Whenever law enforcement or other authorized officials of a State Party ('the requesting Party') encounter a ship flying the flag or displaying marks of registry of another State Party ('the first Party'), located seaward of any State's territorial sea, and the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship has been, is or is about to be involved in the commission of an offence set forth in article 3, *3bis*, *3ter* or *3quater*, and the requesting Party desires to board,

- (a) it shall request, in accordance with paragraphs 1 and 2 that the first Party confirm the claim of nationality, and
- (b) if nationality is confirmed, the requesting Party shall ask the first Party (hereinafter referred to as, 'the flag State') for authorization to board and to take appropriate measures with regard to that ship which may include stopping, boarding and searching the ship, its cargo and persons on board, and questioning the persons on board in order to determine if an offence set forth in article 3, *3bis*, *3ter* or *3quater* has been, is being or is about to be committed, and

- (c) the flag State shall either:
- (i) authorize the requesting Party to board and to take appropriate measures set out in subparagraph 5(b), subject to any conditions it may impose in accordance with paragraph 7; or
 - (ii) conduct the boarding and search with its own law enforcement or other officials; or
 - (iii) conduct the boarding and search together with the requesting Party, subject to any conditions it may impose in accordance with paragraph 7; or
 - (iv) decline to authorize a boarding and search.

The requesting Party shall not board the ship or take measures set out in subparagraph 5(b) without the express authorization of the flag State.

- (d) Upon or after depositing its instrument of ratification, acceptance, approval or accession, a State Party may notify the Secretary-General that, with respect to ships flying its flag or displaying its mark of registry, the requesting Party is granted authorization to board and search the ship, its cargo and persons on board, and to question the persons on board in order to locate and examine documentation of its nationality and determine if an offence set forth in article 3, *3bis*, *3ter* or *3quater* has been, is being or is about to be committed, if there is no response from the first Party within four hours of acknowledgement of receipt of a request to confirm nationality.
- (e) Upon or after depositing its instrument of ratification, acceptance, approval or accession, a State Party may notify the Secretary-General that, with respect to ships flying its flag or displaying its mark of registry, the requesting Party is authorized to board and search a ship, its cargo and persons on board, and to question the persons on board in order to determine if an offence under article 3, *3bis*, *3ter* or *3quater* has been, is being or is about to be committed.

The notifications made pursuant to this paragraph can be withdrawn at any time.

6. When evidence of conduct described in article 3, *3bis*, *3ter* or *3quater* is found as the result of any boarding conducted pursuant to this article, the flag State may authorize the requesting Party to detain the ship, cargo and persons on board pending receipt of disposition instructions from the flag State. The requesting Party shall inform promptly the flag State of the results of a boarding, search, and detention conducted pursuant to this article. The requesting Party shall also inform promptly the flag State of the discovery of evidence of illegal conduct that is not subject to this Convention.

7. The flag State, consistent with the other provisions of this Convention, may subject its authorization under paragraph 5 or 6 to conditions, including obtaining additional information from the requesting Party, and conditions relating to responsibility for and the extent of measures to be taken. No additional measures may be taken without the express authorization of the flag State, except when necessary to relieve imminent danger to the lives of persons or where those measures derive from relevant bilateral or multilateral agreements.

8. For all boardings pursuant to this article, the flag State has the right to exercise jurisdiction over a detained ship, cargo or other items and persons on board, including seizure, forfeiture, arrest and prosecution. However, the flag State may, subject to its constitution and laws, consent to the exercise of jurisdiction by another State having jurisdiction under article 6.

9. When carrying out the authorized actions under this article, the use of force shall be avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. Any use of force pursuant to this article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.

10. Safeguards:

- (a) Where a State Party takes measures against a ship in accordance with this article, it shall:
- (i) take due account of the need not to endanger the safety of life at sea;
 - (ii) ensure that all persons on board are treated in a manner which preserves their basic human dignity, and in compliance with the applicable provisions of international law, including international law of human rights;
 - (iii) ensure that a boarding and search pursuant to this article shall be conducted in accordance with applicable international law;
 - (iv) take due account of the safety and security of the ship and its cargo;
 - (v) take due account of the need not to prejudice the commercial or legal interests of the flag State;
 - (vi) ensure, within available means, that any measure taken with regard to the ship or its cargo is environmentally sound under the circumstances;
 - (vii) ensure that persons on board against whom proceedings may be commenced in connection with any of the offences set forth in article 3, *3bis*, *3ter* or *3quater* are afforded the protections of paragraph 2 of article 10, regardless of location;
 - (viii) ensure that the master of a ship is advised of its intention to board, and is, or has been, afforded the opportunity to contact the ship's owner and the flag State at the earliest opportunity; and
 - (ix) take reasonable efforts to avoid a ship being unduly detained or delayed.

- (b) Provided that authorization to board by a flag State shall not *per se* give rise to its liability, States Parties shall be liable for any damage, harm or loss attributable to them arising from measures taken pursuant to this article when:
- (i) the grounds for such measures prove to be unfounded, provided that the ship has not committed any act justifying the measures taken; or
 - (ii) such measures are unlawful or exceed that reasonably required in light of available information to implement the provisions of this article.

States Parties shall provide effective recourse in respect of such damage, harm or loss.

- (c) Where a State Party takes measures against a ship in accordance with this Convention, it shall take due account of the need not to interfere with or to affect:
- (i) the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or
 - (ii) the authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the ship.
- (d) Any measure taken pursuant to this article shall be carried out by law enforcement or other authorized officials from warships or military aircraft, or from other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect and, notwithstanding articles 2 and *2bis*, the provisions of this article shall apply.
- (e) For the purposes of this article 'law enforcement or other authorized officials' means uniformed or otherwise clearly identifiable members of law enforcement or other government authorities duly authorized by their government. For the specific purpose of law enforcement under this Convention, law enforcement or other authorized officials shall provide appropriate government-issued identification documents for examination by the master of the ship upon boarding.

11. This article does not apply to or limit boarding of ships, conducted by any State Party in accordance with international law, seaward of any State's territorial sea, including boardings based upon the right of visit, the rendering of assistance to persons, ships and property in distress or peril, or an authorization from the flag State to take law enforcement or other action.

12. States Parties are encouraged to develop standard operating procedures for joint operations pursuant to this article and consult, as appropriate, with other States Parties with a view to harmonizing such standard operating procedures for the conduct of operations.

13. States Parties may conclude agreements or arrangements between them to facilitate law enforcement operations carried out in accordance with this article.

14. Each State Party shall take appropriate measures to ensure that its law enforcement or other authorized officials, and law enforcement or other authorized officials of other States Parties acting on its behalf, are empowered to act pursuant to this article.

15. Upon or after depositing its instrument of ratification, acceptance, approval or accession, each State Party shall designate the authority, or, where necessary, authorities to receive and respond to requests for assistance, for confirmation of nationality, and for authorization to take appropriate measures. Such designation, including contact information, shall be notified to the Secretary-General within one month of becoming a Party, who shall inform all other States Parties within one month of the designation. Each State Party is responsible for providing prompt notice through the Secretary-General of any changes in the designation or contact information.