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DRAFT CONVENTION ON WRECK REMOVAL

Wrecks of non-States Parties

Submitted by the United States

SUMMARY

Executive summary: The draft wreck removal convention (DWRC) must not adversely affect the rights of non-Parties under customary international law, as reflected in the United Nations Convention on the Law of the Sea, 1982 (UNCLOS). The United States proposes to replace the text in article 17 with alternative text.

Action to be taken: Paragraph 31

Related documents: LEG 91/3/1; LEG 91/12 and LEG 92/4

Background

1 The United States proposed, in document LEG 91/3/1, to add an additional paragraph to article 17 of the DWRC in order to define more clearly the scope of the convention. After some discussion, at the ninety-first session of the Legal Committee, the United States proposed alternative text in document LEG 91/WP.5, and this text has been retained for further discussion at the Committee's ninety-second session, in footnote 24 of document LEG 92/4. The purpose of this submission is to explain why it is desirable to clarify that the Parties to the DWRC have no intention of purporting to alter rights of non-States Parties that exist under customary international law.

2 The United States offers several options for refining the text of the Convention but suggests that it is preferable to replace the current text of article 17 with the following:

“Nothing in this Convention shall prejudice the rights and obligations of non-State Parties to this Convention, under the United Nations Convention on the Law of the Sea done at Montego Bay, on 10 December 1982, and under the customary international law of the sea.”

General

3 Customary international law, as reflected in UNCLOS, provides only limited authority to a coastal State with respect to wrecks.

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4 While States are free to join the DWRC and consent, through being a party to that convention, to subject their flag vessels to the enhanced authority of coastal States provided under that convention, States that do not join it have not consented to the enhanced authority of coastal States provided under that Convention.

5 Parties to the convention cannot legally purport to prejudice the rights of non-Parties under customary international law, even if they do not include a non-prejudice clause in the convention. Nevertheless, it would be desirable to make clear, either specifically or generally, that the Parties have no intention of purporting to prejudice such rights.

6 This could be accomplished either through individual adjustments to specific provisions (such as through the definition of “wreck”) or through a general clause making clear the absence of any intent to prejudice the rights of non-parties under customary international law.

Exclusive Economic Zone and High Seas

7 There are several areas in which the DWRC would purport to give greater authority to coastal States Parties, *vis-à-vis* wrecks in the Exclusive Economic Zone (EEZ), than is provided under customary international law.

8 Specifically, article 221 of UNCLOS acknowledges the right of coastal States, pursuant to customary and conventional international law, to take and enforce measures beyond the territorial sea proportional to the actual or threatened damage to protect their coastline, or related interests, from pollution or threat of pollution following upon a maritime casualty which may reasonably be expected to result in major harmful consequences.

9 This provision does not authorize a coastal State to take some of the steps that would be authorized under the DWRC.

10 For example, customary international law provides only limited authority to a coastal State to be able to remove a sunken foreign flag vessel from its EEZ, i.e., if pollution or threat of pollution from the wreck may reasonably be expected to result in major harmful consequences.

11 In contrast, article 10(7) of the DWRC would purport to give the coastal State authority to remove a wreck for reasons that go beyond customary international law, namely also in circumstances where the wreck “poses a danger or impediment to navigation.” (See definition of “hazard” in article 1(5)(a)).

12 If “wreck” were defined to exclude vessels of States non-Parties, that would not raise an issue. Parties would be free to subject their vessels to removal on a basis (such as danger to navigation) other than that provided under customary law, as reflected in UNCLOS.

13 However, the definition of “wreck” does not exclude vessels of States non-Parties.

14 As a result, article 10(7) would purport to authorize a coastal State Party, for reasons beyond pollution reasons, to remove vessels, not only of States Parties, but also of States non-Parties. In this respect, the convention would purport to prejudice the rights of non-Parties under customary international law.

15 The DWRC could potentially avoid such overreaching *vis-à-vis* wrecks of non-Party States through an adjustment to the definition of “wreck,” a clear statement that the provision does not apply to wrecks of non-Party States, a clear statement that the consent of the flag State in question is required, or a general non-prejudice clause as shown below. None of these is present in the current draft.

16 Second, the DWRC would authorize coastal States to impose financial costs on foreign shipowners, which is not a coastal State EEZ authority provided under customary international law. (Several IMO conventions have been elaborated to fill that gap, most recently the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001).

17 Specifically, article 13(3) permits any State Party to issue insurance certificates for ships not registered in a State Party. It is not clear that this provision applies only to those non-Party ships entering ports of States Parties, as set out in article 13(13).

18 This overreaching *vis-à-vis* non-Parties could be remedied, for example, by:

- Amending the second line of article 13(3) to read “... issued to each ship to which this Convention applies of [.....] gross tonnage and above ...”, and
- Amending the final clause of the second sentence of article 13(3) to read “with respect to a ship not registered in a State Party to which paragraph 13 applies it may be issued or certified by the appropriate authority of any State Party”.

Territorial Sea

19 There is one problem in the DWRC concerning the territorial sea. The insurance provision of the DWRC was intended to permit a State Party to apply the relevant provisions of article 13 to its territorial sea.

20 In this regard, it is important to get the language of article 13(2) correct in order to limit that provision to the territorial sea. It needs to refer to waters under its “sovereignty” rather than “jurisdiction” (which can be read to include the EEZ, not just the territorial sea).

Remedies

21 The simplest and surest way to address the issues raised would be a single provision, making clear that there is no intention to purport to prejudice the rights of non-Parties under customary international law.

22 Paragraph 6 of the Secretariat’s document, LEG 92/4, provides:

“The Committee decided to include, as a footnote in the text for further consideration at its next session, a proposal for the inclusion of a new paragraph to article 17 aimed at clarifying that the draft convention does not legally confer any authority upon coastal States with respect to wrecks of States which are not party to the convention, or otherwise interfere with the rights and obligations, (including navigational rights and jurisdiction over flag States) of such States, beyond that provided under customary international law as reflected in UNCLOS.”

23 The new paragraph referred to above is quoted in note 24 of the annex to document LEG 92/4 as follows:

“(2) Nothing in this Convention shall prejudice the rights and obligations of non-State Parties to this Convention, under the United Nations Convention on the Law of the Sea done at Montego Bay, on 10 December 1982, and under the customary international law of the sea.”

24 Ideally, this paragraph would be the only paragraph in article 17.

25 If others also seek a first paragraph, before this paragraph, that addresses the effect of the Convention on States Parties, then such a paragraph would need to read as paragraph 1 in note 24 of the annex to document LEG 92/4, as follows:

“(1) Except as provided herein, nothing in this Convention shall prejudice the rights and obligations of States Parties under the United Nations Convention on the Law of the Sea done at Montego Bay, on 10 December 1982, and under the customary international law of the sea.”

26 The reason that such a paragraph must begin with “except as provided herein” is that it would not be legally accurate without such an introduction. The Convention will in fact affect the rights of States Parties, in that they are taking on additional obligations and subjecting their flag vessels to coastal State authorities that are not otherwise provided under customary international law.

27 Alternatively, as suggested above, these concerns could be addressed through specific adjustments to individual provisions (such as through definitions that exclude vessels of non-Party States or other means).

28 Finally, it should be noted that, although some have suggested that the convention should incorporate a provision tracking article 16 of the International Convention for the Control and Management of Ships’ Ballast Water and Sediments, 2004, (same as in the International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001) or the preambular paragraph from the Convention on Suppression of Unlawful Acts against the Safety of Maritime Navigation, neither clearly addresses this issue.

29 Those provisions make no distinction between States that are Parties to that treaty and those that are not. In this case, States that become Parties to the Wreck Removal Convention are agreeing to prejudice their rights in certain ways; for example, they are agreeing that wrecks flying their flag are subject to greater coastal state authority than would be the case if they were not a Party to this Convention. So Parties are not in the same category as non-Parties when it comes to the “prejudice” that flows from this Convention.

30 The language the United States proposes makes the accurate legal statement that Parties are not prejudiced except to the extent provided in the Convention and that non-Parties are not prejudiced at all.

Action requested of the Legal Committee

31 The Legal Committee is invited to consider the contents of, and comment on, this submission as appropriate.